COURT FILE NUMBER	2601-07148
COURT JUDICIAL CENTRE	COURT OF KING'S BENCH OF ALBERTA CALGARY
	IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, RSC 1985, c C-36, as amended AND IN THE MATTER OF THE PLAN OF COMPROMISE OR ARRANGEMENT OF MONETTE FARMS LTD., MONETTE FARMS ONTARIO CORP., NEXGEN SEEDS LTD., MONETTE PRODUCE LTD., MONETTE SEEDS LTD., MONETTE LAND CORP., DMO HOLDINGS LTD., DMO HOLDINGS USA, INC., MONETTE SEEDS USA, LLC, MONETTE FARMS ARIZONA, LLC, MONETTE FARMS USA, INC.,1012595 DE INC., MONETTE PRODUCE, LLC, GOAT'S PEAK WINERY LTD., MONETTE FARMS BC LTD., MONETTE FARMS LAND GP LTD., MONETTE FARMS LAND II GP LTD., AND MONETTE FARMS BC GP LTD.
APPLICANTS	MONETTE FARMS LTD., MONETTE FARMS ONTARIO CORP., NEXGEN SEEDS LTD., MONETTE PRODUCE LTD., MONETTE SEEDS LTD., MONETTE LAND CORP., DMO HOLDINGS LTD., DMO HOLDINGS USA, INC., MONETTE SEEDS USA, LLC, MONETTE FARMS ARIZONA, LLC, MONETTE FARMS USA, INC., 1012595 DE INC., MONETTE PRODUCE, LLC, GOAT'S PEAK WINERY LTD., MONETTE FARMS BC LTD., MONETTE FARMS LAND GP LTD., MONETTE FARMS LAND II GP LTD., AND MONETTE FARMS BC GP LTD.
DOCUMENT	**BOOK OF AUTHORITIES OF THE APPLICANTS**

Clerk's Stamp

JUDICIAL CENTRE OF CALGARY
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CLERK OF THE COURT

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

Cassels Brock & Blackwell LLP
Suite 3700, Bankers Hall West
888 3rd Street SW
Calgary, Alberta, T2P 5C5

Telephone: (403) 351-2920
Facsimile: (403) 648-1151
Email: joliver@cassels.com / dmarechal@cassels.com / mclarksonmaciel@cassels.com

File No.: 063030-01

Attention: Jeffrey Oliver / Danielle Maréchal / Matteo Clarkson-Maciel

LIST OF AUTHORITIES

STATUTES

Tab	Authority
1.	*Companies' Creditors Arrangement Act*, RSC 1985, c C-36

JURISPRUDENCE

Tab	Authority
2.	*Nortel Networks Corp, Re,* 2009 CanLII 39492 (ONSC)
3.	*Royal Bank v Soundair Corp.,* 1991 CanLII 2727 (ONCA)
4.	*In Re Hudson's Bay Company,* 2025 ONSC 6764
5.	*9354-9186 Québec Inc v Callidus Capital Corp*, 2020 SCC 10
6.	*Re PSINet Ltd.*, 2001 CanLII 28266 (ONSC)
7.	*Stelco Inc (Re)*, 2004 CanLII 24933 (ONSC)
8.	*Re Canada North Group Inc,* 2017 ABQB 508

ORDERS

9.	Court File No. 2303-06543: *J.W. Carr Holdings Ltd et al,* Order (Expedited Sale Approval and Vesting Order Protocol) (Northridge Phase 6 & 7, O'Brien Lake & Hillcrest) granted May 23, 2023 by the Honourable Justice J.T. Neilson in the Alberta Court of King's Bench.
10.	Court File No. 1001-07852: *Medican Holdings Ltd et al*, Approval and Vesting Order (Condominium Sales) granted June 11, 2010 by the Honourable Justice K.M. Horner in the Alberta Court of Queen's Bench (as it then was).
11.	Court File No. CV-13-19866: *Bank of Montreal v Portofino Corporation,* Omnibus Approval and Vesting Order granted May 2, 2014 by the Honourable Justice Campbell in the Ontario Superior Court of Justice.
12.	Court File No. 2203-01087: *Symphony Condominium Ltd,* Order (Approval of Marketing Process, Sale Approval Process, Activities, Timbercreek Distributions and Sealing) granted by the Honourable G.S. Dunlop on May 18, 2022 in the Alberta Court of Queen's Bench (as it then was).

TAB 1

Canada Federal Statutes
Companies' Creditors Arrangement Act
Part II — Jurisdiction of Courts (ss. 9-18.5)

KeyCite treatment
Most Recently Cited in: Coast Automotive Group Inc (Re) , 2026 ABKB 366, 2026 CarswellAlta 1239 | (Alta. K.B., May 11, 2026)

R.S.C. 1985, c. C-36, s. 11

s 11. General power of court

Currency

11.General power of court
Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

Amendment History
1992, c. 27, s. 90; 1996, c. 6, s. 167(1)(d); 1997, c. 12, s. 124; 2005, c. 47, s. 128

Judicial Consideration (6)

Currency
Federal English Statutes reflect amendments current to February 11, 2026
Federal English Regulations Current to Gazette Vol. 159:25 (December 3, 2025)

End of Document

Canada Federal Statutes
Companies' Creditors Arrangement Act
Part II — Jurisdiction of Courts (ss. 9-18.5)

KeyCite treatment
Most Recently Cited in: Coast Automotive Group Inc (Re) , 2026 ABKB 366, 2026 CarswellAlta 1239 | (Alta. K.B., May 11, 2026)

R.S.C. 1985, c. C-36, s. 11.02

s 11.02

Currency

11.02
11.02(1)Stays, etc. — initial application
A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 10 days,

(a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

11.02(2)Stays, etc. — other than initial application
A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

(a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

11.02(3)Burden of proof on application
The court shall not make the order unless

(a) the applicant satisfies the court that circumstances exist that make the order appropriate; and

(b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

11.02(4)Restriction

Orders doing anything referred to in subsection (1) or (2) may only be made under this section.

Amendment History
2005, c. 47, s. 128; 2019, c. 29, s. 137

Judicial Consideration (1)

Currency
Federal English Statutes reflect amendments current to February 11, 2026
Federal English Regulations Current to Gazette Vol. 159:25 (December 3, 2025)

End of Document

KeyCite treatment
Most Recently Cited in: Farms and Families of North America Inc. v. AgraCity Crop & Nutrition Ltd., 2026 SKCA 58, 2026 CarswellSask 205 | (Sask. C.A., Apr 29, 2026)

R.S.C. 1985, c. C-36, s. 36

s 36.

Currency

36.

36(1)Restriction on disposition of business assets

A debtor company in respect of which an order has been made under this Act may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.

36(2)Notice to creditors

A company that applies to the court for an authorization is to give notice of the application to the secured creditors who are likely to be affected by the proposed sale or disposition.

36(3)Factors to be considered

In deciding whether to grant the authorization, the court is to consider, among other things,

(a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;

(b) whether the monitor approved the process leading to the proposed sale or disposition;

(c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;

(d) the extent to which the creditors were consulted;

(e) the effects of the proposed sale or disposition on the creditors and other interested parties; and

(f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

36(4)Additional factors — related persons

If the proposed sale or disposition is to a person who is related to the company, the court may, after considering the factors referred to in subsection (3), grant the authorization only if it is satisfied that

(a) good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the company; and

(b) the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition.

36(5) Related persons
For the purpose of subsection (4), a person who is related to the company includes

(a) a director or officer of the company;

(b) a person who has or has had, directly or indirectly, control in fact of the company; and

(c) a person who is related to a person described in paragraph (a) or (b).

36(6) Assets may be disposed of free and clear
The court may authorize a sale or disposition free and clear of any security, charge or other restriction and, if it does, it shall also order that other assets of the company or the proceeds of the sale or disposition be subject to a security, charge or other restriction in favour of the creditor whose security, charge or other restriction is to be affected by the order.

36(7) Restriction — employers
The court may grant the authorization only if the court is satisfied that the company can and will make the payments that would have been required under paragraphs 6(5)(a) and (6)(a) if the court had sanctioned the compromise or arrangement.

36(8) Restriction — intellectual property
If, on the day on which an order is made under this Act in respect of the company, the company is a party to an agreement that grants to another party a right to use intellectual property that is included in a sale or disposition authorized under subsection (6), that sale or disposition does not affect that other party's right to use the intellectual property — including the other party's right to enforce an exclusive use — during the term of the agreement, including any period for which the other party extends the agreement as of right, as long as the other party continues to perform its obligations under the agreement in relation to the use of the intellectual property.

Amendment History
2005, c. 47, s. 131; 2007, c. 36, s. 78; 2017, c. 26, s. 14; 2018, c. 27, s. 269

Judicial Consideration (2)

Currency
Federal English Statutes reflect amendments current to February 11, 2026
Federal English Regulations Current to Gazette Vol. 159:25 (December 3, 2025)

End of Document

TAB 2

COURT FILE NO.: 09-CL-7950
DATE: 20090723

SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)

RE: **IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED**

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF NORTEL NETWORKS CORPORATION, NORTEL NETWORKS LIMITED, NORTEL NETWORKS GLOBAL CORPORATION, NORTEL NETWORKS INTERNATIONAL CORPORATION AND NORTEL NETWORKS TECHNOLOGY CORPORATION

APPLICANTS

APPLICATION UNDER THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

BEFORE: **MORAWETZ J.**

COUNSEL: **Derrick Tay and Jennifer Stam, for Nortel Networks Corporation, et al**

Lyndon Barnes and Adam Hirsh, for the Board of Directors of Nortel Networks Corporation and Nortel Networks Limited

J. Carfagnini and J. Pasquariello, for Ernst & Young Inc., Monitor

M. Starnino, for the Superintendent of Financial Services and Administrator of PBGF

S. Philpott, for the Former Employees

K. Zych, for Noteholders

Pamela Huff and Craig Thorburn, for MatlinPatterson Global Advisors LLC, MatlinPatterson Global Opportunities Partners III L.P. and Matlin Patterson Opportunities Partners (Cayman) III L.P.

David Ward, for UK Pension Protection Fund

Leanne Williams, for Flextronics Inc.

Alex MacFarlane, for the Official Committee of Unsecured Creditors

Arthur O. Jacques and Tom McRae, for Felske & Sylvain (de facto Continuing Employees' Committee)

Robin B. Schwill and Matthew P. Gottlieb, for Nortel Networks UK Limited

A. Kauffman, for Export Development Canada

D. Ullman, for Verizon Communications Inc.

G. Benchetrit, for IBM

HEARD &
DECIDED: JUNE 29, 2009

E N D O R S E M E N T

INTRODUCTION

[1] On June 29, 2009, I granted the motion of the Applicants and approved the bidding procedures (the "Bidding Procedures") described in the affidavit of Mr. Riedel sworn June 23, 2009 (the "Riedel Affidavit") and the Fourteenth Report of Ernst & Young, Inc., in its capacity as Monitor (the "Monitor") (the "Fourteenth Report"). The order was granted immediately after His Honour Judge Gross of the United States Bankruptcy Court for the District of Delaware (the "U.S. Court") approved the Bidding Procedures in the Chapter 11 proceedings.

[2] I also approved the Asset Sale Agreement dated as of June 19, 2009 (the "Sale Agreement") among Nokia Siemens Networks B.V. ("Nokia Siemens Networks" or the "Purchaser"), as buyer, and Nortel Networks Corporation ("NNC"), Nortel Networks Limited ("NNL"), Nortel Networks, Inc. ("NNI") and certain of their affiliates, as vendors (collectively the "Sellers") in the form attached as Appendix "A" to the Fourteenth Report and I also approved and accepted the Sale Agreement for the purposes of conducting the "stalking horse" bidding process in accordance with the Bidding Procedures including, the Break-Up Fee and the Expense Reimbursement (as both terms are defined in the Sale Agreement).

[3] An order was also granted sealing confidential Appendix "B" to the Fourteenth Report containing the schedules and exhibits to the Sale Agreement pending further order of this court.

[4] The following are my reasons for granting these orders.

[5] The hearing on June 29, 2009 (the "Joint Hearing") was conducted by way of video conference with a similar motion being heard by the U.S. Court. His Honor Judge Gross presided over the hearing in the U.S. Court. The Joint Hearing was conducted in accordance with the provisions of the Cross-Border Protocol, which had previously been approved by both the U.S. Court and this court.

[6] The Sale Agreement relates to the Code Division Multiple Access ("CMDA") business Long-Term Evolution ("LTE") Access assets.

[7] The Sale Agreement is not insignificant. The Monitor reports that revenues from CDMA comprised over 21% of Nortel's 2008 revenue. The CDMA business employs approximately 3,100 people (approximately 500 in Canada) and the LTE business employs approximately 1,000 people (approximately 500 in Canada). The purchase price under the Sale Agreement is $650 million.

BACKGROUND

[8] The Applicants were granted CCAA protection on January 14, 2009. Insolvency proceedings have also been commenced in the United States, the United Kingdom, Israel and France.

[9] At the time the proceedings were commenced, Nortel's business operated through 143 subsidiaries, with approximately 30,000 employees globally. As of January 2009, Nortel employed approximately 6,000 people in Canada alone.

[10] The stated purpose of Nortel's filing under the CCAA was to stabilize the Nortel business to maximize the chances of preserving all or a portion of the enterprise. The Monitor reported that a thorough strategic review of the company's assets and operations would have to be undertaken in consultation with various stakeholder groups.

[11] In April 2009, the Monitor updated the court and noted that various restructuring alternatives were being considered.

[12] On June 19, 2009, Nortel announced that it had entered into the Sale Agreement with respect to its assets in its CMDA business and LTE Access assets (collectively, the "Business") and that it was pursuing the sale of its other business units. Mr. Riedel in his affidavit states that Nortel has spent many months considering various restructuring alternatives before determining in its business judgment to pursue "going concern" sales for Nortel's various business units.

[13] In deciding to pursue specific sales processes, Mr. Riedel also stated that Nortel's management considered:

(a) the impact of the filings on Nortel's various businesses, including deterioration in sales; and

(b) the best way to maximize the value of its operations, to preserve jobs and to continue businesses in Canada and the U.S.

[14] Mr. Riedel notes that while the Business possesses significant value, Nortel was faced with the reality that:

(a) the Business operates in a highly competitive environment;

(b) full value cannot be realized by continuing to operate the Business through a restructuring; and

(c) in the absence of continued investment, the long-term viability of the Business would be put into jeopardy.

[15] Mr. Riedel concluded that the proposed process for the sale of the Business pursuant to an auction process provided the best way to preserve the Business as a going concern and to maximize value and preserve the jobs of Nortel employees.

[16] In addition to the assets covered by the Sale Agreement, certain liabilities are to be assumed by the Purchaser. This issue is covered in a comprehensive manner at paragraph 34 of the Fourteenth Report. Certain liabilities to employees are included on this list. The assumption of these liabilities is consistent with the provisions of the Sale Agreement that requires the Purchaser to extend written offers of employment to at least 2,500 employees in the Business.

[17] The Monitor also reports that given that certain of the U.S. Debtors are parties to the Sale Agreement and given the desire to maximize value for the benefit of stakeholders, Nortel determined and it has agreed with the Purchaser that the Sale Agreement is subject to higher or better offers being obtained pursuant to a sale process under s. 363 of the U.S. Bankruptcy Code and that the Sale Agreement shall serve as a "stalking horse" bid pursuant to that process.

[18] The Bidding Procedures provide that all bids must be received by the Seller by no later than July 21, 2009 and that the Sellers will conduct an auction of the purchased assets on July 24, 2009. It is anticipated that Nortel will ultimately seek a final sales order from the U.S. Court on or about July 28, 2009 and an approval and vesting order from this court in respect of the Sale Agreement and purchased assets on or about July 30, 2009.

[19] The Monitor recognizes the expeditious nature of the sale process but the Monitor has been advised that given the nature of the Business and the consolidation occurring in the global market, there are likely to be a limited number of parties interested in acquiring the Business.

[20] The Monitor also reports that Nortel has consulted with, among others, the Official Committee of Unsecured Creditors (the "UCC") and the bondholder group regarding the Bidding Procedures and is of the view that both are supportive of the timing of this sale process. (It is noted that the UCC did file a limited objection to the motion relating to certain aspects of the Bidding Procedures.)

[21] Given the sale efforts made to date by Nortel, the Monitor supports the sale process outlined in the Fourteenth Report and more particularly described in the Bidding Procedures.

[22] Objections to the motion were filed in the U.S. Court and this court by MatlinPatterson Global Advisors LLC, MatlinPatterson Global Opportunities Partners III L.P. and Matlin Patterson Opportunities Partners (Cayman) III L.P. (collectively, "MatlinPatterson") as well the UCC.

[23] The objections were considered in the hearing before Judge Gross and, with certain limited exceptions, the objections were overruled.

ISSUES AND DISCUSSION

[24] The threshold issue being raised on this motion by the Applicants is whether the CCAA affords this court the jurisdiction to approve a sales process in the absence of a formal plan of compromise or arrangement and a creditor vote. If the question is answered in the affirmative, the secondary issue is whether this sale should authorize the Applicants to sell the Business.

[25] The Applicants submit that it is well established in the jurisprudence that this court has the jurisdiction under the CCAA to approve the sales process and that the requested order should be granted in these circumstances.

[26] Counsel to the Applicants submitted a detailed factum which covered both issues.

[27] Counsel to the Applicants submits that one of the purposes of the CCAA is to preserve the going concern value of debtors companies and that the court's jurisdiction extends to authorizing sale of the debtor's business, even in the absence of a plan or creditor vote.

[28] The CCAA is a flexible statute and it is particularly useful in complex insolvency cases in which the court is required to balance numerous constituents and a myriad of interests.

[29] The CCAA has been described as "skeletal in nature". It has also been described as a "sketch, an outline, a supporting framework for the resolution of corporate insolvencies in the public interest". *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.* (2008), 45 C.B.R. (5th) 163 (Ont. C.A.) at paras. 44, 61, leave to appeal refused [2008] SCCA 337. ("ATB Financial").

[30] The jurisprudence has identified as sources of the court's discretionary jurisdiction, *inter alia*:

(a) the power of the court to impose terms and conditions on the granting of a stay under s. 11(4) of the CCAA;

(b) the specific provision of s. 11(4) of the CCAA which provides that the court may make an order "on such terms as it may impose"; and

(c) the inherent jurisdiction of the court to "fill in the gaps" of the CCAA in order to give effect to its objects. *Re Canadian Red Cross Society* (1998), 5 C.B.R. (4th) 299 (Ont. Gen. Div.) at para. 43; *Re PSINet Ltd.* (2001), 28 C.B.R. (4th) 95 (Ont. S.C.J.) at para. 5, *ATB Financial*, *supra*, at paras. 43-52.

[31] However, counsel to the Applicants acknowledges that the discretionary authority of the court under s. 11 must be informed by the purpose of the CCAA.

> Its exercise must be guided by the scheme and object of the Act and by the legal principles that govern corporate law issues. *Re Stelco Inc.* (2005), 9 C.B.R. (5th) 135 (Ont. C.A.) at para. 44.

[32] In support of the court's jurisdiction to grant the order sought in this case, counsel to the Applicants submits that Nortel seeks to invoke the "overarching policy" of the CCAA, namely, to preserve the going concern. *Re Residential Warranty Co. of Canada Inc*. (2006), 21 C.B.R. (5th) 57 (Alta. Q.B.) at para. 78.

[33] Counsel to the Applicants further submits that CCAA courts have repeatedly noted that the purpose of the CCAA is to preserve the benefit of a going concern business for all stakeholders, or "the whole economic community":

> The purpose of the CCAA is to facilitate arrangements that might avoid liquidation of the company and allow it to continue in business to the benefit of the whole economic community, including the shareholders, the creditors (both secured and unsecured) and the employees. *Citibank Canada v. Chase Manhattan Bank of Canada* (1991), 5 C.B.R. (3rd) 167 (Ont. Gen. Div.) at para. 29. *Re Consumers Packaging Inc*. (2001) 27 C.B.R. (4th) 197 (Ont. C.A.) at para. 5.

[34] Counsel to the Applicants further submits that the CCAA should be given a broad and liberal interpretation to facilitate its underlying purpose, including the preservation of the going concern for the benefit of all stakeholders and further that it should not matter whether the business continues as a going concern under the debtor's stewardship or under new ownership, for as long as the business continues as a going concern, a primary goal of the CCAA will be met.

[35] Counsel to the Applicants makes reference to a number of cases where courts in Ontario, in appropriate cases, have exercised their jurisdiction to approve a sale of assets, even in the absence of a plan of arrangement being tendered to stakeholders for a vote. In doing so, counsel to the Applicants submits that the courts have repeatedly recognized that they have jurisdiction under the CCAA to approve asset sales in the absence of a plan of arrangement, where such sale is in the best interests of stakeholders generally. *Re Canadian Red Cross Society, supra*, *Re PSINet, supra*, *Re Consumers Packaging, supra*, *Re Stelco Inc*. (2004), 6 C.B.R. (5th) 316 (Ont. S.C.J.) at para. 1, *Re Tiger Brand Knitting Co.* (2005) 9 C.B.R. (5th) 315, *Re Caterpillar*

Financial Services Ltd. v. Hardrock Paving Co. (2008), 45 C.B.R. (5th) 87 and *Re Lehndorff General Partner Ltd.* (1993), 17 C.B.R. (3rd) 24 (Ont. Gen. Div.).

[36] In *Re Consumers Packaging, supra*, the Court of Appeal for Ontario specifically held that a sale of a business as a going concern during a CCAA proceeding is consistent with the purposes of the CCAA:

> The sale of Consumers' Canadian glass operations as a going concern pursuant to the Owens-Illinois bid allows the preservation of Consumers' business (albeit under new ownership), and is therefore consistent with the purposes of the CCAA.
>
> …we cannot refrain from commenting that Farley J.'s decision to approve the Owens-Illinois bid is consistent with previous decisions in Ontario and elsewhere that have emphasized the broad remedial purpose of flexibility of the CCAA and have approved the sale and disposition of assets during CCAA proceedings prior to a formal plan being tendered. *Re Consumers Packaging, supra, at paras. 5, 9.*

[37] Similarly, in *Re Canadian Red Cross Society, supra*, Blair J. (as he then was) expressly affirmed the court's jurisdiction to approve a sale of assets in the course of a CCAA proceeding before a plan of arrangement had been approved by creditors. *Re Canadian Red Cross Society, supra*, at paras. 43, 45.

[38] Similarly, in *PSINet Limited, supra*, the court approved a going concern sale in a CCAA proceeding where no plan was presented to creditors and a substantial portion of the debtor's Canadian assets were to be sold. Farley J. noted as follows:

> [If the sale was not approved,] there would be a liquidation scenario ensuing which would realize far less than this going concern sale (which appears to me to have involved a transparent process with appropriate exposure designed to maximize the proceeds), thus impacting upon the rest of the creditors, especially as to the unsecured, together with the material enlarging of the unsecured claims by the disruption claims of approximately 8,600 customers (who will be materially disadvantaged by an interrupted transition) plus the job losses for approximately 200 employees. *Re PSINet Limited, supra*, at para. 3.

[39] In *Re Stelco Inc., supra*, in 2004, Farley J. again addressed the issue of the feasibility of selling the operations as a going concern:

> I would observe that usually it is the creditor side which wishes to terminate CCAA proceedings and that when the creditors threaten to take action, there is a realization that a liquidation scenario will not only have a negative effect upon a CCAA applicant, but also upon its workforce. Hence, the CCAA may be employed to provide stability during a period of necessary financial and operational restructuring – and if a restructuring of the "old company" is not

> feasible, then there is the exploration of the feasibility of the sale of the operations/enterprise as a going concern (with continued employment) in whole or in part. *Re Stelco Inc, supra*, at para. 1.

[40] I accept these submissions as being general statements of the law in Ontario. The value of equity in an insolvent debtor is dubious, at best, and, in my view, it follows that the determining factor should not be whether the business continues under the debtor's stewardship or under a structure that recognizes a new equity structure. An equally important factor to consider is whether the case can be made to continue the business as a going concern.

[41] Counsel to the Applicants also referred to decisions from the courts in Quebec, Manitoba and Alberta which have similarly recognized the court's jurisdiction to approve a sale of assets during the course of a CCAA proceeding. *Re Boutique San Francisco Inc*. (2004), 7 C.B.R. (5th) 189 (Quebec S. C.), *Re Winnipeg Motor Express Inc*. (2008), 49 C.B.R. (5th) 302 (Man. Q.B.) at paras. 41, 44, and *Re Calpine Canada Energy Limited* (2007), 35 C.B.R. (5th) (Alta. Q.B.) at para. 75.

[42] Counsel to the Applicants also directed the court's attention to a recent decision of the British Columbia Court of Appeal which questioned whether the court should authorize the sale of substantially all of the debtor's assets where the debtor's plan "will simply propose that the net proceeds from the sale…be distributed to its creditors". In *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp*. (2008), 46 C.B.R. (5th) 7 (B.C.C.A.) ("*Cliffs Over Maple Bay*"), the court was faced with a debtor who had no active business but who nonetheless sought to stave off its secured creditor indefinitely. The case did not involve any type of sale transaction but the Court of Appeal questioned whether a court should authorize the sale under the CCAA without requiring the matter to be voted upon by creditors.

[43] In addressing this matter, it appears to me that the British Columbia Court of Appeal focussed on whether the court should grant the requested relief and not on the question of whether a CCAA court has the jurisdiction to grant the requested relief.

[44] I do not disagree with the decision in *Cliffs Over Maple Bay*. However, it involved a situation where the debtor had no active business and did not have the support of its stakeholders. That is not the case with these Applicants.

[45] The *Cliffs Over Maple Bay* decision has recently been the subject of further comment by the British Columbia Court of Appeal in *Asset Engineering L.P. v. Forest and Marine Financial Limited Partnership* (2009) B.C.C.A. 319.

[46] At paragraphs 24 - 26 of the *Forest and Marine* decision, Newbury J.A. stated:

> 24. In *Cliffs Over Maple Bay*, the debtor company was a real estate developer whose one project had failed. The company had been dormant for some time. It applied for CCAA protection but described its proposal for restructuring in vague terms that amounted essentially to a plan to "secure sufficient funds" to complete the stalled project (Para. 34). This court, per Tysoe J.A., ruled that although the

Act can apply to single-project companies, its purposes are unlikely to be engaged in such instances, since mortgage priorities are fully straight forward and there will be little incentive for senior secured creditors to compromise their interests (Para. 36). Further, the Court stated, the granting of a stay under s. 11 is "not a free standing remedy that the court may grant whenever an insolvent company wishes to undertake a "restructuring"…Rather, s. 11 is ancillary to the fundamental purpose of the CCAA, and a stay of proceedings freezing the rights of creditors should only be granted in furtherance of the CCAA's fundamental purpose". That purpose has been described in Meridian Developments Inc. v. Toronto Dominion Bank (1984) 11 D.L.R. (4th) 576 (Alta. Q.B.):

> The legislation is intended to have wide scope and allow a judge to make orders which will effectively maintain the status quo for a period while the insolvent company attempts to gain the approval of its creditors for a proposed arrangement which will enable the company to remain in operation for what is, hopefully, the future benefit of both the company and its creditors. [at 580]

25. The Court was not satisfied in *Cliffs Over Maple Bay* that the "restructuring" contemplated by the debtor would do anything other than distribute the net proceeds from the sale, winding up or liquidation of its business. The debtor had no intention of proposing a plan of arrangement, and its business would not continue following the execution of its proposal – thus it could not be said the purposes of the statute would be engaged…

26. In my view, however, the case at bar is quite different from *Cliffs Over Maple Bay*. Here, the main debtor, the Partnership, is at the centre of a complicated corporate group and carries on an active financing business that it hopes to save notwithstanding the current economic cycle. (The business itself which fills a "niche" in the market, has been carried on in one form or another since 1983.) The CCAA is appropriate for situations such as this where it is unknown whether the "restructuring" will ultimately take the form of a refinancing or will involve a reorganization of the corporate entity or entities and a true compromise of the rights of one or more parties. The "fundamental purpose" of the Act – to preserve the *status quo* while the debtor prepares a plan that will enable it to remain in business to the benefit of all concerned – will be furthered by granting a stay so that the means contemplated by the Act – a compromise or arrangement – can be developed, negotiated and voted on if necessary…

[47] It seems to me that the foregoing views expressed in *Forest and Marine* are not inconsistent with the views previously expressed by the courts in Ontario. The CCAA is intended to be flexible and must be given a broad and liberal interpretation to achieve its objectives and a sale by the debtor which preserves its business as a going concern is, in my view, consistent with those objectives.

[48] I therefore conclude that the court does have the jurisdiction to authorize a sale under the CCAA in the absence of a plan.

[49] I now turn to a consideration of whether it is appropriate, in this case, to approve this sales process. Counsel to the Applicants submits that the court should consider the following factors in determining whether to authorize a sale under the CCAA in the absence of a plan:

(a) is a sale transaction warranted at this time?

(b) will the sale benefit the whole "economic community"?

(c) do any of the debtors' creditors have a *bona fide* reason to object to a sale of the business?

(d) is there a better viable alternative?

I accept this submission.

[50] It is the position of the Applicants that Nortel's proposed sale of the Business should be approved as this decision is to the benefit of stakeholders and no creditor is prejudiced. Further, counsel submits that in the absence of a sale, the prospects for the Business are a loss of competitiveness, a loss of value and a loss of jobs.

[51] Counsel to the Applicants summarized the facts in support of the argument that the Sale Transaction should be approved, namely:

(a) Nortel has been working diligently for many months on a plan to reorganize its business;

(b) in the exercise of its business judgment, Nortel has concluded that it cannot continue to operate the Business successfully within the CCAA framework;

(c) unless a sale is undertaken at this time, the long-term viability of the Business will be in jeopardy;

(d) the Sale Agreement continues the Business as a going concern, will save at least 2,500 jobs and constitutes the best and most valuable proposal for the Business;

(e) the auction process will serve to ensure Nortel receives the highest possible value for the Business;

(f) the sale of the Business at this time is in the best interests of Nortel and its stakeholders; and

(g) the value of the Business is likely to decline over time.

[52] The objections of MatlinPatterson and the UCC have been considered. I am satisfied that the issues raised in these objections have been addressed in a satisfactory manner by the ruling of Judge Gross and no useful purpose would be served by adding additional comment.

[53] Counsel to the Applicants also emphasize that Nortel will return to court to seek approval of the most favourable transaction to emerge from the auction process and will aim to satisfy the elements established by the court for approval as set out in *Royal Bank v. Soundair* (1991), 7 C.B.R. (3rd) 1 (Ont. C.A.) at para. 16.

DISPOSITION

[54] The Applicants are part of a complicated corporate group. They carry on an active international business. I have accepted that an important factor to consider in a CCAA process is whether the case can be made to continue the business as a going concern. I am satisfied having considered the factors referenced at [49], as well as the facts summarized at [51], that the Applicants have met this test. I am therefore satisfied that this motion should be granted.

[55] Accordingly, I approve the Bidding Procedures as described in the Riedel Affidavit and the Fourteenth Report of the Monitor, which procedures have been approved by the U.S. Court.

[56] I am also satisfied that the Sale Agreement should be approved and further that the Sale Agreement be approved and accepted for the purposes of conducting the "stalking horse" bidding process in accordance with the Bidding Procedures including, without limitation the Break-Up Fee and the Expense Reimbursement (as both terms are defined in the Sale Agreement).

[57] Further, I have also been satisfied that Appendix B to the Fourteenth Report contains information which is commercially sensitive, the dissemination of which could be detrimental to the stakeholders and, accordingly, I order that this document be sealed, pending further order of the court.

[58] In approving the Bidding Procedures, I have also taken into account that the auction will be conducted prior to the sale approval motion. This process is consistent with the practice of this court.

[59] Finally, it is the expectation of this court that the Monitor will continue to review ongoing issues in respect of the Bidding Procedures. The Bidding Procedures permit the Applicants to waive certain components of qualified bids without the consent of the UCC, the bondholder group and the Monitor. However, it is the expectation of this court that, if this situation arises, the Applicants will provide advance notice to the Monitor of its intention to do so.

MORAWETZ J.

Heard and Decided: June 29, 2009

Reasons Released: July 23, 2009

TAB 3

Royal Bank of Canada v. Soundair Corp., Canadian Pension Capital Ltd. and Canadian Insurers Capital Corp.

Indexed as: Royal Bank of Canada v. Soundair Corp. (C.A.)

4 O.R. (3d) 1
[1991] O.J. No. 1137
Action No. 318/91

ONTARIO
Court of Appeal for Ontario
Goodman, McKinlay and Galligan JJ.A.
July 3, 1991

Debtor and creditor -- Receivers -- Court-appointed receiver accepting offer to purchase assets against wishes of secured creditors -- Receiver acting properly and prudently -- Wishes of creditors not determinative -- Court approval of sale confirmed on appeal.

Air Toronto was a division of Soundair. In April 1990, one of Soundair's creditors, the Royal Bank, appointed a receiver to operate Air Toronto and sell it as a going concern. The receiver was authorized to sell Air Toronto to Air Canada, or, if that sale could not be completed, to negotiate and sell Air Toronto to another person. Air Canada made an offer which the receiver rejected. The receiver then entered into negotiations with Canadian Airlines International (Canadian); two subsidiaries of Canadian, Ontario Express Ltd. and Frontier Airlines Ltd., made an offer to purchase on March 6, 1991 (the OEL offer). Air Canada and a creditor of Soundair, CCFL, presented an offer to purchase to the receiver on March 7, 1991 through 922, a company formed for that purpose (the 922 offer). The receiver declined the 922 offer because it contained an unacceptable condition and accepted the OEL offer. 922 made a

second offer, which was virtually identical to the first one except that the unacceptable condition had been removed. In proceedings before Rosenberg J., an order was made approving the sale of Air Toronto to OEL and dismissing the 922 offer. CCFL appealed.

Held, the appeal should be dismissed.

Per Galligan J.A.: When deciding whether a receiver has acted providently, the court should examine the conduct of the receiver in light of the information the receiver had when it agreed to accept an offer, and should be very cautious before deciding that the receiver's conduct was improvident based upon information which has come to light after it made its decision. The decision to sell to OEL was a sound one in the circumstances faced by the receiver on March 8, 1991. Prices in other offers received after the receiver has agreed to a sale have relevance only if they show that the price contained in the accepted offer was so unreasonably low as to demonstrate that the receiver was improvident in accepting it. If they do not do so, they should not be considered upon a motion to confirm a sale recommended by a court-appointed receiver. If the 922 offer was better than the OEL offer, it was only marginally better and did not lead to an inference that the disposition strategy of the receiver was improvident.

While the primary concern of a receiver is the protecting of the interests of creditors, a secondary but important consideration is the integrity of the process by which the sale is effected. The court must exercise extreme caution before it interferes with the process adopted by a receiver to sell an unusual asset. It is important that prospective purchasers know that, if they are acting in good faith, bargain seriously with a receiver and enter into an agreement with it, a court will not lightly interfere with the commercial judgment of the receiver to sell the asset to them.

The failure of the receiver to give an offering memorandum to those who expressed an interest in the purchase of Air Toronto did not result in the process being unfair, as there was no proof that if an offering memorandum had been widely

distributed among persons qualified to have purchased Air Toronto, a viable offer would have come forth from a party other than 922 or OEL.

The fact that the 922 offer was supported by Soundair's secured creditors did not mean that the court should have given effect to their wishes. Creditors who asked the court to appoint a receiver to dispose of assets (and therefore insulated themselves from the risks of acting privately) should not be allowed to take over control of the process by the simple expedient of supporting another purchaser if they do not agree with the sale by the receiver. If the court decides that a court-appointed receiver has acted providently and properly (as the receiver did in this case), the views of creditors should not be determinative.

Per McKinlay J.A. (concurring in the result): While the procedure carried out by the receiver in this case was appropriate, given the unfolding of events and the unique nature of the assets involved, it was not a procedure which was likely to be appropriate in many receivership sales.

Per Goodman J.A. (dissenting): The fact that a creditor has requested an order of the court appointing a receiver does not in any way diminish or derogate from his right to obtain the maximum benefit to be derived from any disposition of the debtor's assets. The creditors in this case were convinced that acceptance of the 922 offer was in their best interest and the evidence supported that belief. Although the receiver acted in good faith, the process which it used was unfair insofar as 922 was concerned and improvident insofar as the secured creditors were concerned.

Cases referred to

Beauty Counsellors of Canada Ltd. (Re) (1986), 58 C.B.R. (N.S.) 237 (Ont. Bkcy.); British Columbia Development Corp. v. Spun Cast Industries Inc. (1977), 5 B.C.L.R. 94, 26 C.B.R. (N.S.) 28 (S.C.); Cameron v. Bank of Nova Scotia (1981), 38 C.B.R. (N.S.) 1, 45 N.S.R. (2d) 303, 86 A.P.R. 303 (C.A.); Crown Trust Co. v. Rosenberg (1986), 60 O.R. (2d) 87, 22 C.P.C.

(2d) 131, 67 C.B.R. (N.S.) 320 (note), 39 D.L.R. (4th) 526 (H.C.J.); Salima Investments Ltd. v. Bank of Montreal (1985), 41 Alta. L.R. (2d) 58, 65 A.R. 372, 59 C.B.R. (N.S.) 242, 21 D.L.R. (4th) 473 (C.A.); Selkirk (Re) (1986), 58 C.B.R. (N.S.) 245 (Ont. Bkcy.); Selkirk (Re) (1987), 64 C.B.R. (N.S.) 140 (Ont. Bkcy.)

Statutes referred to

Employment Standards Act, R.S.O. 1980, c. 137
Environmental Protection Act, R.S.O. 1980, c. 141

APPEAL from the judgment of the General Division, Rosenberg J., May 1, 1991, approving the sale of an airline by a receiver.

J.B. Berkow and Steven H. Goldman, for appellants.

John T. Morin, Q.C., for Air Canada.

L.A.J. Barnes and Lawrence E. Ritchie, for Royal Bank of Canada.

Sean F. Dunphy and G.K. Ketcheson for Ernst & Young Inc., receiver of Soundair Corp., respondent.

W.G. Horton, for Ontario Express Ltd.

Nancy J. Spies, for Frontier Air Ltd.

GALLIGAN J.A.:-- This is an appeal from the order of Rosenberg J. made on May 1, 1991 (Gen. Div.). By that order, he approved the sale of Air Toronto to Ontario Express Limited and Frontier Air Limited and he dismissed a motion to approve an offer to purchase Air Toronto by 922246 Ontario Limited.

It is necessary at the outset to give some background to the dispute. Soundair Corporation (Soundair) is a corporation

engaged in the air transport business. It has three divisions. One of them is Air Toronto. Air Toronto operates a scheduled airline from Toronto to a number of mid-sized cities in the United States of America. Its routes serve as feeders to several of Air Canada's routes. Pursuant to a connector agreement, Air Canada provides some services to Air Toronto and benefits from the feeder traffic provided by it. The operational relationship between Air Canada and Air Toronto is a close one.

In the latter part of 1989 and the early part of 1990, Soundair was in financial difficulty. Soundair has two secured creditors who have an interest in the assets of Air Toronto. The Royal Bank of Canada (the Royal Bank) is owed at least $65,000,000. The appellants Canadian Pension Capital Limited and Canadian Insurers Capital Corporation (collectively called CCFL) are owed approximately $9,500,000. Those creditors will have a deficiency expected to be in excess of $50,000,000 on the winding-up of Soundair.

On April 26, 1990, upon the motion of the Royal Bank, O'Brien J. appointed Ernst & Young Inc. (the receiver) as receiver of all of the assets, property and undertakings of Soundair. The order required the receiver to operate Air Toronto and sell it as a going concern. Because of the close relationship between Air Toronto and Air Canada, it was contemplated that the receiver would obtain the assistance of Air Canada to operate Air Toronto. The order authorized the receiver:

> (b) to enter into contractual arrangements with Air Canada to retain a manager or operator, including Air Canada, to manage and operate Air Toronto under the supervision of Ernst & Young Inc. until the completion of the sale of Air Toronto to Air Canada or other person ...

Also because of the close relationship, it was expected that Air Canada would purchase Air Toronto. To that end, the order of O'Brien J. authorized the receiver:

> (c) to negotiate and do all things necessary or desirable to complete a sale of Air Toronto to Air Canada and, if a sale

to Air Canada cannot be completed, to negotiate and sell Air Toronto to another person, subject to terms and conditions approved by this Court.

Over a period of several weeks following that order, negotiations directed towards the sale of Air Toronto took place between the receiver and Air Canada. Air Canada had an agreement with the receiver that it would have exclusive negotiating rights during that period. I do not think it is necessary to review those negotiations, but I note that Air Canada had complete access to all of the operations of Air Toronto and conducted due diligence examinations. It became thoroughly acquainted with every aspect of Air Toronto's operations.

Those negotiations came to an end when an offer made by Air Canada on June 19, 1990, was considered unsatisfactory by the receiver. The offer was not accepted and lapsed. Having regard to the tenor of Air Canada's negotiating stance and a letter sent by its solicitors on July 20, 1990, I think that the receiver was eminently reasonable when it decided that there was no realistic possibility of selling Air Toronto to Air Canada.

The receiver then looked elsewhere. Air Toronto's feeder business is very attractive, but it only has value to a national airline. The receiver concluded reasonably, therefore, that it was commercially necessary for one of Canada's two national airlines to be involved in any sale of Air Toronto. Realistically, there were only two possible purchasers whether direct or indirect. They were Air Canada and Canadian Airlines International.

It was well known in the air transport industry that Air Toronto was for sale. During the months following the collapse of the negotiations with Air Canada, the receiver tried unsuccessfully to find viable purchasers. In late 1990, the receiver turned to Canadian Airlines International, the only realistic alternative. Negotiations began between them. Those negotiations led to a letter of intent dated February 11, 1991. On March 6, 1991, the receiver received an offer from Ontario

Express Limited and Frontier Airlines Limited, who are subsidiaries of Canadian Airlines International. This offer is called the OEL offer.

In the meantime, Air Canada and CCFL were having discussions about making an offer for the purchase of Air Toronto. They formed 922246 Ontario Limited (922) for the purpose of purchasing Air Toronto. On March 1, 1991, CCFL wrote to the receiver saying that it proposed to make an offer. On March 7, 1991, Air Canada and CCFL presented an offer to the receiver in the name of 922. For convenience, its offers are called the 922 offers.

The first 922 offer contained a condition which was unacceptable to the receiver. I will refer to that condition in more detail later. The receiver declined the 922 offer and on March 8, 1991, accepted the OEL offer. Subsequently, 922 obtained an order allowing it to make a second offer. It then submitted an offer which was virtually identical to that of March 7, 1991, except that the unacceptable condition had been removed.

The proceedings before Rosenberg J. then followed. He approved the sale to OEL and dismissed a motion for the acceptance of the 922 offer. Before Rosenberg J., and in this court, both CCFL and the Royal Bank supported the acceptance of the second 922 offer.

There are only two issues which must be resolved in this appeal. They are:

(1) Did the receiver act properly when it entered into an agreement to sell Air Toronto to OEL?

(2) What effect does the support of the 922 offer by the secured creditors have on the result?

I will deal with the two issues separately.

I. DID THE RECEIVER ACT PROPERLY

IN AGREEING TO SELL TO OEL?

Before dealing with that issue there are three general observations which I think I should make. The first is that the sale of an airline as a going concern is a very complex process. The best method of selling an airline at the best price is something far removed from the expertise of a court. When a court appoints a receiver to use its commercial expertise to sell an airline, it is inescapable that it intends to rely upon the receiver's expertise and not upon its own. Therefore, the court must place a great deal of confidence in the actions taken and in the opinions formed by the receiver. It should also assume that the receiver is acting properly unless the contrary is clearly shown. The second observation is that the court should be reluctant to second-guess, with the benefit of hindsight, the considered business decisions made by its receiver. The third observation which I wish to make is that the conduct of the receiver should be reviewed in the light of the specific mandate given to him by the court.

The order of O'Brien J. provided that if the receiver could not complete the sale to Air Canada that it was "to negotiate and sell Air Toronto to another person". The court did not say how the receiver was to negotiate the sale. It did not say it was to call for bids or conduct an auction. It told the receiver to negotiate and sell. It obviously intended, because of the unusual nature of the asset being sold, to leave the method of sale substantially in the discretion of the receiver. I think, therefore, that the court should not review minutely the process of the sale when, broadly speaking, it appears to the court to be a just process.

As did Rosenberg J., I adopt as correct the statement made by Anderson J. in Crown Trust Co. v. Rosenberg (1986), 60 O.R. (2d) 87, 39 D.L.R. (4th) 526 (H.C.J.), at pp. 92-94 O.R., pp. 531-33 D.L.R., of the duties which a court must perform when deciding whether a receiver who has sold a property acted properly. When he set out the court's duties, he did not put them in any order of priority, nor do I. I summarize those duties as follows:

1. It should consider whether the receiver has made a sufficient effort to get the best price and has not acted improvidently.

2. It should consider the interests of all parties.

3. It should consider the efficacy and integrity of the process by which offers are obtained.

4. It should consider whether there has been unfairness in the working out of the process.

I intend to discuss the performance of those duties separately.

1. Did the receiver make a sufficient effort to get the best price and did it act providently?

Having regard to the fact that it was highly unlikely that a commercially viable sale could be made to anyone but the two national airlines, or to someone supported by either of them, it is my view that the receiver acted wisely and reasonably when it negotiated only with Air Canada and Canadian Airlines International. Furthermore, when Air Canada said that it would submit no further offers and gave the impression that it would not participate further in the receiver's efforts to sell, the only course reasonably open to the receiver was to negotiate with Canadian Airlines International. Realistically, there was nowhere else to go but to Canadian Airlines International. In doing so, it is my opinion that the receiver made sufficient efforts to sell the airline.

When the receiver got the OEL offer on March 6, 1991, it was over ten months since it had been charged with the responsibility of selling Air Toronto. Until then, the receiver had not received one offer which it thought was acceptable. After substantial efforts to sell the airline over that period, I find it difficult to think that the receiver acted improvidently in accepting the only acceptable offer which it had.

On March 8, 1991, the date when the receiver accepted the OEL offer, it had only two offers, the OEL offer which was acceptable, and the 922 offer which contained an unacceptable condition. I cannot see how the receiver, assuming for the moment that the price was reasonable, could have done anything but accept the OEL offer.

When deciding whether a receiver had acted providently, the court should examine the conduct of the receiver in light of the information the receiver had when it agreed to accept an offer. In this case, the court should look at the receiver's conduct in the light of the information it had when it made its decision on March 8, 1991. The court should be very cautious before deciding that the receiver's conduct was improvident based upon information which has come to light after it made its decision. To do so, in my view, would derogate from the mandate to sell given to the receiver by the order of O'Brien J. I agree with and adopt what was said by Anderson J. in Crown Trust v. Rosenberg, supra, at p. 112 O.R., p. 551 D.L.R.:

> Its decision was made as a matter of business judgment on the elements then available to it. It is of the very essence of a receiver's function to make such judgments and in the making of them to act seriously and responsibly so as to be prepared to stand behind them.
>
> If the court were to reject the recommendation of the Receiver in any but the most exceptional circumstances, it would materially diminish and weaken the role and function of the Receiver both in the perception of receivers and in the perception of any others who might have occasion to deal with them. It would lead to the conclusion that the decision of the Receiver was of little weight and that the real decision was always made upon the motion for approval. That would be a consequence susceptible of immensely damaging results to the disposition of assets by court-appointed receivers.

(Emphasis added)

I also agree with and adopt what was said by Macdonald J.A.

in Cameron v. Bank of Nova Scotia (1981), 38 C.B.R. (N.S.) 1, 45 N.S.R. (2d) 303 (C.A.), at p. 11 C.B.R., p. 314 N.S.R.:

> In my opinion if the decision of the receiver to enter into an agreement of sale, subject to court approval, with respect to certain assets is reasonable and sound under the circumstances at the time existing it should not be set aside simply because a later and higher bid is made. To do so would literally create chaos in the commercial world and receivers and purchasers would never be sure they had a binding agreement.

(Emphasis added)

On March 8, 1991, the receiver had two offers. One was the OEL offer which it considered satisfactory but which could be withdrawn by OEL at any time before it was accepted. The receiver also had the 922 offer which contained a condition that was totally unacceptable. It had no other offers. It was faced with the dilemma of whether it should decline to accept the OEL offer and run the risk of it being withdrawn, in the hope that an acceptable offer would be forthcoming from 922. An affidavit filed by the president of the receiver describes the dilemma which the receiver faced, and the judgment made in the light of that dilemma:

> 24. An asset purchase agreement was received by Ernst & Young on March 7, 1991 which was dated March 6, 1991. This agreement was received from CCFL in respect of their offer to purchase the assets and undertaking of Air Toronto. Apart from financial considerations, which will be considered in a subsequent affidavit, the Receiver determined that it would not be prudent to delay acceptance of the OEL agreement to negotiate a highly uncertain arrangement with Air Canada and CCFL. Air Canada had the benefit of an "exclusive" in negotiations for Air Toronto and had clearly indicated its intention to take itself out of the running while ensuring that no other party could seek to purchase Air Toronto and maintain the Air Canada connector arrangement vital to its survival. The CCFL offer represented a radical reversal of this position by Air Canada at the eleventh hour. However, it

> contained a significant number of conditions to closing which were entirely beyond the control of the Receiver. As well, the CCFL offer came less than 24 hours before signing of the agreement with OEL which had been negotiated over a period of months, at great time and expense.

(Emphasis added)
I am convinced that the decision made was a sound one in the circumstances faced by the receiver on March 8, 1991.

I now turn to consider whether the price contained in the OEL offer was one which it was provident to accept. At the outset, I think that the fact that the OEL offer was the only acceptable one available to the receiver on March 8, 1991, after ten months of trying to sell the airline, is strong evidence that the price in it was reasonable. In a deteriorating economy, I doubt that it would have been wise to wait any longer.

I mentioned earlier that, pursuant to an order, 922 was permitted to present a second offer. During the hearing of the appeal, counsel compared at great length the price contained in the second 922 offer with the price contained in the OEL offer. Counsel put forth various hypotheses supporting their contentions that one offer was better than the other.

It is my opinion that the price contained in the 922 offer is relevant only if it shows that the price obtained by the Receiver in the OEL offer was not a reasonable one. In Crown Trust v. Rosenberg, supra, Anderson J., at p. 113 O.R., p. 551 D.L.R., discussed the comparison of offers in the following way:

> No doubt, as the cases have indicated, situations might arise where the disparity was so great as to call in question the adequacy of the mechanism which had produced the offers. It is not so here, and in my view that is substantially an end of the matter.

In two judgments, Saunders J. considered the circumstances in which an offer submitted after the receiver had agreed to a

sale should be considered by the court. The first is Re Selkirk (1986), 58 C.B.R. (N.S.) 245 (Ont. Bkcy.), at p. 247:

> If, for example, in this case there had been a second offer of a substantially higher amount, then the court would have to take that offer into consideration in assessing whether the receiver had properly carried out his function of endeavouring to obtain the best price for the property.

The second is Re Beauty Counsellors of Canada Ltd. (1986), 58 C.B.R. (N.S.) 237 (Ont. Bkcy.), at p. 243:

> If a substantially higher bid turns up at the approval stage, the court should consider it. Such a bid may indicate, for example, that the trustee has not properly carried out its duty to endeavour to obtain the best price for the estate.

In Re Selkirk (1987), 64 C.B.R. (N.S.) 140 (Ont. Bkcy.), at p. 142, McRae J. expressed a similar view:

> The court will not lightly withhold approval of a sale by the receiver, particularly in a case such as this where the receiver is given rather wide discretionary authority as per the order of Mr. Justice Trainor and, of course, where the receiver is an officer of this court. Only in a case where there seems to be some unfairness in the process of the sale or where there are substantially higher offers which would tend to show that the sale was improvident will the court withhold approval. It is important that the court recognize the commercial exigencies that would flow if prospective purchasers are allowed to wait until the sale is in court for approval before submitting their final offer. This is something that must be discouraged.

(Emphasis added)

What those cases show is that the prices in other offers have relevance only if they show that the price contained in the offer accepted by the receiver was so unreasonably low as to demonstrate that the receiver was improvident in accepting it. I am of the opinion, therefore, that if they do not tend to

show that the receiver was improvident, they should not be considered upon a motion to confirm a sale recommended by a court-appointed receiver. If they were, the process would be changed from a sale by a receiver, subject to court approval, into an auction conducted by the court at the time approval is sought. In my opinion, the latter course is unfair to the person who has entered bona fide into an agreement with the receiver, can only lead to chaos, and must be discouraged.

If, however, the subsequent offer is so substantially higher than the sale recommended by the receiver, then it may be that the receiver has not conducted the sale properly. In such circumstances, the court would be justified itself in entering into the sale process by considering competitive bids. However, I think that that process should be entered into only if the court is satisfied that the receiver has not properly conducted the sale which it has recommended to the court.

It is necessary to consider the two offers. Rosenberg J. held that the 922 offer was slightly better or marginally better than the OEL offer. He concluded that the difference in the two offers did not show that the sale process adopted by the receiver was inadequate or improvident.

Counsel for the appellants complained about the manner in which Rosenberg J. conducted the hearing of the motion to confirm the OEL sale. The complaint was, that when they began to discuss a comparison of the two offers, Rosenberg J. said that he considered the 922 offer to be better than the OEL offer. Counsel said that when that comment was made, they did not think it necessary to argue further the question of the difference in value between the two offers. They complain that the finding that the 922 offer was only marginally better or slightly better than the OEL offer was made without them having had the opportunity to argue that the 922 offer was substantially better or significantly better than the OEL offer. I cannot understand how counsel could have thought that by expressing the opinion that the 922 offer was better, Rosenberg J. was saying that it was a significantly or substantially better one. Nor can I comprehend how counsel took the comment to mean that they were foreclosed from arguing that

the offer was significantly or substantially better. If there was some misunderstanding on the part of counsel, it should have been raised before Rosenberg J. at the time. I am sure that if it had been, the misunderstanding would have been cleared up quickly. Nevertheless, this court permitted extensive argument dealing with the comparison of the two offers.

The 922 offer provided for $6,000,000 cash to be paid on closing with a royalty based upon a percentage of Air Toronto profits over a period of five years up to a maximum of $3,000,000. The OEL offer provided for a payment of $2,000,000 on closing with a royalty paid on gross revenues over a five-year period. In the short term, the 922 offer is obviously better because there is substantially more cash up front. The chances of future returns are substantially greater in the OEL offer because royalties are paid on gross revenues while the royalties under the 922 offer are paid only on profits. There is an element of risk involved in each offer.

The receiver studied the two offers. It compared them and took into account the risks, the advantages and the disadvantages of each. It considered the appropriate contingencies. It is not necessary to outline the factors which were taken into account by the receiver because the manager of its insolvency practice filed an affidavit outlining the considerations which were weighed in its evaluation of the two offers. They seem to me to be reasonable ones. That affidavit concluded with the following paragraph:

> 24. On the basis of these considerations the Receiver has approved the OEL offer and has concluded that it represents the achievement of the highest possible value at this time for the Air Toronto division of SoundAir.

The court appointed the receiver to conduct the sale of Air Toronto and entrusted it with the responsibility of deciding what is the best offer. I put great weight upon the opinion of the receiver. It swore to the court which appointed it that the OEL offer represents the achievement of the highest possible value at this time for Air Toronto. I have not been convinced

that the receiver was wrong when he made that assessment. I am, therefore, of the opinion that the 922 offer does not demonstrate any failure upon the part of the receiver to act properly and providently.

It follows that if Rosenberg J. was correct when he found that the 922 offer was in fact better, I agree with him that it could only have been slightly or marginally better. The 922 offer does not lead to an inference that the disposition strategy of the receiver was inadequate, unsuccessful or improvident, nor that the price was unreasonable.

I am, therefore, of the opinion that the receiver made a sufficient effort to get the best price and has not acted improvidently.

2. Consideration of the interests of all parties

It is well established that the primary interest is that of the creditors of the debtor: see Crown Trust Co. v. Rosenberg, supra, and Re Selkirk (1986, Saunders J.), supra. However, as Saunders J. pointed out in Re Beauty Counsellors, supra, at p. 244 C.B.R., "it is not the only or overriding consideration".

In my opinion, there are other persons whose interests require consideration. In an appropriate case, the interests of the debtor must be taken into account. I think also, in a case such as this, where a purchaser has bargained at some length and doubtless at considerable expense with the receiver, the interests of the purchaser ought to be taken into account. While it is not explicitly stated in such cases as Crown Trust Co. v. Rosenberg, supra, Re Selkirk (1986, Saunders J.), supra, Re Beauty Counsellors, supra, Re Selkirk (1987, McRae J.), supra, and Cameron, supra, I think they clearly imply that the interests of a person who has negotiated an agreement with a court-appointed receiver are very important.

In this case, the interests of all parties who would have an interest in the process were considered by the receiver and by Rosenberg J.

3. Consideration of the efficacy and integrity of the process by which the offer was obtained

While it is accepted that the primary concern of a receiver is the protecting of the interests of the creditors, there is a secondary but very important consideration and that is the integrity of the process by which the sale is effected. This is particularly so in the case of a sale of such a unique asset as an airline as a going concern.

The importance of a court protecting the integrity of the process has been stated in a number of cases. First, I refer to Re Selkirk (1986), supra, where Saunders J. said at p. 246 C.B.R.:

> In dealing with the request for approval, the court has to be concerned primarily with protecting the interest of the creditors of the former bankrupt. A secondary but important consideration is that the process under which the sale agreement is arrived at should be consistent with commercial efficacy and integrity.
>
> In that connection I adopt the principles stated by Macdonald J.A. of the Nova Scotia Supreme Court (Appeal Division) in Cameron v. Bank of N.S. (1981), 38 C.B.R. (N.S.) 1, 45 N.S.R. (2d) 303, 86 A.P.R. 303 (C.A.), where he said at p. 11:
>
> In my opinion if the decision of the receiver to enter into an agreement of sale, subject to court approval, with respect to certain assets is reasonable and sound under the circumstances at the time existing it should not be set aside simply because a later and higher bid is made. To do so would literally create chaos in the commercial world and receivers and purchasers would never be sure they had a finding agreement. On the contrary, they would know that other bids could be received and considered up until the application for court approval is heard -- this would be an intolerable situation.

While those remarks may have been made in the context of a

bidding situation rather than a private sale, I consider them to be equally applicable to a negotiation process leading to a private sale. Where the court is concerned with the disposition of property, the purpose of appointing a receiver is to have the receiver do the work that the court would otherwise have to do.

In Salima Investments Ltd. v. Bank of Montreal (1985), 41 Alta. L.R. (2d) 58, 21 D.L.R. (4th) 473 (C.A.), at p. 61 Alta. L.R., p. 476 D.L.R., the Alberta Court of Appeal said that sale by tender is not necessarily the best way to sell a business as an ongoing concern. It went on to say that when some other method is used which is provident, the court should not undermine the process by refusing to confirm the sale.

Finally, I refer to the reasoning of Anderson J. in Crown Trust Co. v. Rosenberg, supra, at p. 124 O.R., pp. 562-63 D.L.R.:

> While every proper effort must always be made to assure maximum recovery consistent with the limitations inherent in the process, no method has yet been devised to entirely eliminate those limitations or to avoid their consequences. Certainly it is not to be found in loosening the entire foundation of the system. Thus to compare the results of the process in this case with what might have been recovered in some other set of circumstances is neither logical nor practical.

(Emphasis added)

It is my opinion that the court must exercise extreme caution before it interferes with the process adopted by a receiver to sell an unusual asset. It is important that prospective purchasers know that, if they are acting in good faith, bargain seriously with a receiver and enter into an agreement with it, a court will not lightly interfere with the commercial judgment of the receiver to sell the asset to them.

Before this court, counsel for those opposing the confirmation of the sale to OEL suggested many different ways

in which the receiver could have conducted the process other than the way which he did. However, the evidence does not convince me that the receiver used an improper method of attempting to sell the airline. The answer to those submissions is found in the comment of Anderson J. in Crown Trust Co. v. Rosenberg, supra, at p. 109 O.R., p. 548 D.L.R.:

> The court ought not to sit as on appeal from the decision of the Receiver, reviewing in minute detail every element of the process by which the decision is reached. To do so would be a futile and duplicitous exercise.

It would be a futile and duplicitous exercise for this court to examine in minute detail all of the circumstances leading up to the acceptance of the OEL offer. Having considered the process adopted by the receiver, it is my opinion that the process adopted was a reasonable and prudent one.

4. Was there unfairness in the process?

As a general rule, I do not think it appropriate for the court to go into the minutia of the process or of the selling strategy adopted by the receiver. However, the court has a responsibility to decide whether the process was fair. The only part of this process which I could find that might give even a superficial impression of unfairness is the failure of the receiver to give an offering memorandum to those who expressed an interest in the purchase of Air Toronto.

I will outline the circumstances which relate to the allegation that the receiver was unfair in failing to provide an offering memorandum. In the latter part of 1990, as part of its selling strategy, the receiver was in the process of preparing an offering memorandum to give to persons who expressed an interest in the purchase of Air Toronto. The offering memorandum got as far as draft form, but was never released to anyone, although a copy of the draft eventually got into the hands of CCFL before it submitted the first 922 offer on March 7, 1991. A copy of the offering memorandum forms part of the record and it seems to me to be little more than puffery, without any hard information which a sophisticated

purchaser would require in order to make a serious bid.

The offering memorandum had not been completed by February 11, 1991. On that date, the receiver entered into the letter of intent to negotiate with OEL. The letter of intent contained a provision that during its currency the receiver would not negotiate with any other party. The letter of intent was renewed from time to time until the OEL offer was received on March 6, 1991.

The receiver did not proceed with the offering memorandum because to do so would violate the spirit, if not the letter, of its letter of intent with OEL.

I do not think that the conduct of the receiver shows any unfairness towards 922. When I speak of 922, I do so in the context that Air Canada and CCFL are identified with it. I start by saying that the receiver acted reasonably when it entered into exclusive negotiations with OEL. I find it strange that a company, with which Air Canada is closely and intimately involved, would say that it was unfair for the receiver to enter into a time-limited agreement to negotiate exclusively with OEL. That is precisely the arrangement which Air Canada insisted upon when it negotiated with the receiver in the spring and summer of 1990. If it was not unfair for Air Canada to have such an agreement, I do not understand why it was unfair for OEL to have a similar one. In fact, both Air Canada and OEL in its turn were acting reasonably when they required exclusive negotiating rights to prevent their negotiations from being used as a bargaining lever with other potential purchasers. The fact that Air Canada insisted upon an exclusive negotiating right while it was negotiating with the receiver demonstrates the commercial efficacy of OEL being given the same right during its negotiations with the receiver. I see no unfairness on the part of the receiver when it honoured its letter of intent with OEL by not releasing the offering memorandum during the negotiations with OEL.

Moreover, I am not prepared top find that 922 was in any way prejudiced by the fact that it did not have an offering memorandum. It made an offer on March 7, 1991, which it

contends to this day was a better offer than that of OEL. 922 has not convinced me that if it had an offering memorandum its offer would have been any different or any better than it actually was. The fatal problem with the first 922 offer was that it contained a condition which was completely unacceptable to the receiver. The receiver properly, in my opinion, rejected the offer out of hand because of that condition. That condition did not relate to any information which could have conceivably been in an offering memorandum prepared by the receiver. It was about the resolution of a dispute between CCFL and the Royal Bank, something the receiver knew nothing about.

Further evidence of the lack of prejudice which the absence of an offering memorandum has caused 922 is found in CCFL's stance before this court. During argument, its counsel suggested, as a possible resolution of this appeal, that this court should call for new bids, evaluate them and then order a sale to the party who put in the better bid. In such a case, counsel for CCFL said that 922 would be prepared to bid within seven days of the court's decision. I would have thought that, if there were anything to CCFL's suggestion that the failure to provide an offering memorandum was unfair to 922, it would have told the court that it needed more information before it would be able to make a bid.

I am satisfied that Air Canada and CCFL have, and at all times had, all of the information which they would have needed to make what to them would be a commercially viable offer to the receiver. I think that an offering memorandum was of no commercial consequence to them, but the absence of one has since become a valuable tactical weapon.

It is my opinion that there is no convincing proof that if an offering memorandum had been widely distributed among persons qualified to have purchased Air Toronto, a viable offer would have come forth from a party other than 922 or OEL. Therefore, the failure to provide an offering memorandum was neither unfair nor did it prejudice the obtaining of a better price on March 8, 1991, than that contained in the OEL offer. I would not give effect to the contention that the process adopted by the receiver was an unfair one.

There are two statements by Anderson J. contained in Crown Trust Co. v. Rosenberg, supra, which I adopt as my own. The first is at p. 109 O.R., p. 548 D.L.R.:

> The court should not proceed against the recommendations of its Receiver except in special circumstances and where the necessity and propriety of doing so are plain. Any other rule or approach would emasculate the role of the Receiver and make it almost inevitable that the final negotiation of every sale would take place on the motion for approval.

The second is at p. 111 O.R., p. 550 D.L.R.:

> It is equally clear, in my view, though perhaps not so clearly enunciated, that it is only in an exceptional case that the court will intervene and proceed contrary to the Receiver's recommendations if satisfied, as I am, that the Receiver has acted reasonably, prudently and fairly and not arbitrarily.

In this case the receiver acted reasonably, prudently, fairly and not arbitrarily. I am of the opinion, therefore, that the process adopted by the receiver in reaching an agreement was a just one.

In his reasons for judgment, after discussing the circumstances leading to the 922 offer, Rosenberg J. said this [at p. 31 of the reasons]:

> They created a situation as of March 8, where the receiver was faced with two offers, one of which was in acceptable form and one of which could not possibly be accepted in its present form. The receiver acted appropriately in accepting the OEL offer.

I agree.

The receiver made proper and sufficient efforts to get the best price that it could for the assets of Air Toronto. It adopted a reasonable and effective process to sell the airline

which was fair to all persons who might be interested in purchasing it. It is my opinion, therefore, that the receiver properly carried out the mandate which was given to it by the order of O'Brien J. It follows that Rosenberg J. was correct when he confirmed the sale to OEL.

II. THE EFFECT OF THE SUPPORT OF THE 922 OFFER BY THE TWO SECURED CREDITORS

As I noted earlier, the 922 offer was supported before Rosenberg J., and in this court, by CCFL and by the Royal Bank, the two secured creditors. It was argued that, because the interests of the creditors are primary, the court ought to give effect to their wish that the 922 offer be accepted. I would not accede to that suggestion for two reasons.

The first reason is related to the fact that the creditors chose to have a receiver appointed by the court. It was open to them to appoint a private receiver pursuant to the authority of their security documents. Had they done so, then they would have had control of the process and could have sold Air Toronto to whom they wished. However, acting privately and controlling the process involves some risks. The appointment of a receiver by the court insulates the creditors from those risks. But insulation from those risks carries with it the loss of control over the process of disposition of the assets. As I have attempted to explain in these reasons, when a receiver's sale is before the court for confirmation the only issues are the propriety of the conduct of the receiver and whether it acted providently. The function of the court at that stage is not to step in and do the receiver's work or change the sale strategy adopted by the receiver. Creditors who asked the court to appoint a receiver to dispose of assets should not be allowed to take over control of the process by the simple expedient of supporting another purchaser if they do not agree with the sale made by the receiver. That would take away all respect for the process of sale by a court-appointed receiver.

There can be no doubt that the interests of the creditor are an important consideration in determining whether the receiver has properly conducted a sale. The opinion of the creditors as

to which offer ought to be accepted is something to be taken into account. But, if the court decides that the receiver has acted properly and providently, those views are not necessarily determinative. Because, in this case, the receiver acted properly and providently, I do not think that the views of the creditors should override the considered judgment of the receiver.

The second reason is that, in the particular circumstances of this case, I do not think the support of CCFL and the Royal Bank of the 922 offer is entitled to any weight. The support given by CCFL can be dealt with summarily. It is a co-owner of 922. It is hardly surprising and not very impressive to hear that it supports the offer which it is making for the debtors' assets.

The support by the Royal Bank requires more consideration and involves some reference to the circumstances. On March 6, 1991, when the first 922 offer was made, there was in existence an interlender agreement between the Royal Bank and CCFL. That agreement dealt with the share of the proceeds of the sale of Air Toronto which each creditor would receive. At the time, a dispute between the Royal Bank and CCFL about the interpretation of that agreement was pending in the courts. The unacceptable condition in the first 922 offer related to the settlement of the interlender dispute. The condition required that the dispute be resolved in a way which would substantially favour CCFL. It required that CCFL receive $3,375,000 of the $6,000,000 cash payment and the balance, including the royalties, if any, be paid to the Royal Bank. The Royal Bank did not agree with that split of the sale proceeds.

On April 5, 1991, the Royal Bank and CCFL agreed to settle the interlender dispute. The settlement was that if the 922 offer was accepted by the court, CCFL would receive only $1,000,000 and the Royal Bank would receive $5,000,000 plus any royalties which might be paid. It was only in consideration of that settlement that the Royal Bank agreed to support the 922 offer.

The Royal Bank's support of the 922 offer is so affected by

the very substantial benefit which it wanted to obtain from the settlement of the interlender dispute that, in my opinion, its support is devoid of any objectivity. I think it has no weight.

While there may be circumstances where the unanimous support by the creditors of a particular offer could conceivably override the proper and provident conduct of a sale by a receiver, I do not think that this is such a case. This is a case where the receiver has acted properly and in a provident way. It would make a mockery out of the judicial process, under which a mandate was given to this receiver to sell this airline, if the support by these creditors of the 922 offer were permitted to carry the day. I give no weight to the support which they give to the 922 offer.

In its factum, the receiver pointed out that, because of greater liabilities imposed upon private receivers by various statutes such as the Employment Standards Act, R.S.O. 1980, c. 137, and the Environmental Protection Act, R.S.O. 1980, c. 141, it is likely that more and more the courts will be asked to appoint receivers in insolvencies. In those circumstances, I think that creditors who ask for court-appointed receivers and business people who choose to deal with those receivers should know that if those receivers act properly and providently their decisions and judgments will be given great weight by the courts who appoint them. I have decided this appeal in the way I have in order to assure business people who deal with court-appointed receivers that they can have confidence that an agreement which they make with a court-appointed receiver will be far more than a platform upon which others may bargain at the court approval stage. I think that persons who enter into agreements with court-appointed receivers, following a disposition procedure that is appropriate given the nature of the assets involved, should expect that their bargain will be confirmed by the court.

The process is very important. It should be carefully protected so that the ability of court-appointed receivers to negotiate the best price possible is strengthened and supported. Because this receiver acted properly and providently in entering into the OEL agreement, I am of the opinion that

Rosenberg J. was right when he approved the sale to OEL and dismissed the motion to approve the 922 offer.

I would, accordingly, dismiss the appeal. I would award the receiver, OEL and Frontier Airlines Limited their costs out of the Soundair estate, those of the receiver on a solicitor-and-client scale. I would make no order as to the costs of any of the other parties or interveners.

MCKINLAY J.A. (concurring in the result):-- I agree with Galligan J.A. in result, but wish to emphasize that I do so on the basis that the undertaking being sold in this case was of a very special and unusual nature. It is most important that the integrity of procedures followed by court-appointed receivers be protected in the interests of both commercial morality and the future confidence of business persons in their dealings with receivers. Consequently, in all cases, the court should carefully scrutinize the procedure followed by the receiver to determine whether it satisfies the tests set out by Anderson J. in Crown Trust Co. v. Rosenberg (1986), 60 O.R. (2d) 87, 39 D.L.R. (4th) 526 (H.C.J.). While the procedure carried out by the receiver in this case, as described by Galligan J.A., was appropriate, given the unfolding of events and the unique nature of the assets involved, it is not a procedure that is likely to be appropriate in many receivership sales.

I should like to add that where there is a small number of creditors who are the only parties with a real interest in the proceeds of the sale (i.e., where it is clear that the highest price attainable would result in recovery so low that no other creditors, shareholders, guarantors, etc., could possibly benefit therefrom), the wishes of the interested creditors should be very seriously considered by the receiver. It is true, as Galligan J.A. points out, that in seeking the court appointment of a receiver, the moving parties also seek the protection of the court in carrying out the receiver's functions. However, it is also true that in utilizing the court process the moving parties have opened the whole process to detailed scrutiny by all involved, and have probably added significantly to their costs and consequent shortfall as a result of so doing. The adoption of the court process should in

no way diminish the rights of any party, and most certainly not the rights of the only parties with a real interest. Where a receiver asks for court approval of a sale which is opposed by the only parties in interest, the court should scrutinize with great care the procedure followed by the receiver. I agree with Galligan J.A. that in this case that was done. I am satisfied that the rights of all parties were properly considered by the receiver, by the learned motions court judge, and by Galligan J.A.

GOODMAN J.A. (dissenting):-- I have had the opportunity of reading the reasons for judgment herein of Galligan and McKinlay JJ.A. Respectfully, I am unable to agree with their conclusion.

The case at bar is an exceptional one in the sense that upon the application made for approval of the sale of the assets of Air Toronto two competing offers were placed before Rosenberg J. Those two offers were that of Frontier Airlines Ltd. and Ontario Express Limited (OEL) and that of 922246 Ontario Limited (922), a company incorporated for the purpose of acquiring Air Toronto. Its shares were owned equally by Canadian Pension Capital Limited and Canadian Insurers Capital Corporation (collectively CCFL) and Air Canada. It was conceded by all parties to these proceedings that the only persons who had any interest in the proceeds of the sale were two secured creditors, viz., CCFL and the Royal Bank of Canada (the Bank). Those two creditors were unanimous in their position that they desired the court to approve the sale to 922. We were not referred to nor am I aware of any case where a court has refused to abide by the unanimous wishes of the only interested creditors for the approval of a specific offer made in receivership proceedings.

In British Columbia Development Corp. v. Spun Cast Industries Inc. (1977), 5 B.C.L.R. 94, 26 C.B.R. (N.S.) 28 (S.C.), Berger J. said at p. 95 B.C.L.R., p. 30 C.B.R.:

> Here all of those with a financial stake in the plant have joined in seeking the court's approval of the sale to Fincas. This court does not having a roving commission to decide what

> is best for investors and businessmen when they have agreed among themselves what course of action they should follow. It is their money.

I agree with that statement. It is particularly apt to this case. The two secured creditors will suffer a shortfall of approximately $50,000,000. They have a tremendous interest in the sale of assets which form part of their security. I agree with the finding of Rosenberg J., Gen. Div., May 1, 1991, that the offer of 922 is superior to that of OEL. He concluded that the 922 offer is marginally superior. If by that he meant that mathematically it was likely to provide slightly more in the way of proceeds it is difficult to take issue with that finding. If on the other hand he meant that having regard to all considerations it was only marginally superior, I cannot agree. He said in his reasons [pp. 17-18]:

> I have come to the conclusion that knowledgeable creditors such as the Royal Bank would prefer the 922 offer even if the other factors influencing their decision were not present. No matter what adjustments had to be made, the 922 offer results in more cash immediately. Creditors facing the type of loss the Royal Bank is taking in this case would not be anxious to rely on contingencies especially in the present circumstances surrounding the airline industry.

I agree with that statement completely. It is apparent that the difference between the two offers insofar as cash on closing is concerned amounts to approximately $3,000,000 to $4,000,000. The Bank submitted that it did not wish to gamble any further with respect to its investment and that the acceptance and court approval of the OEL offer, in effect, supplanted its position as a secured creditor with respect to the amount owing over and above the down payment and placed it in the position of a joint entrepreneur but one with no control. This results from the fact that the OEL offer did not provide for any security for any funds which might be forthcoming over and above the initial downpayment on closing.

In Cameron v. Bank of Nova Scotia (1981), 38 C.B.R. (N.S.) 1, 45 N.S.R. (2d) 303 (C.A.), Hart J.A., speaking for the majority

of the court, said at p. 10 C.B.R., p. 312 N.S.R.:

> Here we are dealing with a receiver appointed at the instance of one major creditor, who chose to insert in the contract of sale a provision making it subject to the approval of the court. This, in my opinion, shows an intention on behalf of the parties to invoke the normal equitable doctrines which place the court in the position of looking to the interests of all persons concerned before giving its blessing to a particular transaction submitted for approval. In these circumstances the court would not consider itself bound by the contract entered into in good faith by the receiver but would have to look to the broader picture to see that the contract was for the benefit of the creditors as a whole. When there was evidence that a higher price was readily available for the property the chambers judge was, in my opinion, justified in exercising his discretion as he did. Otherwise he could have deprived the creditors of a substantial sum of money.

This statement is apposite to the circumstances of the case at bar. I hasten to add that in my opinion it is not only price which is to be considered in the exercise of the judge's discretion. It may very well be, as I believe to be so in this case, that the amount of cash is the most important element in determining which of the two offers is for the benefit and in the best interest of the creditors.

It is my view, and the statement of Hart J.A. is consistent therewith, that the fact that a creditor has requested an order of the court appointing a receiver does not in any way diminish or derogate from his right to obtain the maximum benefit to be derived from any disposition of the debtor's assets. I agree completely with the views expressed by McKinlay J.A. in that regard in her reasons.

It is my further view that any negotiations which took place between the only two interested creditors in deciding to support the approval of the 922 offer were not relevant to the determination by the presiding judge of the issues involved in the motion for approval of either one of the two offers nor are

they relevant in determining the outcome of this appeal. It is sufficient that the two creditors have decided unanimously what is in their best interest and the appeal must be considered in the light of that decision. It so happens, however, that there is ample evidence to support their conclusion that the approval of the 922 offer is in their best interests.

I am satisfied that the interests of the creditors are the prime consideration for both the receiver and the court. In Re Beauty Counsellors of Canada Ltd. (1986), 58 C.B.R. (N.S.) 237 (Ont. Bkcy.) Saunders J. said at p. 243:

> This does not mean that a court should ignore a new and higher bid made after acceptance where there has been no unfairness in the process. The interests of the creditors, while not the only consideration, are the prime consideration.

I agree with that statement of the law. In Re Selkirk (1986), 58 C.B.R. (N.S.) 245 (Ont. Bkcy.) Saunders J. heard an application for court approval for the sale by the sheriff of real property in bankruptcy proceedings. The sheriff had been previously ordered to list the property for sale subject to approval of the court. Saunders J. said at p. 246 C.B.R.:

> In dealing with the request for approval, the court has to be concerned primarily with protecting the interests of the creditors of the former bankrupt. A secondary but important consideration is that the process under which the sale agreement is arrived at should be consistent with the commercial efficacy and integrity.

I am in agreement with that statement as a matter of general principle. Saunders J. further stated that he adopted the principles stated by Macdonald J.A. in Cameron, supra, at pp. 92-94 O.R., pp. 531-33 D.L.R., quoted by Galligan J.A. in his reasons. In Cameron, the remarks of Macdonald J.A. related to situations involving the calling of bids and fixing a time limit for the making of such bids. In those circumstances the process is so clear as a matter of commercial practice that an interference by the court in such process might have a

deleterious effect on the efficacy of receivership proceedings in other cases. But Macdonald J.A. recognized that even in bid or tender cases where the offeror for whose bid approval is sought has complied with all requirements a court might not approve the agreement of purchase and sale entered into by the receiver. He said at pp. 11-12 C.B.R., p. 314 N.S.R.:

> There are, of course, many reasons why a court might not approve an agreement of purchase and sale, viz., where the offer accepted is so low in relation to the appraised value as to be unrealistic; or, where the circumstances indicate that insufficient time was allowed for the making of bids or that inadequate notice of sale by bid was given (where the receiver sells property by the bid method); or, where it can be said that the proposed sale is not in the best interest of either the creditors or the owner. Court approval must involve the delicate balancing of competing interests and not simply a consideration of the interests of the creditors.

The deficiency in the present case is so large that there has been no suggestion of a competing interest between the owner and the creditors.

I agree that the same reasoning may apply to a negotiation process leading to a private sale but the procedure and process applicable to private sales of a wide variety of businesses and undertakings with the multiplicity of individual considerations applicable and perhaps peculiar to the particular business is not so clearly established that a departure by the court from the process adopted by the receiver in a particular case will result in commercial chaos to the detriment of future receivership proceedings. Each case must be decided on its own merits and it is necessary to consider the process used by the receiver in the present proceedings and to determine whether it was unfair, improvident or inadequate.

It is important to note at the outset that Rosenberg J. made the following statement in his reasons [p. 15]:

> On March 8, 1991 the trustee accepted the OEL offer subject to court approval. The receiver at that time had no other

offer before it that was in final form or could possibly be accepted. The receiver had at the time the knowledge that Air Canada with CCFL had not bargained in good faith and had not fulfilled the promise of its letter of March 1. The receiver was justified in assuming that Air Canada and CCFL's offer was a long way from being in an acceptable form and that Air Canada and CCFL's objective was to interrupt the finalizing of the OEL agreement and to retain as long as possible the Air Toronto connector traffic flowing into Terminal 2 for the benefit of Air Canada.

In my opinion there was no evidence before him or before this court to indicate that Air Canada with CCFL had not bargained in good faith and that the receiver had knowledge of such lack of good faith. Indeed, on this appeal, counsel for the receiver stated that he was not alleging Air Canada and CCFL had not bargained in good faith. Air Canada had frankly stated at the time that it had made its offer to purchase which was eventually refused by the receiver that it would not become involved in an "auction" to purchase the undertaking of Air Canada and that, although it would fulfil its contractual obligations to provide connecting services to Air Toronto, it would do no more than it was legally required to do insofar as facilitating the purchase of Air Toronto by any other person. In so doing Air Canada may have been playing "hard ball" as its behaviour was characterized by some of the counsel for opposing parties. It was nevertheless merely openly asserting its legal position as it was entitled to do.

Furthermore there was no evidence before Rosenberg J. or this court that the receiver had assumed that Air Canada and CCFL's objective in making an offer was to interrupt the finalizing of the OEL agreement and to retain as long as possible the Air Toronto connector traffic flowing into Terminal 2 for the benefit of Air Canada. Indeed, there was no evidence to support such an assumption in any event although it is clear that 922 and through it CCFL and Air Canada were endeavouring to present an offer to purchase which would be accepted and/or approved by the court in preference to the offer made by OEL.

To the extent that approval of the OEL agreement by Rosenberg

J. was based on the alleged lack of good faith in bargaining and improper motivation with respect to connector traffic on the part of Air Canada and CCFL, it cannot be supported.

I would also point out that, rather than saying there was no other offer before it that was final in form, it would have been more accurate to have said that there was no unconditional offer before it.

In considering the material and evidence placed before the court I am satisfied that the receiver was at all times acting in good faith. I have reached the conclusion, however, that the process which he used was unfair insofar as 922 is concerned and improvident insofar as the two secured creditors are concerned.

Air Canada had been negotiating with Soundair Corporation for the purchase from it of Air Toronto for a considerable period of time prior to the appointment of a receiver by the court. It had given a letter of intent indicating a prospective sale price of $18,000,000. After the appointment of the receiver, by agreement dated April 30, 1990, Air Canada continued its negotiations for the purchase of Air Toronto with the receiver. Although this agreement contained a clause which provided that the receiver "shall not negotiate for the sale ... of Air Toronto with any person except Air Canada", it further provided that the receiver would not be in breach of that provision merely by receiving unsolicited offers for all or any of the assets of Air Toronto. In addition, the agreement, which had a term commencing on April 30, 1990, could be terminated on the fifth business day following the delivery of a written notice of termination by one party to the other. I point out this provision merely to indicate that the exclusivity privilege extended by the Receiver to Air Canada was of short duration at the receiver's option.

As a result of due diligence investigations carried out by Air Canada during the month of April, May and June of 1990, Air Canada reduced its offer to 8.1 million dollars conditional upon there being $4,000,000 in tangible assets. The offer was made on June 14, 1990 and was open for acceptance until June

29, 1990.

By amending agreement dated June 19, 1990 the receiver was released from its covenant to refrain from negotiating for the sale of the Air Toronto business and assets to any person other than Air Canada. By virtue of this amending agreement the receiver had put itself in the position of having a firm offer in hand with the right to negotiate and accept offers from other persons. Air Canada in these circumstances was in the subservient position. The receiver, in the exercise of its judgment and discretion, allowed the Air Canada offer to lapse. On July 20, 1990 Air Canada served a notice of termination of the April 30, 1990 agreement.

Apparently as a result of advice received from the receiver to the effect that the receiver intended to conduct an auction for the sale of the assets and business of the Air Toronto Division of Soundair Corporation, the solicitors for Air Canada advised the receiver by letter dated July 20, 1990 in part as follows:

> Air Canada has instructed us to advise you that it does not intend to submit a further offer in the auction process.

This statement together with other statements set forth in the letter was sufficient to indicate that Air Canada was not interested in purchasing Air Toronto in the process apparently contemplated by the receiver at that time. It did not form a proper foundation for the receiver to conclude that there was no realistic possibility of selling Air Toronto to Air Canada, either alone or in conjunction with some other person, in different circumstances. In June 1990 the receiver was of the opinion that the fair value of Air Toronto was between $10,000,000 and $12,000,000.

In August 1990 the receiver contacted a number of interested parties. A number of offers were received which were not deemed to be satisfactory. One such offer, received on August 20, 1990, came as a joint offer from OEL and Air Ontario (an Air Canada connector). It was for the sum of $3,000,000 for the good will relating to certain Air Toronto routes but did not

include the purchase of any tangible assets or leasehold interests.

In December 1990 the receiver was approached by the management of Canadian Partner (operated by OEL) for the purpose of evaluating the benefits of an amalgamated Air Toronto/Air Partner operation. The negotiations continued from December of 1990 to February of 1991 culminating in the OEL agreement dated March 8, 1991.

On or before December, 1990, CCFL advised the receiver that it intended to make a bid for the Air Toronto assets. The receiver, in August of 1990, for the purpose of facilitating the sale of Air Toronto assets, commenced the preparation of an operating memorandum. He prepared no less than six draft operating memoranda with dates from October 1990 through March 1, 1991. None of these were distributed to any prospective bidder despite requests having been received therefor, with the exception of an early draft provided to CCFL without the receiver's knowledge.

During the period December 1990 to the end of January 1991, the receiver advised CCFL that the offering memorandum was in the process of being prepared and would be ready soon for distribution. He further advised CCFL that it should await the receipt of the memorandum before submitting a formal offer to purchase the Air Toronto assets.

By late January CCFL had become aware that the receiver was negotiating with OEL for the sale of Air Toronto. In fact, on February 11, 1991, the receiver signed a letter of intent with OEL wherein it had specifically agreed not to negotiate with any other potential bidders or solicit any offers from others.

By letter dated February 25, 1991, the solicitors for CCFL made a written request to the Receiver for the offering memorandum. The receiver did not reply to the letter because he felt he was precluded from so doing by the provisions of the letter of intent dated February 11, 1991. Other prospective purchasers were also unsuccessful in obtaining the promised memorandum to assist them in preparing their bids. It should be

noted that exclusivity provision of the letter of intent expired on February 20, 1991. This provision was extended on three occasions, viz., February 19, 22 and March 5, 1991. It is clear that from a legal standpoint the receiver, by refusing to extend the time, could have dealt with other prospective purchasers and specifically with 922.

It was not until March 1, 1991 that CCFL had obtained sufficient information to enable it to make a bid through 922. It succeeded in so doing through its own efforts through sources other than the receiver. By that time the receiver had already entered into the letter of intent with OEL. Notwithstanding the fact that the receiver knew since December of 1990 that CCFL wished to make a bid for the assets of Air Toronto (and there is no evidence to suggest that at any time such a bid would be in conjunction with Air Canada or that Air Canada was in any way connected with CCFL) it took no steps to provide CCFL with information necessary to enable it to make an intelligent bid and, indeed, suggested delaying the making of the bid until an offering memorandum had been prepared and provided. In the meantime by entering into the letter of intent with OEL it put itself in a position where it could not negotiate with CCFL or provide the information requested.

On February 28, 1991, the solicitors for CCFL telephoned the receiver and were advised for the first time that the receiver had made a business decision to negotiate solely with OEL and would not negotiate with anyone else in the interim.

By letter dated March 1, 1991 CCFL advised the receiver that it intended to submit a bid. It set forth the essential terms of the bid and stated that it would be subject to customary commercial provisions. On March 7, 1991 CCFL and Air Canada, jointly through 922, submitted an offer to purchase Air Toronto upon the terms set forth in the letter dated March 1, 1991. It included a provision that the offer was conditional upon the interpretation of an interlender agreement which set out the relative distribution of proceeds as between CCFL and the Royal Bank. It is common ground that it was a condition over which the receiver had no control and accordingly would not have been acceptable on that ground alone. The receiver did not, however,

contact CCFL in order to negotiate or request the removal of the condition although it appears that its agreement with OEL not to negotiate with any person other than OEL expired on March 6, 1991.

The fact of the matter is that by March 7, 1991, the receiver had received the offer from OEL which was subsequently approved by Rosenberg J. That offer was accepted by the receiver on March 8, 1991. Notwithstanding the fact that OEL had been negotiating the purchase for a period of approximately three months the offer contained a provision for the sole benefit of the purchaser that it was subject to the purchaser obtaining:

> ... a financing commitment within 45 days of the date hereof in an amount not less than the Purchase Price from the Royal Bank of Canada or other financial institution upon terms and conditions acceptable to them. In the event that such a financing commitment is not obtained within such 45 day period, the purchaser or OEL shall have the right to terminate this agreement upon giving written notice of termination to the vendor on the first Business Day following the expiry of the said period.

The purchaser was also given the right to waive the condition.

In effect the agreement was tantamount to a 45-day option to purchase excluding the right of any other person to purchase Air Toronto during that period of time and thereafter if the condition was fulfilled or waived. The agreement was, of course, stated to be subject to court approval.

In my opinion the process and procedure adopted by the receiver was unfair to CCFL. Although it was aware from December 1990 that CCFL was interested in making an offer, it effectively delayed the making of such offer by continually referring to the preparation of the offering memorandum. It did not endeavour during the period December 1990 to March 7, 1991 to negotiate with CCFL in any way the possible terms of purchase and sale agreement. In the result no offer was sought from CCFL by the receiver prior to February 11, 1991 and thereafter it put itself in the position of being unable to

negotiate with anyone other than OEL. The receiver, then, on March 8, 1991 chose to accept an offer which was conditional in nature without prior consultation with CCFL (922) to see whether it was prepared to remove the condition in its offer.

I do not doubt that the receiver felt that it was more likely that the condition in the OEL offer would be fulfilled than the condition in the 922 offer. It may be that the receiver, having negotiated for a period of three months with OEL, was fearful that it might lose the offer if OEL discovered that it was negotiating with another person. Nevertheless it seems to me that it was imprudent and unfair on the part of the receiver to ignore an offer from an interested party which offered approximately triple the cash down payment without giving a chance to the offeror to remove the conditions or other terms which made the offer unacceptable to it. The potential loss was that of an agreement which amounted to little more than an option in favour of the offeror.

In my opinion the procedure adopted by the receiver was unfair to CCFL in that, in effect, it gave OEL the opportunity of engaging in exclusive negotiations for a period of three months notwithstanding the fact that it knew CCFL was interested in making an offer. The receiver did not indicate a deadline by which offers were to be submitted and it did not at any time indicate the structure or nature of an offer which might be acceptable to it.

In his reasons Rosenberg J. stated that as of March 1, CCFL and Air Canada had all the information that they needed and any allegations of unfairness in the negotiating process by the receiver had disappeared. He said [p. 31]:

> They created a situation as of March 8, where the receiver was faced with two offers, one of which was in acceptable form and one of which could not possibly be accepted in its present form. The receiver acted appropriately in accepting the OEL offer.

If he meant by "acceptable in form" that it was acceptable to the receiver, then obviously OEL had the unfair advantage of

its lengthy negotiations with the receiver to ascertain what kind of an offer would be acceptable to the receiver. If, on the other hand, he meant that the 922 offer was unacceptable in its form because it was conditional, it can hardly be said that the OEL offer was more acceptable in this regard as it contained a condition with respect to financing terms and conditions "acceptable to them".

It should be noted that on March 13, 1991 the representatives of 922 first met with the receiver to review its offer of March 7, 1991 and at the request of the receiver withdrew the inter-lender condition from its offer. On March 14, 1991 OEL removed the financing condition from its offer. By order of Rosenberg J. dated March 26, 1991, CCFL was given until April 5, 1991 to submit a bid and on April 5, 1991, 922 submitted its offer with the interlender condition removed.

In my opinion the offer accepted by the receiver is improvident and unfair insofar as the two creditors are concerned. It is not improvident in the sense that the price offered by 922 greatly exceeded that offered by OEL. In the final analysis it may not be greater at all. The salient fact is that the cash down payment in the 922 offer constitutes approximately two-thirds of the contemplated sale price whereas the cash down payment in the OEL transaction constitutes approximately 20 to 25 per cent of the contemplated sale price. In terms of absolute dollars, the down payment in the 922 offer would likely exceed that provided for in the OEL agreement by approximately $3,000,000 to $4,000,000.

In Re Beauty Counsellors of Canada Ltd., supra, Saunders J. said at p. 243 C.B.R.:

> If a substantially higher bid turns up at the approval stage, the court should consider it. Such a bid may indicate, for example, that the trustee has not properly carried out its duty to endeavour to obtain the best price for the estate. In such a case the proper course might be to refuse approval and to ask the trustee to recommence the process.

I accept that statement as being an accurate statement of the

law. I would add, however, as previously indicated, that in determining what is the best price for the estate the receiver or court should not limit its consideration to which offer provides for the greater sale price. The amount of down payment and the provision or lack thereof to secure payment of the balance of the purchase price over and above the down payment may be the most important factor to be considered and I am of the view that is so in the present case. It is clear that that was the view of the only creditors who can benefit from the sale of Air Toronto.

I note that in the case at bar the 922 offer in conditional form was presented to the receiver before it accepted the OEL offer. The receiver in good faith, although I believe mistakenly, decided that the OEL offer was the better offer. At that time the receiver did not have the benefit of the views of the two secured creditors in that regard. At the time of the application for approval before Rosenberg J. the stated preference of the two interested creditors was made quite clear. He found as a fact that knowledgeable creditors would not be anxious to rely on contingencies in the present circumstances surrounding the airline industry. It is reasonable to expect that a receiver would be no less knowledgeable in that regard and it is his primary duty to protect the interests of the creditors. In my view it was an improvident act on the part of the receiver to have accepted the conditional offer made by OEL and Rosenberg J. erred in failing to dismiss the application of the receiver for approval of the OEL offer. It would be most inequitable to foist upon the two creditors who have already been seriously hurt more unnecessary contingencies.

Although in other circumstances it might be appropriate to ask the receiver to recommence the process, in my opinion, it would not be appropriate to do so in this case. The only two interested creditors support the acceptance of the 922 offer and the court should so order.

Although I would be prepared to dispose of the case on the grounds stated above, some comment should be addressed to the question of interference by the court with the process and

procedure adopted by the receiver.

I am in agreement with the view expressed by McKinlay J.A. in her reasons that the undertaking being sold in this case was of a very special and unusual nature. As a result the procedure adopted by the receiver was somewhat unusual. At the outset, in accordance with the terms of the receiving order, it dealt solely with Air Canada. It then appears that the receiver contemplated a sale of the assets by way of auction and still later contemplated the preparation and distribution of an offering memorandum inviting bids. At some point, without advice to CCFL, it abandoned that idea and reverted to exclusive negotiations with one interested party. This entire process is not one which is customary or widely accepted as a general practice in the commercial world. It was somewhat unique having regard to the circumstances of this case. In my opinion the refusal of the court to approve the offer accepted by the receiver would not reflect on the integrity of procedures followed by court-appointed receivers and is not the type of refusal which will have a tendency to undermine the future confidence of business persons in dealing with receivers.

Rosenberg J. stated that the Royal Bank was aware of the process used and tacitly approved it. He said it knew the terms of the letter of intent in February 1991 and made no comment. The Royal Bank did, however, indicate to the receiver that it was not satisfied with the contemplated price nor the amount of the down payment. It did not, however, tell the receiver to adopt a different process in endeavouring to sell the Air Toronto assets. It is not clear from the material filed that at the time it became aware of the letter of intent, it knew that CCFL was interested in purchasing Air Toronto.

I am further of the opinion that a prospective purchaser who has been given an opportunity to engage in exclusive negotiations with a receiver for relatively short periods of time which are extended from time to time by the receiver and who then makes a conditional offer, the condition of which is for his sole benefit and must be fulfilled to his satisfaction unless waived by him, and which he knows is to be subject to

court approval, cannot legitimately claim to have been unfairly dealt with if the court refuses to approve the offer and approves a substantially better one.

In conclusion I feel that I must comment on the statement made by Galligan J.A. in his reasons to the effect that the suggestion made by counsel for 922 constitutes evidence of lack of prejudice resulting from the absence of an offering memorandum. It should be pointed out that the court invited counsel to indicate the manner in which the problem should be resolved in the event that the court concluded that the order approving the OEL offer should be set aside. There was no evidence before the court with respect to what additional information may have been acquired by CCFL since March 8, 1991 and no inquiry was made in that regard. Accordingly, I am of the view that no adverse inference should be drawn from the proposal made as a result of the court's invitation.

For the above reasons I would allow the appeal with one set of costs to CCFL-922, set aside the order of Rosenberg J., dismiss the receiver's motion with one set of costs to CCFL-922 and order that the assets of Air Toronto be sold to numbered corporation 922246 on the terms set forth in its offer with appropriate adjustments to provide for the delay in its execution. Costs awarded shall be payable out of the estate of Soundair Corporation. The costs incurred by the receiver in making the application and responding to the appeal shall be paid to him out of the assets of the estate of Soundair Corporation on a solicitor-and-client basis. I would make no order as to costs of any of the other parties or interveners.

Appeal dismissed.

TAB 4

CITATION: *In Re Hudson's Bay Company*, 2025 ONSC 6764
COURT FILE NO.: CV-25-00738613-00CL
DATE: 20251128

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

IN THE MATTER OF THE ***COMPANIES' CREDITORS ARRANGEMENT ACT***, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF **HUDSON'S BAY COMPANY** ULC COMPAGNIE DE LA BAIE D'HUDSON SRI, HBC CANADA PARENT HOLDINGS INC., HBC CANADA PARENT HOLDINGS 2 INC., HBC BAY HOLDINGS I INC., HBC BAY HOLDINGS II ULC, THE BAY HOLDINGS ULC, HBC CENTERPOINT GP INC., HBC YSS 1 LP INC., HBC YSS 2 LP INC., HBC HOLDINGS GP INC., SNOSPMIS LIMITED, 2472596 ONTARIO INC., and 2472598 ONTARIO INC., Applicants

BEFORE: Peter J. Osborne J.

COUNSEL: *Ashley Taylor, Brittney Ketwarro and Philip Yang*, for the Hudson's Bay Company
David Bish, for The Cadillac Fairview Corporation
Linc Rogers and Caitlin McIntyre, for Restore Capital LLC
D. J. Miller, for Oxford Properties Group
Andrew Harmes, for RioCan Real Estate Investment Trust
Natasha MacParland and Jason Stephanian, for Wittington Investments Limited
Linda Galessiere, for Ivanhoe Cambridge II Inc. Jones Lang LaSalle Inc., Morguard Investments Limited, Salthill Property Management Inc.
Frederick Schumann, for DKRT Family Corp.
Vivian Li, for Department of Justice (Manitoba)
Brian Kolenda, for Restore Capital for FILO Agent
Methura Sinnadurai, for Toronto Hydro
Asad Moten, for Department of Justice (Canada)
Sean Zweig and Michael Shakra, for Court Appointed Monitor

ENDORSEMENT

[1] The Applicants (collectively for the purposes of this Endorsement, "HBC" or "The Hudson's Bay Company") seek an order approving a proposed auction process for the Royal Proclamation Charter (the "Charter").

[2] To say that the Charter has significance to stakeholders in this *CCAA* Proceeding as well as to other stakeholders who are not directly involved in matters arising out of the insolvency

of HBC would be a gross understatement. It has profound historical and cultural significance to Canada and its people.

[3] The Charter was granted by King Charles II in 1670. It established HBC and granted the Company a trade monopoly over what was then known as Rupert's Land and which encompasses what is today a significant part of Canadian territory. In addition, it granted to HBC the power to make certain laws, build forts and administer justice. Until HBC sought protection from its creditors under the *CCAA*, it was the oldest continuously operating company in North America.

[4] Defined terms in this Endorsement have the meaning given to them in the Motion Record of HBC and/or the Ninth Report of the Monitor and the Supplement thereto, unless otherwise stated.

[5] As is common in *CCAA* proceedings, I previously approved a SISP Order in this Proceeding to set out the framework of the process for soliciting interest in and selling assets of HBC to maximize recoveries for stakeholders.

[6] Clearly, however, it was necessary to consider next steps regarding the Charter differently and separately from both the general assets of HBC and also from its Art Collection (which is the subject of separate auctions). There has been significant public interest in the Charter, a number of stakeholders have expressed an interest in the process by which it is to be managed, and numerous other parties and groups have contacted the Monitor to express their views.

[7] Beyond certain export restrictions related to Canadian cultural property (discussed further below), there is very little law governing the disposition and stewardship of a document such as the Charter.

[8] Accordingly, one of the challenges for this Court is to balance the objective in an insolvency proceeding such as this to maximize recoveries from all assets of a debtor company for the benefit of creditors and other stakeholders against the imperative of ensuring that a document such as the Charter is addressed in a manner that reflects its relevance and importance to Canada, its history and all of its peoples.

[9] The motion today is not opposed by any party. It is supported by the Joint Bidders, the first Senior Secured Lender, the FILO Agent, and is not opposed by the second Senior Secured Lender, Pathlight. It is recommended by the Court-appointed Monitor.

[10] In addition to the Department of Justice (Canada) on behalf of the Department of Canadian Heritage (among others), the Department of Justice (Manitoba), numerous Indigenous groups, museums, archives, and other public institutions have expressed views with respect to the Charter.

[11] Having reviewed all of the materials and heard the submissions of all parties who wished to make them, I granted the order, albeit with numerous revisions. I indicated at the conclusion of the hearing that reasons would follow. These are those reasons.

[12] In June 2025, HBC received an unsolicited offer from Wittington Investments Limited to purchase the Charter for $12.5 million. Wittington is the private holding company of a prominent Canadian family. The offer included a commitment to immediately donate the Charter to the Canadian Museum of History where, after a robust and extensive consultation process, it would be shared with museums and Indigenous groups across Canada, prioritizing the long-term preservation of the Charter.

[13] In the summer of 2025, HBC brought a motion seeking approval to sell the Charter pursuant to the Wittington offer. I scheduled that motion for September 9, 2025. While many steps in an insolvency proceeding are undertaken in "real-time" or on short notice, given the Charter's profound historical and cultural significance, I directed that the motion for an order approving the sale of the Charter should not be rushed, in order that all interested parties and other stakeholders could have an adequate opportunity to consider the issues.

[14] At the (very appropriate) request of HBC, I directed that any party wishing to submit materials in respect of the motion do so no later than August 21, 2025, in order that all interested stakeholders could have an opportunity to consider not only the motion materials of HBC, but the submissions made by any other party who intended to take a position on the motion.

[15] By that deadline, HBC had received one responding motion record from DKRT Family Corp. DKRT is the private holding company of another prominent Canadian family. DKRT opposed the approval of the sale of the Charter pursuant to the Wittington offer and submitted that the Charter should be the subject of an open auction, albeit with conditions. DKRT advised the Company that it was prepared and willing to provide an opening bid of at least $15 million if the Charter were auctioned.

[16] HBC, Reflect and the Monitor had numerous discussions with other Interested Parties, including representatives of major Canadian cultural institutions. There were several expressions of interest in the acquisition of the Charter were it to be made available through an auction process.

[17] HBC, Reflect and the Monitor then initiated discussions with Wittington and DKRT, together their respective advisors, to further discuss their offers and the path forward. To ensure appropriate protections were in place, HBC obtained a binding commitment letter from DKRT to participate in any Court-approved auction process, to submit an opening bid of not less than $15 million on terms consistent with those set out in the DKRT Responding Motion Record, and other terms.

[18] Accordingly, HBC, in consultation with the Monitor, Reflect, the FILO Agent and Pathlight, determined that a competitive auction process, with conditions, was appropriate.

[19] On September 28, 2025, HBC received an unsolicited Joint Bid from Wittington and DKRT (the "Joint Bidders") together.

[20] On November 14, 2025, the Joint Bidders executed a Joint Commitment Letter pursuant to which they agreed to participate in a Court-approved auction if so authorized and bid at least $18 million for the Charter. That Joint Commitment Letter has been made publicly available. HBC and the Monitor, following consultation with Reflect, that FILO Agent and Pathlight, agreed to permit the Joint Bidders to act together, and accepted the Joint Bid.

[21] With the minimum price represented by the Joint Bid, HBC now seeks approval of an (updated and revised) Charter Auction Process.

[22] The Court has broad discretion under the *CCAA* to facilitate restructurings, and in the course of so doing to approve a sales process in relation to a debtor's business and/or assets, prior to or in the absence of a plan of compromise and arrangement: *Grant Forest Products Inc (Re)*, 2013 ONSC 5933 at para. 44; and *Indalex Ltd (Re)*, 2011 ONCA 265 at para. 180.

[23] In *Nortel Networks Corporation (Re),* 2009 CanLII 39492 (ONSC) at paras. 47-48, the court identified several factors to be considered in determining whether to approve a sales process:

a. is a sale warranted at this time?

b. will the sale be of benefit to the whole economic community?

c. do any of the debtor's creditors have a *bona fide* reason to object to a sale?; and

d. is there a better viable alternative?.

[24] These factors have been consistently applied in numerous subsequent cases, including, in particular, retail insolvencies: *Nordstrom Canada Retail Inc.* (April 20, 2023) Ont SCJ [Commercial List] Court File No. CV-23-00695619-00CL (Endorsement), at paras. 6−13; *Bed Bath & Beyond Canada Ltd.,* (February 21, 2023) Ont SCJ [Commercial List] Court File No. CV-23-00694493-00CL (Endorsement), at paras. 7−9; *Target Canada Co. (Re)* (February 5, 2015) Ont SCJ [Commercial List] Court File No. CV-15-10832-00CL (Endorsement), at para. 3; and *Green Growth Brands, (Re),* 2020 ONSC 3565 at para. 61.

[25] Further, and while the factors set out in section 36 of the *CCAA* have direct applicability to a sale approval rather than approval of a sales process, this Court has held in several cases that the *Nortel* factors should be evaluated in light of the considerations that may ultimately

apply to a subsequent sale approval motion pursuant to section 36: *Brainhunter Inc. (Re)*, 2009 CanLII 72333 (ONSC) at para. 17.

[26] In *CanWest Global Communications Corp.*, 2010 ONSC 2870 at para. 13, Justice Pepall held that the criteria enumerated in Section 36(3) of the *CCAA* largely overlapped with the common law criteria established in *Royal Bank v. Soundair Corp.* (1991), 83 D.L.R. (4th) 76 (Ont. C.A.) at para. 16 (commonly referred to as the *Soundair Principles*) for approval of a sale of assets in an insolvency scenario and remain relevant when considering the statutory test:

a. whether sufficient effort has been made to obtain the best price and whether the debtor has acted improvidently;

b. the interests of all parties;

c. the efficacy and integrity of the process by which offers have been obtained the me: and

d. whether there has been any unfairness in the working out of the process.

[27] I am satisfied that a consideration of all of these factors justifies approval of the Charter Auction Process at this time.

[28] The restructuring efforts of HBC have resulted in the liquidation of many of its assets. No party takes the position that the Charter is not an asset of HBC. HBC submits, and the Monitor agrees, that the Auction is expected to maximize monetization recoveries from the Charter for the benefit of creditors.

[29] The potential sale of the Charter has been known to all stakeholders (and the general public, given the significant media interest) for many months. I am satisfied that the proposed timelines in the Charter Auction Process will provide an opportunity for any Potential Bidder to familiarize themselves with the finalized process (if not done already), make inquiries of the Monitor, and prepare to participate in the auction if so desired.

[30] Importantly, in this unique case, the proposed Charter Auction Process has been structured to benefit not only the broader economic community, but the broader community of Canada and its peoples as well. Put simply, the objective is to maximize the value for stakeholders, but to do so while safeguarding the Charter's unique cultural and historical significance and ensure its future preservation in public trust.

[31] I am also satisfied that, as part of the Charter Auction Process, the Joint Bid should be approved as a Qualified Bid. The Joint Bid has terms that ensure that there will be at least one committed bidder in the Auction. Even if there are no other bids, the terms of the Joint

Bid, within the context of the proposed Charter Auction Process, contain sufficiently robust safeguards to further ensure that the Charter remains in Canada and is made accessible to the public.

[32] Specifically, the Joint Bid contemplates a donation in equal parts, utilizing a shared public custodianship model, to a consortium comprised of the Archives of Manitoba, the Manitoba Museum, the Canadian Museum of History and the Royal Ontario Museum (collectively, the "Public Custodians"). The Joint Bidders have, as noted above, irrevocably committed to participating in the auction and placing a minimum opening bid of $18 million.

[33] In addition, and if the Joint Bid is ultimately selected as the Successful Bid and approved by the Court, the Joint Bidders have also committed to provide a $5 million donation to the Public Custodians to fund stewardship, consultation and education in public access related to the Charter. They have advised the Monitor that this contemplated donation is intended to facilitate public engagement that will:

a. involve consultations with First Nations, Inuit and Métis communities and organizations, as well as other relevant organizations and the broader Canadian public;

b. promote sharing of the Charter with institutions across Canada for public display;

c. support the Public Custodians' educational programs and outreach efforts in connection with the Charter; and

d. ensure that the Charter remains in Canada, as well as its preservation, stewardship and continuing accessibility for all Canadians.

[34] I also note that:

a. the Public Custodians are not bound by the Joint Bid and are free to accept a donation from any other Qualified Bidders; and

b. the Charter will remain in Canada and is in any event subject to export restrictions as set out in the *Cultural Property Export and Import Act*.

[35] The terms of the Charter Auction Process provide that any Potential Bidder must irrevocably commit to permanently donating the Royal Charter, immediately upon closing of the purchase, to one or more Canadian public institutions that are equipped to preserve cultural property for the long term, and ensure public access through exhibitions, programming, publications, research or online platforms, including but not limited to museums or archives. Specifically, the Terms of the Charter Auction Process provide that any Potential Bidder must, in order to be qualified as such, submit a proposal that includes the following:

a. a commitment, in form and substance, to bid no less than $18.5 million;

b. an acknowledgement that the Charter is of outstanding significance, high national importance, and is protected under the *Cultural Property Export and Import Act;*

c. confirmation that the Potential Bidder is considering the acquisition of the Charter for its own account and is irrevocably committing to permanently donate, immediately after purchase, the Charter to one or more Canadian public institutions with the ability to preserve cultural property for the long term and make it accessible to the public through exhibitions, programming, publication, research or online, and which includes a museum or archives;

d. details of the donation, including the quantum, if any, that the Potential Bidder will donate to the proposed Public Institution to support a consultation process, sharing of the Charter or other Charter-related activities; and a letter from the Public Institution to which the Charter is proposed to be donated indicating that it will accept the donation, and the terms thereof, and which sets out the capacity of that Public Institution to ensure the continued preservation of the Charter, its plan to conduct a consultation process with respect to chairing the Royal Charter with other Public Institutions and Indigenous groups, and other particulars.

[36] The specific mechanics, steps and timing for the Charter Auction Process are set out in motion materials of HBC and the Ninth Report of the Monitor and the Supplement thereto, all of which are in the public Court file and also publicly available on the website of the Court-appointed Monitor.

[37] Finally, any sale of the Charter to the Successful Bidder (whether the Joint Bidders or other Qualified Bidders) following the Auction is subject to the approval of this Court, to be sought on notice to all stakeholders.

[38] I am satisfied that none of the Company's creditors or stakeholders have a *bona fide* reason to object to the Charter Auction Process, and I am reinforced in this conclusion by the fact that, following a lengthy notice period well in excess of that required by the *Rules*, no creditor or stakeholder opposes approval of the Charter Auction Process. The Senior Lenders of HBC are supportive of the relief sought, and it is recommended by the Monitor.

[39] I am satisfied that approval of the Charter Auction Process will not materially prejudice any stakeholders of the Applicants and that there is no better, viable alternative. Put simply, the historical and cultural significance of the Charter is such that a more typical SISP, designed with the exclusive objective of maximizing monetary proceeds, is not appropriate here.

[40] The Applicants and Reflect, in consultation with the Monitor, evaluated numerous alternative approaches to the disposition of the Charter and determined that the proposed Charter Auction Process represents the best possible process in the circumstances. I agree.

[41] For all of these reasons, the Charter Auction Process, including the Joint Bid for the purposes thereof, is approved.

[42] Order to go in accordance with these reasons.

Osborne J.

TAB 5

9354-9186 Québec inc. and 9354-9178 Québec inc. *Appellants*

v.

Callidus Capital Corporation, International Game Technology, Deloitte LLP, Luc Carignan, François Vigneault, Philippe Millette, Francis Proulx and François Pelletier *Respondents*

and

Ernst & Young Inc., IMF Bentham Limited (now known as Omni Bridgeway Limited), Bentham IMF Capital Limited (now known as Omni Bridgeway Capital (Canada) Limited), Insolvency Institute of Canada and Canadian Association of Insolvency and Restructuring Professionals *Interveners*

- and -

IMF Bentham Limited (now known as Omni Bridgeway Limited) and Bentham IMF Capital Limited (now known as Omni Bridgeway Capital (Canada) Limited) *Appellants*

v.

Callidus Capital Corporation, International Game Technology, Deloitte LLP, Luc Carignan, François Vigneault, Philippe Millette, Francis Proulx and François Pelletier *Respondents*

and

9354-9186 Québec inc. et 9354-9178 Québec inc. *Appelantes*

c.

Callidus Capital Corporation, International Game Technology, Deloitte S.E.N.C.R.L., Luc Carignan, François Vigneault, Philippe Millette, Francis Proulx et François Pelletier *Intimés*

et

Ernst & Young Inc., IMF Bentham Limited (maintenant connue sous le nom d'Omni Bridgeway Limited), Corporation Bentham IMF Capital (maintenant connue sous le nom de Corporation Omni Bridgeway Capital (Canada)), Institut d'insolvabilité du Canada et Association canadienne des professionnels de l'insolvabilité et de la réorganisation *Intervenants*

- et -

IMF Bentham Limited (maintenant connue sous le nom d'Omni Bridgeway Limited) et Corporation Bentham IMF Capital (maintenant connue sous le nom de Corporation Omni Bridgeway Capital (Canada)) *Appelantes*

c.

Callidus Capital Corporation, International Game Technology, Deloitte S.E.N.C.R.L., Luc Carignan, François Vigneault, Philippe Millette, Francis Proulx et François Pelletier *Intimés*

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Association canadienne des professionnels
de l'insolvabilité et de la réorganisation
Intervenants

Indexed as: 9354-9186 Québec inc. *v.* Callidus Capital Corp.

2020 SCC 10

File No.: 38594.

Hearing and judgment: January 23, 2020.

Reasons delivered: May 8, 2020.

Present: Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Rowe and Kasirer JJ.

Répertorié : 9354-9186 Québec inc. *c.* Callidus Capital Corp.

2020 CSC 10

N° du greffe : 38594.

Audition et jugement : 23 janvier 2020.

Motifs déposés : 8 mai 2020.

Présents : Le juge en chef Wagner et les juges Abella, Moldaver, Karakatsanis, Côté, Rowe et Kasirer.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Bankruptcy and insolvency — Discretionary authority of supervising judge in proceedings under Companies' Creditors Arrangement Act — Appellate review of decisions of supervising judge — Whether supervising judge has discretion to bar creditor from voting on plan of arrangement where creditor is acting for improper purpose — Whether supervising judge can approve third party litigation funding as interim financing — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, ss. 11, 11.2.

The debtor companies filed a petition for the issuance of an initial order under the *Companies' Creditors Arrangement Act* ("*CCAA*") in November 2015. The petition succeeded, and the initial order was issued by a supervising judge, who became responsible for overseeing the proceedings. Since then, substantially all of the assets of the debtor companies have been liquidated, with the notable exception of retained claims for damages against the companies' only secured creditor. In September 2017, the secured creditor proposed a plan of arrangement, which later failed to receive sufficient creditor support. In February 2018, the secured creditor proposed another, virtually identical, plan of arrangement. It also sought the supervising judge's permission to vote on this new plan in the same class as the debtor companies' unsecured creditors, on the basis that its security was worth nil. Around the

EN APPEL DE LA COUR D'APPEL DU QUÉBEC

Faillite et insolvabilité — Pouvoir discrétionnaire du juge surveillant dans une instance introduite sous le régime de la Loi sur les arrangements avec les créanciers des compagnies — Contrôle en appel des décisions du juge surveillant — Le juge surveillant a-t-il le pouvoir discrétionnaire d'empêcher un créancier de voter sur un plan d'arrangement si ce créancier agit dans un but illégitime? — Le juge surveillant peut-il approuver le financement de litige par un tiers à titre de financement temporaire? — Loi sur les arrangements avec les créanciers des compagnies, L.R.C. 1985, c. C-36, art. 11, 11.2.

En novembre 2015, les compagnies débitrices déposent une requête en délivrance d'une ordonnance initiale sous le régime de la *Loi sur les arrangements avec les créanciers des compagnies* (« *LACC* »). La requête est accueillie, et l'ordonnance initiale est rendue par un juge surveillant, qui est chargé de surveiller le déroulement de l'instance. Depuis, la quasi-totalité des éléments d'actif de la compagnie débitrice ont été liquidés, à l'exception notable des réclamations réservées en dommages-intérêts contre le seul créancier garanti des compagnies. En septembre 2017, le créancier garanti propose un plan d'arrangement, qui n'obtient pas subséquemment l'appui nécessaire des créanciers. En février 2018, le créancier garanti propose un autre plan d'arrangement, presque identique au premier. Il demande aussi au juge surveillant la permission de voter sur ce nouveau plan dans la même catégorie que

same time, the debtor companies sought interim financing in the form of a proposed third party litigation funding agreement, which would permit them to pursue litigation of the retained claims. They also sought the approval of a related super-priority litigation financing charge.

The supervising judge determined that the secured creditor should not be permitted to vote on the new plan because it was acting with an improper purpose. As a result, the new plan had no reasonable prospect of success and was not put to a creditors' vote. The supervising judge allowed the debtor companies' application, authorizing them to enter into a third party litigation funding agreement. On appeal by the secured creditor and certain of the unsecured creditors, the Court of Appeal set aside the supervising judge's order, holding that he had erred in reaching the foregoing conclusions.

Held: The appeal should be allowed and the supervising judge's order reinstated.

The supervising judge made no error in barring the secured creditor from voting or in authorizing the third party litigating funding agreement. A supervising judge has the discretion to bar a creditor from voting on a plan of arrangement where they determine that the creditor is acting for an improper purpose. A supervising judge can also approve third party litigation funding as interim financing, pursuant to s. 11.2 of the *CCAA*. The Court of Appeal was not justified in interfering with the supervising judge's discretionary decisions in this regard, having failed to treat them with the appropriate degree of deference.

The *CCAA* is one of three principal insolvency statutes in Canada. It pursues an array of overarching remedial objectives that reflect the wide ranging and potentially catastrophic impacts insolvency can have. These objectives include: providing for timely, efficient and impartial resolution of a debtor's insolvency; preserving and maximizing the value of a debtor's assets; ensuring fair and equitable treatment of the claims against a debtor; protecting the public interest; and, in the context of a commercial insolvency, balancing the costs and benefits of restructuring or liquidating the company. The architecture of the *CCAA* leaves the case-specific assessment and balancing of these objectives to the supervising judge.

les créanciers non garantis des compagnies débitrices, au motif que sa sûreté ne vaut rien. À peu près au même moment, les compagnies débitrices demandent un financement temporaire sous forme d'un accord de financement de litige par un tiers qui leur permettrait de poursuivre l'instruction des réclamations réservées. Elles sollicitent également l'approbation d'une charge super-prioritaire pour financer le litige.

Le juge surveillant décide que le créancier garanti ne peut voter sur le nouveau plan parce qu'il agit dans un but illégitime. En conséquence, le nouveau plan n'a aucune possibilité raisonnable d'être avalisé et il n'est pas soumis au vote des créanciers. Le juge surveillant accueille la demande des compagnies débitrices et les autorise à conclure un accord de financement de litige par un tiers. À l'issue d'un appel formé par le créancier garanti et certains des créanciers non garantis, la Cour d'appel annule l'ordonnance du juge surveillant, estimant qu'il est parvenu à tort aux conclusions qui précèdent.

Arrêt : Le pourvoi est accueilli et l'ordonnance du juge surveillant est rétablie.

Le juge surveillant n'a commis aucune erreur en empêchant le créancier garanti de voter ou en approuvant l'accord de financement de litige par un tiers. Un juge surveillant a le pouvoir discrétionnaire d'empêcher un créancier de voter sur un plan d'arrangement s'il décide que le créancier agit dans un but illégitime. Un juge surveillant peut aussi approuver le financement de litige par un tiers à titre de financement temporaire, en vertu de l'art. 11.2 de la *LACC*. La Cour d'appel n'était pas justifiée de modifier les décisions discrétionnaires du juge surveillant à cet égard et n'a pas fait preuve de la déférence à laquelle elle était tenue par rapport à ces décisions.

La *LACC* est l'une des trois principales lois canadiennes en matière d'insolvabilité. Elle poursuit un grand nombre d'objectifs réparateurs généraux qui témoignent de la vaste gamme des conséquences potentiellement catastrophiques qui peuvent découler de l'insolvabilité. Ces objectifs incluent les suivants : régler de façon rapide, efficace et impartiale l'insolvabilité d'un débiteur; préserver et maximiser la valeur des actifs d'un débiteur; assurer un traitement juste et équitable des réclamations déposées contre un débiteur; protéger l'intérêt public; et, dans le contexte d'une insolvabilité commerciale, établir un équilibre entre les coûts et les bénéfices découlant de la restructuration ou de la liquidation d'une compagnie. La structure de la *LACC* laisse au juge surveillant le soin de procéder à un examen et à une mise en balance au cas par cas de ces objectifs.

From beginning to end, each proceeding under the *CCAA* is overseen by a single supervising judge, who has broad discretion to make a variety of orders that respond to the circumstances of each case. The anchor of this discretionary authority is s. 11 of the *CCAA*, with empowers a judge to make any order that they consider appropriate in the circumstances. This discretionary authority is broad, but not boundless. It must be exercised in furtherance of the remedial objectives of the *CCAA* and with three baseline considerations in mind: (1) that the order sought is appropriate in the circumstances, and (2) that the applicant has been acting in good faith and (3) with due diligence. The due diligence consideration discourages parties from sitting on their rights and ensures that creditors do not strategically manoeuvre or position themselves to gain an advantage. A high degree of deference is owed to discretionary decisions made by judges supervising *CCAA* proceedings and, as such, appellate intervention will only be justified if the supervising judge erred in principle or exercised their discretion unreasonably.

A creditor can generally vote on a plan of arrangement or compromise that affects its rights, subject to any specific provisions of the *CCAA* that may restrict its voting rights, or a proper exercise of discretion by the supervising judge to constrain or bar the creditor's right to vote. Given that the *CCAA* regime contemplates creditor participation in decision-making as an integral facet of the workout regime, the discretion to bar a creditor from voting should only be exercised where the circumstances demand such an outcome. Where a creditor is seeking to exercise its voting rights in a manner that frustrates, undermines, or runs counter to the remedial objectives of the *CCAA* — that is, acting for an improper purpose — s. 11 of the *CCAA* supplies the supervising judge with the discretion to bar that creditor from voting. This discretion parallels the similar discretion that exists under the *Bankruptcy and Insolvency Act* and advances the basic fairness that permeates Canadian insolvency law and practice. Whether this discretion ought to be exercised in a particular case is a circumstance-specific inquiry that the supervising judge is best-positioned to undertake.

In the instant case, the supervising judge's decision to bar the secured creditor from voting on the new plan discloses no error justifying appellate intervention. When he made this decision, the supervising judge was intimately

Chaque procédure fondée sur la *LACC* est supervisée du début à la fin par un seul juge surveillant, qui a le vaste pouvoir discrétionnaire de rendre toute une gamme d'ordonnances susceptibles de répondre aux circonstances de chaque cas. Le point d'ancrage de ce pouvoir discrétionnaire est l'art. 11 de la *LACC*, lequel confère au juge le pouvoir de rendre toute ordonnance qu'il estime indiquée. Quoique vaste, ce pouvoir discrétionnaire n'est pas sans limites. Son exercice doit tendre à la réalisation des objectifs réparateurs de la *LACC* et tenir compte de trois considérations de base : (1) que l'ordonnance demandée est indiquée, et (2) que le demandeur a agi de bonne foi et (3) avec la diligence voulue. La considération de diligence décourage les parties de rester sur leurs positions et fait en sorte que les créanciers n'usent pas stratégiquement de ruse ou ne se placent pas eux-mêmes dans une position pour obtenir un avantage. Les décisions discrétionnaires des juges chargés de la supervision des procédures intentées sous le régime de la *LACC* commandent un degré élevé de déférence. En conséquence, les cours d'appel ne seront justifiées d'intervenir que si le juge surveillant a commis une erreur de principe ou exercé son pouvoir discrétionnaire de manière déraisonnable.

En général, un créancier peut voter sur un plan d'arrangement ou une transaction qui a une incidence sur ses droits, sous réserve des dispositions de la *LACC* qui peuvent limiter son droit de voter, ou de l'exercice justifié par le juge surveillant de son pouvoir discrétionnaire de limiter ou de supprimer ce droit. Étant donné que le régime de la *LACC*, dont l'un des aspects essentiels tient à la participation du créancier au processus décisionnel, les créanciers ne devraient être empêchés de voter que si les circonstances l'exigent. Lorsqu'un créancier cherche à exercer ses droits de vote de manière à contrecarrer ou à miner les objectifs réparateurs de la *LACC* ou à aller à l'encontre de ceux-ci — c'est-à-dire à agir dans un but illégitime — l'art. 11 de la *LACC* confère au juge surveillant le pouvoir discrétionnaire d'empêcher le créancier de voter. Ce pouvoir discrétionnaire s'apparente au pouvoir discrétionnaire semblable qui existe en vertu de la *Loi sur la faillite et l'insolvabilité* et favorise l'équité fondamentale qui imprègne le droit et la pratique en matière d'insolvabilité au Canada. La question de savoir s'il y a lieu d'exercer le pouvoir discrétionnaire dans une situation donnée appelle une analyse fondée sur les circonstances propres à chaque situation que le juge surveillant est le mieux placé pour effectuer.

En l'espèce, la décision du juge surveillant d'empêcher le créancier garanti de voter sur le nouveau plan ne révèle aucune erreur justifiant l'intervention d'une cour d'appel. Lorsqu'il a rendu sa décision, le juge surveillant

familiar with these proceedings, having presided over them for over 2 years, received 15 reports from the monitor, and issued approximately 25 orders. He considered the whole of the circumstances and concluded that the secured creditor's vote would serve an improper purpose. He was aware that the secured creditor had chosen not to value any of its claim as unsecured prior to the vote on the first plan and did not attempt to vote on that plan, which ultimately failed to receive the other creditors' approval. Between the failure of the first plan and the proposal of the (essentially identical) new plan, none of the factual circumstances relating to the debtor companies' financial or business affairs had materially changed. However, the secured creditor sought to value the entirety of its security at nil and, on that basis, sought leave to vote on the new plan as an unsecured creditor. If the secured creditor were permitted to vote in this way, the new plan would certainly have met the double majority threshold for approval under s. 6(1) of the *CCAA*. The inescapable inference was that the secured creditor was attempting to strategically value its security to acquire control over the outcome of the vote and thereby circumvent the creditor democracy the *CCAA* protects. The secured creditor's course of action was also plainly contrary to the expectation that parties act with due diligence in an insolvency proceeding, which includes acting with due diligence in valuing their claims and security. The secured creditor was therefore properly barred from voting on the new plan.

Whether third party litigation funding should be approved as interim financing is a case-specific inquiry that should have regard to the text of s. 11.2 of the *CCAA* and the remedial objectives of the *CCAA* more generally. Interim financing is a flexible tool that may take on a range of forms. This is apparent from the wording of s. 11.2(1), which is broad and does not mandate any standard form or terms. At its core, interim financing enables the preservation and realization of the value of a debtor's assets. In some circumstances, like the instant case, litigation funding furthers this basic purpose. Third party litigation funding agreements may therefore be approved as interim financing in *CCAA* proceedings when the supervising judge determines that doing so would be fair and appropriate, having regard to all the circumstances and the objectives of the Act. This requires consideration of the specific factors set out in s. 11.2(4) of the *CCAA*. These factors need not be mechanically applied or individually reviewed by the supervising judge, as not all of them will be significant in every case, nor are they exhaustive.

connaissait très bien les procédures en cause, car il les avait présidées pendant plus de 2 ans, avait reçu 15 rapports du contrôleur et avait délivré environ 25 ordonnances. Il a tenu compte de l'ensemble des circonstances et a conclu que le vote du créancier garanti viserait un but illégitime. Il savait qu'avant le vote sur le premier plan, le créancier garanti avait choisi de n'évaluer aucune partie de sa réclamation à titre de créancier non garanti et n'avait pas tenté de voter sur ce plan, qui n'a finalement pas reçu l'aval des autres créanciers. Entre l'insuccès du premier plan et la proposition du nouveau plan (identique pour l'essentiel au premier plan), les circonstances factuelles se rapportant aux affaires financières ou commerciales des compagnies débitrices n'avaient pas réellement changé. Pourtant, le créancier garanti a tenté d'évaluer la totalité de sa sûreté à zéro et, sur cette base, a demandé l'autorisation de voter sur le nouveau plan à titre de créancier non garanti. Si le créancier garanti avait été autorisé à voter de cette façon, le nouveau plan aurait certainement satisfait au critère d'approbation à double majorité prévu par le par. 6(1) de la *LACC*. La seule conclusion possible était que le créancier garanti tentait d'évaluer stratégiquement la valeur de sa sûreté afin de prendre le contrôle du vote et ainsi contourner la démocratie entre les créanciers que défend la *LACC*. La façon d'agir du créancier garanti était manifestement contraire à l'attente selon laquelle les parties agissent avec diligence dans une procédure d'insolvabilité, ce qui comprend le fait de faire preuve de diligence raisonnable dans l'évaluation de leurs réclamations et sûretés. Le créancier garanti a donc été empêché à bon droit de voter sur le nouveau plan.

La question de savoir s'il y a lieu d'approuver le financement d'un litige par un tiers à titre de financement temporaire commande une analyse fondée sur les faits de l'espèce qui doit tenir compte du libellé de l'art. 11.2 de la *LACC* et des objectifs réparateurs de la *LACC* de façon plus générale. Le financement temporaire est un outil souple qui peut revêtir différentes formes. Cela ressort du libellé du par. 11.2(1), qui est large et ne prescrit aucune forme ou condition type. Le financement temporaire permet essentiellement de préserver et de réaliser la valeur des éléments d'actif du débiteur. Dans certaines circonstances, comme en l'espèce, le financement de litige favorise la réalisation de cet objectif fondamental. Les accords de financement de litige par un tiers peuvent être approuvés à titre de financement temporaire dans le cadre des procédures fondées sur la *LACC* lorsque le juge surveillant estime qu'il serait juste et approprié de le faire, compte tenu de l'ensemble des circonstances et des objectifs de la Loi. Cela implique la prise en considération des facteurs précis énoncés au par. 11.2(4) de la *LACC*. Ces facteurs

Additionally, in order for a third party litigation funding agreement to be approved as interim financing, the agreement must not contain terms that effectively convert it into a plan of arrangement.

In the instant case, there is no basis upon which to interfere with the supervising judge's exercise of his discretion to approve the litigation funding agreement as interim financing. A review of the supervising judge's reasons as a whole, combined with a recognition of his manifest experience with the debtor companies' *CCAA* proceedings, leads to the conclusion that the factors listed in s. 11.2(4) concern matters that could not have escaped his attention and due consideration. It is apparent that he was focussed on the fairness at stake to all parties, the specific objectives of the *CCAA*, and the particular circumstances of this case when he approved the litigation funding agreement as interim financing. Further, the litigation funding agreement is not a plan of arrangement because it does not propose any compromise of the creditors' rights. The fact that the creditors may walk away with more or less money at the end of the day does not change the nature or existence of their rights to access the funds generated from the debtor companies' assets, nor can it be said to compromise those rights. Finally, the litigation financing charge does not convert the litigation funding agreement into a plan of arrangement. Holding otherwise would effectively extinguish the supervising judge's authority to approve these charges without a creditors' vote, which is expressly provided for in s. 11.2 of the *CCAA*.

Cases Cited

By Wagner C.J. and Moldaver J.

Applied: *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379; **considered:** *Re Crystallex*, 2012 ONCA 404, 293 O.A.C. 102; *Laserworks Computer Services Inc. (Bankruptcy), Re*, 1998 NSCA 42, 165 N.S.R. (2d) 296; **referred to:** *Bayens v. Kinross Gold Corporation*, 2013 ONSC 4974, 117 O.R. (3d) 150; *Hayes v. The City of Saint John*, 2016 NBQB 125; *Schenk v. Valeant Pharmaceuticals International Inc.*, 2015 ONSC 3215, 74 C.P.C. (7th) 332; *Re Blackburn*, 2011 BCSC 1671, 27 B.C.L.R. (5th) 199; *Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6, [2013] 1 S.C.R. 271; *Ernst & Young Inc. v. Essar Global Fund*

ne doivent pas être appliqués machinalement ou examinés individuellement par le juge surveillant, car ils ne seront pas tous importants dans tous les cas, et ils ne sont pas non plus exhaustifs. En outre, pour qu'un accord de financement de litige par un tiers soit approuvé à titre de financement temporaire, il ne doit pas comporter des conditions qui le convertissent effectivement en plan d'arrangement.

En l'espèce, il n'y a aucune raison d'intervenir dans l'exercice par le juge surveillant de son pouvoir discrétionnaire d'approuver l'accord de financement de litige à titre de financement temporaire. L'examen des motifs du juge surveillant dans leur ensemble, conjugué à la reconnaissance de son expérience évidente des procédures intentées par les compagnies débitrices sous le régime de la *LACC*, mène à la conclusion que les facteurs énumérés au par. 11.2(4) concernent des questions qui n'auraient pu échapper à son attention et à son examen adéquat. Il est manifeste que le juge surveillant a mis l'accent sur l'équité envers toutes les parties, les objectifs précis de la *LACC* et les circonstances particulières de la présente affaire lorsqu'il a approuvé l'accord de financement de litige à titre de financement temporaire. De plus, l'accord de financement de litige ne constitue pas un plan d'arrangement parce qu'il ne propose aucune transaction visant les droits des créanciers. Le fait que les créanciers puissent en fin de compte remporter plus ou moins d'argent ne modifie en rien la nature ou l'existence de leurs droits d'avoir accès aux fonds provenant des actifs des compagnies débitrices, pas plus qu'on ne saurait dire qu'il s'agit d'une transaction à l'égard de leurs droits. Enfin, la charge relative au financement de litige ne convertit pas l'accord de financement de litige en plan d'arrangement. Une conclusion contraire aurait pour effet d'annihiler le pouvoir du juge surveillant d'approuver ces charges sans un vote des créanciers, un résultat qui est expressément prévu par l'art. 11.2 de la *LACC*.

Jurisprudence

Citée par le juge en chef Wagner et le juge Moldaver

Arrêt appliqué : *Century Services Inc. c. Canada (Procureur général)*, 2010 CSC 60, [2010] 3 R.C.S. 379; **arrêts examinés :** *Re Crystallex*, 2012 ONCA 404, 293 O.A.C. 102; *Laserworks Computer Services Inc. (Bankruptcy), Re*, 1998 NSCA 42, 165 N.S.R. (2d) 296; **arrêts mentionnés :** *Bayens c. Kinross Gold Corporation*, 2013 ONSC 4974, 117 O.R. (3d) 150; *Hayes c. The City of Saint John*, 2016 NBQB 125; *Schenk c. Valeant Pharmaceuticals International Inc.*, 2015 ONSC 3215, 74 C.P.C. (7th) 332; *Re Blackburn*, 2011 BCSC 1671, 27 B.C.L.R. (5th) 199; *Sun Indalex Finance, LLC c. Syndicat des Métallos*, 2013 CSC 6, [2013] 1 R.C.S. 271; *Ernst*

Ltd., 2017 ONCA 1014, 139 O.R. (3d) 1; *Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc.*, 2019 ONCA 508, 435 D.L.R. (4th) 416; *Re Canadian Red Cross Society* (1998), 5 C.B.R. (4th) 299; *Re Target Canada Co.*, 2015 ONSC 303, 22 C.B.R. (6th) 323; *Uti Energy Corp. v. Fracmaster Ltd.*, 1999 ABCA 178, 244 A.R. 93, aff'g 1999 ABQB 379, 11 C.B.R. (4th) 204; *Orphan Well Association v. Grant Thornton Ltd.*, 2019 SCC 5, [2019] 1 S.C.R. 150; *Stelco Inc. (Re)* (2005), 253 D.L.R. (4th) 109; *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24; *North American Tungsten Corp. v. Global Tungsten and Powders Corp.*, 2015 BCCA 390, 377 B.C.A.C. 6; *Re BA Energy Inc.*, 2010 ABQB 507, 70 C.B.R. (5th) 24; *HSBC Bank Canada v. Bear Mountain Master Partnership*, 2010 BCSC 1563, 72 C.B.R. (5th) 276; *Caterpillar Financial Services Ltd. v. 360networks Corp.*, 2007 BCCA 14, 279 D.L.R. (4th) 701; *Grant Forest Products Inc. v. Toronto-Dominion Bank*, 2015 ONCA 570, 387 D.L.R. (4th) 426; *Bridging Finance Inc. v. Béton Brunet 2001 inc.*, 2017 QCCA 138, 44 C.B.R. (6th) 175; *New Skeena Forest Products Inc., Re*, 2005 BCCA 192, 39 B.C.L.R. (4th) 338; *Canadian Metropolitan Properties Corp. v. Libin Holdings Ltd.*, 2009 BCCA 40, 308 D.L.R. (4th) 339; *Metcalfe & Mansfield Alternative Investments II Corp. (Re)*, 2008 ONCA 587, 296 D.L.R. (4th) 135; *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601; *Re 1078385 Ontario Ltd.* (2004), 206 O.A.C. 17; *ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140; *Nortel Networks Corp., Re*, 2015 ONCA 681, 391 D.L.R. (4th) 283; *Kitchener Frame Ltd.*, 2012 ONSC 234, 86 C.B.R. (5th) 274; *Royal Oak Mines Inc., Re* (1999), 6 C.B.R. (4th) 314; *Boutiques San Francisco Inc. v. Richter & Associés Inc.*, 2003 CanLII 36955; *Dugal v. Manulife Financial Corp.*, 2011 ONSC 1785, 105 O.R. (3d) 364; *Montgrain v. Banque nationale du Canada*, 2006 QCCA 557, [2006] R.J.Q. 1009; *Langtry v. Dumoulin* (1884), 7 O.R. 644; *McIntyre Estate v. Ontario (Attorney General)* (2002), 218 D.L.R. (4th) 193; *Marcotte v. Banque de Montréal*, 2015 QCCS 1915; *Houle v. St. Jude Medical Inc.*, 2017 ONSC 5129, 9 C.P.C. (8th) 321, aff'd 2018 ONSC 6352, 429 D.L.R. (4th) 739; *Stanway v. Wyeth*, 2013 BCSC 1585, 56 B.C.L.R. (5th) 192; *Re Crystallex International Corporation*, 2012 ONSC 2125, 91 C.B.R. (5th) 169; *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.*, 2008 BCCA 327, 296 D.L.R. (4th) 577.

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Jean-Philippe Groleau, *Christian Lachance*, *Gabriel Lavery Lepage* and *Hannah Toledano*, for the appellants/interveners 9354-9186 Québec inc. and 9354-9178 Québec inc.

Neil A. Peden, for the appellants/interveners IMF Bentham Limited (now known as Omni Bridgeway Limited) and Bentham IMF Capital Limited (now known as Omni Bridgeway Capital (Canada) Limited).

Geneviève Cloutier and *Clifton P. Prophet*, for the respondent Callidus Capital Corporation.

Jocelyn Perreault, *Noah Zucker* and *François Alexandre Toupin*, for the respondents International

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POURVOIS contre un arrêt de la Cour d'appel du Québec (les juges Dutil, Schrager et Dumas), 2019 QCCA 171, [2019] AZ-51566416, [2019] Q.J. No. 670 (QL), 2019 CarswellQue 94 (WL Can.), qui a infirmé une décision du juge Michaud, 2018 QCCS 1040, [2018] AZ-51477967, [2018] Q.J. No. 1986 (QL), 2018 CarswellQue 1923 (WL Can.). Pourvois accueillis.

Jean-Philippe Groleau, *Christian Lachance*, *Gabriel Lavery Lepage* et *Hannah Toledano*, pour les appelantes/intervenantes 9354-9186 Québec inc. et 9354-9178 Québec inc.

Neil A. Peden, pour les appelantes/intervenantes IMF Bentham Limited (maintenant connue sous le nom d'Omni Bridgeway Limited) et Corporation Bentham IMF Capital (maintenant connue sous le nom de Corporation Omni Bridgeway Capital (Canada)).

Geneviève Cloutier et *Clifton P. Prophet*, pour l'intimée Callidus Capital Corporation.

Jocelyn Perreault, *Noah Zucker* et *François Alexandre Toupin*, pour les intimés International

Game Technology, Deloitte LLP, Luc Carignan, François Vigneault, Philippe Millette, Francis Proulx and François Pelletier.

Joseph Reynaud and *Nathalie Nouvet*, for the intervener Ernst & Young Inc.

Sylvain Rigaud, *Arad Mojtahedi* and *Saam Pousht-Mashhad*, for the interveners the Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals.

The reasons for judgment of the Court were delivered by

THE CHIEF JUSTICE AND MOLDAVER J.—

I. Overview

[1] These appeals arise in the context of an ongoing proceeding instituted under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"), in which substantially all of the assets of the debtor companies have been liquidated. The proceeding was commenced well over four years ago. Since then, a single supervising judge has been responsible for its oversight. In this capacity, he has made numerous discretionary decisions.

[2] Two of the supervising judge's decisions are in issue before us. Each raises a question requiring this Court to clarify the nature and scope of judicial discretion in *CCAA* proceedings. The first is whether a supervising judge has the discretion to bar a creditor from voting on a plan of arrangement where they determine that the creditor is acting for an improper purpose. The second is whether a supervising judge can approve third party litigation funding as interim financing, pursuant to s. 11.2 of the *CCAA*.

[3] For the reasons that follow, we would answer both questions in the affirmative, as did the supervising judge. To the extent the Court of Appeal disagreed

Game Technology, Deloitte S.E.N.C.R.L., Luc Carignan, François Vigneault, Philippe Millette, Francis Proulx et François Pelletier.

Joseph Reynaud et *Nathalie Nouvet*, pour l'intervenante Ernst & Young Inc.

Sylvain Rigaud, *Arad Mojtahedi* et *Saam Pousht-Mashhad*, pour les intervenants l'Institut d'insolvabilité du Canada et l'Association canadienne des professionnels de l'insolvabilité et de la réorganisation.

Version française des motifs de jugement de la Cour rendus par

LE JUGE EN CHEF ET LE JUGE MOLDAVER —

I. Aperçu

[1] Ces pourvois s'inscrivent dans le contexte d'une instance toujours en cours introduite sous le régime de la *Loi sur les arrangements avec les créanciers de compagnies*, L.R.C. 1985, c. C-36 (« *LACC* »), dans le cadre de laquelle la quasi-totalité des éléments d'actif des compagnies débitrices ont été liquidés. L'instance a été introduite il y a plus de quatre ans. Depuis, un seul juge surveillant a été chargé de sa supervision. À ce titre, il a rendu de nombreuses décisions discrétionnaires.

[2] Deux de ces décisions du juge surveillant font l'objet du présent pourvoi. Chacune d'elles soulève une question exigeant de notre Cour qu'elle précise la nature et la portée du pouvoir discrétionnaire exercé par les tribunaux dans les instances relevant de la *LACC*. La première est de savoir si le juge surveillant dispose du pouvoir discrétionnaire d'interdire à un créancier de voter sur un plan d'arrangement s'il estime que ce créancier agit dans un but illégitime. La deuxième porte sur le pouvoir du juge surveillant d'approuver le financement du litige par un tiers à titre de financement temporaire, en vertu de l'art. 11.2 de la *LACC*.

[3] Pour les motifs qui suivent, nous sommes d'avis de répondre à ces deux questions par l'affirmative, à l'instar du juge surveillant. Dans la mesure où la

and went on to interfere with the supervising judge's discretionary decisions, we conclude that it was not justified in doing so. In our respectful view, the Court of Appeal failed to treat the supervising judge's decisions with the appropriate degree of deference. In the result, as we ordered at the conclusion of the hearing, these appeals are allowed and the supervising judge's order reinstated.

II. Facts

[4] In 1994, Mr. Gérald Duhamel founded Bluberi Gaming Technologies Inc., which is now one of the appellants, 9354-9186 Québec inc. The corporation manufactured, distributed, installed, and serviced electronic casino gaming machines. It also provided management systems for gambling operations. Its sole shareholder has at all material times been Bluberi Group Inc., which is now another of the appellants, 9354-9178 Québec inc. Through a family trust, Mr. Duhamel controls Bluberi Group Inc. and, as a result, Bluberi Gaming (collectively, "Bluberi").

[5] In 2012, Bluberi sought financing from the respondent, Callidus Capital Corporation ("Callidus"), which describes itself as an "asset-based or distressed lender" (R.F., at para. 26). Callidus extended a credit facility of approximately $24 million to Bluberi. This debt was secured in part by a share pledge agreement.

[6] Over the next three years, Bluberi lost significant amounts of money, and Callidus continued to extend credit. By 2015, Bluberi owed approximately $86 million to Callidus — close to half of which Bluberi asserts is comprised of interest and fees.

A. *Bluberi's Institution of CCAA Proceedings and Initial Sale of Assets*

[7] On November 11, 2015, Bluberi filed a petition for the issuance of an initial order under the *CCAA*. In its petition, Bluberi alleged that its liquidity issues

Cour d'appel s'est dite d'avis contraire et a modifié les décisions discrétionnaires du juge surveillant, nous concluons qu'elle n'était pas justifiée de le faire. Avec égards, la Cour d'appel n'a pas fait preuve de la déférence à laquelle elle était tenue par rapport aux décisions du juge surveillant. C'est pourquoi, comme nous l'avons ordonné à l'issue de l'audience, les pourvois sont accueillis et l'ordonnance du juge surveillant est rétablie.

II. Les faits

[4] En 1994, M. Gérald Duhamel fonde Bluberi Gaming Technologies Inc., qui est devenue l'une des appelantes, 9354-9186 Québec inc. L'entreprise fabriquait, distribuait, installait et entretenait des appareils de jeux électroniques pour casino. Elle offrait aussi des systèmes de gestion dans le domaine des jeux d'argent. Pendant toute la période pertinente, son unique actionnaire était Bluberi Group Inc., qui est devenue une autre des appelantes, 9354-9178 Québec inc. Par l'entremise d'une fiducie familiale, M. Duhamel contrôlait Bluberi Group inc. et, de ce fait, Bluberi Gaming (collectivement, « Bluberi »).

[5] En 2012, Bluberi demande du financement à l'intimée Callidus Capital Corporation (« Callidus »), qui se décrit comme un [TRADUCTION] « prêteur offrant du financement garanti par des actifs ou du financement à des entreprises en difficulté financière » (m.i., par. 26). Callidus lui consent une facilité de crédit d'environ 24 millions de dollars, que Bluberi garantit partiellement en signant une entente par laquelle elle met en gage ses actions.

[6] Au cours des trois années suivantes, Bluberi perd d'importantes sommes d'argent et Callidus continue de lui consentir du crédit. En 2015, Bluberi doit environ 86 millions de dollars à Callidus — Bluberi affirme que près de la moitié de cette somme est composée d'intérêts et de frais.

A. *L'introduction des procédures sous le régime de la LACC par Bluberi et la vente initiale d'actifs*

[7] Le 11 novembre 2015, Bluberi dépose une requête en délivrance d'une ordonnance initiale sous le régime de la *LACC*. Dans sa requête, Bluberi allègue

were the result of Callidus taking *de facto* control of the corporation and dictating a number of purposefully detrimental business decisions. Bluberi alleged that Callidus engaged in this conduct in order to deplete the corporation's equity value with a view to owning Bluberi and, ultimately, selling it.

[8] Over Callidus's objection, Bluberi's petition succeeded. The supervising judge, Michaud J., issued an initial order under the *CCAA*. Among other things, the initial order confirmed that Bluberi was a "debtor company" within the meaning of s. 2(1) of the Act; stayed any proceedings against Bluberi or any director or officer of Bluberi; and appointed Ernst & Young Inc. as monitor ("Monitor").

[9] Working with the Monitor, Bluberi determined that a sale of its assets was necessary. On January 28, 2016, it proposed a sale solicitation process, which the supervising judge approved. That process led to Bluberi entering into an asset purchase agreement with Callidus. The agreement contemplated that Callidus would obtain all of Bluberi's assets in exchange for extinguishing almost the entirety of its secured claim against Bluberi, which had ballooned to approximately $135.7 million. Callidus would maintain an undischarged secured claim of $3 million against Bluberi. The agreement would also permit Bluberi to retain claims for damages against Callidus arising from its alleged involvement in Bluberi's financial difficulties ("Retained Claims").[1] Throughout these proceedings, Bluberi has asserted that the Retained Claims should amount to over $200 million in damages.

[10] The supervising judge approved the asset purchase agreement, and the sale of Bluberi's assets to Callidus closed in February 2017. As a result, Callidus effectively acquired Bluberi's business, and has continued to operate it as a going concern.

[1] Bluberi does not appear to have filed this claim yet (see 2018 QCCS 1040, at para. 10 (CanLII)).

que ses problèmes de liquidité découlent du fait que Callidus exerce un contrôle de facto à l'égard de son entreprise et lui dicte un certain nombre de décisions d'affaires dans l'intention de lui nuire. Bluberi prétend que Callidus agit ainsi afin de réduire la valeur des actions dans le but de devenir propriétaire de Bluberi et ultimement de la vendre.

[8] Malgré l'objection de Callidus, la requête de Bluberi est accueillie. Le juge surveillant, le juge Michaud, rend une ordonnance initiale sous le régime de la *LACC*. Celle-ci confirme entre autres que Bluberi est une « compagnie débitrice » au sens du par. 2(1) de la Loi, suspend toute procédure introduite à l'encontre de Bluberi, de ses administrateurs ou dirigeants, et désigne Ernst & Young Inc. pour agir à titre de contrôleur (« contrôleur »).

[9] Travaillant en collaboration avec le contrôleur, Bluberi décide que la vente de ses actifs est nécessaire. Le 28 janvier 2016, elle propose un processus de mise en vente que le juge surveillant approuve. Ce processus débouche sur la conclusion d'une convention d'achat d'actifs entre Bluberi et Callidus. Cette convention prévoit que Callidus obtient l'ensemble des actifs de Bluberi en échange de l'extinction de la presque totalité de la créance garantie qu'elle détient à l'encontre de Bluberi, qui s'élevait à environ 135,7 millions de dollars. Callidus conserve une créance garantie non libérée de 3 millions de dollars contre Bluberi. La convention prévoit aussi que Bluberi se réserve le droit de réclamer des dommages-intérêts à Callidus en raison de l'implication alléguée de celle-ci dans ses difficultés financières (les « réclamations réservées »)[1]. Tout au long de ces procédures, Bluberi affirme que la valeur des réclamations ainsi réservées représente plus de 200 millions de dollars en dommages-intérêts.

[10] Le juge surveillant approuve la convention d'achat d'actifs, et la vente des actifs de Bluberi à Callidus est conclue en février 2017. En conséquence, Callidus acquiert l'entreprise de Bluberi et en poursuit l'exploitation.

[1] Bluberi semble ne pas avoir encore déposé cette action (voir 2018 QCCS 1040, par. 10 (CanLII)).

[11] Since the sale, the Retained Claims have been Bluberi's sole remaining asset and thus the sole security for Callidus's $3 million claim.

B. *The Initial Competing Plans of Arrangement*

[12] On September 11, 2017, Bluberi filed an application seeking the approval of a $2 million interim financing credit facility to fund the litigation of the Retained Claims and other related relief. The lender was a joint venture numbered company incorporated as 9364-9739 Québec inc. This interim financing application was set to be heard on September 19, 2017.

[13] However, one day before the hearing, Callidus proposed a plan of arrangement ("First Plan") and applied for an order convening a creditors' meeting to vote on that plan. The First Plan proposed that Callidus would fund a $2.5 million (later increased to $2.63 million) distribution to Bluberi's creditors, except itself, in exchange for a release from the Retained Claims. This would have fully satisfied the claims of Bluberi's former employees and those creditors with claims worth less than $3000; creditors with larger claims were to receive, on average, 31 percent of their respective claims.

[14] The supervising judge adjourned the hearing of both applications to October 5, 2017. In the meantime, Bluberi filed its own plan of arrangement. Among other things, the plan proposed that half of any proceeds resulting from the Retained Claims, after payment of expenses and Bluberi's creditors' claims, would be distributed to the unsecured creditors, as long as the net proceeds exceeded $20 million.

[15] On October 5, 2017, the supervising judge ordered that the parties' plans of arrangement could be put to a creditors' vote. He ordered that both parties share the fees and expenses related to the

[11] Depuis la vente, les réclamations réservées sont le seul élément d'actif de Bluberi et représentent donc la seule garantie que possède Callidus pour sa créance de 3 millions de dollars.

B. *Les premiers plans d'arrangement concurrents*

[12] Le 11 septembre 2017, Bluberi dépose une demande par laquelle elle sollicite l'approbation d'un financement provisoire de 2 millions de dollars sous forme de facilité de crédit afin de financer le coût des procédures liées aux réclamations réservées ainsi que d'autres mesures de réparation accessoires. Le prêteur est une coentreprise constituée sous le numéro 9364-9739 Québec inc. Cette demande de financement provisoire devait être instruite le 19 septembre 2017.

[13] Toutefois, la veille de l'audience, Callidus propose un plan d'arrangement (« premier plan ») et demande une ordonnance pour convoquer les créanciers à une assemblée afin qu'ils votent sur ce plan. Le premier plan proposait que Callidus avance la somme de 2,5 millions de dollars (puis plus tard 2,63 millions de dollars) aux fins de distribution aux créanciers de Bluberi, sauf elle-même, en échange de quoi elle serait libérée des réclamations réservées. Cette somme aurait permis d'acquitter entièrement les créances des anciens employés de Bluberi et toutes celles de moins de 3 000 $; les créanciers dont la créance était plus élevée devaient recevoir chacun en moyenne 31 pour 100 du montant de leur réclamation.

[14] Le juge surveillant ajourne donc l'audition des deux demandes au 5 octobre 2017. Entre-temps, Bluberi dépose son propre plan d'arrangement dans lequel elle propose notamment que la moitié de toute somme provenant des réclamations réservées, après paiement des dépenses et acquittement des réclamations des créanciers de Bluberi, soit distribuée aux créanciers non garantis, pourvu que la somme nette ainsi obtenue soit supérieure à 20 millions de dollars.

[15] Le 5 octobre 2017, le juge surveillant ordonne que les plans d'arrangement des parties soient soumis au vote des créanciers. Il ordonne que les honoraires et dépenses découlant de la présentation des

presentation of the plans of arrangement at a creditors' meeting, and that a party's failure to deposit those funds with the Monitor would bar the presentation of that party's plan of arrangement. Bluberi elected not to deposit the necessary funds, and, as a result, only Callidus's First Plan was put to the creditors.

C. *Creditors' Vote on Callidus's First Plan*

[16] On December 15, 2017, Callidus submitted its First Plan to a creditors' vote. The plan failed to receive sufficient support. Section 6(1) of the *CCAA* provides that, to be approved, a plan must receive a "double majority" vote in each class of creditors — that is, a majority in *number* of class members, which also represents two-thirds in *value* of the class members' claims. All of Bluberi's creditors, besides Callidus, formed a single voting class of unsecured creditors. Of the 100 voting unsecured creditors, 92 creditors (representing $3,450,882 of debt) voted in favour, and 8 voted against (representing $2,375,913 of debt). The First Plan failed because the creditors voting in favour only held 59.22 percent of the total value being voted, which did not meet the s. 6(1) threshold. Most notably, SMT Hautes Technologies ("SMT"), which held 36.7 percent of Bluberi's debt, voted against the plan.

[17] Callidus did not vote on the First Plan — despite the Monitor explicitly stating that Callidus could have "vote[d] . . . the portion of its claim, assessed by Callidus, to be an unsecured claim" (Joint R.R., vol. III, at p.188).

D. *Bluberi's Interim Financing Application and Callidus's New Plan*

[18] On February 6, 2018, Bluberi filed one of the applications underlying these appeals, seeking authorization of a proposed third party litigation funding agreement ("LFA") with a publicly traded

plans d'arrangement à l'assemblée des créanciers soient partagés entre les parties et qu'il soit interdit à toute partie qui ne dépose pas les fonds nécessaires auprès du contrôleur de présenter son plan d'arrangement. Bluberi choisit de ne pas déposer les fonds nécessaires et, en conséquence, seul le premier plan de Callidus est présenté aux créanciers.

C. *Le vote des créanciers sur le premier plan de Callidus*

[16] Le 15 décembre 2017, Callidus soumet son premier plan au vote des créanciers. Le plan n'obtient pas l'appui nécessaire. Le paragraphe 6(1) de la *LACC* prévoit que, pour être approuvé, le plan doit obtenir la « double majorité » de chaque catégorie de créanciers — c'est-à-dire, la majorité en *nombre* d'une catégorie de créanciers, qui représente aussi les deux tiers en *valeur* des réclamations de cette catégorie de créanciers. Tous les créanciers de Bluberi, hormis Callidus, forment une seule catégorie de créanciers non garantis ayant droit de vote. Des 100 créanciers non garantis, 92 (qui ont ensemble une créance de 3 450 882 $) votent en faveur du plan, et 8 votent contre (qui ont ensemble une créance de 2 375 913 $). Le premier plan échoue parce que les réclamations des créanciers ayant voté en sa faveur ne détiennent que 59,22 p. 100 en valeur des réclamations de ceux ayant voté, ce qui ne respectait pas le seuil établi au par. 6(1). Plus particulièrement, SMT Hautes Technologies (« SMT »), qui détient 36,7 p. 100 de la dette de Bluberi, vote contre le plan.

[17] Callidus ne vote pas sur le premier plan — malgré les propos explicites du contrôleur, selon qui Callidus pouvait [TRADUCTION] « voter [. . .] selon le pourcentage de sa créance qui, de l'avis de Callidus, était non garantie » (dossier conjoint des intimés, vol. III, p. 188).

D. *La demande de financement provisoire de Bluberi et le nouveau plan de Callidus*

[18] Le 6 février 2018, Bluberi dépose une des demandes à l'origine des présents pourvois. Elle demande au tribunal l'autorisation de conclure un accord de financement du litige par un tiers (« AFL »)

litigation funder, IMF Bentham Limited or its Canadian subsidiary, Bentham IMF Capital Limited (collectively, "Bentham"). Bluberi's application also sought the placement of a $20 million super-priority charge in favour of Bentham on Bluberi's assets ("Litigation Financing Charge").

[19] The LFA contemplated that Bentham would fund Bluberi's litigation of the Retained Claims in exchange for receiving a portion of any settlement or award after trial. However, were Bluberi's litigation to fail, Bentham would lose all of its invested funds. The LFA also provided that Bentham could terminate the litigation of the Retained Claims if, acting reasonably, it were no longer satisfied of the merits or commercial viability of the litigation.

[20] Callidus and certain unsecured creditors who voted in favour of its plan (who are now respondents and style themselves the "Creditors' Group") contested Bluberi's application on the ground that the LFA was a plan of arrangement and, as such, had to be submitted to a creditors' vote.[2]

[21] On February 12, 2018, Callidus filed the other application underlying these appeals, seeking to put another plan of arrangement to a creditors' vote ("New Plan"). The New Plan was essentially identical to the First Plan, except that Callidus increased the proposed distribution by $250,000 (from $2.63 million to $2.88 million). Further, Callidus filed an amended proof of claim, which purported to value the security attached to its $3 million claim at *nil*. Callidus was of the view that this valuation was proper because Bluberi had no assets other than the Retained Claims. On this basis, Callidus asserted that it stood in the position of an unsecured creditor, and sought the supervising judge's permission to vote on the New Plan with the other unsecured creditors.

[2] Notably, the Creditors' Group advised Callidus that it would lend its support to the New Plan. It also asked Callidus to reimburse any legal fees incurred in association with that support. At the same time, the Creditors' Group did not undertake to vote in any particular way, and confirmed that each of its members would assess all available alternatives individually.

avec un bailleur de fonds de litiges coté en bourse, IMF Bentham Limited ou sa filiale canadienne, Corporation Bentham IMF Capital (collectivement, « Bentham »). Bluberi demande également l'autorisation de grever son actif d'une charge superprioritaire de 20 millions de dollars en faveur de Bentham (« charge liée au financement du litige »).

[19] L'AFL prévoit que Bentham financera le litige relatif aux réclamations réservées de Bluberi et qu'en retour elle recevra un pourcentage de toute somme convenue par règlement ou accordée à l'issue d'un procès. Toutefois, dans l'éventualité où Bluberi serait déboutée, Bentham perdra la totalité des fonds investis. L'AFL prévoit aussi que Bentham peut mettre fin au recours si, agissant de façon raisonnable, elle n'est plus convaincue du bien-fondé du litige ou de sa viabilité commerciale.

[20] Callidus et certains créanciers non garantis qui ont voté en faveur de son plan (qui sont maintenant intimés au présent pourvoi et se font appeler le « groupe de créanciers ») contestent la demande de Bluberi au motif que l'AFL est un plan d'arrangement et qu'à ce titre, il doit être soumis au vote des créanciers[2].

[21] Le 12 février 2018, Callidus dépose l'autre demande qui est à l'origine des présents pourvois, laquelle vise à soumettre un autre plan d'arrangement au vote des créanciers (« nouveau plan »). Le nouveau plan est pour l'essentiel identique au premier plan, sauf que Callidus propose que la somme à distribuer soit augmentée de 250 000 $ (passant de 2,63 millions à 2,88 millions de dollars). Callidus a en outre déposé une preuve de réclamation modifiée qui ramène à *zéro* la valeur de la garantie liée à sa créance de 3 millions de dollars. Callidus considère que cette évaluation est juste parce que Bluberi n'a aucun autre élément d'actif que les revendications réservées. Sur cette base, elle fait valoir qu'elle se trouve dans la situation d'un créancier non garanti et

[2] Fait à remarquer, le groupe de créanciers a informé Callidus qu'il appuierait le nouveau plan. Il lui a aussi demandé de rembourser tous les frais juridiques découlant de cet appui. Par ailleurs, le groupe de créanciers ne s'est pas engagé à voter d'une certaine façon, et a confirmé que chacun de ses membres évaluerait toutes les possibilités qui s'offraient à lui.

Given the size of its claim, if Callidus were permitted to vote on the New Plan, the plan would necessarily pass a creditors' vote. Bluberi opposed Callidus's application.

[22] The supervising judge heard Bluberi's interim financing application and Callidus's application regarding its New Plan together. Notably, the Monitor supported Bluberi's position.

III. Decisions Below

A. *Quebec Superior Court, 2018 QCCS 1040 (Michaud J.)*

[23] The supervising judge dismissed Callidus's application, declining to submit the New Plan to a creditors' vote. He granted Bluberi's application, authorizing Bluberi to enter into a litigation funding agreement with Bentham on the terms set forth in the LFA and imposing the Litigation Financing Charge on Bluberi's assets.

[24] With respect to Callidus's application, the supervising judge determined Callidus should not be permitted to vote on the New Plan because it was acting with an "improper purpose" (para. 48 (CanLII)). He acknowledged that creditors are generally entitled to vote in their own self-interest. However, given that the First Plan — which was almost identical to the New Plan — had been defeated by a creditors' vote, the supervising judge concluded that Callidus's attempt to vote on the New Plan was an attempt to override the result of the first vote. In particular, he wrote:

> Taking into consideration the creditors' interest, the Court accepted, in the fall of 2017, that Callidus' Plan be submitted to their vote with the understanding that, as a secured creditor, Callidus would not cast a vote. However, under the present circumstances, it would serve an improper purpose if Callidus was allowed to vote on its own plan, especially when its vote would very likely result in

demande au juge surveillant la permission de voter sur le nouveau plan avec les autres créanciers non garantis. Vu l'importance de sa réclamation, le plan serait nécessairement adopté par les créanciers si Callidus était autorisée à voter. Bluberi s'oppose à la demande de Callidus.

[22] Le juge surveillant instruit ensemble la demande de financement provisoire de Bluberi ainsi que la demande présentée par Callidus concernant son nouveau plan. Il est à souligner que le contrôleur appuie la position de Bluberi.

III. Historique judiciaire

A. *Cour supérieure du Québec, 2018 QCCS 1040 (le juge Michaud)*

[23] Le juge surveillant rejette la demande de Callidus et refuse de soumettre le nouveau plan au vote des créanciers. Il accueille la demande de Bluberi, l'autorisant ainsi à conclure un accord de financement du litige avec Bentham aux conditions énoncées dans l'AFL et ordonne que les actifs de Bluberi soient grevés de la charge liée au financement du litige.

[24] En ce qui a trait à la demande de Callidus, le juge surveillant décide que cette dernière ne peut voter sur le nouveau plan parce qu'elle agit dans un [TRADUCTION] « but illégitime » (par. 48 (CanLII)). Il reconnaît que les créanciers ont habituellement le droit de voter dans leur propre intérêt. Or, étant donné que le premier plan — qui était presque identique au nouveau plan — a été rejeté par les créanciers, le juge surveillant conclut qu'en demandant à voter sur le nouveau plan, Callidus tentait de contourner le résultat du premier vote. Il écrit notamment :

> [TRADUCTION] Tenant compte de leur intérêt, la Cour a accepté à l'automne 2017 que le plan de Callidus soit soumis au vote des créanciers, étant entendu que, en tant que créancière garantie, celle-ci ne voterait pas. Toutefois, si, dans les circonstances actuelles, Callidus était autorisée à voter sur son propre plan, elle le ferait dans un but illégitime d'autant plus qu'il est probable que son vote

the New Plan meeting the two thirds threshold for approval under the CCAA.

As pointed out by SMT, the main unsecured creditor, Callidus' attempt to vote aims only at cancelling SMT's vote which prevented Callidus' Plan from being approved at the creditors' meeting.

It is one thing to let the creditors vote on a plan submitted by a secured creditor, it is another to allow this secured creditor to vote on its own plan in order to exert control over the vote for the sole purpose of obtaining releases. [paras. 45-47]

[25] The supervising judge concluded that, in these circumstances, allowing Callidus to vote would be both "unfair and unreasonable" (para. 47). He also observed that Callidus's conduct throughout the *CCAA* proceedings "lacked transparency" (at para. 41) and that Callidus was "solely motivated by the [pending] litigation" (para. 44). In sum, he found that Callidus's conduct was contrary to the "requirements of appropriateness, good faith, and due diligence", and ordered that Callidus would not be permitted to vote on the New Plan (para. 48, citing *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379, at para. 70).

[26] Because Callidus was not permitted to vote on the New Plan and SMT had unequivocally stated its intention to vote against it, the supervising judge concluded that the plan had no reasonable prospect of success. He therefore declined to submit it to a creditors' vote.

[27] With respect to Bluberi's application, the supervising judge considered three issues relevant to these appeals: (1) whether the LFA should be submitted to a creditors' vote; (2) if not, whether the LFA ought to be approved by the court; and (3) if so, whether the $20 million Litigation Financing Charge should be imposed on Bluberi's assets.

[28] The supervising judge determined that the LFA did not need to be submitted to a creditors' vote because it was not a plan of arrangement. He considered a plan of arrangement to involve "an arrangement

permettrait d'atteindre le seuil de deux tiers nécessaire pour que le nouveau plan soit approuvé en vertu de la LACC.

Comme l'a souligné SMT, la principale créancière non garantie, Callidus souhaite voter afin d'annuler le vote de SMT, qui a empêché que son plan soit approuvé lors de l'assemblée des créanciers.

C'est une chose de laisser les créanciers voter sur un plan présenté par un créancier garanti, c'en est une autre de laisser ce créancier garanti voter sur son propre plan et exercer ainsi un contrôle sur le vote à seule fin d'être libéré de toute responsabilité. [par. 45-47]

[25] Le juge surveillant conclut que, dans les circonstances, permettre à Callidus de voter serait à la fois [TRADUCTION] « injuste et déraisonnable » (par. 47). Il note aussi que, tout au long de la procédure introduite en vertu de la *LACC*, Callidus a « manqué de transparence » (par. 41) et qu'elle « n'est motivée que par le litige [en cours] » (par. 44). En somme, il conclut que la conduite de Callidus est contraire à « l'opportunité, [à] la bonne foi et [à] la diligence » requises, et il ordonne que Callidus ne puisse pas voter sur le nouveau plan (par. 48, citant *Century Services Inc. c. Canada (Procureur général)*, 2010 CSC 60, [2010] 3 R.C.S. 379, par. 70).

[26] Puisque Callidus n'a pas été autorisée à voter sur le nouveau plan et que SMT a manifesté sans équivoque son intention de voter contre celui-ci, le juge surveillant conclut que le plan n'a aucune possibilité raisonnable de recevoir l'aval des créanciers. Il refuse donc de le soumettre au vote des créanciers.

[27] Pour ce qui est de la demande de Bluberi, le juge surveillant examine trois questions qui sont pertinentes pour les présents pourvois : (1) si l'AFL devait être soumis au vote des créanciers; (2) dans la négative, si l'AFL devait être approuvé par le tribunal; et (3) le cas échéant, s'il devait ordonner que la charge liée au financement du litige de 20 millions de dollars grève les actifs de Bluberi.

[28] Le juge surveillant décide qu'il n'est pas nécessaire de soumettre l'AFL au vote des créanciers parce qu'il ne s'agit pas d'un plan d'arrangement. Il considère qu'un tel plan suppose [TRADUCTION] « un

or compromise between a debtor and its creditors" (para. 71, citing *Re Crystallex*, 2012 ONCA 404, 293 O.A.C. 102, at para. 92 ("*Crystallex*")). In his view, the LFA lacked this essential feature. He also concluded that the LFA did not need to be accompanied by a plan, as Bluberi had stated its intention to file a plan in the future.

[29] After reviewing the terms of the LFA, the supervising judge found it met the criteria for approval of third party litigation funding set out in *Bayens v. Kinross Gold Corporation*, 2013 ONSC 4974, 117 O.R. (3d) 150, at para. 41, and *Hayes v. The City of Saint John*, 2016 NBQB 125, at para. 4 (CanLII). In particular, he considered Bentham's percentage of return to be reasonable in light of its level of investment and risk. Further, the supervising judge rejected Callidus and the Creditors' Group's argument that the LFA gave too much discretion to Bentham. He found that the LFA did not allow Bentham to exert undue influence on the litigation of the Retained Claims, noting similarly broad clauses had been approved in the *CCAA* context (para. 82, citing *Schenk v. Valeant Pharmaceuticals International Inc.*, 2015 ONSC 3215, 74 C.P.C. (7th) 332, at para. 23).

[30] Finally, the supervising judge imposed the Litigation Financing Charge on Bluberi's assets. While significant, the supervising judge considered the amount to be reasonable given: the amount of damages that would be claimed from Callidus; Bentham's financial commitment to the litigation; and the fact that Bentham was not charging any interim fees or interest (i.e., it would only profit in the event of successful litigation or settlement). Put simply, Bentham was taking substantial risks, and it was reasonable that it obtain certain guarantees in exchange.

[31] Callidus, again supported by the Creditors' Group, appealed the supervising judge's order, impleading Bentham in the process.

arrangement ou une transaction entre un débiteur et ses créanciers » (par. 71, citant *Re Crystallex*, 2012 ONCA 404, 293 O.A.C. 102, par. 92 (« *Crystallex* »)). À son avis, l'AFL est dépourvu de cette caractéristique essentielle. Il conclut aussi qu'il n'est pas nécessaire que l'AFL soit assorti d'un plan étant donné que Bluberi a exprimé l'intention d'en déposer un plus tard.

[29] Après en avoir examiné les modalités, le juge surveillant conclut que l'AFL respecte le critère d'approbation applicable en matière de financement d'un litige par un tiers qui est établi dans les décisions *Bayens c. Kinross Gold Corporation*, 2013 ONSC 4974, 117 O.R. (3d) 150, par. 41, et *Hayes c. The City of Saint John*, 2016 NBQB 125, par. 4 (CanLII). Plus particulièrement, il considère que le taux de retour de Bentham est raisonnable eu égard à son niveau d'investissement et de risque. Il rejette en outre l'argument avancé par Callidus et le groupe de créanciers, qui soutenaient que l'AFL donne trop de latitude à Bentham. Il conclut que l'AFL ne permet pas à Bentham d'exercer une influence indue sur le déroulement du litige lié aux réclamations réservées et souligne que des clauses générales semblables à celles qu'il contient ont déjà été approuvées dans le contexte de la *LACC* (par. 82, citant *Schenk c. Valeant Pharmaceuticals International Inc.*, 2015 ONSC 3215, 74 C.P.C. (7th) 332, par. 23).

[30] Enfin, le juge surveillant ordonne que les actifs de Bluberi soient grevés de la charge liée au financement du litige. Il juge que, même s'il est élevé, le montant en question est raisonnable étant donné : le montant des dommages-intérêts qui sont réclamés à Callidus; l'engagement financier de Bentham dans le litige; et le fait que Bentham n'exige aucune provision pour frais ou intérêts (c.-à-d. qu'elle ne tirera profit de l'accord que si le procès ou le règlement est couronné de succès). En termes simples, Bentham prend des risques importants et il est raisonnable qu'elle obtienne certaines garanties en échange.

[31] Callidus, de nouveau appuyée par le groupe de créanciers, interjette appel de l'ordonnance du juge surveillant et met en cause Bentham.

B. *Quebec Court of Appeal, 2019 QCCA 171 (Dutil and Schrager JJ.A. and Dumas J. (ad hoc))*

[32] The Court of Appeal allowed the appeal, finding that "[t]he exercise of the judge's discretion [was] not founded in law nor on a proper treatment of the facts so that irrespective of the standard of review applied, appellate intervention [was] justified" (para. 48 (CanLII)). In particular, the court identified two errors of relevance to these appeals.

[33] First, the court was of the view that the supervising judge erred in finding that Callidus had an improper purpose in seeking to vote on its New Plan. In its view, Callidus should have been permitted to vote. The court relied heavily on the notion that creditors have a right to vote in their own self-interest. It held that any judicial discretion to preclude voting due to improper purpose should be reserved for the "clearest of cases" (para. 62, referring to *Re Blackburn*, 2011 BCSC 1671, 27 B.C.L.R. (5th) 199, at para. 45). The court was of the view that Callidus's transparent attempt to obtain a release from Bluberi's claims against it did not amount to an improper purpose. The court also considered Callidus's conduct prior to and during the *CCAA* proceedings to be incapable of justifying a finding of improper purpose.

[34] Second, the court concluded that the supervising judge erred in approving the LFA as interim financing because, in its view, the LFA was not connected to Bluberi's commercial operations. The court concluded that the supervising judge had both "misconstrued in law the notion of interim financing and misapplied that notion to the factual circumstances of the case" (para. 78).

[35] In light of this perceived error, the court substituted its view that the LFA was a plan of arrangement and, as a result, should have been submitted

B. *Cour d'appel du Québec, 2019 QCCA 171 (les juges Dutil et Schrager et le juge Dumas (ad hoc))*

[32] La Cour d'appel accueille l'appel et conclut que [TRADUCTION] « [l]'exercice par le juge de son pouvoir discrétionnaire [n'était] pas fondé en droit, non plus qu'il ne reposait sur un traitement approprié des faits, de sorte que, peu importe la norme de contrôle appliquée, il [était] justifié d'intervenir en appel » (par. 48 (CanLII)). En particulier, la cour relève deux erreurs qui sont pertinentes pour les présents pourvois.

[33] D'une part, la cour conclut que le juge surveillant a commis une erreur en concluant que Callidus a agi dans un but illégitime en demandant l'autorisation de voter sur son nouveau plan. À son avis, Callidus aurait dû être autorisée à voter. La cour s'appuie grandement sur l'idée que les créanciers ont le droit de voter en fonction de leur propre intérêt. Elle juge que l'exercice du pouvoir discrétionnaire qui consiste à empêcher un créancier de voter dans un but illégitime devrait être [TRADUCTION] « réservé aux cas les plus évidents » (par. 62, renvoyant à *Re Blackburn*, 2011 BCSC 1671, 27 B.C.L.R. (5th) 199, par. 45). Selon elle, en tentant de façon transparente d'être libérée des réclamations de Bluberi à son égard, Callidus ne pouvait être considérée comme ayant agi dans un but illégitime. La cour conclut également que la conduite de Callidus, avant et pendant la procédure introduite en vertu de la *LACC*, ne pouvait justifier la conclusion qu'il existe un but illégitime.

[34] D'autre part, la cour conclut que le juge surveillant a eu tort d'approuver l'AFL en tant qu'accord de financement provisoire parce qu'à son avis, il n'est pas lié aux opérations commerciales de Bluberi. Elle conclut que le juge surveillant a [TRADUCTION] « donné à la notion de financement provisoire une interprétation non fondée en droit et qu'il a mal appliqué cette notion aux circonstances factuelles de l'affaire » (par. 78).

[35] À la lumière de ce qu'elle percevait comme une erreur, la cour substitue son opinion selon laquelle l'AFL est un plan d'arrangement et que pour

to a creditors' vote. It held that "[a]n arrangement or proposal can encompass both a compromise of creditors' claims as well as the process undertaken to satisfy them" (para. 85). The court considered the LFA to be a plan of arrangement because it affected the creditors' share in any eventual litigation proceeds, would cause them to wait for the outcome of any litigation, and could potentially leave them with nothing at all. Moreover, the court held that Bluberi's scheme "as a whole", being the prosecution of the Retained Claims and the LFA, should be submitted as a plan to the creditors for their approval (para. 89).

[36] Bluberi and Bentham (collectively, "appellants"), again supported by the Monitor, now appeal to this Court.

IV. Issues

[37] These appeals raise two issues:

(1) Did the supervising judge err in barring Callidus from voting on its New Plan on the basis that it was acting for an improper purpose?

(2) Did the supervising judge err in approving the LFA as interim financing, pursuant to s. 11.2 of the *CCAA*?

V. Analysis

A. *Preliminary Considerations*

[38] Addressing the above issues requires situating them within the contemporary Canadian insolvency landscape and, more specifically, the *CCAA* regime. Accordingly, before turning to those issues, we review (1) the evolving nature of *CCAA* proceedings; (2) the role of the supervising judge in those proceedings; and (3) the proper scope of appellate review of a supervising judge's exercise of discretion.

cette raison, il aurait dû être soumis au vote des créanciers. Elle conclut [TRADUCTION] « [qu'u]n arrangement ou une proposition peut englober une transaction visant les réclamations des créanciers ainsi que le processus suivi pour y donner suite » (par. 85). La cour juge que l'AFL est un plan d'arrangement parce qu'il a une incidence sur la participation des créanciers à l'indemnité susceptible d'être accordée à la suite d'un litige, qu'il oblige ceux-ci à attendre l'issue de tout litige, et qu'il est possible que les créanciers se retrouvent les mains vides. De plus, la cour conclut que le projet de Bluberi « dans son entièreté », soit la poursuite des réclamations réservées et l'AFL, doit être soumis à l'approbation des créanciers (par. 89).

[36] Bluberi et Bentham (collectivement, les « appelantes »), encore une fois appuyées par le contrôleur, se pourvoient maintenant devant notre Cour.

IV. Questions en litige

[37] Les pourvois soulèvent deux questions :

(1) Le juge surveillant a-t-il commis une erreur en empêchant Callidus de voter sur son nouveau plan au motif qu'elle agissait dans un but illégitime?

(2) Le juge surveillant a-t-il commis une erreur en approuvant l'AFL en tant que plan de financement provisoire, selon les termes de l'art. 11.2 de la *LACC*?

V. Analyse

A. *Considérations préliminaires*

[38] Pour répondre aux questions ci-dessus, nous devons les situer dans le contexte contemporain de l'insolvabilité au Canada, et plus précisément du régime de la *LACC*. Ainsi, avant de passer à ces questions, nous examinons (1) la nature évolutive des procédures intentées sous le régime de la *LACC*; (2) le rôle que joue le juge surveillant dans ces procédures; et (3) la portée du contrôle, en appel, de l'exercice du pouvoir discrétionnaire du juge surveillant.

(1) The Evolving Nature of *CCAA* Proceedings

[39] The *CCAA* is one of three principal insolvency statutes in Canada. The others are the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"), which covers insolvencies of both individuals and companies, and the *Winding-up and Restructuring Act*, R.S.C. 1985, c. W-11 ("*WURA*"), which covers insolvencies of financial institutions and certain other corporations, such as insurance companies (*WURA*, s. 6(1)). While both the *CCAA* and the *BIA* enable reorganizations of insolvent companies, access to the *CCAA* is restricted to debtor companies facing total claims in excess of $5 million (*CCAA*, s. 3(1)).

[40] Together, Canada's insolvency statutes pursue an array of overarching remedial objectives that reflect the wide ranging and potentially "catastrophic" impacts insolvency can have (*Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6, [2013] 1 S.C.R. 271, at para. 1). These objectives include: providing for timely, efficient and impartial resolution of a debtor's insolvency; preserving and maximizing the value of a debtor's assets; ensuring fair and equitable treatment of the claims against a debtor; protecting the public interest; and, in the context of a commercial insolvency, balancing the costs and benefits of restructuring or liquidating the company (J. P. Sarra, "The Oscillating Pendulum: Canada's Sesquicentennial and Finding the Equilibrium for Insolvency Law", in J. P. Sarra and B. Romaine, eds., *Annual Review of Insolvency Law 2016* (2017), 9, at pp. 9-10; J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2nd ed. 2013), at pp. 4-5 and 14; Standing Senate Committee on Banking, Trade and Commerce, *Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act* (2003), at pp. 9-10; R. J. Wood, *Bankruptcy and Insolvency Law* (2nd ed. 2015), at pp. 4-5).

(1) La nature évolutive des procédures intentées sous le régime de la *LACC*

[39] La *LACC* est l'une des trois principales lois canadiennes en matière d'insolvabilité. Les autres sont la *Loi sur la faillite et l'insolvabilité*, L.R.C. 1985 c. B-3 (« *LFI* »), qui traite de l'insolvabilité des personnes physiques et des sociétés, et la *Loi sur les liquidations et les restructurations*, L.R.C. 1985 c. W-11 (« *LLR* »), qui traite de l'insolvabilité des institutions financières et de certaines autres personnes morales, telles que les compagnies d'assurance (*LLR*, par. 6(1)). Bien que la *LACC* et la *LFI* permettent toutes deux la restructuration de compagnies insolvables, l'accès à la *LACC* est limité aux sociétés débitrices qui sont aux prises avec des réclamations dont le montant total est supérieur à 5 millions de dollars (*LACC*, par. 3(1)).

[40] Ensemble, les lois canadiennes sur l'insolvabilité poursuivent un grand nombre d'objectifs réparateurs généraux qui témoignent de la vaste gamme des conséquences potentiellement « catastrophiques » qui peuvent découler de l'insolvabilité (*Sun Indalex Finance, LLC c. Syndicat des Métallos*, 2013 CSC 6, [2013] 1 R.C.S. 271, par. 1). Ces objectifs incluent les suivants : régler de façon rapide, efficace et impartiale l'insolvabilité d'un débiteur; préserver et maximiser la valeur des actifs d'un débiteur; assurer un traitement juste et équitable des réclamations déposées contre un débiteur; protéger l'intérêt public; et, dans le contexte d'une insolvabilité commerciale, établir un équilibre entre les coûts et les bénéfices découlant de la restructuration ou de la liquidation d'une compagnie (J. P. Sarra, « The Oscillating Pendulum : Canada's Sesquicentennial and Finding the Equilibrium for Insolvency Law », dans J. P. Sarra et B. Romaine, dir., *Annual Review of Insolvency Law 2016* (2017), 9, p. 9-10; J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2e éd. 2013), p. 4-5 et 14; Comité sénatorial permanent des banques et du commerce, *Les débiteurs et les créanciers doivent se partager le fardeau : Examen de la Loi sur la faillite et l'insolvabilité et de la Loi sur les arrangements avec les créanciers des compagnies* (2003), p. 13-14; R. J. Wood, *Bankruptcy and Insolvency Law* (2e éd. 2015), p. 4-5).

[41] Among these objectives, the *CCAA* generally prioritizes "avoiding the social and economic losses resulting from liquidation of an insolvent company" (*Century Services*, at para. 70). As a result, the typical *CCAA* case has historically involved an attempt to facilitate the reorganization and survival of the pre-filing debtor company in an operational state — that is, as a going concern. Where such a reorganization was not possible, the alternative course of action was seen as a liquidation through either a receivership or under the *BIA* regime. This is precisely the outcome that was sought in *Century Services* (see para. 14).

[42] That said, the *CCAA* is fundamentally insolvency legislation, and thus it also "has the simultaneous objectives of maximizing creditor recovery, preservation of going-concern value where possible, preservation of jobs and communities affected by the firm's financial distress . . . and enhancement of the credit system generally" (Sarra, *Rescue! The Companies' Creditors Arrangement Act*, at p. 14; see also *Ernst & Young Inc. v. Essar Global Fund Ltd.*, 2017 ONCA 1014, 139 O.R. (3d) 1 ("*Essar*"), at para. 103). In pursuit of those objectives, *CCAA* proceedings have evolved to permit outcomes that do not result in the emergence of the pre-filing debtor company in a restructured state, but rather involve some form of liquidation of the debtor's assets under the auspices of the Act itself (Sarra, "The Oscillating Pendulum: Canada's Sesquicentennial and Finding the Equilibrium for Insolvency Law", at pp. 19-21). Such scenarios are referred to as "liquidating CCAAs", and they are now commonplace in the *CCAA* landscape (see *Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc.*, 2019 ONCA 508, 435 D.L.R. (4th) 416, at para. 70).

[41] Parmi ces objectifs, la *LACC* priorise en général le fait d'« éviter les pertes sociales et économiques résultant de la liquidation d'une compagnie insolvable » (*Century Services*, par. 70). C'est pourquoi les affaires types qui relèvent de cette loi ont historiquement facilité la restructuration de l'entreprise débitrice qui n'a pas encore déposé de proposition en la maintenant dans un état opérationnel, c'est-à-dire en permettant qu'elle poursuive ses activités. Lorsqu'une telle restructuration n'était pas possible, on considérait qu'il fallait alors procéder à la liquidation par voie de mise sous séquestre ou sous le régime de la *LFI*. C'est précisément le résultat qui était recherché dans l'affaire *Century Services* (voir par. 14).

[42] Cela dit, la *LACC* est fondamentalement une loi sur l'insolvabilité, et à ce titre, elle a aussi [TRADUCTION] « comme objectifs simultanés de maximiser le recouvrement au profit des créanciers, de préserver la valeur d'exploitation dans la mesure du possible, de protéger les emplois et les collectivités touchées par les difficultés financières de l'entreprise [. . .] et d'améliorer le système de crédit de manière générale » (Sarra, *Rescue! The Companies' Creditors Arrangement Act*, p. 14; voir aussi *Ernst & Young Inc. c. Essar Global Fund Ltd.*, 2017 ONCA 1014, 139 O.R. (3d) 1 (« *Essar* »), par. 103). Afin d'atteindre ces objectifs, les procédures intentées sous le régime de la *LACC* ont évolué de telle sorte qu'elles permettent des solutions qui évitent l'émergence, sous une forme restructurée, de la société débitrice qui existait avant le début des procédures, mais qui impliquent plutôt une certaine forme de liquidation des actifs du débiteur sous le régime même de la Loi (Sarra, « The Oscillating Pendulum : Canada's Sesquicentennial and Finding the Equilibium for Insolvency Law », p. 19-21). Ces cas, qualifiés de [TRADUCTION] « procédures de liquidation sous le régime de la *LACC* », sont maintenant courants dans le contexte de la *LACC* (voir *Third Eye Capital Corporation c. Ressources Dianor Inc./Dianor Resources Inc.*, 2019 ONCA 508, 435 D.L.R. (4th) 416, par. 70).

[43] Liquidating CCAAs take diverse forms and may involve, among other things: the sale of the debtor company as a going concern; an "en bloc" sale of assets that are capable of being operationalized by a buyer; a partial liquidation or downsizing of business operations; or a piecemeal sale of assets (B. Kaplan, "Liquidating CCAAs: Discretion Gone Awry?", in J. P. Sarra, ed., *Annual Review of Insolvency Law* (2008), 79, at pp. 87-89). The ultimate commercial outcomes facilitated by liquidating CCAAs are similarly diverse. Some may result in the continued operation of the business of the debtor under a different going concern entity (e.g., the liquidations in *Indalex* and *Re Canadian Red Cross Society* (1998), 5 C.B.R. (4th) 299 (Ont. C.J. (Gen. Div.)), while others may result in a sale of assets and inventory with no such entity emerging (e.g., the proceedings in *Re Target Canada Co.*, 2015 ONSC 303, 22 C.B.R. (6th) 323, at paras. 7 and 31). Others still, like the case at bar, may involve a going concern sale of most of the assets of the debtor, leaving residual assets to be dealt with by the debtor and its stakeholders.

[43] Les procédures de liquidation sous le régime de la *LACC* revêtent différentes formes et peuvent, entre autres, inclure la vente de la société débitrice à titre d'entreprise en activité; la vente « en bloc » des éléments d'actif susceptibles d'être exploités par un acquéreur; une liquidation partielle de l'entreprise ou une réduction de ses activités; ou encore une vente de ses actifs élément par élément (B. Kaplan, « Liquidating CCAAs : Discretion Gone Awry? » dans J. P. Sarra, dir., *Annual Review of Insolvency Law* (2008), 79, p. 87-89). Les résultats commerciaux ultimement obtenus à l'issue des procédures de liquidation introduites sous le régime de la *LACC* sont eux aussi variés. Certaines procédures peuvent avoir pour résultat la continuité des activités de la débitrice sous la forme d'une autre entité viable (p. ex., les sociétés liquidées dans *Indalex* et *Re Canadian Red Cross Society* (1998), 5 C.B.R. (4th) 299 (C.J. Ont., Div. gén.)), alors que d'autres peuvent simplement aboutir à la vente des actifs et de l'inventaire sans donner naissance à une nouvelle entité (p. ex., la procédure en cause dans *Re Target Canada Co.*, 2015 ONSC 303, 22 C.B.R. (6th) 323, par. 7 et 31). D'autres encore, comme dans le dossier qui nous occupe, peuvent donner lieu à la vente de la plupart des actifs de la débitrice en vue de la poursuite de son activité, laissant à la débitrice et aux parties intéressées le soin de s'occuper des actifs résiduaires.

[44] *CCAA* courts first began approving these forms of liquidation pursuant to the broad discretion conferred by the Act. The emergence of this practice was not without criticism, largely on the basis that it appeared to be inconsistent with the *CCAA* being a "restructuring statute" (see, e.g., *Uti Energy Corp. v. Fracmaster Ltd.*, 1999 ABCA 178, 244 A.R. 93, at paras. 15-16, aff'g 1999 ABQB 379, 11 C.B.R. (4th) 204, at paras. 40-43; A. Nocilla, "The History of the Companies' Creditors Arrangement Act and the Future of Re-Structuring Law in Canada" (2014), 56 *Can. Bus. L.J.* 73, at pp. 88-92).

[44] Les tribunaux chargés de l'application de la *LACC* ont d'abord commencé à approuver ces formes de liquidation en exerçant le vaste pouvoir discrétionnaire que leur confère la Loi. L'émergence de cette pratique a fait l'objet de critiques, essentiellement parce qu'elle semblait incompatible avec l'objectif de « restructuration » de la *LACC* (voir, p. ex., *Uti Energy Corp. c. Fracmaster Ltd.*, 1999 ABCA 178, 244 A.R. 93, par. 15-16, conf. 1999 ABQB 379, 11 C.B.R. (4th) 204, par. 40-43; A. Nocilla, « The History of the Companies' Creditors Arrangement Act and the Future of Re-Structuring Law in Canada » (2014), 56 *Rev. can. dr. comm.* 73, p. 88-92).

[45] However, since s. 36 of the *CCAA* came into force in 2009, courts have been using it to effect liquidating CCAAs. Section 36 empowers courts to authorize the sale or disposition of a debtor

[45] Toutefois, depuis que l'art. 36 de la *LACC* est entré en vigueur en 2009, les tribunaux l'utilisent pour consentir à une liquidation sous le régime de la *LACC*. L'article 36 confère aux tribunaux le pouvoir

company's assets outside the ordinary course of business.[3] Significantly, when the Standing Senate Committee on Banking, Trade and Commerce recommended the adoption of s. 36, it observed that liquidation is not necessarily inconsistent with the remedial objectives of the *CCAA*, and that it may be a means to "raise capital [to facilitate a restructuring], eliminate further loss for creditors or focus on the solvent operations of the business" (p. 147). Other commentators have observed that liquidation can be a "vehicle to restructure a business" by allowing the business to survive, albeit under a different corporate form or ownership (Sarra, *Rescue! The Companies' Creditors Arrangement Act*, at p. 169; see also K. P. McElcheran, *Commercial Insolvency in Canada* (4th ed. 2019), at p. 311). Indeed, in *Indalex*, the company sold its assets under the *CCAA* in order to preserve the jobs of its employees, despite being unable to survive as their employer (see para. 51).

[46] Ultimately, the relative weight that the different objectives of the *CCAA* take on in a particular case may vary based on the factual circumstances, the stage of the proceedings, or the proposed solutions that are presented to the court for approval. Here, a parallel may be drawn with the *BIA* context. In *Orphan Well Association v. Grant Thornton Ltd.*, 2019 SCC 5, [2019] 1 S.C.R. 150, at para. 67, this Court explained that, as a general matter, the *BIA* serves two purposes: (1) the bankrupt's financial rehabilitation and (2) the equitable distribution of the bankrupt's assets among creditors. However,

[3] We note that while s. 36 now codifies the jurisdiction of a supervising court to grant a sale and vesting order, and enumerates factors to guide the court's discretion to grant such an order, it is silent on when courts ought to approve a liquidation under the *CCAA* as opposed to requiring the parties to proceed to liquidation under a receivership or the *BIA* regime (see Sarra, *Rescue! The Companies' Creditors Arrangement Act*, at pp. 167-68; A. Nocilla, "Asset Sales Under the Companies' Creditors Arrangement Act and the Failure of Section 36" (2012) 52 *Can. Bus. L.J.* 226, at pp. 243-44 and 247). This issue remains an open question and was not put to this Court in either *Indalex* or these appeals.

d'autoriser la vente ou la disposition des actifs d'une compagnie débitrice hors du cours ordinaire de ses affaires[3]. Fait important, lorsque le Comité sénatorial permanent des banques et du commerce a recommandé l'adoption de l'art. 36, il a fait observer que la liquidation n'est pas nécessairement incompatible avec les objectifs réparateurs de la *LACC* et qu'il pourrait s'agir d'un moyen « soit pour obtenir des capitaux [et faciliter la restructuration] ou éviter des pertes plus graves aux créanciers, soit pour se concentrer sur ses activités solvables » (p. 163). D'autres auteurs ont observé que la liquidation peut [TRADUCTION] « être un moyen de restructurer une entreprise » en lui permettant de survivre, quoique sous une forme corporative différente ou sous la gouverne de propriétaires différents (Sarra, *Rescue! The Companies' Creditors Arrangement Act*, p. 169; voir aussi K. P. McElcheran, *Commercial Insolvency in Canada* (4e éd. 2019), p. 311). D'ailleurs, dans l'arrêt *Indalex*, la compagnie a vendu ses actifs sous le régime de la *LACC* afin de protéger les emplois de son personnel, même si elle ne pouvait demeurer leur employeur (voir par. 51).

[46] En définitive, le poids relatif attribué aux différents objectifs de la *LACC* dans une affaire donnée peut varier en fonction des circonstances factuelles, de l'étape des procédures ou des solutions qui sont présentées à la cour pour approbation. En l'espèce, il est possible d'établir un parallèle avec le contexte de la *LFI*. Dans l'arrêt *Orphan Well Association c. Grant Thornton Ltd.*, 2019 CSC 5, [2019] 1 R.C.S. 150, par. 67, notre Cour a expliqué que, de façon générale, la *LFI* vise deux objectifs : (1) la réhabilitation financière du failli, et (2) le partage équitable des actifs du failli entre les créanciers. Or, dans les cas où

[3] Mentionnons que, bien que l'art. 36 codifie désormais le pouvoir du juge surveillant de rendre une ordonnance de vente et de dévolution, et qu'il énonce les facteurs devant orienter l'exercice de son pouvoir discrétionnaire d'accorder une telle ordonnance, il est muet quant aux circonstances dans lesquelles les tribunaux doivent approuver une liquidation sous le régime de la *LACC* plutôt que d'exiger des parties qu'elles procèdent à la liquidation par voie de mise sous séquestre ou sous le régime de la *LFI* (voir Sarra, *Rescue! The Companies' Creditors Arrangement Act*, p. 167-168; A. Nocilla, « Asset Sales Under the Companies' Creditors Arrangement Act and the Failure of Section 36 » (2012) 52 *Rev. can. dr. comm.* 226, p. 243-244 et 247). Cette question demeure ouverte et n'a pas été soumise à la Cour dans *Indalex* non plus que dans les présents pourvois.

in circumstances where a debtor corporation will never emerge from bankruptcy, only the latter purpose is relevant (see para. 67). Similarly, under the *CCAA*, when a reorganization of the pre-filing debtor company is not a possibility, a liquidation that preserves going-concern value and the ongoing business operations of the pre-filing company may become the predominant remedial focus. Moreover, where a reorganization or liquidation is complete and the court is dealing with residual assets, the objective of maximizing creditor recovery from those assets may take centre stage. As we will explain, the architecture of the *CCAA* leaves the case-specific assessment and balancing of these remedial objectives to the supervising judge.

(2) The Role of a Supervising Judge in *CCAA* Proceedings

[47] One of the principal means through which the *CCAA* achieves its objectives is by carving out a unique supervisory role for judges (see Sarra, *Rescue! The Companies' Creditors Arrangement Act*, at pp. 18-19). From beginning to end, each *CCAA* proceeding is overseen by a single supervising judge. The supervising judge acquires extensive knowledge and insight into the stakeholder dynamics and the business realities of the proceedings from their ongoing dealings with the parties.

[48] The *CCAA* capitalizes on this positional advantage by supplying supervising judges with broad discretion to make a variety of orders that respond to the circumstances of each case and "meet contemporary business and social needs" (*Century Services*, at para. 58) in "real-time" (para. 58, citing R. B. Jones, "The Evolution of Canadian Restructuring: Challenges for the Rule of Law", in J. P. Sarra, ed., *Annual Review of Insolvency Law 2005* (2006), 481, at p. 484). The anchor of this discretionary authority is s. 11, which empowers a judge "to make any order that [the judge] considers appropriate in the circumstances". This section has been described as "the engine" driving the statutory scheme (*Stelco*

la société débitrice ne s'extirpera jamais de la faillite, seul le dernier objectif est pertinent (voir par. 67). Dans la même veine, sous le régime de la *LACC*, lorsque la restructuration d'une société débitrice qui n'a pas déposé de proposition est impossible, une liquidation visant à protéger sa valeur d'exploitation et à maintenir ses activités courantes peut devenir l'objectif réparateur principal. En outre, lorsque la restructuration ou la liquidation est terminée et que le tribunal doit décider du sort des actifs résiduels, l'objectif de maximiser le recouvrement des créanciers à partir de ces actifs peut passer au premier plan. Comme nous l'expliquerons, la structure de la *LACC* laisse au juge surveillant le soin de procéder à un examen et à une mise en balance au cas par cas de ces objectifs réparateurs.

(2) Le rôle du juge surveillant dans les procédures intentées sous le régime de la *LACC*

[47] Un des principaux moyens par lesquels la *LACC* atteint ses objectifs réside dans le rôle particulier de surveillance qu'elle réserve aux juges (voir Sarra, *Rescue! The Companies' Creditors Arrangement Act*, p. 18-19). Chaque procédure fondée sur la *LACC* est supervisée du début à la fin par un seul juge surveillant. En raison de ses rapports continus avec les parties, ce dernier acquiert une connaissance approfondie de la dynamique entre les intéressés et des réalités commerciales entourant la procédure.

[48] La *LACC* mise sur la position avantageuse qu'occupe le juge surveillant en lui accordant le vaste pouvoir discrétionnaire de rendre toute une gamme d'ordonnances susceptibles de répondre aux circonstances de chaque cas et de « [s'adapter] aux besoins commerciaux et sociaux contemporains » (*Century Services*, par. 58) en « temps réel » (par. 58, citant R. B. Jones, « The Evolution of Canadian Restructuring : Challenges for the Rule of Law », dans J. P. Sarra, dir., *Annual Review of Insolvency Law 2005* (2006), 481, p. 484). Le point d'ancrage de ce pouvoir discrétionnaire est l'art. 11, qui confère au juge le pouvoir de « rendre toute ordonnance qu'il estime indiquée ». Cette disposition a été décrite

Inc. (Re) (2005), 253 D.L.R. (4th) 109 (Ont. C.A.), at para. 36).

[49] The discretionary authority conferred by the *CCAA*, while broad in nature, is not boundless. This authority must be exercised in furtherance of the remedial objectives of the *CCAA*, which we have explained above (see *Century Services*, at para. 59). Additionally, the court must keep in mind three "baseline considerations" (at para. 70), which the applicant bears the burden of demonstrating: (1) that the order sought is appropriate in the circumstances, and (2) that the applicant has been acting in good faith and (3) with due diligence (para. 69).

[50] The first two considerations of appropriateness and good faith are widely understood in the *CCAA* context. Appropriateness "is assessed by inquiring whether the order sought advances the policy objectives underlying the *CCAA*" (para. 70). Further, the well-established requirement that parties must act in good faith in insolvency proceedings has recently been made express in s. 18.6 of the *CCAA*, which provides:

Good faith

18.6 (1) Any interested person in any proceedings under this Act shall act in good faith with respect to those proceedings.

Good faith — powers of court

(2) If the court is satisfied that an interested person fails to act in good faith, on application by an interested person, the court may make any order that it considers appropriate in the circumstances.

(See also *BIA*, s. 4.2; *Budget Implementation Act, 2019, No. 1*, S.C. 2019, c. 29, ss. 133 and 140.)

[51] The third consideration of due diligence requires some elaboration. Consistent with the *CCAA* regime generally, the due diligence consideration discourages parties from sitting on their rights and ensures that creditors do not strategically manoeuver or

comme étant le « moteur » du régime législatif (*Stelco Inc. (Re)* (2005), 253 D.L.R. (4th) 109 (C.A. Ont.), par. 36).

[49] Quoique vaste, le pouvoir discrétionnaire conféré par la *LACC* n'est pas sans limites. Son exercice doit tendre à la réalisation des objectifs réparateurs de la *LACC*, que nous avons expliqués ci-dessus (voir *Century Services*, par. 59). En outre, la cour doit garder à l'esprit les trois « considérations de base » (par. 70) qu'il incombe au demandeur de démontrer : (1) que l'ordonnance demandée est indiquée, et (2) qu'il a agi de bonne foi et (3) avec la diligence voulue (par. 69).

[50] Les deux premières considérations, l'opportunité et la bonne foi, sont largement connues dans le contexte de la *LACC*. Le tribunal « évalue l'opportunité de l'ordonnance demandée en déterminant si elle favorisera la réalisation des objectifs de politique générale qui sous-tendent la Loi » (par. 70). Par ailleurs, l'exigence bien établie selon laquelle les parties doivent agir de bonne foi dans les procédures d'insolvabilité est depuis peu mentionnée de façon expresse à l'art. 18.6 de la *LACC*, qui dispose :

Bonne foi

18.6 (1) Tout intéressé est tenu d'agir de bonne foi dans le cadre d'une procédure intentée au titre de la présente loi.

Bonne foi — pouvoirs du tribunal

(2) S'il est convaincu que l'intéressé n'agit pas de bonne foi, le tribunal peut, à la demande de tout intéressé, rendre toute ordonnance qu'il estime indiquée.

(Voir aussi *LFI*, art. 4.2; *Loi nº 1 d'exécution du budget de 2019*, L.C. 2019, c. 29, art. 133 et 140.)

[51] La troisième considération, celle de la diligence, requiert qu'on s'y attarde. Conformément au régime de la *LACC* en général, la considération de diligence décourage les parties de rester sur leurs positions et fait en sorte que les créanciers n'usent

position themselves to gain an advantage (*Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. C.J. (Gen. Div.)), at p. 31). The procedures set out in the *CCAA* rely on negotiations and compromise between the debtor and its stakeholders, as overseen by the supervising judge and the monitor. This necessarily requires that, to the extent possible, those involved in the proceedings be on equal footing and have a clear understanding of their respective rights (see McElcheran, at p. 262). A party's failure to participate in *CCAA* proceedings in a diligent and timely fashion can undermine these procedures and, more generally, the effective functioning of the *CCAA* regime (see, e.g., *North American Tungsten Corp. v. Global Tungsten and Powders Corp.*, 2015 BCCA 390, 377 B.C.A.C. 6, at paras. 21-23; *Re BA Energy Inc.*, 2010 ABQB 507, 70 C.B.R. (5th) 24; *HSBC Bank Canada v. Bear Mountain Master Partnership*, 2010 BCSC 1563, 72 C.B.R. (5th) 276, at para. 11; *Caterpillar Financial Services Ltd. v. 360networks Corp.*, 2007 BCCA 14, 279 D.L.R. (4th) 701, at paras. 51-52, in which the courts seized on a party's failure to act diligently).

[52] We pause to note that supervising judges are assisted in their oversight role by a court appointed monitor whose qualifications and duties are set out in the *CCAA* (see ss. 11.7, 11.8 and 23 to 25). The monitor is an independent and impartial expert, acting as "the eyes and the ears of the court" throughout the proceedings (*Essar*, at para. 109). The core of the monitor's role includes providing an advisory opinion to the court as to the fairness of any proposed plan of arrangement and on orders sought by parties, including the sale of assets and requests for interim financing (see *CCAA*, s. 23(1)(d) and (i); Sarra, *Rescue! The Companies' Creditors Arrangement Act*, at pp. 566 and 569).

pas stratégiquement de ruse ou ne se placent pas eux-mêmes dans une position pour obtenir un avantage (*Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (C.J. Ont. (Div. gén.)), p. 31). La procédure prévue par la *LACC* se fonde sur les négociations et les transactions entre le débiteur et les intéressés, le tout étant supervisé par le juge surveillant et le contrôleur. Il faut donc nécessairement que, dans la mesure du possible, ceux qui participent au processus soient sur un pied d'égalité et aient une compréhension claire de leurs droits respectifs (voir McElcheran, p. 262). La partie qui, dans le cadre d'une procédure fondée sur la *LACC*, n'agit pas avec diligence et en temps utile risque de compromettre le processus et, de façon plus générale, de nuire à l'efficacité du régime de la Loi (voir, p. ex., *North American Tungsten Corp. c. Global Tungsten and Powders Corp.*, 2015 BCCA 390, 377 B.C.A.C. 6 par. 21-23; *Re BA Energy Inc.*, 2010 ABQB 507, 70 C.B.R. (5th) 24; *HSBC Bank Canada c. Bear Mountain Master Partnership*, 2010 BCSC 1563, 72 C.B.R. (5th) 276 par. 11; *Caterpillar Financial Services Ltd. c. 360networks Corp.*, 2007 BCCA 14, 279 D.L.R. (4th) 701, par. 51-52, où les tribunaux se sont penchés sur le manque de diligence d'une partie).

[52] Nous soulignons que les juges surveillants s'acquittent de leur rôle de supervision avec l'aide d'un contrôleur qui est nommé par le tribunal et dont les compétences et les attributions sont énoncées dans la *LACC* (voir art. 11.7, 11.8 et 23 à 25). Le contrôleur est un expert indépendant et impartial qui agit comme [TRADUCTION] « les yeux et les oreilles du tribunal » tout au long de la procédure (*Essar*, par. 109). Il a essentiellement pour rôle de donner au tribunal des avis consultatifs sur le caractère équitable de tout plan d'arrangement proposé et sur les ordonnances demandées par les parties, y compris celles portant sur la vente d'actifs et le financement provisoire (voir *LACC*, al. 23(1)d) et i); Sarra, *Rescue! The Companies' Creditors Arrangement Act*, p. 566 et 569).

(3) Appellate Review of Exercises of Discretion by a Supervising Judge

[53] A high degree of deference is owed to discretionary decisions made by judges supervising *CCAA* proceedings. As such, appellate intervention will only be justified if the supervising judge erred in principle or exercised their discretion unreasonably (see *Grant Forest Products Inc. v. Toronto-Dominion Bank*, 2015 ONCA 570, 387 D.L.R. (4th) 426, at para. 98; *Bridging Finance Inc. v. Béton Brunet 2001 inc.*, 2017 QCCA 138, 44 C.B.R. (6th) 175, at para. 23). Appellate courts must be careful not to substitute their own discretion in place of the supervising judge's (*New Skeena Forest Products Inc., Re*, 2005 BCCA 192, 39 B.C.L.R. (4th) 338, at para. 20).

[54] This deferential standard of review accounts for the fact that supervising judges are steeped in the intricacies of the *CCAA* proceedings they oversee. In this respect, the comments of Tysoe J.A. in *Canadian Metropolitan Properties Corp. v. Libin Holdings Ltd.*, 2009 BCCA 40, 308 D.L.R. (4th) 339 ("*Re Edgewater Casino Inc.*), at para. 20, are apt:

> . . . one of the principal functions of the judge supervising the *CCAA* proceeding is to attempt to balance the interests of the various stakeholders during the reorganization process, and it will often be inappropriate to consider an exercise of discretion by the supervising judge in isolation of other exercises of discretion by the judge in endeavoring to balance the various interests. . . . *CCAA* proceedings are dynamic in nature and the supervising judge has intimate knowledge of the reorganization process. The nature of the proceedings often requires the supervising judge to make quick decisions in complicated circumstances.

[55] With the foregoing in mind, we turn to the issues on appeal.

(3) Le contrôle en appel de l'exercice du pouvoir discrétionnaire du juge surveillant

[53] Les décisions discrétionnaires des juges chargés de la supervision des procédures intentées sous le régime de la *LACC* commandent un degré élevé de déférence. Ainsi, les cours d'appel ne seront justifiées d'intervenir que si le juge surveillant a commis une erreur de principe ou exercé son pouvoir discrétionnaire de manière déraisonnable (voir *Grant Forest Products Inc. c. Toronto-Dominion Bank*, 2015 ONCA 570, 387 D.L.R. (4th) 426, par. 98; *Bridging Finance Inc. c. Béton Brunet 2001 inc.*, 2017 QCCA 138, 44 C.B.R. (6th) 175, par. 23). Elles doivent prendre garde de ne pas substituer leur propre pouvoir discrétionnaire à celui du juge surveillant (*New Skeena Forest Products Inc.*, *Re*, 2005 BCCA 192, 39 B.C.L.R. (4th) 338, par. 20).

[54] Cette norme déférente de contrôle tient compte du fait que le juge surveillant possède une connaissance intime des procédures intentées sous le régime de la *LACC* dont il assure la supervision. À cet égard, les observations formulées par le juge Tysoe dans *Canadian Metropolitan Properties Corp. c. Libin Holdings Ltd.*, 2009 BCCA 40, 308 D.L.R. (4th) 339 (« *Re Edgewater Casino Inc.* »), par. 20, sont pertinentes :

> [TRADUCTION] . . . une des fonctions principales du juge chargé de la supervision de la procédure fondée sur la *LACC* est d'essayer d'établir un équilibre entre les intérêts des différents intéressés durant le processus de restructuration, et il sera bien souvent inopportun d'examiner une des décisions qu'il aura rendues à cet égard isolément des autres. [. . .] Les procédures intentées sous le régime de la *LACC* sont de nature dynamique et le juge surveillant a une connaissance intime du processus de restructuration. La nature du processus l'oblige souvent à prendre des décisions rapides dans des situations complexes.

[55] En gardant ce qui précède à l'esprit, nous passons maintenant aux questions soulevées par le présent pourvoi.

B. *Callidus Should Not Be Permitted to Vote on Its New Plan*

[56] A creditor can generally vote on a plan of arrangement or compromise that affects its rights, subject to any specific provisions of the *CCAA* that may restrict its voting rights (e.g., s. 22(3)), or a proper exercise of discretion by the supervising judge to constrain or bar the creditor's right to vote. We conclude that one such constraint arises from s. 11 of the *CCAA*, which provides supervising judges with the discretion to bar a creditor from voting where the creditor is acting for an improper purpose. Supervising judges are best-placed to determine whether this discretion should be exercised in a particular case. In our view, the supervising judge here made no error in exercising his discretion to bar Callidus from voting on the New Plan.

(1) Parameters of Creditors' Right to Vote on Plans of Arrangement

[57] Creditor approval of any plan of arrangement or compromise is a key feature of the *CCAA*, as is the supervising judge's oversight of that process. Where a plan is proposed, an application may be made to the supervising judge to order a creditors' meeting to vote on the proposed plan (*CCAA*, ss. 4 and 5). The supervising judge has the discretion to determine whether to order the meeting. For the purposes of voting at a creditors' meeting, the debtor company may divide the creditors into classes, subject to court approval (*CCAA*, s. 22(1)). Creditors may be included in the same class if "their interests or rights are sufficiently similar to give them a commonality of interest" (*CCAA*, s. 22(2); see also L. W. Houlden, G. B. Morawetz and J. P. Sarra, *Bankruptcy and Insolvency Law of Canada* (4th ed. (loose-leaf)), vol. 4, at §149). If the requisite "double majority" in each class of creditors — again, a majority in *number* of class members, which also represents two-thirds in *value* of the class members' claims — vote in favour of the plan, the supervising judge may sanction the plan (*Metcalfe & Mansfield Alternative Investments II Corp. (Re)*, 2008 ONCA 587, 296 D.L.R. (4th) 135, at para. 34; see *CCAA*, s. 6). The supervising judge will conduct what is

B. *Callidus ne devrait pas être autorisée à voter sur son nouveau plan*

[56] En général, un créancier peut voter sur un plan d'arrangement ou une transaction qui a une incidence sur ses droits, sous réserve des dispositions de la *LACC* qui peuvent limiter son droit de voter (p. ex., par. 22(3)), ou de l'exercice justifié par le juge surveillant de son pouvoir discrétionnaire de limiter ou de supprimer ce droit. Nous concluons qu'une telle limite découle de l'art. 11 de la *LACC*, qui confère au juge surveillant le pouvoir discrétionnaire d'empêcher le créancier de voter lorsqu'il agit dans un but illégitime. Le juge surveillant est mieux placé que quiconque pour déterminer s'il doit exercer ce pouvoir dans un cas donné. À notre avis, le juge surveillant n'a, en l'espèce, commis aucune erreur en exerçant son pouvoir discrétionnaire pour empêcher Callidus de voter sur le nouveau plan.

(1) Les paramètres du droit d'un créancier de voter sur un plan d'arrangement

[57] L'approbation par les créanciers d'un plan d'arrangement ou d'une transaction est l'une des principales caractéristiques de la *LACC*, tout comme la supervision du processus assurée par le juge surveillant. Lorsqu'un plan est proposé, le juge surveillant peut, sur demande, ordonner que soit convoquée une assemblée des créanciers pour que ceux-ci puissent voter sur le plan proposé (*LACC*, art. 4 et 5). Le juge surveillant a le pouvoir discrétionnaire de décider ou non d'ordonner qu'une assemblée soit convoquée. Pour les besoins du vote à l'assemblée des créanciers, la compagnie débitrice peut établir des catégories de créanciers, sous réserve de l'approbation du tribunal (*LACC,* par. 22(1)). Peuvent faire partie de la même catégorie les créanciers « ayant des droits ou intérêts à ce point semblables [. . .] qu'on peut en conclure qu'ils ont un intérêt commun » (*LACC*, par. 22(2); voir aussi L. W. Houlden, G. B. Morawetz, et J. P. Sarra, *Bankruptcy and Insolvency Law of Canada* (4e éd. (feuilles mobiles)), vol. 4, §149). Si la « double majorité » requise dans chaque catégorie de créanciers — rappelons qu'il s'agit de la majorité en *nombre* d'une catégorie, qui représente aussi les deux-tiers en *valeur* des réclamations de cette catégorie — vote

commonly referred to as a "fairness hearing" to determine, among other things, whether the plan is fair and reasonable (Wood, at pp. 490-92; see also Sarra, *Rescue! The Companies' Creditors Arrangement Act*, at p. 529; Houlden, Morawetz and Sarra at §45). Once sanctioned by the supervising judge, the plan is binding on each class of creditors that participated in the vote (*CCAA*, s. 6(1)).

[58] Creditors with a provable claim against the debtor whose interests are affected by a proposed plan are usually entitled to vote on plans of arrangement (Wood, at p. 470). Indeed, there is no express provision in the *CCAA* barring such a creditor from voting on a plan of arrangement, including a plan it sponsors.

[59] Notwithstanding the foregoing, the appellants submit that a purposive interpretation of s. 22(3) of the *CCAA* reveals that, as a general matter, a creditor should be precluded from voting on its own plan. Section 22(3) provides:

Related creditors

(3) A creditor who is related to the company may vote against, but not for, a compromise or arrangement relating to the company.

The appellants note that s. 22(3) was meant to harmonize the *CCAA* scheme with s. 54(3) of the *BIA*, which provides that "[a] creditor who is related to the debtor may vote against but not for the acceptance of the proposal." The appellants point out that, under s. 50(1) of the *BIA*, only debtors can sponsor plans; as a result, the reference to "debtor" in s. 54(3) captures *all* plan sponsors. They submit that if s. 54(3) captures all plan sponsors, s. 22(3) of the *CCAA* must do the same. On this basis, the appellants ask us to extend the voting restriction in s. 22(3) to apply not only to creditors who are "related to the company", as the provision states, but to any

en faveur du plan, le juge surveillant peut homologuer celui-ci (*Metcalfe & Mansfield Alternative Investments II Corp. (Re)*, 2008 ONCA 587, 296 D.L.R. (4th) 135, par. 34; voir la *LACC*, art. 6). Le juge surveillant tiendra ce qu'on appelle communément une [TRADUCTION] « audience d'équité » pour décider, entre autres choses, si le plan est juste et raisonnable (Wood, p. 490-492; Sarra, *Rescue! The Companies' Creditors Arrangement Act*, p. 529; Houlden, Morawetz et Sarra, §45). Une fois homologué par le juge surveillant, le plan lie chaque catégorie de créanciers qui a participé au vote (*LACC*, par. 6(1)).

[58] Les créanciers qui ont une réclamation prouvable contre le débiteur et dont les intérêts sont touchés par un plan d'arrangement proposé ont habituellement le droit de voter sur un tel plan (Wood, p. 470). En fait, aucune disposition expresse de la *LACC* n'interdit à un créancier de voter sur un plan d'arrangement, y compris sur un plan dont il fait la promotion.

[59] Nonobstant ce qui précède, les appelantes soutiennent qu'une interprétation téléologique du par. 22(3) de la *LACC* révèle que, de façon générale, un créancier ne devrait pas pouvoir voter sur son propre plan. Le paragraphe 22(3) prévoit :

Créancier lié

(3) Le créancier lié à la compagnie peut voter contre, mais non pour, l'acceptation de la transaction ou de l'arrangement.

Les appelantes font remarquer que le par. 22(3) devait permettre d'harmoniser le régime de la *LACC* avec le par. 54(3) de la *LFI*, qui dispose que « [u]n créancier qui est lié au débiteur peut voter contre, mais non pour, l'acceptation de la proposition. » Elles soulignent que, en vertu du par. 50(1) de la *LFI*, seuls les débiteurs peuvent faire la promotion d'un plan; ainsi, le « débiteur » auquel renvoie le par. 54(3) s'entend de *tous* les promoteurs de plan. Elles soutiennent que, si le par. 54(3) vise tous les promoteurs de plan, le par. 22(3) de la *LACC* doit également les viser. Pour cette raison, les appelantes nous demandent d'étendre la restriction au droit de

creditor who sponsors a plan. They submit that this interpretation gives effect to the underlying intention of both provisions, which they say is to ensure that a creditor who has a conflict of interest cannot "dilute" or overtake the votes of other creditors.

[60] We would not accept this strained interpretation of s. 22(3). Section 22(3) makes no mention of conflicts of interest between creditors and plan sponsors generally. The wording of s. 22(3) only places voting restrictions on creditors who are "related to the [debtor] company". These words are "precise and unequivocal" and, as such, must "play a dominant role in the interpretive process" (*Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601, at para. 10). In our view, the appellants' analogy to the *BIA* is not sufficient to overcome the plain wording of this provision.

[61] While the appellants are correct that s. 22(3) was enacted to harmonize the treatment of related parties in the *CCAA* and *BIA*, its history demonstrates that it is not a general conflict of interest provision. Prior to the amendments incorporating s. 22(3) into the *CCAA*, the *CCAA* clearly allowed creditors to put forward a plan of arrangement (see Houlden, Morawetz and Sarra, at §33, *Red Cross*; *Re 1078385 Ontario Inc.* (2004), 206 O.A.C. 17). In contrast, under the *BIA*, only debtors could make proposals. Parliament is presumed to have been aware of this obvious difference between the two statutes (see *ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140, at para. 59; see also *Third Eye*, at para. 57). Despite this difference, Parliament imported, with necessary modification, the wording of the *BIA* related creditor provision into the *CCAA*. Going beyond this language entails accepting that Parliament failed to choose the right words to give effect to its intention, which we do not.

voter imposée par le par. 22(3) de manière à ce qu'elle s'applique non seulement aux créanciers « lié[s] à la compagnie », comme le prévoit la disposition, mais aussi à tous les créanciers qui font la promotion d'un plan. Elles soutiennent que cette interprétation donne effet à l'intention sous-jacente aux deux dispositions, intention qui, de dire les appelantes, est de faire en sorte qu'un créancier qui est en conflit d'intérêts ne puisse pas « diluer » ou supplanter le vote des autres créanciers.

[60] Nous n'acceptons pas cette interprétation forcée du par. 22(3). Il n'est nullement question dans cette disposition de conflit d'intérêts entre les créanciers et les promoteurs d'un plan en général. Les restrictions au droit de voter imposées par le par. 22(3) ne s'appliquent qu'aux créanciers qui sont « lié[s] à la compagnie [débitrice] ». Ce libellé est « précis et non équivoque », et il doit ainsi « joue[r] un rôle primordial dans le processus d'interprétation » (*Hypothèques Trustco Canada c. Canada*, 2005 CSC 54, [2005] 2 R.C.S. 601, par. 10). À notre avis, l'analogie que les appelantes font avec la *LFI* ne suffit pas à écarter le libellé clair de cette disposition.

[61] Bien que les appelantes aient raison de dire que l'adoption du par. 22(3) visait à harmoniser le traitement réservé aux parties liées par la *LACC* et la *LFI*, son historique montre qu'il ne s'agit pas d'une disposition générale relative aux conflits d'intérêts. Avant qu'elle soit modifiée et qu'on y incorpore le par. 22(3), la *LACC* permettait clairement aux créanciers de présenter un plan d'arrangement (voir Houlden, Morawetz et Sarra, §33, *Red Cross*; *Re 1078385 Ontario Inc.* (2004), 206 O.A.C. 17). À l'opposé, en vertu de la *LFI*, seuls les débiteurs pouvaient déposer une proposition. Il faut présumer que le législateur était au fait de cette différence évidente entre les deux lois (voir *ATCO Gas and Pipelines Ltd. c. Alberta (Energy and Utilities Board)*, 2006 CSC 4, [2006] 1 R.C.S. 140, par. 59; voir aussi *Third Eye*, par. 57). Le législateur a malgré tout importé dans la *LACC*, avec les adaptations nécessaires, le texte de la disposition de la *LFI* portant sur les créanciers liés. Aller au-delà de ce libellé suppose d'accepter que le législateur n'a pas choisi les bons mots pour donner effet à son intention, ce que nous ne ferons pas.

[62] Indeed, Parliament did not mindlessly reproduce s. 54(3) of the *BIA* in s. 22(3) of the *CCAA*. Rather, it made two modifications to the language of s. 54(3) to bring it into conformity with the language of the *CCAA*. First, it changed "proposal" (a defined term in the *BIA*) to "compromise or arrangement" (a term used throughout the *CCAA*). Second, it changed "debtor" to "company", recognizing that companies are the only kind of debtor that exists in the *CCAA* context.

[63] Our view is further supported by Industry Canada's explanation of the rationale for s. 22(3) as being to "reduce the ability of debtor companies to organize a restructuring plan that confers additional benefits to related parties" (Office of the Superintendent of Bankruptcy Canada, *Bill C-12: Clause by Clause Analysis* (online), cl. 71, s. 22 (emphasis added); see also Standing Senate Committee on Banking, Trade and Commerce, at p. 151).

[64] Finally, we note that the *CCAA* contains other mechanisms that attenuate the concern that a creditor with conflicting legal interests with respect to a plan it proposes may distort the creditors' vote. Although we reject the appellants' interpretation of s. 22(3), that section still bars creditors who are related to the debtor company from voting in favour of *any* plan. Additionally, creditors who do not share a sufficient commonality of interest may be forced to vote in separate classes (s. 22(1) and (2)), and, as we will explain, a supervising judge may bar a creditor from voting where the creditor is acting for an improper purpose.

(2) Discretion to Bar a Creditor From Voting in Furtherance of an Improper Purpose

[65] There is no dispute that the *CCAA* is silent on when a creditor who is otherwise entitled to vote on a plan can be barred from voting. However, *CCAA* supervising judges are often called upon "to sanction measures for which there is no explicit authority in the *CCAA*" (*Century Services*, at para. 61; see also para. 62). In *Century Services*, this Court endorsed

[62] En fait, le législateur n'a pas reproduit de façon irréfléchie, au par. 22(3) de la *LACC,* le texte du par. 54(3) de la *LFI*. Au contraire, il a apporté deux modifications au libellé du par. 54(3) pour l'adapter à celui employé dans la *LACC*. Premièrement, il a remplacé le terme « proposition » (défini dans la *LFI*) par les mots « transaction ou arrangement » (employés tout au long dans la *LACC*). Deuxièmement, il a remplacé « débiteur » par « compagnie », reconnaissant ainsi que les compagnies sont les seuls débiteurs qui existent dans le contexte de la *LACC*.

[63] Notre opinion est en outre appuyée par Industrie Canada, selon qui l'adoption du par. 22(3) se justifie par la volonté de « réduire la capacité des compagnies débitrices d'établir un plan de restructuration apportant des avantages supplémentaires à des personnes qui leur sont liées » (Bureau du surintendant des faillites Canada, *Projet de loi C-12 : analyse article par article* (en ligne), cl. 71, art. 22 (nous soulignons); voir aussi Comité sénatorial permanent des banques et du commerce, p. 166).

[64] Enfin, nous soulignons que la *LACC* prévoit d'autres mécanismes qui réduisent le risque qu'un créancier en situation de conflit d'intérêts par rapport au plan qu'il propose puisse biaiser le vote des créanciers. Bien que nous rejetions l'interprétation donnée par les appelantes au par. 22(3), ce paragraphe interdit tout de même aux créanciers liés à la compagnie débitrice de voter en faveur de *tout* plan. De plus, les créanciers qui n'ont pas suffisamment d'intérêts en commun pourraient être contraints de voter dans des catégories distinctes (par. 22(1) et (2)); et, comme nous l'expliquerons, le juge surveillant peut empêcher un créancier de voter si ce dernier agit dans un but illégitime.

(2) Le pouvoir discrétionnaire d'interdire à un créancier de voter dans un but illégitime

[65] Il est acquis aux débats que la *LACC* ne contient aucune disposition énonçant les circonstances dans lesquelles un créancier, autrement admissible à voter sur un plan, peut être empêché de le faire. Toutefois, les juges chargés d'appliquer la *LACC* sont souvent appelés à « sanctionner des mesures non expressément prévues par la *LACC* »

a "hierarchical" approach to determining whether jurisdiction exists to sanction a proposed measure: ". . . courts [must] rely first on an interpretation of the provisions of the *CCAA* text before turning to inherent or equitable jurisdiction to anchor measures taken in a *CCAA* proceeding" (para. 65). In most circumstances, a purposive and liberal interpretation of the provisions of the *CCAA* will be sufficient "to ground measures necessary to achieve its objectives" (para. 65).

[66] Applying this approach, we conclude that jurisdiction exists under s. 11 of the *CCAA* to bar a creditor from voting on a plan of arrangement or compromise where the creditor is acting for an improper purpose.

[67] Courts have long recognized that s. 11 of the *CCAA* signals legislative endorsement of the "broad reading of *CCAA* authority developed by the jurisprudence" (*Century Services*, at para. 68). Section 11 states:

General power of court

11 Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

On the plain wording of the provision, the jurisdiction granted by s. 11 is constrained only by restrictions set out in the *CCAA* itself, and the requirement that the order made be "appropriate in the circumstances".

[68] Where a party seeks an order relating to a matter that falls within the supervising judge's purview, and for which there is no *CCAA* provision conferring more specific jurisdiction, s. 11 necessarily is the

(*Century Services*, par. 61; voir aussi par. 62). Dans l'arrêt *Century Services*, notre Cour a souscrit à l'approche « hiérarchisée » qui vise à déterminer si le tribunal a compétence pour sanctionner une mesure proposée : « . . . les tribunaux procédèrent d'abord à une interprétation des dispositions de la *LACC* avant d'invoquer leur compétence inhérente ou leur compétence en equity pour justifier des mesures prises dans le cadre d'une procédure fondée sur la *LACC* » (par. 65). Dans la plupart des cas, une interprétation téléologique et large des dispositions de la *LACC* suffira à « justifier les mesures nécessaires à la réalisation de ses objectifs » (par. 65).

[66] Après avoir appliqué cette approche, nous concluons que l'art. 11 de la *LACC* confère au tribunal le pouvoir d'interdire à un créancier de voter sur un plan d'arrangement ou une transaction s'il agit dans un but illégitime.

[67] Les tribunaux reconnaissent depuis longtemps que le libellé de l'art. 11 de la *LACC* indique que le législateur a sanctionné « l'interprétation large du pouvoir conféré par la *LACC* qui a été élaborée par la jurisprudence » (*Century Services*, par. 68). L'article 11 est ainsi libellé :

Pouvoir général du tribunal

11 Malgré toute disposition de la *Loi sur la faillite et l'insolvabilité* ou de la *Loi sur les liquidations et les restructurations*, le tribunal peut, dans le cas de toute demande sous le régime de la présente loi à l'égard d'une compagnie débitrice, rendre, sur demande d'un intéressé, mais sous réserve des restrictions prévues par la présente loi et avec ou sans avis, toute ordonnance qu'il estime indiquée.

Selon le libellé clair de la disposition, le pouvoir conféré par l'art. 11 n'est limité que par les restrictions imposées par la *LACC* elle-même, ainsi que par l'exigence que l'ordonnance soit « indiquée » dans les circonstances.

[68] Lorsqu'une partie sollicite une ordonnance relativement à une question qui entre dans le champ de compétence du juge surveillant, mais pour laquelle aucune disposition de la *LACC* ne confère plus

provision of first resort in anchoring jurisdiction. As Blair J.A. put it in *Stelco*, s. 11 "for the most part supplants the need to resort to inherent jurisdiction" in the *CCAA* context (para. 36).

[69] Oversight of the plan negotiation, voting, and approval process falls squarely within the supervising judge's purview. As indicated, there are no specific provisions in the *CCAA* which govern when a creditor who is otherwise eligible to vote on a plan may nonetheless be barred from voting. Nor is there any provision in the *CCAA* which suggests that a creditor has an absolute right to vote on a plan that cannot be displaced by a proper exercise of judicial discretion. However, given that the *CCAA* regime contemplates creditor participation in decision-making as an integral facet of the workout regime, creditors should only be barred from voting where the circumstances demand such an outcome. In other words, it is necessarily a discretionary, circumstance-specific inquiry.

[70] Thus, it is apparent that s. 11 serves as the source of the supervising judge's jurisdiction to issue a discretionary order barring a creditor from voting on a plan of arrangement. The exercise of this discretion must further the remedial objectives of the *CCAA* and be guided by the baseline considerations of appropriateness, good faith, and due diligence. This means that, where a creditor is seeking to exercise its voting rights in a manner that frustrates, undermines, or runs counter to those objectives — that is, acting for an "improper purpose" — the supervising judge has the discretion to bar that creditor from voting.

[71] The discretion to bar a creditor from voting in furtherance of an improper purpose under the *CCAA* parallels the similar discretion that exists under the *BIA*, which was recognized in *Laserworks Computer Services Inc. (Bankruptcy), Re*, 1998 NSCA 42, 165 N.S.R. (2d) 296. In *Laserworks*, the Nova Scotia

précisément compétence, l'art. 11 est nécessairement la disposition à laquelle on peut recourir d'emblée pour fonder la compétence du tribunal. Comme l'a dit le juge Blair dans l'arrêt *Stelco*, l'art. 11 [TRADUCTION] « fait en sorte que la plupart du temps, il est inutile de recourir à la compétence inhérente » dans le contexte de la *LACC* (par. 36).

[69] La supervision des négociations entourant le plan, tout comme le vote et le processus d'approbation, relève nettement de la compétence du juge surveillant. Comme nous l'avons dit, aucune disposition de la *LACC* ne vise le cas où un créancier par ailleurs admissible à voter sur un plan peut néanmoins être empêché de le faire. Il n'existe non plus aucune disposition de la *LACC* selon laquelle le droit que possède un créancier de voter sur un plan est absolu et que ce droit ne peut pas être écarté par l'exercice légitime du pouvoir discrétionnaire du tribunal. Toutefois, étant donné le régime de la *LACC*, dont l'un des aspects essentiels tient à la participation du créancier au processus décisionnel, les créanciers ne devraient être empêchés de voter que si les circonstances l'exigent. Autrement dit, il faut nécessairement procéder à un examen discrétionnaire axé sur les circonstances propres à chaque situation.

[70] L'article 11 constitue donc manifestement la source de la compétence du juge surveillant pour rendre une ordonnance discrétionnaire empêchant un créancier de voter sur un plan d'arrangement. L'exercice du pouvoir discrétionnaire doit favoriser la réalisation des objets réparateurs de la *LACC* et être fondé sur les considérations de base que sont l'opportunité, la bonne foi et la diligence. Cela signifie que, lorsqu'un créancier cherche à exercer ses droits de vote de manière à contrecarrer, à miner ces objectifs ou à aller à l'encontre de ceux-ci — c'est-à-dire à agir dans un « but illégitime » — le juge surveillant a le pouvoir discrétionnaire d'empêcher le créancier de voter.

[71] Le pouvoir discrétionnaire d'empêcher un créancier de voter dans un but illégitime au sens de la *LACC* s'apparente au pouvoir discrétionnaire semblable qui existe en vertu de la *LFI*, lequel a été reconnu dans l'arrêt *Laserworks Computer Services Inc. (Bankruptcy), Re*, 1998 NSCA 42, 165 N.S.R.

Court of Appeal concluded that the discretion to bar a creditor from voting in this way stemmed from the court's power, inherent in the scheme of the *BIA*, to supervise "[e]ach step in the bankruptcy process" (at para. 41), as reflected in ss. 43(7), 108(3), and 187(9) of the Act. The court explained that s. 187(9) specifically grants the power to remedy a "substantial injustice", which arises "when the *BIA* is used for an improper purpose" (para. 54). The court held that "[a]n improper purpose is any purpose collateral to the purpose for which the bankruptcy and insolvency legislation was enacted by Parliament" (para. 54).

[72] While not determinative, the existence of this discretion under the *BIA* lends support to the existence of similar discretion under the *CCAA* for two reasons.

[73] First, this conclusion would be consistent with this Court's recognition that the *CCAA* "offers a more flexible mechanism with greater judicial discretion" than the *BIA* (*Century Services*, at para. 14 (emphasis added)).

[74] Second, this Court has recognized the benefits of harmonizing the two statutes to the extent possible. For example, in *Indalex*, the Court observed that "in order to avoid a race to liquidation under the *BIA*, courts will favour an interpretation of the *CCAA* that affords creditors analogous entitlements" to those received under the *BIA* (para. 51; see also *Century Services*, at para. 24; *Nortel Networks Corp., Re*, 2015 ONCA 681, 391 D.L.R. (4th) 283, at paras. 34-46). Thus, where the statutes are capable of bearing a harmonious interpretation, that interpretation ought to be preferred "to avoid the ills that can arise from [insolvency] 'statute-shopping'" (*Kitchener Frame Ltd.*, 2012 ONSC 234, 86 C.B.R. (5th) 274, at para. 78; see also para. 73). In our view, the articulation of "improper purpose" set out in *Laserworks* — that is, any purpose collateral to the purpose of insolvency legislation — is entirely harmonious with the nature and scope of judicial discretion afforded by the *CCAA*. Indeed, as we have explained, this

(2d) 296. Dans *Laserworks*, la Cour d'appel de la Nouvelle-Écosse a conclu que le pouvoir discrétionnaire d'empêcher un créancier de voter de cette façon découlait du pouvoir du tribunal, inhérent au régime établi par la *LFI*, de superviser [TRADUCTION] « [c]haque étape du processus de faillite » (par. 41), comme l'indiquent les par. 43(7), 108(3) et 187(9) de la Loi. La cour a expliqué que le par. 187(9) confère expressément le pouvoir de remédier à une « injustice grave », laquelle se produit « lorsque la *LFI* est utilisée dans un but illégitime » (par. 54). La cour a statué que « [l]e but illégitime est un but qui est accessoire à l'objet pour lequel la loi en matière de faillite et d'insolvabilité a été adoptée par le législateur » (par. 54).

[72] Bien qu'elle ne soit pas déterminante, l'existence de ce pouvoir discrétionnaire en vertu de la *LFI* étaye l'existence d'un pouvoir discrétionnaire semblable en vertu de la *LACC* pour deux raisons.

[73] D'abord, cette conclusion serait compatible avec le fait que la Cour a reconnu que la *LACC* « établit un mécanisme plus souple, dans lequel les tribunaux disposent d'un plus grand pouvoir discrétionnaire » que sous le régime de la *LFI* (*Century Services*, par. 14 (nous soulignons)).

[74] Ensuite, la Cour a reconnu les bienfaits de l'harmonisation, dans la mesure du possible, des deux lois. À titre d'exemple, dans l'arrêt *Indalex*, la Cour a souligné que « pour éviter de précipiter une liquidation sous le régime de la *LFI*, les tribunaux privilégieront une interprétation de la *LACC* qui confère [. . .] aux créanciers [des droits analogues] » à ceux dont ils jouissent en vertu de la *LFI* (par. 51; voir également *Century Services*, par. 24; *Nortel Networks Corp., Re*, 2015 ONCA 681, 391 D.L.R. (4th) 283, par. 34-46). Ainsi, lorsque les lois permettent une interprétation harmonieuse, il y a lieu de retenir cette interprétation [TRADUCTION] « afin d'écarter les embûches pouvant découler du choix des créanciers de "recourir à la loi la plus favorable" [en matière d'insolvabilité] » (*Kitchener Frame Ltd.*, 2012 ONSC 234, 86 C.B.R. (5th) 274, par. 78; voir aussi par. 73). À notre avis, la manière dont a été formulé le « but illégitime » dans l'arrêt *Laserworks* — c'est-à-dire un but accessoire à l'objet de la loi en

discretion is to be exercised in accordance with the *CCAA*'s objectives as an insolvency statute.

[75] We also observe that the recognition of this discretion under the *CCAA* advances the basic fairness that "permeates Canadian insolvency law and practice" (Sarra, "The Oscillating Pendulum: Canada's Sesquicentennial and Finding the Equilibrium for Insolvency Law", at p. 27; see also *Century Services*, at paras. 70 and 77). As Professor Sarra observes, fairness demands that supervising judges be in a position to recognize and meaningfully address circumstances in which parties are working against the goals of the statute:

> The Canadian insolvency regime is based on the assumption that creditors and the debtor share a common goal of maximizing recoveries. The substantive aspect of fairness in the insolvency regime is based on the assumption that all involved parties face real economic risks. Unfairness resides where only some face these risks, while others actually benefit from the situation . . . . If the *CCAA* is to be interpreted in a purposive way, the courts must be able to recognize when people have conflicting interests and are working actively against the goals of the statute. [Emphasis added.]

("The Oscillating Pendulum: Canada's Sesquicentennial and Finding the Equilibrium for Insolvency Law", at p. 30)

In this vein, the supervising judge's oversight of the *CCAA* voting regime must not only ensure strict compliance with the Act, but should further its goals as well. We are of the view that the policy objectives of the *CCAA* necessitate the recognition of the discretion to bar a creditor from voting where the creditor is acting for an improper purpose.

matière d'insolvabilité — s'harmonise parfaitement avec la nature et la portée du pouvoir discrétionnaire judiciaire que confère la *LACC*. En effet, comme nous l'avons expliqué, ce pouvoir discrétionnaire doit être exercé conformément aux objets de la *LACC* en tant que loi en matière d'insolvabilité.

[75] Nous soulignons également que la reconnaissance de l'existence de ce pouvoir discrétionnaire sous le régime de la *LACC* favorise l'équité fondamentale qui [TRADUCTION] « imprègne le droit et la pratique en matière d'insolvabilité au Canada » (Sarra, « The Oscillating Pendulum : Canada's Sesquicentennial and Finding the Equilibrium for Insolvency Law », p. 27; voir également *Century Services*, par. 70 et 77). Comme le fait observer la professeure Sarra, l'équité commande que les juges surveillants soient en mesure de reconnaître les situations où les parties empêchent la réalisation des objectifs de la loi et de prendre des mesures utiles à leur égard :

> [TRADUCTION] Le régime d'insolvabilité canadien repose sur la présomption que les créanciers et le débiteur ont pour objectif commun de maximiser les recouvrements. L'aspect substantiel de la justice dans le régime d'insolvabilité repose sur la présomption que toutes les parties concernées sont exposées à de réels risques économiques. L'injustice réside dans les situations où seules certaines personnes sont exposées aux risques, tandis que d'autres tirent en fait avantage de la situation. [. . .] Si l'on veut que la *LACC* reçoive une interprétation téléologique, les tribunaux doivent être en mesure de reconnaître les situations où les gens ont des intérêts opposés et s'emploient activement à contrecarrer les objectifs de la loi. [Nous soulignons.]

(« The Oscillating Pendulum : Canada's Sesquicentennial and Finding the Equilibrium for Insolvency Law », p. 30)

Dans le même ordre d'idées, la surveillance du régime de droit de vote prévu par la *LACC* qu'exerce le juge surveillant ne doit pas seulement assurer une application stricte de la Loi, mais doit aussi favoriser la réalisation de ses objectifs. Nous estimons que la réalisation des objectifs de politique de la *LACC* nécessite la reconnaissance du pouvoir discrétionnaire d'empêcher un créancier de voter s'il agit dans un but illégitime.

[76] Whether this discretion ought to be exercised in a particular case is a circumstance-specific inquiry that must balance the various objectives of the *CCAA*. As this case demonstrates, the supervising judge is best-positioned to undertake this inquiry.

(3) The Supervising Judge Did Not Err in Prohibiting Callidus From Voting

[77] In our view, the supervising judge's decision to bar Callidus from voting on the New Plan discloses no error justifying appellate intervention. As we have explained, discretionary decisions like this one must be approached from the appropriate posture of deference. It bears mentioning that, when he made this decision, the supervising judge was intimately familiar with Bluberi's *CCAA* proceedings. He had presided over them for over 2 years, received 15 reports from the Monitor, and issued approximately 25 orders.

[78] The supervising judge considered the whole of the circumstances and concluded that Callidus's vote would serve an improper purpose (paras. 45 and 48). We agree with his determination. He was aware that, prior to the vote on the First Plan, Callidus had chosen not to value *any* of its claim as unsecured and later declined to vote at all — despite the Monitor explicitly inviting it do so.[4] The supervising judge was also aware that Callidus's First Plan had failed to receive the other creditors' approval at the creditors' meeting of December 15, 2017, and that Callidus had chosen not to take the opportunity to amend or increase the value of its plan at that time, which it was entitled to do (see *CCAA*, ss. 6 and 7; Monitor, I.F., at para. 17). Between the failure of the First Plan and the proposal of the New Plan — which was identical to the First Plan, save for a modest increase of $250,000 — none of the factual circumstances relating to Bluberi's financial or business

[4] It bears noting that the Monitor's statement in this regard did not decide whether Callidus would ultimately have been entitled to vote on the First Plan. Because Callidus did not even attempt to vote on the First Plan, this question was never put to the supervising judge.

[76] La question de savoir s'il y a lieu d'exercer le pouvoir discrétionnaire dans une situation donnée appelle une analyse fondée sur les circonstances propres à chaque situation qui doit mettre en balance les divers objectifs de la *LACC*. Comme le démontre le présent dossier, le juge surveillant est le mieux placé pour procéder à cette analyse.

(3) Le juge surveillant n'a pas commis d'erreur en interdisant à Callidus de voter

[77] À notre avis, la décision du juge surveillant d'empêcher Callidus de voter sur le nouveau plan ne révèle aucune erreur justifiant l'intervention d'une cour d'appel. Comme nous l'avons expliqué, il faut adopter l'attitude de déférence appropriée à l'égard des décisions discrétionnaires de ce genre. Il convient de mentionner que, lorsqu'il a rendu sa décision, le juge surveillant connaissait très bien les procédures fondées sur la *LACC* relatives à Bluberi. Il les avait présidées pendant plus de 2 ans, avait reçu 15 rapports du contrôleur et avait délivré environ 25 ordonnances.

[78] Le juge surveillant a tenu compte de l'ensemble des circonstances et a conclu que le vote de Callidus viserait un but illégitime (par. 45 et 48). Nous sommes d'accord avec cette conclusion. Il savait qu'avant le vote sur le premier plan, Callidus avait choisi de n'évaluer *aucune partie* de sa réclamation à titre de créancier non garanti et s'était par la suite abstenue de voter — bien que le contrôleur l'ait expressément invité à le faire[4]. Le juge surveillant savait aussi que le premier plan de Callidus n'avait pas reçu l'aval des autres créanciers à l'assemblée des créanciers tenue le 15 décembre 2017, et que Callidus avait choisi de ne pas profiter de l'occasion pour modifier ou augmenter la valeur de son plan à ce moment-là, ce qu'elle était en droit de faire (voir *LACC*, art. 6 et 7; contrôleur, m.i., par. 17). Entre l'insuccès du premier plan et la proposition du nouveau plan — qui était identique au premier plan, hormis la modeste augmentation de 250 000 $ — les

[4] Il convient de souligner que la déclaration du contrôleur à cet égard ne permettait pas de décider si Callidus aurait finalement eu le droit de voter sur le premier plan. Comme Callidus n'a même pas essayé de voter sur le premier plan, cette question n'a jamais été soumise au juge surveillant.

affairs had materially changed. However, Callidus sought to value the *entirety* of its security at *nil* and, on that basis, sought leave to vote on the New Plan as an unsecured creditor. If Callidus were permitted to vote in this way, the New Plan would certainly have met the s. 6(1) threshold for approval. In these circumstances, the inescapable inference was that Callidus was attempting to strategically value its security to acquire control over the outcome of the vote and thereby circumvent the creditor democracy the *CCAA* protects. Put simply, Callidus was seeking to take a "second kick at the can" and manipulate the vote on the New Plan. The supervising judge made no error in exercising his discretion to prevent Callidus from doing so.

[79] Indeed, as the Monitor observes, "[o]nce a plan of arrangement or proposal has been submitted to the creditors of a debtor for voting purposes, to order a second creditors' meeting to vote on a substantially similar plan would not advance the policy objectives of the CCAA, nor would it serve and enhance the public's confidence in the process or otherwise serve the ends of justice" (I.F., at para. 18). This is particularly the case given that the cost of having another meeting to vote on the New Plan would have been upwards of $200,000 (see supervising judge's reasons, at para. 72).

[80] We add that Callidus's course of action was plainly contrary to the expectation that parties act with due diligence in an insolvency proceeding — which, in our view, includes acting with due diligence in valuing their claims and security. At all material times, Bluberi's Retained Claims have been the sole asset securing Callidus's claim. Callidus has pointed to nothing in the record that indicates that the value of the Retained Claims has changed. Had Callidus been of the view that the Retained Claims had no value, one would have expected Callidus to have valued its security accordingly prior to the vote on the First Plan, if not earlier. Parenthetically, we note that, irrespective of the timing, an attempt at

circonstances factuelles se rapportant aux affaires financières ou commerciales de Bluberi n'avaient pas réellement changé. Pourtant, Callidus a tenté d'évaluer la *totalité* de sa sûreté à *zéro* et, sur cette base, a demandé l'autorisation de voter sur le nouveau plan à titre de créancier non garanti. Si Callidus avait été autorisée à voter de cette façon, le nouveau plan aurait certainement satisfait au critère d'approbation prévu par le par. 6(1). Dans ces circonstances, la seule conclusion possible était que Callidus tentait d'évaluer stratégiquement la valeur de sa sûreté afin de prendre le contrôle du vote et ainsi contourner la démocratie entre les créanciers que défend la *LACC*. En termes simples, Callidus cherchait à « se donner une seconde chance » et à manipuler le vote sur le nouveau plan. Le juge surveillant n'a pas commis d'erreur en exerçant son pouvoir discrétionnaire pour empêcher Callidus de le faire.

[79] En effet, comme le fait observer le contrôleur, [TRADUCTION] « [u]ne fois que le plan d'arrangement ou la proposition ont été présentés aux créanciers du débiteur aux fins d'un vote, le fait d'ordonner la tenue d'une seconde assemblée des créanciers pour voter sur un plan à peu près semblable ne favoriserait pas la réalisation des objectifs de politique de la LACC, pas plus qu'il ne servirait ou n'accroîtrait la confiance du public dans le processus ou ne servirait par ailleurs les fins de la justice » (m.i., par. 18). C'est particulièrement le cas en l'espèce étant donné que la tenue d'une autre assemblée pour voter sur le nouveau plan aurait coûté plus de 200 000 $ (voir les motifs du juge surveillant, par. 72).

[80] Ajoutons que la façon d'agir de Callidus était manifestement contraire à l'attente selon laquelle les parties agissent avec diligence dans les procédures d'insolvabilité — ce qui, à notre avis, comprend le fait de faire preuve de diligence raisonnable dans l'évaluation de leurs réclamations et sûretés. Pendant toute la période pertinente, les réclamations retenues de Bluberi ont constitué les seuls éléments d'actif garantissant la réclamation de Callidus. Cette dernière n'a rien relevé dans le dossier qui indique que la valeur des réclamations retenues a changé. Si Callidus estimait que les réclamations retenues n'avaient aucune valeur, on se serait attendu à ce qu'elle ait évalué sa sûreté en conséquence avant

such a valuation may well have failed. This would have prevented Callidus from voting as an unsecured creditor, even in the absence of Callidus's improper purpose.

[81] As we have indicated, discretionary decisions attract a highly deferential standard of review. Deference demands that review of a discretionary decision begin with a proper characterization of the basis for the decision. Respectfully, the Court of Appeal failed in this regard. The Court of Appeal seized on the supervising judge's somewhat critical comments relating to Callidus's goal of being released from the Retained Claims and its conduct throughout the proceedings as being incapable of grounding a finding of improper purpose. However, as we have explained, these considerations did not drive the supervising judge's conclusion. His conclusion was squarely based on Callidus' attempt to manipulate the creditors' vote to ensure that its New Plan would succeed where its First Plan had failed (see supervising judge's reasons, at paras. 45-48). We see nothing in the Court of Appeal's reasons that grapples with this decisive impropriety, which goes far beyond a creditor merely acting in its own self-interest.

[82] In sum, we see nothing in the supervising judge's reasons on this point that would justify appellate intervention. Callidus was properly barred from voting on the New Plan.

[83] Before moving on, we note that the Court of Appeal addressed two further issues: whether Callidus is "related" to Bluberi within the meaning of s. 22(3) of the *CCAA*; and whether, if permitted to vote, Callidus should be ordered to vote in a separate class from Bluberi's other creditors (see *CCAA*, s. 22(1) and (2)). Given our conclusion that the supervising judge did not err in barring Callidus from voting on the New Plan on the basis that Callidus was acting for an improper purpose, it is unnecessary to

le vote sur le premier plan, voire même plus tôt. Nous ouvrons une parenthèse pour souligner que, peu importe le moment, la tentative d'évaluer ainsi la sûreté aurait pu fort bien échouer. Cela aurait empêché Callidus de voter à titre de créancier non garanti même si elle ne poursuivait pas de but illégitime.

[81] Comme nous l'avons indiqué, les décisions discrétionnaires appellent une norme de contrôle empreinte d'une grande déférence. La déférence commande que l'examen d'une décision discrétionnaire commence par la qualification appropriée du fondement de la décision. Soit dit en tout respect, la Cour d'appel a échoué à cet égard. La Cour d'appel s'est saisie des commentaires quelque peu critiques formulés par le juge surveillant à l'égard de l'objectif de Callidus d'être libérée des réclamations retenues et de la conduite de celle-ci tout au long des procédures pour affirmer qu'il ne s'agissait pas de considérations pouvant donner lieu à une conclusion de but illégitime. Toutefois, comme nous l'avons expliqué, ce ne sont pas ces considérations qui ont amené le juge surveillant à tirer sa conclusion. Sa conclusion reposait nettement sur la tentative de Callidus de manipuler le vote des créanciers pour faire en sorte que son nouveau plan soit retenu alors que son premier plan ne l'avait pas été (voir les motifs du juge surveillant, par. 45-48). Nous ne voyons rien dans les motifs de la Cour d'appel qui s'attaque à cette irrégularité déterminante, qui va beaucoup plus loin que le simple fait pour un créancier d'agir dans son propre intérêt.

[82] En résumé, nous ne voyons rien dans les motifs du juge surveillant sur ce point qui justifie l'intervention d'une cour d'appel. Callidus a été à juste titre empêchée de voter sur le nouveau plan.

[83] Avant de passer au prochain point, soulignons que la Cour d'appel a abordé deux questions supplémentaires : Callidus est-elle « liée » à Bluberi au sens du par. 22(3) de la *LACC*? Si Callidus est autorisée à voter, convient-il de lui ordonner de voter dans une catégorie distincte des autres créanciers de Bluberi (voir la *LACC*, par. 22(1) et (2))? Vu notre conclusion que le juge surveillant n'a pas commis d'erreur en interdisant à Callidus de voter sur le nouveau plan au motif qu'elle avait agi dans un but illégitime, il n'est

address either of these issues. However, nothing in our reasons should be read as endorsing the Court of Appeal's analysis of them.

C. *Bluberi's LFA Should Be Approved as Interim Financing*

[84] In our view, the supervising judge made no error in approving the LFA as interim financing pursuant to s. 11.2 of the *CCAA*. Interim financing is a flexible tool that may take on a range of forms. As we will explain, third party litigation funding may be one such form. Whether third party litigation funding should be approved as interim financing is a case-specific inquiry that should have regard to the text of s. 11.2 and the remedial objectives of the *CCAA* more generally.

(1) Interim Financing and Section 11.2 of the *CCAA*

[85] Interim financing, despite being expressly provided for in s. 11.2 of the *CCAA*, is not defined in the Act. Professor Sarra has described it as "refer[ring] primarily to the working capital that the debtor corporation requires in order to keep operating during restructuring proceedings, as well as to the financing to pay the costs of the workout process" (*Rescue! The Companies' Creditors Arrangement Act*, at p. 197). Interim financing used in this way — sometimes referred to as "debtor-in-possession" financing — protects the going-concern value of the debtor company while it develops a workable solution to its insolvency issues (p. 197; *Royal Oak Mines Inc., Re* (1999), 6 C.B.R. (4th) 314 (Ont. C.J. (Gen. Div.)), at paras. 7, 9 and 24; *Boutiques San Francisco Inc. v. Richter & Associés Inc.*, 2003 CanLII 36955 (Que. Sup. Ct.), at para. 32). That said, interim financing is not limited to providing debtor companies with immediate operating capital. Consistent with the remedial objectives of the *CCAA*, interim financing

pas nécessaire de se prononcer sur l'une ou l'autre de ces questions. Cependant, rien dans les présents motifs ne doit être interprété comme souscrivant à l'analyse que la Cour d'appel a faite de ces questions.

C. *L'AFL de Bluberi devrait être approuvé à titre de financement temporaire*

[84] À notre avis, le juge surveillant n'a commis aucune erreur en approuvant l'AFL à titre de financement temporaire en vertu de l'art. 11.2 de la *LACC*. Le financement temporaire est un outil souple qui peut revêtir différentes formes. Comme nous l'expliquerons, le financement d'un litige par un tiers peut constituer l'une de ces formes. La question de savoir s'il y a lieu d'approuver le financement d'un litige par un tiers à titre de financement temporaire commande une analyse fondée sur les faits de l'espèce qui doit tenir compte du libellé de l'art. 11.2 et des objectifs réparateurs de la *LACC* de façon plus générale.

(1) Le financement temporaire et l'art. 11.2 de la *LACC*

[85] Bien qu'il soit expressément prévu par l'art. 11.2 de la *LACC*, le financement temporaire n'est pas défini dans la Loi. La professeure Sarra l'a décrit comme [TRADUCTION] « vis[ant] principalement le fonds de roulement dont a besoin la société débitrice pour continuer de fonctionner pendant la restructuration ainsi que les fonds nécessaires pour payer les frais liés au processus de sauvetage » (*Rescue! The Companies' Creditors Arrangement Act*, p. 197). Utilisé de cette façon, le financement temporaire — parfois appelé financement de [TRADUCTION] « débiteur-exploitant » — protège la valeur d'exploitation de la compagnie débitrice pendant qu'elle met au point une solution viable à ses problèmes d'insolvabilité (p. 197; *Royal Oak Mines Inc., Re* (1999), 6 C.B.R. (4th) 314 (C.J. Ont. (Div. gén.)), par. 7, 9 et 24; *Boutiques San Francisco Inc. c. Richter & Associés Inc.*, 2003 CanLII 36955 (C.S. Qc), par. 32). Cela dit, le financement temporaire ne se limite pas à fournir un fonds de roulement

at its core enables the preservation and realization of the value of a debtor's assets.

[86] Since 2009, s. 11.2(1) of the *CCAA* has codified a supervising judge's discretion to approve interim financing, and to grant a corresponding security or charge in favour of the lender in the amount the judge considers appropriate:

Interim financing

11.2 (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.

[87] The breadth of a supervising judge's discretion to approve interim financing is apparent from the wording of s. 11.2(1). Aside from the protections regarding notice and pre-filing security, s. 11.2(1) does not mandate any standard form or terms.[5] It simply provides that the financing must be in an amount that is "appropriate" and "required by the company, having regard to its cash-flow statement".

immédiat aux compagnies débitrices. Conformément aux objectifs réparateurs de la *LACC*, le financement temporaire permet essentiellement de préserver et de réaliser la valeur des éléments d'actif du débiteur.

[86] Depuis 2009, le par. 11.2(1) de la *LACC* a codifié le pouvoir discrétionnaire du juge surveillant d'approuver le financement temporaire et d'accorder une charge ou une sûreté correspondante, d'un montant qu'il estime indiqué, en faveur du prêteur :

Financement temporaire

11.2 (1) Sur demande de la compagnie débitrice, le tribunal peut par ordonnance, sur préavis de la demande aux créanciers garantis qui seront vraisemblablement touchés par la charge ou sûreté, déclarer que tout ou partie des biens de la compagnie sont grevés d'une charge ou sûreté — d'un montant qu'il estime indiqué — en faveur de la personne nommée dans l'ordonnance qui accepte de prêter à la compagnie la somme qu'il approuve compte tenu de l'état de l'évolution de l'encaisse et des besoins de celle-ci. La charge ou sûreté ne peut garantir qu'une obligation postérieure au prononcé de l'ordonnance.

[87] L'étendue du pouvoir discrétionnaire du juge surveillant d'approuver le financement temporaire ressort du libellé du par. 11.2(1). Abstraction faite des protections concernant le préavis et les sûretés constituées avant le dépôt des procédures, le par. 11.2(1) ne prescrit aucune forme ou condition type[5]. Il prévoit simplement que le financement doit être d'un montant qui est « indiqué » et qui tient compte de « l'état de l'évolution de l'encaisse et des besoins de [la compagnie] ».

[5] A further exception has been codified in the 2019 amendments to the *CCAA*, which create s. 11.2(5) (see *Budget Implementation Act, 2019, No. 1*, s. 138). This section provides that at the time an initial order is sought, "no order shall be made under subsection [11.2](1) unless the court is also satisfied that the terms of the loan are limited to what is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period". This provision does not apply in this case, and the parties have not relied on it. However, it may be that it restricts the ability of supervising judges to approve LFAs as interim financing at the time of granting an Initial Order.

[5] Une autre exception a été codifiée dans les modifications apportées en 2019 à la *LACC* qui créent le par. 11.2(5) (voir *Loi nº 1 d'exécution du budget de 2019*, art. 138). Cet article prévoit que, lorsqu'une ordonnance relative à la demande initiale a été demandée, « le tribunal ne rend l'ordonnance visée au paragraphe [11.2](1) que s'il est également convaincu que les modalités du financement temporaire demandé sont limitées à ce qui est normalement nécessaire à la continuation de l'exploitation de la compagnie débitrice dans le cours ordinaire de ses affaires durant cette période ». Cette disposition ne s'applique pas en l'espèce, et les parties ne l'ont pas invoquée. Toutefois, il se peut qu'elle ait pour effet d'empêcher les juges surveillants d'approuver des AFL à titre de financement temporaire au moment où l'ordonnance relative à la demande initiale est rendue.

[88] The supervising judge may also grant the lender a "super-priority charge" that will rank in priority over the claims of any secured creditors, pursuant to s. 11.2(2):

Priority — secured creditors

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

[89] Such charges, also known as "priming liens", reduce lenders' risks, thereby incentivizing them to assist insolvent companies (Innovation, Science and Economic Development Canada, *Archived — Bill C-55: clause by clause analysis*, last updated December 29, 2016 (online), cl. 128, s. 11.2; Wood, at p. 387). As a practical matter, these charges are often the only way to encourage this lending. Normally, a lender protects itself against lending risk by taking a security interest in the borrower's assets. However, debtor companies under *CCAA* protection will often have pledged all or substantially all of their assets to other creditors. Accordingly, without the benefit of a super-priority charge, an interim financing lender would rank behind those other creditors (McElcheran, at pp. 298-99). Although super-priority charges do subordinate secured creditors' security positions to the interim financing lender's — a result that was controversial at common law — Parliament has indicated its general acceptance of the trade-offs associated with these charges by enacting s. 11.2(2) (see M. B. Rotsztain and A. Dostal, "Debtor-In-Possession Financing", in S. Ben-Ishai and A. Duggan, eds., *Canadian Bankruptcy and Insolvency Law: Bill C-55, Statute c. 47 and Beyond* (2007), 227, at pp. 228-29 and 240-50). Indeed, this balance was expressly considered by the Standing Senate Committee on Banking, Trade and Commerce that recommended codifying interim financing in the *CCAA* (pp. 100-104).

[90] Ultimately, whether proposed interim financing should be approved is a question that the supervising judge is best-placed to answer. The *CCAA*

[88] Le juge surveillant peut également accorder au prêteur une « charge super prioritaire » qui aura priorité sur toute réclamation des créanciers garantis, en vertu du par. 11.2(2) :

Priorité — créanciers garantis

(2) Le tribunal peut préciser, dans l'ordonnance, que la charge ou sûreté a priorité sur toute réclamation des créanciers garantis de la compagnie.

[89] Ces charges, également appelées « superprivilèges », réduisent les risques des prêteurs, les incitant ainsi à aider les compagnies insolvables (Innovation, Sciences et Développement économique Canada, *Archivé — Projet de loi C-55 : analyse article par article*, dernière mise à jour le 29 décembre 2016 (en ligne), cl. 128, art. 11.2; Wood, p. 387). Sur le plan pratique, ces charges constituent souvent le seul moyen d'encourager ce type de prêt. Généralement, le prêteur se protège contre le risque de crédit en prenant une sûreté sur les éléments d'actifs de l'emprunteur. Or, les compagnies débitrices qui sont sous la protection de la *LACC* ont souvent donné en gage la totalité ou la presque totalité de leurs actifs à d'autres créanciers. En l'absence d'une charge super prioritaire, le prêteur qui accepte d'apporter un financement temporaire prendrait rang derrière les autres créanciers (McElcheran, p. 298-299). Bien que la charge super prioritaire subordonne les sûretés des créanciers garantis à celle du prêteur qui apporte un financement temporaire — un résultat qui a suscité la controverse en common law — le législateur a signifié son acceptation générale des transactions allant de pair avec ces charges en adoptant le par. 11.2(2) (voir M. B. Rotsztain et A. Dostal, « Debtor-In-Possession Financing », dans S. Ben-Ishai et A. Duggan, dir., *Canadian Bankruptcy and Insolvency Law : Bill C-55, Statute c. 47 and Beyond* (2007), 227, p. 228-229 et 240-250). En effet, cet équilibre a été expressément pris en considération par le Comité sénatorial permanent des banques et du commerce, qui a recommandé la codification du financement temporaire dans la *LACC* (p. 111-115).

[90] Au bout du compte, la question de savoir s'il y a lieu d'approuver le financement temporaire projeté est une question à laquelle le juge surveillant est le

sets out a number of factors that help guide the exercise of this discretion. The inclusion of these factors in s. 11.2 was informed by the Standing Senate Committee on Banking, Trade and Commerce's view that they would help meet the "fundamental principles" that have guided the development of Canadian insolvency law, including "fairness, predictability and efficiency" (p. 103; see also Innovation, Science and Economic Development Canada, cl. 128, s. 11.2). In deciding whether to grant interim financing, the supervising judge is to consider the following non-exhaustive list of factors:

Factors to be considered

(4) In deciding whether to make an order, the court is to consider, among other things,

(a) the period during which the company is expected to be subject to proceedings under this Act;

(b) how the company's business and financial affairs are to be managed during the proceedings;

(c) whether the company's management has the confidence of its major creditors;

(d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;

(e) the nature and value of the company's property;

(f) whether any creditor would be materially prejudiced as a result of the security or charge; and

(g) the monitor's report referred to in paragraph 23(1)(b), if any.

(*CCAA*, s. 11.2(4))

[91] Prior to the coming into force of the above provisions in 2009, courts had been using the general discretion conferred by s. 11 to authorize interim financing and associated super-priority charges

mieux placé pour répondre. La *LACC* énonce un certain nombre de facteurs qui encadrent l'exercice de ce pouvoir discrétionnaire. L'inclusion de ces facteurs dans le par. 11.2 reposait sur le point de vue du Comité sénatorial permanent des banques et du commerce selon lequel ils permettraient de respecter les « principes fondamentaux » ayant guidé la conception des lois en matière d'insolvabilité au Canada, notamment « l'équité, la prévisibilité et l'efficience » (p. 115; voir également Innovation, Sciences et Développement économique Canada, cl. 128, art. 11.2). Pour décider s'il y a lieu d'accorder le financement temporaire, le juge surveillant doit prendre en considération les facteurs non exhaustifs suivants :

Facteurs à prendre en considération

(4) Pour décider s'il rend l'ordonnance, le tribunal prend en considération, entre autres, les facteurs suivants :

a) la durée prévue des procédures intentées à l'égard de la compagnie sous le régime de la présente loi;

b) la façon dont les affaires financières et autres de la compagnie seront gérées au cours de ces procédures;

c) la question de savoir si ses dirigeants ont la confiance de ses créanciers les plus importants;

d) la question de savoir si le prêt favorisera la conclusion d'une transaction ou d'un arrangement viable à l'égard de la compagnie;

e) la nature et la valeur des biens de la compagnie;

f) la question de savoir si la charge ou sûreté causera un préjudice sérieux à l'un ou l'autre des créanciers de la compagnie;

g) le rapport du contrôleur visé à l'alinéa 23(1)b).

(*LACC*, par. 11.2(4))

[91] Avant l'entrée en vigueur en 2009 des dispositions susmentionnées, les tribunaux utilisaient le pouvoir discrétionnaire général que confère l'art. 11 pour autoriser le financement temporaire

(*Century Services*, at para. 62). Section 11.2 largely codifies the approaches those courts have taken (Wood, at p. 388; McElcheran, at p. 301). As a result, where appropriate, guidance may be drawn from the pre-codification interim financing jurisprudence.

[92] As with other measures available under the *CCAA*, interim financing is a flexible tool that may take different forms or attract different considerations in each case. Below, we explain that third party litigation funding may, in appropriate cases, be one such form.

(2) Supervising Judges May Approve Third Party Litigation Funding as Interim Financing

[93] Third party litigation funding generally involves "a third party, otherwise unconnected to the litigation, agree[ing] to pay some or all of a party's litigation costs, in exchange for a portion of that party's recovery in damages or costs" (R. K. Agarwal and D. Fenton, "Beyond Access to Justice: Litigation Funding Agreements Outside the Class Actions Context" (2017), 59 *Can. Bus. L.J.* 65, at p. 65). Third party litigation funding can take various forms. A common model involves the litigation funder agreeing to pay a plaintiff's disbursements and indemnify the plaintiff in the event of an adverse cost award in exchange for a share of the proceeds of any successful litigation or settlement (see *Dugal v. Manulife Financial Corp.*, 2011 ONSC 1785, 105 O.R. (3d) 364; *Bayens*).

[94] Outside of the *CCAA* context, the approval of third party litigation funding agreements has been somewhat controversial. Part of that controversy arises from the potential of these agreements to offend the common law doctrines of champerty and

et la constitution des charges super prioritaires s'y rattachant (*Century Services*, par. 62). L'article 11.2 codifie en grande partie les approches adoptées par ces tribunaux (Wood, p. 388; McElcheran, p. 301). En conséquence, il est possible, le cas échéant, de s'inspirer de la jurisprudence relative au financement temporaire antérieure à la codification.

[92] Comme c'est le cas pour les autres mesures susceptibles d'être prises sous le régime de la *LACC*, le financement temporaire est un outil souple qui peut revêtir différentes formes ou faire intervenir différentes considérations dans chaque cas. Comme nous l'expliquerons plus loin, le financement d'un litige par un tiers peut, dans les cas qui s'y prêtent, constituer l'une de ces formes.

(2) Les juges surveillants peuvent approuver le financement d'un litige par un tiers à titre de financement temporaire

[93] Le financement d'un litige par un tiers met généralement en cause [TRADUCTION] « un tiers, n'ayant par ailleurs aucun lien avec le litige, [qui] accepte de payer une partie ou la totalité des frais de litige d'une partie, en échange d'une portion de la somme recouvrée par cette partie au titre des dommages-intérêts ou des dépens » (R. K. Agarwal et D. Fenton, « Beyond Access to Justice : Litigation Funding Agreements Outside the Class Actions Context » (2017), 59 *Rev. can. dr. comm.* 65, p. 65). Le financement d'un litige par un tiers peut revêtir diverses formes. Un modèle courant met en cause un bailleur de fonds de litiges qui s'engage à payer les débours du demandeur et à indemniser ce dernier dans l'éventualité d'une adjudication des dépens défavorable, en échange d'une partie de la somme obtenue dans le cadre d'un procès ou d'un règlement couronné de succès (voir *Dugal c. Manulife Financial Corp.*, 2011 ONSC 1785, 105 O.R. (3d) 364; *Bayens*).

[94] En dehors du cadre de la *LACC*, l'approbation des accords de financement d'un litige par un tiers a été quelque peu controversée. Une partie de cette controverse découle de la possibilité que ces accords portent atteinte aux doctrines de common

maintenance.[6] The tort of maintenance prohibits "officious intermeddling with a lawsuit which in no way belongs to one" (L. N. Klar et al., *Remedies in Tort* (loose-leaf), vol. 1, by L. Berry, ed., at p. 14-11, citing *Langtry v. Dumoulin* (1884), 7 O.R. 644 (Ch. Div.), at p. 661). Champerty is a species of maintenance that involves an agreement to share in the proceeds or otherwise profit from a successful suit (*McIntyre Estate v. Ontario (Attorney General)* (2002), 218 D.L.R. (4th) 193 (Ont. C.A.), at para. 26).

[95] Building on jurisprudence holding that *contingency fee* arrangements are not champertous where they are not motivated by an improper purpose (e.g., *McIntyre Estate*), lower courts have increasingly come to recognize that *litigation funding* agreements are also not *per se* champertous. This development has been focussed within class action proceedings, where it arose as a response to barriers like adverse cost awards, which were stymieing litigants' access to justice (see *Dugal*, at para. 33; *Marcotte v. Banque de Montréal*, 2015 QCCS 1915, at paras. 43-44 (CanLII); *Houle v. St. Jude Medical Inc.*, 2017 ONSC 5129, 9 C.P.C. (8th) 321, at para. 52, aff'd 2018 ONSC 6352, 429 D.L.R. (4th) 739 (Div. Ct.); see also *Stanway v. Wyeth*, 2013 BCSC 1585, 56 B.C.L.R. (5th) 192, at para. 13). The jurisprudence on the approval of third party litigation funding agreements in the class action context — and indeed, the parameters of their legality generally — is still evolving, and no party before this Court has invited us to evaluate it.

[6] The extent of this controversy varies by province. In Ontario, champertous agreements are forbidden by statute (see *An Act respecting Champerty*, R.S.O. 1897, c. 327). In Quebec, concerns associated with champerty and maintenance do not arise as acutely because champerty and maintenance are not part of the law as such (see *Montgrain v. Banque nationale du Canada*, 2006 QCCA 557, [2006] R.J.Q. 1009; G. Michaud, "New Frontier: The Emergence of Litigation Funding in the Canadian Insolvency Landscape" in J. P. Sarra et al., eds., *Annual Review of Insolvency Law 2018* (2019), 221, at p. 231).

law concernant la champartie (*champerty*) et le soutien abusif (*maintenance*)[6]. Le délit de soutien abusif interdit [TRADUCTION] « l'immixtion trop empressée dans une action avec laquelle on n'a rien à voir » (L. N. Klar et autres, *Remedies in Tort* (feuilles mobiles), vol. 1, par L. Berry, dir., p. 14-11, citant *Langtry c. Dumoulin* (1884), 7 O.R. 644 (Ch. Div.), p. 661). La champartie est une sorte de soutien abusif qui comporte un accord prévoyant le partage de la somme obtenue ou de tout autre profit réalisé dans le cadre d'une action réussie (*McIntyre Estate c. Ontario (Attorney General)* (2002), 218 D.L.R. (4th) 193 (C.A. Ont.), par. 26).

[95] S'appuyant sur la jurisprudence voulant que les conventions d'*honoraires conditionnels* ne constituent pas de la champartie lorsqu'elles ne sont pas motivées par un but illégitime (p. ex., *McIntyre Estate*), les tribunaux d'instance inférieure en sont venus progressivement à reconnaître que les accords de *financement d'un litige* ne constituent pas non plus de la champartie *en soi*. Cette évolution s'est opérée surtout dans le contexte des recours collectifs, en réaction aux obstacles, comme les adjudications de dépens défavorables, qui entravaient l'accès des parties à la justice (voir *Dugal*, par. 33; *Marcotte c. Banque de Montréal*, 2015 QCCS 1915, par. 43-44 (CanLII); *Houle c. St. Jude Medical Inc.*, 2017 ONSC 5129, 9 C.P.C. (8th) 321, par. 52, conf. par 2018 ONSC 6352, 429 D.L.R. (4th) 739 (C. div.); voir également *Stanway c. Wyeth*, 2013 BCSC 1585, 56 B.C.L.R. (5th) 192, par. 13). La jurisprudence relative à l'approbation des accords de financement de litige par un tiers dans le contexte des recours collectifs — et même les paramètres de leur légalité en général — continue d'évoluer, et aucune des parties au présent pourvoi ne nous a invités à l'analyser.

[6] L'ampleur de la controverse varie selon les provinces. En Ontario, les accords de champartie sont interdits par la loi (voir *An Act respecting Champerty*, R.S.O. 1897, c. 327). Au Québec, les questions relatives à la champartie et au soutien abusif ne se posent pas de façon aussi aiguë parce que la champartie et le soutien abusif ne font pas partie du droit comme tel (voir *Montgrain c. Banque nationale du Canada*, 2006 QCCA 557, [2006] R.J.Q. 1009; G. Michaud, « New Frontier : The Emergence of Litigation Funding in the Canadian Insolvabilité Landscape » dans J. P. Sarra et autres, dir., *Annual Review of Insolvency Law 2018* (2019), 221, p. 231).

[96] That said, insofar as third party litigation funding agreements are not *per se* illegal, there is no principled basis upon which to restrict supervising judges from approving such agreements as interim financing in appropriate cases. We acknowledge that this funding differs from more common forms of interim financing that are simply designed to help the debtor "keep the lights on" (see *Royal Oak*, at paras. 7 and 24). However, in circumstances like the case at bar, where there is a single litigation asset that could be monetized for the benefit of creditors, the objective of maximizing creditor recovery has taken centre stage. In those circumstances, litigation funding furthers the basic purpose of interim financing: allowing the debtor to realize on the value of its assets.

[96] Cela dit, dans la mesure où les accords de financement de litige par un tiers ne sont pas illégaux *en soi*, il n'y a aucune raison de principe qui permet d'empêcher les juges surveillants d'approuver ce type d'accord à titre de financement temporaire dans les cas qui s'y prêtent. Nous reconnaissons que cette forme de financement diffère des formes plus courantes de financement temporaire qui visent simplement à aider le débiteur à [TRADUCTION] « payer les frais courants » (voir *Royal Oak*, par. 7 et 24). Toutefois, dans des circonstances semblables à celles en l'espèce, lorsqu'il existait un seul élément d'actif susceptible de monétisation au bénéfice des créanciers, l'objectif visant à maximiser le recouvrement des créanciers a occupé le devant de la scène. En pareilles circonstances, le financement de litige favorise la réalisation de l'objectif fondamental du financement temporaire : permettre au débiteur de réaliser la valeur de ses éléments d'actif.

[97] We conclude that third party litigation funding agreements may be approved as interim financing in *CCAA* proceedings when the supervising judge determines that doing so would be fair and appropriate, having regard to all the circumstances and the objectives of the Act. This requires consideration of the specific factors set out in s. 11.2(4) of the *CCAA*. That said, these factors need not be mechanically applied or individually reviewed by the supervising judge. Indeed, not all of them will be significant in every case, nor are they exhaustive. Further guidance may be drawn from other areas in which third party litigation funding agreements have been approved.

[97] Nous concluons que les accords de financement de litige par un tiers peuvent être approuvés à titre de financement temporaire dans le cadre des procédures fondées sur la *LACC* lorsque le juge surveillant estime qu'il serait juste et approprié de le faire, compte tenu de l'ensemble des circonstances et des objectifs de la Loi. Cela implique la prise en considération des facteurs précis énoncés au par. 11.2(4) de la *LACC*. Cela dit, ces facteurs ne doivent pas être appliqués machinalement ou examinés individuellement par le juge surveillant. En effet, ils ne seront pas tous importants dans tous les cas, et ils ne sont pas non plus exhaustifs. Des enseignements supplémentaires peuvent être tirés d'autres domaines où des accords de financement de litige par un tiers ont été approuvés.

[98] The foregoing is consistent with the practice that is already occurring in lower courts. Most notably, in *Crystallex*, the Ontario Court of Appeal approved a third party litigation funding agreement in circumstances substantially similar to the case at bar. *Crystallex* involved a mining company that had the right to develop a large gold deposit in Venezuela. Crystallex eventually became insolvent and (similar to Bluberi) was left with only a single significant asset: a US$3.4 billion arbitration claim against Venezuela. After entering *CCAA* protection,

[98] Ce qui précède est compatible avec la pratique qui a déjà cours devant les tribunaux d'instance inférieure. Plus particulièrement, dans *Crystallex*, la Cour d'appel de l'Ontario a approuvé un accord de financement de litige par un tiers dans des circonstances très semblables à celles en l'espèce. Cette affaire mettait en cause une société minière ayant le droit d'exploiter un grand gisement d'or au Venezuela. Crystallex est finalement devenue insolvable, et (comme Bluberi) il ne lui restait plus qu'un seul élément d'actif important : une réclamation

Crystallex sought the approval of a third party litigation funding agreement. The agreement contemplated that the lender would advance substantial funds to finance the arbitration in exchange for, among other things, a percentage of the net proceeds of any award or settlement. The supervising judge approved the agreement as interim financing pursuant to s. 11.2. The Court of Appeal unanimously found no error in the supervising judge's exercise of discretion. It concluded that s. 11.2 "does not restrict the ability of the supervising judge, where appropriate, to approve the grant of a charge securing financing before a plan is approved that may continue after the company emerges from CCAA protection" (para. 68).

[99] A key argument raised by the creditors in *Crystallex* — and one that Callidus and the Creditors' Group have put before us now — was that the litigation funding agreement at issue was a plan of arrangement and not interim financing. This was significant because, if the agreement was in fact a plan, it would have had to be put to a creditors' vote pursuant to ss. 4 and 5 of the *CCAA* prior to receiving court approval. The court in *Crystallex* rejected this argument, as do we.

[100] There is no definition of plan of arrangement in the *CCAA*. In fact, the *CCAA* does not refer to plans at all — it only refers to an "arrangement" or "compromise" (see ss. 4 and 5). The authors of *Bankruptcy and Insolvency Law of Canada* offer the following general definition of these terms, relying on early English case law:

> A "compromise" presupposes some dispute about the rights compromised and a settling of that dispute on terms that are satisfactory to the debtor and the creditor. An agreement to accept less than 100¢ on the dollar would be a compromise where the debtor disputes the debt or lacks the means to pay it. "Arrangement" is a broader word

d'arbitrage de 3,4 milliards de dollars américains contre le Venezuela. Après s'être placée sous la protection de la *LACC*, Crystallex a demandé l'approbation d'un accord de financement de litige par un tiers. L'accord prévoyait que le prêteur avancerait des fonds importants pour financer l'arbitrage en échange, notamment, d'un pourcentage de la somme nette obtenue à la suite d'une sentence ou d'un règlement. Le juge surveillant a approuvé l'accord à titre de financement temporaire en vertu de l'art. 11.2. La Cour d'appel a conclu à l'unanimité que le juge surveillant n'avait commis aucune erreur dans l'exercice de son pouvoir discrétionnaire. Elle a conclu que l'art. 11.2 [TRADUCTION] « n'empêche pas le juge surveillant d'approuver, s'il y a lieu, avant qu'un plan soit approuvé, l'octroi d'une charge garantissant un financement qui pourra continuer après que la compagnie aura émergé de la protection de la *LACC* » (par. 68).

[99] Dans *Crystallex*, l'un des principaux arguments soulevés par les créanciers — et l'un de ceux qu'ont soulevés Callidus et le groupe de créanciers dans le présent pourvoi — était que l'accord de financement de litige en cause était un plan d'arrangement et non pas un financement temporaire. Il s'agissait d'un argument important car, si l'accord était en fait un plan, il aurait dû être soumis à un vote des créanciers conformément aux art. 4 et 5 de la *LACC* avant de recevoir l'aval du tribunal. La cour, dans *Crystallex*, a rejeté cet argument, et nous en faisons autant.

[100] La *LACC* ne définit pas le plan d'arrangement. En fait, la *LACC* ne fait aucunement allusion aux plans — elle fait uniquement état d'un « arrangement » ou d'une « transaction » (voir art. 4 et 5). S'appuyant sur l'ancienne jurisprudence anglaise, les auteurs de *Bankruptcy and Insolvency Law of Canada* proposent la définition générale suivante de ces termes :

> [TRADUCTION] La « transaction » suppose d'emblée l'existence d'un différend au sujet des droits visés par la transaction et d'un règlement de ce différend selon des conditions jugées satisfaisantes par le débiteur et le créancier. L'accord visant à accepter une somme inférieure à 100 ¢ par dollar constituerait une transaction lorsque

than "compromise" and is not limited to something analogous to a compromise. It would include any scheme for reorganizing the affairs of the debtor: *Re Guardian Assur. Co.,* [1917] 1 Ch. 431, 61 Sol. Jo 232, [1917] H.B.R. 113 (C.A.); *Re Refund of Dues under Timber Regulations,* [1935] A.C. 185 (P.C.).

(Houlden, Morawetz and Sarra, at §33)

[101] The apparent breadth of these terms notwithstanding, they do have some limits. More recent jurisprudence suggests that they require, at minimum, some compromise of creditors' rights. For example, in *Crystallex* the litigation funding agreement at issue (known as the Tenor DIP facility) was held not to be a plan of arrangement because it did not "compromise the terms of [the creditors'] indebtedness or take away . . . their legal rights" (para. 93). The Court of Appeal adopted the following reasoning from the lower court's decision, with which we substantially agree:

A "plan of arrangement" or a "compromise" is not defined in the CCAA. It is, however, to be an arrangement or compromise between a debtor and its creditors. The Tenor DIP facility is not on its face such an arrangement or compromise between Crystallex and its creditors. Importantly the rights of the noteholders are not taken away from them by the Tenor DIP facility. The noteholders are unsecured creditors. Their rights are to sue to judgment and enforce the judgment. If not paid, they have a right to apply for a bankruptcy order under the BIA. Under the CCAA, they have the right to vote on a plan of arrangement or compromise. None of these rights are taken away by the Tenor DIP.

(*Re Crystallex International Corporation*, 2012 ONSC 2125, 91 C.B.R. (5th) 169, at para. 50)

[102] Setting out an exhaustive definition of plan of arrangement or compromise is unnecessary to resolve these appeals. For our purposes, it is sufficient to conclude that plans of arrangement require at least

le débiteur conteste la dette ou n'a pas les moyens de la payer. Le mot « arrangement » a un sens plus large que le mot « transaction » et ne se limite pas à quelque chose qui ressemble à une transaction. Il viserait tout plan de réorganisation des affaires du débiteur : *Re Guardian Assur. Co.*, [1917] 1 Ch. 431, 61 Sol. Jo 232, [1917] H.B.R. 113 (C.A.); *Re Refund of Dues under Timber Regulations*, [1935] A.C. 185 (C.P.).

(Houlden, Morawetz et Sarra, §33)

[101] Malgré leur vaste portée apparente, ces termes connaissent quand même certaines limites. Selon une jurisprudence plus récente, ils exigeraient, à tout le moins, une certaine transaction à l'égard des droits des créanciers. Dans *Crystallex*, par exemple, on a conclu que l'accord de financement de litige en cause (également appelé [TRADUCTION] « facilité de DE Tenor ») ne constituait pas un plan d'arrangement parce qu'il ne comportait pas [TRADUCTION] « une transaction visant les conditions [des] dettes envers [des créanciers] ni ne [. . .] privait [ceux-ci] de [. . .] leurs droits reconnus par la loi » (par. 93). La Cour d'appel a fait sien le raisonnement suivant du tribunal de première instance, auquel nous souscrivons pour l'essentiel :

[TRADUCTION] Le « plan d'arrangement » et la « transaction » ne sont pas définis dans la *LACC*. Il doit toutefois s'agir d'un arrangement ou d'une transaction entre un débiteur et ses créanciers. La facilité de DE Tenor ne constitue pas, à première vue, un arrangement ou une transaction entre Crystallex et ses créanciers. Fait important, les détenteurs de billets ne sont pas privés de leurs droits par la facilité de DE Tenor. Les détenteurs de billets sont des créanciers non garantis. Leurs droits se résument à poursuivre en vue d'obtenir un jugement et à faire exécuter ce jugement. S'ils ne sont pas payés, ils ont le droit de demander une ordonnance de faillite en vertu de la LFI. Sous le régime de la *LACC*, ils ont le droit de voter sur un plan d'arrangement ou une transaction. La facilité de DE Tenor ne les prive d'aucun de ces droits.

(*Re Crystallex International Corporation*, 2012 ONSC 2125, 91 C.B.R. (5th) 169, par. 50)

[102] Il n'est pas nécessaire de définir exhaustivement les notions de plan d'arrangement ou de transaction pour trancher les présents pourvois. Il suffit de conclure que les plans d'arrangement doivent au

some compromise of creditors' rights. It follows that a third party litigation funding agreement aimed at extending financing to a debtor company to realize on the value of a litigation asset does not necessarily constitute a plan of arrangement. We would leave it to supervising judges to determine whether, in the particular circumstances of the case before them, a particular third party litigation funding agreement contains terms that effectively convert it into a plan of arrangement. So long as the agreement does not contain such terms, it may be approved as interim financing pursuant to s. 11.2 of the *CCAA*.

[103] We add that there may be circumstances in which a third party litigation funding agreement may contain or incorporate a plan of arrangement (e.g., if it contemplates a plan for distribution of litigation proceeds among creditors). Alternatively, a supervising judge may determine that, despite an agreement itself not being a plan of arrangement, it should be packaged with a plan and submitted to a creditors' vote. That said, we repeat that third party litigation funding agreements are not necessarily, or even generally, plans of arrangement.

[104] None of the foregoing is seriously contested before us. The parties essentially agree that third party litigation funding agreements *can* be approved as interim financing. The dispute between them focusses on whether the supervising judge erred in exercising his discretion to approve the LFA in the absence of a vote of the creditors, either because it was a plan of arrangement or because it should have been accompanied by a plan of arrangement. We turn to these issues now.

(3) The Supervising Judge Did Not Err in Approving the LFA

[105] In our view, there is no basis upon which to interfere with the supervising judge's exercise of his discretion to approve the LFA as interim financing.

moins comporter une certaine transaction à l'égard des droits des créanciers. Il s'ensuit que l'accord de financement de litige par un tiers visant à apporter un financement à la compagnie débitrice pour réaliser la valeur d'un élément d'actif ne constitue pas nécessairement un plan d'arrangement. Nous sommes d'avis de laisser aux juges surveillants le soin de déterminer si, compte tenu des circonstances particulières de l'affaire dont ils sont saisis, l'accord de financement de litige par un tiers comporte des conditions qui le convertissent effectivement en plan d'arrangement. Si l'accord ne comporte pas de telles conditions, il peut être approuvé à titre de financement temporaire en vertu de l'art. 11.2 de la *LACC*.

[103] Ajoutons que, dans certaines circonstances, l'accord de financement de litige par un tiers peut contenir ou incorporer un plan d'arrangement (p. ex., s'il contient un plan prévoyant la distribution aux créanciers des sommes obtenues dans le cadre du litige). Subsidiairement, le juge surveillant peut décider que, bien que l'accord lui-même ne constitue pas un plan d'arrangement, il y a lieu de l'accompagner d'un plan et de le soumettre à un vote des créanciers. Cela dit, nous le répétons, les accords de financement de litige par un tiers ne constituent pas nécessairement, ni même généralement, des plans d'arrangement.

[104] Rien de ce qui précède n'est sérieusement contesté en l'espèce. Les parties s'entendent essentiellement pour dire que les accords de financement de litige par un tiers *peuvent* être approuvés à titre de financement temporaire. Le différend qui les oppose porte sur la question de savoir si le juge surveillant a commis une erreur en exerçant son pouvoir discrétionnaire d'approuver l'AFL en l'absence d'un vote des créanciers, soit parce qu'il constituait un plan d'arrangement, soit parce qu'il aurait dû être accompagné d'un plan d'arrangement. Nous abordons maintenant cette question.

(3) Le juge surveillant n'a pas commis d'erreur en approuvant l'AFL

[105] À notre avis, il n'y a aucune raison d'intervenir dans l'exercice par le juge surveillant de son pouvoir discrétionnaire d'approuver l'AFL à titre de

The supervising judge considered the LFA to be fair and reasonable, drawing guidance from the principles relevant to approving similar agreements in the class action context (para. 74, citing *Bayens*, at para. 41; *Hayes*, at para. 4). In particular, he canvassed the terms upon which Bentham and Bluberi's lawyers would be paid in the event the litigation was successful, the risks they were taking by investing in the litigation, and the extent of Bentham's control over the litigation going forward (paras. 79 and 81). The supervising judge also considered the unique objectives of *CCAA* proceedings in distinguishing the LFA from ostensibly similar agreements that had not received approval in the class action context (paras. 81-82, distinguishing *Houle*). His consideration of those objectives is also apparent from his reliance on *Crystallex*, which, as we have explained, involved the approval of interim financing in circumstances substantially similar to the case at bar (see paras. 67 and 71). We see no error in principle or unreasonableness to this approach.

[106] While the supervising judge did not canvass each of the factors set out in s. 11.2(4) of the *CCAA* individually before reaching his conclusion, this was not itself an error. A review of the supervising judge's reasons as a whole, combined with a recognition of his manifest experience with Bluberi's *CCAA* proceedings, leads us to conclude that the factors listed in s. 11.2(4) concern matters that could not have escaped his attention and due consideration. It bears repeating that, at the time of his decision, the supervising judge had been seized of these proceedings for well over two years and had the benefit of the Monitor's assistance. With respect to each of the s. 11.2(4) factors, we note that:

- the judge's supervisory role would have made him aware of the potential length of Bluberi's *CCAA* proceedings and the extent of creditor support for Bluberi's management (s. 11.2(4)(a) and (c)), though we observe that these factors

financement temporaire. Se fondant sur les principes applicables à l'approbation d'accords semblables dans le contexte des recours collectifs (par. 74, citant *Bayens*, par. 41; *Hayes*, par. 4), le juge surveillant a estimé que l'AFL était juste et raisonnable. Plus particulièrement, il a examiné soigneusement les conditions selon lesquelles les avocats de Bentham et de Bluberi seraient payés si le litige était couronné de succès, les risques qu'ils prenaient en investissant dans le litige et l'étendue du contrôle qu'exercerait désormais Bentham sur le litige (par. 79 et 81). Le juge surveillant a également pris en compte les objectifs uniques des procédures fondées sur la *LACC* en établissant une distinction entre l'AFL et des accords apparemment semblables qui n'avaient pas été approuvés dans le contexte des recours collectifs (par. 81-82, établissant une distinction avec l'affaire *Houle*). Sa prise en compte de ces objectifs ressort également du fait qu'il s'est fondé sur *Crystallex*, qui, comme nous l'avons expliqué, portait sur l'approbation d'un financement temporaire dans des circonstances très semblables à celles en l'espèce (voir par. 67 et 71). Nous ne voyons aucune erreur de principe ni rien de déraisonnable dans cette approche.

[106] Certes, le juge surveillant n'a pas examiné à fond chacun des facteurs énoncés au par. 11.2(4) de la *LACC* de façon individuelle avant de tirer sa conclusion, mais cela ne constituait pas une erreur en soi. L'examen des motifs du juge surveillant dans leur ensemble, conjugué à la reconnaissance de son expérience évidente des procédures intentées par Bluberi sous le régime de la *LACC*, nous mène à conclure que les facteurs énumérés au par. 11.2(4) concernent des questions qui n'auraient pu échapper à son attention et à son examen adéquat. Il convient de rappeler qu'au moment où il a rendu sa décision, le juge surveillant était saisi des procédures en question depuis plus de deux ans et avait pu bénéficier de l'aide du contrôleur. En ce qui a trait à chacun des facteurs énoncés au par. 11.2(4), nous soulignons ce qui suit :

- le rôle de surveillance du juge lui aurait permis de connaître la durée prévue des procédures intentées par Bluberi sous le régime de la *LACC* ainsi que la mesure dans laquelle les dirigeants de Bluberi bénéficiaient du soutien des créanciers

appear to be less significant than the others in the context of this particular case (see para. 96);

- the LFA itself explains "how the company's business and financial affairs are to be managed during the proceedings" (s. 11.2(4)(b));
- the supervising judge was of the view that the LFA would enhance the prospect of a viable plan, as he accepted (1) that Bluberi intended to submit a plan and (2) Bluberi's submission that approval of the LFA would assist it in finalizing a plan "with a view towards achieving maximum realization" of its assets (para. 68, citing 9354-9186 Québec inc. and 9354-9178 Québec inc.'s application, at para. 99; s. 11.2(4)(d));
- the supervising judge was apprised of the "nature and value" of Bluberi's property, which was clearly limited to the Retained Claims (s. 11.2(4)(e));
- the supervising judge implicitly concluded that the creditors would not be materially prejudiced by the Litigation Financing Charge, as he stated that "[c]onsidering the results of the vote [on the First Plan], and given the particular circumstances of this matter, the only potential recovery lies with the lawsuit that the Debtors will launch" (para. 91 (emphasis added); s. 11.2(4)(f)); and
- the supervising judge was also well aware of the Monitor's reports, and drew from the most recent report at various points in his reasons (see, e.g., paras. 64-65 and fn. 1; s. 11.2(4)(g)). It is worth noting that the Monitor supported approving the LFA as interim financing.

[107] In our view, it is apparent that the supervising judge was focussed on the fairness at stake to all parties, the specific objectives of the *CCAA*, and the particular circumstances of this case when he approved the LFA as interim financing. We cannot say that he erred in the exercise of his discretion.

(al. 11.2(4)a) et c)), mais nous constatons que ces facteurs semblent revêtir beaucoup moins d'importance que les autres dans le contexte de la présente affaire (voir par. 96);

- l'AFL lui-même indique « la façon dont les affaires financières et autres de la compagnie seront gérées au cours de ces procédures » (al. 11.2(4)b));
- le juge surveillant était d'avis que l'AFL favoriserait la conclusion d'un plan viable, car il a accepté (1) le fait que Bluberi avait l'intention de présenter un plan et (2) l'argument de Bluberi selon lequel l'approbation de l'AFL l'aiderait à conclure un plan [TRADUCTION] « visant à atteindre une réalisation maximale » de ses éléments d'actif (par. 68, citant la demande de 9354-9186 Québec inc. et de 9354-9178 Québec inc., par. 99; al. 11.2(4)d));
- le juge surveillant était au courant de la « nature et [de] la valeur » des biens de Bluberi, qui se limitaient clairement aux réclamations retenues (al. 11.2(4)e));
- le juge surveillant a conclu implicitement que la charge relative au financement de litige ne causerait pas un préjudice sérieux aux créanciers, car il a affirmé que [TRADUCTION] « [c]ompte tenu du résultat du vote [sur le premier plan] et des circonstances particulières de la présente affaire, la seule possibilité de recouvrement réside dans l'action que vont intenter les débiteurs » (par. 91 (nous soulignons); al. 11.2(4)f));
- le juge surveillant était aussi bien au fait des rapports du contrôleur, et s'est appuyé sur le plus récent d'entre eux à divers endroits dans ses motifs (voir, p. ex., par. 64-65 et note 1; al. 11.2(4)g)). Il convient de souligner que le contrôleur appuyait l'approbation de l'AFL à titre de financement temporaire.

[107] À notre avis, il est manifeste que le juge surveillant a mis l'accent sur l'équité envers toutes les parties, les objectifs précis de la *LACC* et les circonstances particulières de la présente affaire lorsqu'il a approuvé l'AFL à titre de financement temporaire. Nous ne pouvons affirmer qu'il a commis une erreur

Although we are unsure whether the LFA was as favourable to Bluberi's creditors as it might have been — to some extent, it does prioritize Bentham's recovery over theirs — we nonetheless defer to the supervising judge's exercise of discretion.

[108] To the extent the Court of Appeal held otherwise, we respectfully do not agree. Generally speaking, our view is that the Court of Appeal again failed to afford the supervising judge the necessary deference. More specifically, we wish to comment on three of the purported errors in the supervising judge's decision that the Court of Appeal identified.

[109] First, it follows from our conclusion that LFAs can constitute interim financing that the Court of Appeal was incorrect to hold that approving the LFA as interim financing "transcended the nature of such financing" (para. 78).

[110] Second, in our view, the Court of Appeal was wrong to conclude that the LFA was a plan of arrangement, and that *Crystallex* was distinguishable on its facts. The Court of Appeal held that the LFA and associated super-priority Litigation Financing Charge formed a plan because they subordinated the rights of Bluberi's creditors to those of Bentham.

[111] We agree with the supervising judge that the LFA is not a plan of arrangement because it does not propose any compromise of the creditors' rights. To borrow from the Court of Appeal in *Crystallex*, Bluberi's litigation claim is akin to a "pot of gold" (para. 4). Plans of arrangement determine how to distribute that pot. They do not generally determine what a debtor company should do to fill it. The fact that the creditors may walk away with more or less money at the end of the day does not change the nature or existence of their rights to access the pot once it is filled, nor can it be said to "compromise" those rights. When the "pot of gold" is secure — that

dans l'exercice de son pouvoir discrétionnaire. Nous ne savons pas avec certitude si l'AFL était aussi favorable aux créanciers de Bluberi qu'il aurait pu l'être — dans une certaine mesure, il donne priorité au recouvrement de Bentham sur le leur — mais nous nous en remettons néanmoins à l'exercice par le juge surveillant de son pouvoir discrétionnaire.

[108] Dans la mesure où la Cour d'appel a conclu le contraire, en toute déférence, nous ne sommes pas d'accord. De façon générale, nous estimons que la Cour d'appel a encore une fois omis de faire preuve de la déférence nécessaire à l'égard du juge surveillant. Plus particulièrement, nous souhaitons faire des observations sur trois des erreurs qu'aurait décelées la Cour d'appel dans la décision du juge surveillant.

[109] Premièrement, il découle de notre conclusion selon laquelle les AFL peuvent constituer un financement temporaire que la Cour d'appel a eu tort de conclure que l'approbation de l'AFL à titre de financement temporaire [TRADUCTION] « transcendait la nature de ce type de financement » (par. 78).

[110] Deuxièmement, à notre avis, la Cour d'appel a eu tort de conclure que l'AFL était un plan d'arrangement, et qu'il était possible d'établir une distinction entre l'espèce et les faits de l'affaire *Crystallex*. La Cour d'appel a conclu que l'AFL et la charge relative au financement de litige super prioritaire s'y rattachant constituaient un plan parce qu'ils subordonnaient les droits des créanciers de Bluberi à ceux de Bentham.

[111] Nous souscrivons à l'opinion du juge surveillant selon laquelle l'AFL ne constitue pas un plan d'arrangement parce qu'il ne propose aucune transaction visant les droits des créanciers. Pour reprendre la formule qu'a employée la Cour d'appel dans *Crystallex*, la réclamation de Bluberi s'apparente à une [TRADUCTION] « marmite d'or » (par. 4). Les plans d'arrangement établissent la façon dont le contenu de cette marmite sera distribué. Ils n'indiquent généralement pas ce que la compagnie débitrice devra faire pour la remplir. Le fait que les créanciers puissent en fin de compte remporter plus ou moins d'argent ne modifie en rien la nature ou

is, in the event of any litigation or settlement — the net funds will be distributed to the creditors. Here, if the Retained Claims generate funds in excess of Bluberi's total liabilities, the creditors will be paid in full; if there is a shortfall, a plan of arrangement or compromise will determine how the funds are distributed. Bluberi has committed to proposing such a plan (see supervising judge's reasons, at para. 68, distinguishing *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.*, 2008 BCCA 327, 296 D.L.R. (4th) 577).

[112] This is the very same conclusion that was reached in *Crystallex* in similar circumstances:

> The facts of this case are unusual: there is a single "pot of gold" asset which, if realized, will provide significantly more than required to repay the creditors. The supervising judge was in the best position to balance the interests of all stakeholders. I am of the view that the supervising judge's exercise of discretion in approving the Tenor DIP Loan was reasonable and appropriate, despite having the effect of constraining the negotiating position of the creditors.
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> . . . While the approval of the Tenor DIP Loan affected the Noteholders' leverage in negotiating a plan, and has made the negotiation of a plan more complex, it did not compromise the terms of their indebtedness or take away any of their legal rights. It is accordingly not an arrangement, and a creditor vote was not required. [paras. 82 and 93]

[113] We disagree with the Court of Appeal that *Crystallex* should be distinguished on the basis that it involved a single option for creditor recovery (i.e., the arbitration) while this case involves two (i.e., litigation of the Retained Claims and Callidus's New

l'existence de leurs droits d'avoir accès à la marmite une fois qu'elle est remplie, pas plus qu'on ne saurait dire qu'il s'agit d'une « transaction » à l'égard de leurs droits. Lorsque la « marmite d'or » aura été obtenue — c'est-à-dire dans l'éventualité d'une action ou d'un règlement — les sommes nettes seront distribuées aux créanciers. En l'espèce, si les réclamations retenues permettent de recouvrer des sommes qui dépassent le total des dettes de Bluberi, les créanciers seront payés en entier; si les sommes sont insuffisantes, un plan d'arrangement ou une transaction établira la façon dont les sommes seront distribuées. Bluberi s'est engagée à proposer un tel plan (voir les motifs du juge surveillant, par. 68, établissant une distinction avec *Cliffs Over Maple Bay Investments Ltd. c. Fisgard Capital Corp.*, 2008 BCCA 327, 296 D.L.R. (4th) 577).

[112] C'est exactement la même conclusion qui a été tirée dans *Crystallex* dans des circonstances semblables :

> [TRADUCTION] Les faits de l'espèce sont inhabituels : la « marmite d'or » ne contient qu'un seul élément d'actif qui, s'il est réalisé, rapportera beaucoup plus que ce qui est nécessaire pour rembourser les créanciers. Le juge surveillant était le mieux placé pour établir un équilibre entre les intérêts de toutes les parties intéressées. J'estime que l'exercice par le juge surveillant de son pouvoir discrétionnaire d'approuver le prêt de DE Tenor était raisonnable et approprié, bien qu'il ait eu pour effet de limiter la position de négociation des créanciers.
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> . . . L'approbation du prêt de DE Tenor a certes amoindri l'influence que pouvaient exercer les détenteurs de billets lors de la négociation d'un plan, et rendu plus complexe la négociation d'un plan, mais ce prêt ne constituait pas une transaction visant les conditions de leurs dettes ni ne les privait de l'un de leurs droits reconnus par la loi. Il ne s'agit donc pas d'un arrangement, et un vote des créanciers n'était pas nécessaire. [par. 82 et 93]

[113] Nous ne souscrivons pas à l'opinion de la Cour d'appel selon laquelle il y a lieu d'établir une distinction avec *Crystallex* parce que, dans cette affaire, les créanciers disposaient d'un seul moyen de recouvrement (c.-à-d. l'arbitrage) tandis que, dans la

Plan). Given the supervising judge's conclusion that Callidus could not vote on the New Plan, that plan was not a viable alternative to the LFA. This left the LFA and litigation of the Retained Claims as the "only potential recovery" for Bluberi's creditors (supervising judge's reasons, at para. 91). Perhaps more significantly, even if there were multiple options for creditor recovery in either *Crystallex* or this case, the mere presence of those options would not necessarily have changed the character of the third party litigation funding agreements at issue or converted them into plans of arrangement. The question for the supervising judge in each case is whether the agreement before them ought to be approved as interim financing. While other options for creditor recovery may be relevant to that discretionary decision, they are not determinative.

[114] We add that the Litigation Financing Charge does not convert the LFA into a plan of arrangement by "subordinat[ing]" creditors' rights (C.A. reasons, at para. 90). We accept that this charge would have the effect of placing secured creditors like Callidus behind in priority to Bentham. However, this result is expressly provided for in s. 11.2 of the *CCAA*. This "subordination" does not convert statutorily authorized interim financing into a plan of arrangement. Accepting this interpretation would effectively extinguish the supervising judge's authority to approve these charges without a creditors' vote pursuant to s. 11.2(2).

[115] Third, we are of the view that the Court of Appeal was wrong to decide that the supervising judge should have submitted the LFA together with a plan to the creditors for their approval (para. 89). As we have indicated, whether to insist that a debtor package their third party litigation funding agreement

présente affaire, il y en a deux (c.-à-d. l'introduction d'une action à l'égard des réclamations retenues et le nouveau plan de Callidus). Étant donné que le juge surveillant avait conclu que Callidus ne pouvait pas voter sur le nouveau plan, ce plan ne constituait pas une solution de rechange viable à l'AFL. La [TRADUCTION] « seule possibilité de recouvrement » qui s'offrait aux créanciers de Bluberi résidait donc dans l'AFL et l'introduction d'une action à l'égard des réclamations retenues (motifs du juge surveillant, par. 91). Fait peut-être plus important, même si les créanciers avaient disposé de plusieurs moyens de recouvrement, tant dans l'affaire *Crystallex* que dans la présente affaire, la simple existence de ces moyens n'aurait pas nécessairement modifié la nature des accords de financement de litige par un tiers en cause ni n'aurait eu pour effet de les convertir en plans d'arrangement. La question que doit se poser le juge surveillant dans chaque affaire est de savoir si l'accord qui lui est soumis doit être approuvé à titre de financement temporaire. Certes, les autres moyens de recouvrement dont disposent les créanciers peuvent entrer en ligne de compte dans la prise de cette décision discrétionnaire, mais ils ne sont pas déterminants.

[114] Ajoutons que la charge relative au financement de litige ne convertit pas l'AFL en plan d'arrangement en [TRADUCTION] « subordonn[ant] » les droits des créanciers (motifs de la Cour d'appel, par. 90). Nous reconnaissons que cette charge aurait pour effet de placer les créanciers garantis comme Callidus derrière Bentham dans l'ordre de priorité, mais ce résultat est expressément prévu par l'art. 11.2 de la *LACC*. Cette « subordination » ne convertit pas le financement temporaire autorisé par la loi en plan d'arrangement. Retenir cette interprétation aurait pour effet d'annihiler le pouvoir du juge surveillant d'approuver ces charges sans un vote des créanciers en vertu du par. 11.2(2).

[115] Troisièmement, nous estimons que la Cour d'appel a eu tort de conclure que le juge surveillant aurait dû soumettre l'AFL accompagné d'un plan à l'approbation des créanciers (par. 89). Comme nous l'avons indiqué, la décision d'exiger que le débiteur accompagne d'un plan son accord de financement

with a plan is a discretionary decision for the supervising judge to make.

[116] Finally, at the appellants' insistence, we point out that the Court of Appeal's suggestion that the LFA is somehow "akin to an equity investment" was unhelpful and potentially confusing (para. 90). That said, this characterization was clearly *obiter dictum*. To the extent that the Court of Appeal relied on it as support for the conclusion that the LFA was a plan of arrangement, we have already explained why we believe the Court of Appeal was mistaken on this point.

VI. Conclusion

[117] For these reasons, at the conclusion of the hearing we allowed these appeals and reinstated the supervising judge's order. Costs were awarded to the appellants in this Court and the Court of Appeal.

Appeals allowed with costs in the Court and in the Court of Appeal.

Solicitors for the appellants/interveners 9354-9186 Québec inc. and 9354-9178 Québec inc.: Davies Ward Phillips & Vineberg, Montréal.

Solicitors for the appellants/interveners IMF Bentham Limited (now known as Omni Bridgeway Limited) and Bentham IMF Capital Limited (now known as Omni Bridgeway Capital (Canada) Limited): Woods, Montréal.

Solicitors for the respondent Callidus Capital Corporation: Gowling WLG (Canada), Montréal.

Solicitors for the respondents International Game Technology, Deloitte LLP, Luc Carignan, François Vigneault, Philippe Millette, Francis Proulx and François Pelletier: McCarthy Tétrault, Montréal.

Solicitors for the intervener Ernst & Young Inc.: Stikeman Elliott, Montréal.

de litige par un tiers est une décision discrétionnaire qui appartient au juge surveillant.

[116] Enfin, sur les instances des appelantes, nous soulignons que l'affirmation de la Cour d'appel selon laquelle l'AFL [TRADUCTION] « s'apparente [en quelque sorte] à un placement à échéance non déterminée » était inutile et pouvait prêter à confusion (par. 90). Cela dit, il s'agissait manifestement d'une remarque incidente. Dans la mesure où la Cour d'appel s'est fondée sur cette qualification pour conclure que l'AFL constituait un plan d'arrangement, nous avons déjà expliqué pourquoi nous croyons que la Cour d'appel a fait erreur sur ce point.

VI. Conclusion

[117] Pour ces motifs, à l'issue de l'audience, nous avons accueilli les pourvois et rétabli l'ordonnance du juge surveillant. Les dépens devant notre Cour et la Cour d'appel ont été adjugés aux appelantes.

Pourvois accueillis avec dépens devant la Cour et la Cour d'appel.

Procureurs des appelantes/intervenantes 9354-9186 Québec inc. et 9354-9178 Québec inc. : Davies Ward Phillips & Vineberg, Montréal.

Procureurs des appelantes/intervenantes IMF Bentham Limited (maintenant connue sous le nom d'Omni Bridgeway Limited) et Corporation Bentham IMF Capital (maintenant connue sous le nom de Corporation Omni Bridgeway Capital (Canada)) : Woods, Montréal.

Procureurs de l'intimée Callidus Capital Corporation : Gowling WLG (Canada), Montréal.

Procureurs des intimés International Game Technology, Deloitte S.E.N.C.R.L., Luc Carignan, François Vigneault, Philippe Millette, Francis Proulx et François Pelletier : McCarthy Tétrault, Montréal.

Procureurs de l'intervenante Ernst & Young Inc. : Stikeman Elliott, Montréal.

Solicitors for the interveners the Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals: Norton Rose Fulbright Canada, Montréal.

Procureurs des intervenants l'Institut d'insolvabilité du Canada et l'Association canadienne des professionnels de l'insolvabilité et de la réorganisation : Norton Rose Fulbright Canada, Montréal.

TAB 6

Ontario Supreme Court
PSINET Ltd., Re
Date: 2001-09-26

Re PSINET Ltd.

In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 as Amended

In the Matter of a Plan of Compromise or Arrangement of PSINET Limited, PSINET Realty Canada Limited, PSINETWORKS Canada Limited and Toronto Hosting Centre Limited, Applicants

Ontario Superior Court of Justice [Commercial List] Farley J.

Heard: September 26, 2001

Judgment: September 26, 2001

Docket: 01-CL-4155

Lyndon A.J. Barnes, Frederick L. Myers, for Applicants

Geoffrey B. Morawetz, for Monitor, Pricewaterhouse Coopers Inc.

Raymond M. Slattery, for Royal Bank of Canada

Daniel V. MacDonald, for NTFC Capital Corporation

Mark S. Laugesen, for Telus Corporation

Michael J. MacNaughton, for 360Networks Inc.

Tamara Vanmeggelen, for Norstan

Geoff R. Hall, for Key Equipment (formerly Leasetec)

Ashley J. Taylor, for BCE Emergis Inc.

Harvey G. Chaiton, for Comdisco Canada

Paul G. MacDonald, for Cisco System and Cisco Capital

Endorsement. ***Farley J.:***

[1] There was a joint hearing today between the U.S. Bankruptcy Court (Southern District of New York—Judge Robert Gerber) and this court (Superior Court of Justice—Justice

J.M. Farley) concerning the proposed sale of PSINet group assets in Canada to Telus Corporation. These assets were owned in part by the Canadian Applicants under the *Companies' Creditors Arrangement Act* ("CCAA") filing and in part by their U.S. parent PSINet Inc. The transaction, if approved, is to close by October 1, 2001.

[2] There was no opposition to the sale to Telus being approved, save and except from the Royal Bank of Canada which indicated that, with respect to its equipment leases, it wished to be paid out in full the approximately $5 million which would be the balance of payments under such financing arrangements. The PSINet companies however have proposed that the sale be approved with the proviso vis-à-vis the Royal Bank that an amount of money for the full claim be set aside with the court officer, PricewaterhouseCoopers Inc., the monitor in these proceedings, pending a further determination of entitlement and, if so, how much.

[3] In essence the Bank leases seem to be financing arrangements and the retention of title a security device for it *qua* being a creditor. It does not appear to me that the Bank—whose sole concern here is the payment of $5 million and not any request for the return of the equipment—would be prejudiced or otherwise disadvantaged by the arrangements proposed by the PSINet companies. To the contrary in this real time litigation situation, there would be material prejudice (in that the otherwise unopposed sale, even unopposed by the Bank provided it gets $5 million now) to the other stakeholders if the Telus transaction were not proceeded with. Namely, there would be a liquidation scenario ensuing which would realize far less than this going concern sale (which appears to me to have involved a transparent process with appropriate exposure designed to maximize the proceeds), thus impacting upon the rest of the creditors, especially as to the unsecureds, together with the material enlarging of the unsecured claims by the disruption claims of the approximately 8,600 customers (who will be materially disadvantaged by an (physical) interrupted transition) plus the job losses for approximately 200 employees. I see no prejudice in monetizing the claim and having the amount and priority issue dealt with in other proceedings given that the full amount of the Bank's claim is being set aside with the monitor. The Bank cited paragraph 2 *of SkyDome Corp., Re,* [1999] O.J. No. 1261 (Ont. Gen. Div. [Commercial List]) as negating paragraph 5 which was relied on by the Applicants. However in my view this is not the case as paragraph 2 does not indicate that Blair J. had already dealt with vesting out in totality. I there indicated:

> Thus it would appear that Blair J.'s March 2, 1999 Order has already dealt with the vesting out of DMC's claims other than the aforesaid registered interest (registered May 25, 1994…). (emphasis added)

I then went on to state at paragraph 5:

> I do not see that there has been any legal confiscation of rights contemplated by this vesting motion on March 19th. If DMC's registered interest is vested out, then DMC will have a claim against the substituted assets and this claim will be dealt with in a monetary sense based upon a future priorities motion.

[4] In my view *London Drugs Ltd. v. Kuehne & Nagel International Ltd.* (1992), 97 D.L.R. (4th) 261 (S.C.C.) supports the view that the Bank does not have any contractual rights flowing out of the unamended agreement.

[5] *Dylex Ltd., Re* (1995), 31 C.B.R. (3d) 106 (Ont. Gen. Div. [Commercial List]), *Canadian Red Cross Society /Société Canadienne de la Croix-Rouge, Re,* [1998] O.J. No. 3306 (Ont. Gen. Div. [Commercial List]), *SkyDome Corp., Re, supra,* and *T. Eaton Co., Re* (1999), 14 C.B.R. (4th) 288 (Ont. S.C.J. [Commercial List]) all support the proposition that the court has jurisdiction to approve a sale where circumstances dictate same prior to a CCAA plan being submitted.

[6] It seems to me that the sale here has followed the four principles enunciated in *Royal Bank v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (Ont. C.A.) and these principles are equally applicable *mutatis mutandis* in a CCAA sale situation.

[7] No substantive argument or position the Bank now has has been precluded from the Bank as to the subsequent determination of its rights and entitlement.

[8] It appears to me that the Telus transaction (as amended) is the best course of action available in the circumstances and that it involves a maximization of value and is in the best interests of the stakeholders. Both Judge Gerber and I have concluded that the sale as proposed should be approved. Order accordingly.

Order accordingly.

TAB 7

COURT FILE NO.: 04-CL-5306
DATE: 20040322

SUPERIOR COURT OF JUSTICE – ONTARIO
(Commercial List)

RE: IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT WITH RESPECT TO STELCO INC. AND THE OTHER APPLICANTS LISTED IN SCHEDULE "A"

APPLICATION UNDER THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

BEFORE: FARLEY J.

COUNSEL: *Michael E. Barrack, James D. Gage* and *Geoff R. Hall*, for the Applicants

David Jacobs and *Michael McCreary*, for Locals 1005, 5328 and 8782 of the United Steel Workers of America

Ken Rosenberg, Lily Harmer and *Rob Centa*, for United Steelworkers of America

Bob Thornton and *Kyla Mahar*, for Ernst & Young Inc., Monitor of the Applicants

Kevin J. Zych, for the Informal Committee of Stelco Bondholders

David R. Byers, for CIT

Kevin McElcheran, for GE

Murray Gold and *Andrew Hatnay*, for Retired Salaried Beneficiaries

Lewis Gottheil, for CAW Canada and its Local 523

Virginie Gauthier, for Fleet

H. Whiteley, for CIBC

Gail Rubenstein, for FSCO

Kenneth D. Kraft, for EDS Canada Inc.

HEARD: March 5, 2004

ENDORSEMENT

[1] As argued this motion by Locals 1005, 5328 and 8782 United Steel Workers of America (collectively "Union") to rescind the initial order and dismiss the application of Stelco Inc. ("Stelco") and various of its subsidiaries (collectively "Sub Applicants") for access to the protection and process of the *Companies' Creditors Arrangement Act* ("CCAA") was that this access should be denied on the basis that Stelco was not a "debtor company" as defined in s. 2 of the CCAA because it was not insolvent.

[2] Allow me to observe that there was a great deal of debate in the materials and submissions as to the reason(s) that Stelco found itself in with respect to what Michael Locker (indicating he was "an expert in the area of corporate restructuring and a leading steel industry analyst") swore to at paragraph 12 of his affidavit was the "current crisis":

> 12. Contending with weak operating results and resulting tight cash flow, management has deliberately chosen not to fund its employee benefits. By contrast, Dofasco and certain other steel companies have consistently funded both their employee benefit obligations as well as debt service. If Stelco's management had chosen to fund pension obligations, presumably with borrowed money, *the current crisis* and related restructuring plans would focus on debt restructuring as opposed to the reduction of employee benefits and related liabilities. [Emphasis added.]

[3] For the purpose of determining whether Stelco is insolvent and therefore could be considered to be a debtor company, it matters not what the cause or who caused the financial difficulty that Stelco is in as admitted by Locker on behalf of the Union. The management of a corporation could be completely incompetent, inadvertently or advertently; the corporation could be in the grip of ruthless, hard hearted and hard nosed outside financiers; the corporation could be the innocent victim of uncaring policy of a level of government; the employees (unionized or non-unionized) could be completely incompetent, inadvertently or advertently; the relationship of labour and management could be absolutely poisonous; the corporation could be the victim of unforeseen events affecting its viability such a as a fire destroying an essential area of its plant and equipment or of rampaging dumping. One or more or all of these factors (without being exhaustive), whether or not of varying degree and whether or not in combination of some may well have been the cause of a corporation's difficulty. The point here is that Stelco's difficulty exists; the only question is whether Stelco is insolvent within the meaning of that in the "debtor company" definition of the CCAA. However, I would point out, as I did in closing, that no matter how this motion turns out, Stelco does have a problem which has to be addressed – addressed within the CCAA process if Stelco is insolvent or addressed outside that process if Stelco is determined not to be insolvent. The status quo will lead to ruination of Stelco (and its Sub Applicants) and as a result will very badly affect its stakeholder, including pensioners, employees (unionized and non-unionized), management, creditors, suppliers, customers, local and other governments and the local communities. In such situations, time is a precious commodity; it cannot be wasted; no matter how much some would like to take time outs, the clock cannot be stopped. The watchwords of the Commercial List are equally applicable in such circumstances. They are communication, cooperation and common sense. I appreciate that these cases frequently invoke emotions running high and wild; that is understandable on a human basis but it is the considered, rational approach which will solve the problem.

[4] The time to determine whether a corporation is insolvent for the purpose of it being a "debtor company" and thus able to make an application to proceed under the CCAA is the date of filing, in this case January 29, 2004.

[5] The Monitor did not file a report as to this question of insolvency as it properly advised that it wished to take a neutral role. I understand however, that it did provide some assistance in the preparation of Exhibit C to Hap Steven's affidavit.

[6] If I determine in this motion that Stelco is not insolvent, then the initial order would be set aside. See *Montreal Trust Co. of Canada v. Timber Lodge Ltd.* (1992), 15 C.B.R. (3d) 14 (P.E.I.C.A.). The onus is on Stelco as I indicated in my January 29, 2004 endorsement.

[7] S. 2 of the CCAA defines "debtor company" as:

> "debtor company" means any company that:
>
> (a) is bankrupt or insolvent;
>
> (b) has committed an act of bankruptcy within the meaning of *Bankruptcy and Insolvency Act* ["BIA"] or deemed insolvent within the meaning of the *Winding-Up and Restructuring Act*, whether or not proceedings in respect of the company have been taken under either of those Acts;
>
> (c) has made an authorized assignment against which a receiving order has been made under the *Bankruptcy and Insolvency Act*; or
>
> (d) is in the course of being wound-up under the *Winding-Up and Restructuring Act* because the company is insolvent.

[8] Counsel for the Existing Stelco Lenders and the DIP Lenders posited that Stelco would be able to qualify under (b) in light of the fact that as of January 29, 2004 whether or not it was entitled to receive the CCAA protection under (a) as being insolvent, it had ceased to pay its pre-filing debts. I would merely observe as I did at the time of the hearing that I do not find this argument attractive in the least. The most that could be said for that is that such game playing would be ill advised and in my view would not be rewarded by the exercise of judicial discretion to allow such an applicant the benefit of a CCAA stay and other advantages of the procedure for if it were capriciously done where there is not reasonable need, then such ought not to be granted. However, I would point out that if a corporation did capriciously do so, then one might well expect a creditor-initiated application so as to take control of the process (including likely the ouster of management including directors who authorized such unnecessary stoppage); in such a case, while the corporation would not likely be successful in a corporation application, it is likely that a creditor application would find favour of judicial discretion.

[9] This judicial discretion would be exercised in the same way generally as is the case where s. 43(7) of the BIA comes into play whereby a bankruptcy receiving order which otherwise meets the test may be refused. See *Re Kenwood Hills Development Inc.* (1995), 30 C.B.R. (3d) 44 (Ont. Gen. Div.) where at p. 45 I observed:

> The discretion must be exercised judicially based on credible evidence; it should be used according to common sense and justice and in a manner which does not result in an injustice: See *Re Churchill Forest Industries (Manitoba) Ltd.* (1971), 16 C.B.R. (NS) 158 (Man. Q.B.).

[10] Anderson J. in *Re MGM Electric Co. Ltd.* (1982), 42 C.B.R. (N.S.) 29 (Ont. S.C.) at p. 30 declined to grant a bankruptcy receiving order for the eminently good sense reason that it would be counterproductive: "Having regard for the value of the enterprise and having regard to the evidence before me, I think it far from clear that a receiving order would confer a benefit on anyone." This

common sense approach to the judicial exercise of discretion may be contrasted by the rather more puzzling approach in *Re TDM Software Systems Inc.* (1986), 60 C.B.R. (N.S.) 92 (Ont. S.C.).

[11] The Union, supported by the International United Steel Workers of America ("International"), indicated that if certain of the obligations of Stelco were taken into account in the determination of insolvency, then a very good number of large Canadian corporations would be able to make an application under the CCAA. I am of the view that this concern can be addressed as follows. The test of insolvency is to be determined on its own merits, not on the basis that an otherwise technically insolvent corporation should not be allowed to apply. However, if a technically insolvent corporation were to apply and there was no material advantage to the corporation and its stakeholders (in other words, a pressing need to restructure), then one would expect that the court's discretion would be judicially exercised against granting CCAA protection and ancillary relief. In the case of Stelco, it is recognized, as discussed above, that it is in crisis and in need of restructuring – which restructuring, if it is insolvent, would be best accomplished within a CCAA proceeding. Further, I am of the view that the track record of CCAA proceedings in this country demonstrates a healthy respect for the fundamental concerns of interested parties and stakeholders. I have consistently observed that much more can be achieved by negotiations outside the courtroom where there is a reasonable exchange of information, views and the exploration of possible solutions and negotiations held on a without prejudice basis than likely can be achieved by resorting to the legal combative atmosphere of the courtroom. A mutual problem requires a mutual solution. The basic interest of the CCAA is to rehabilitate insolvent corporations for the benefit of all stakeholders. To do this, the cause(s) of the insolvency must be fixed on a long term viable basis so that the corporation may be turned around. It is not achieved by positional bargaining in a tug of war between two parties, each trying for a larger slice of a defined size pie; it may be achieved by taking steps involving shorter term equitable sacrifices and implementing sensible approaches to improve productivity to ensure that the pie grows sufficiently for the long term to accommodate the reasonable needs of the parties.

[12] It appears that it is a given that the Sub Applicants are in fact insolvent. The question then is whether Stelco is insolvent.

[13] There was a question as to whether Stelco should be restricted to the material in its application as presented to the Court on January 29, 2004. I would observe that CCAA proceedings are not in the nature of the traditional adversarial lawsuit usually found in our courtrooms. It seems to me that it would be doing a disservice to the interest of the CCAA to artificially keep the Court in the dark on such a question. Presumably an otherwise deserving "debtor company" would not be allowed access to a continuing CCAA proceeding that it would be entitled to merely because some potential evidence were excluded for traditional adversarial technical reasons. I would point out that in such a case, there would be no prohibition against such a corporation reapplying (with the additional material) subsequently. In such a case, what would be the advantage for anyone of a "pause" before being able to proceed under the rehabilitative process under the CCAA. On a practical basis, I would note that all too often corporations will wait too long before applying, at least this was a significant problem in the early 1990s. In *Re Inducon Development Corp.* (1991), 8 C.B.R. (3d) 306 (Ont. Gen. Div.), I observed:

> Secondly, CCAA is designed to be remedial; it is not, however, designed to be preventative. CCAA should not be the *last* gasp of a dying company; it should be implemented, if it is to be implemented, at a stage prior to the death throe.

[14] It seems to me that the phrase "death throe" could be reasonably replaced with "death spiral". In *Re Cumberland Trading Inc.* (1994), 23 C.B.R. (3d) 225 (Ont. Gen. Div.), I went on to expand on this at p. 228:

> I would also observe that all too frequently debtors wait until virtually the last moment, the last moment, or in some cases, beyond the last moment before even beginning to think about reorganizational (and the attendant support that any successful reorganization requires from the creditors). I noted the lamentable tendency of debtors to deal with these situations as "last gasp" desperation moves in *Re Inducon Development Corp.* (1992), 8 C.B.R. (3d) 308 (Ont. Gen. Div.). To deal with matters on this basis minimizes the chances of success, even if “success” may have been available with earlier spade work.

[15] I have not been able to find in the CCAA reported cases any instance where there has been an objection to a corporation availing itself of the facilities of the CCAA on the basis of whether the corporation was insolvent. Indeed, as indicated above, the major concern here has been that an applicant leaves it so late that the timetable of necessary steps may get impossibly compressed. That is not to say that there have not been objections by parties opposing the application on various other grounds. Prior to the 1992 amendments, there had to be debentures (plural) issued pursuant to a trust deed; I recall that in *Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 1 C.B.R. (3d) 101; 1 O.R. (3d) 280 (C.A.), the initial application was rejected in the morning because there had only been one debenture issued but another one was issued prior to the return to court that afternoon. This case stands for the general proposition that the CCAA should be given a large and liberal interpretation. I should note that there was in *Enterprise Capital Management Inc. v. Semi-Tech Corp.* (1999), 10 C.B.R. (4th) 133 (Ont. S.C.J.) a determination that in a creditor application, the corporation was found not to be insolvent, but see below as to BIA test (c) my views as to the correctness of this decision.

[16] In *Re Lehndorff General Partner Ltd.* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div.) I observed at p. 32:

> One of the purposes of the CCAA is to facilitate ongoing operations of a business where its assets have a greater value as part of an integrated system than individually. The CCAA facilitates reorganization of a company where the alternative, sale of the property piecemeal, is likely to yield far less satisfaction to the creditors.

[17] In *Re Anvil Range Mining Corp.* (2002), 34 C.B.R. (4th) 157 (Ont. C.A.), the court stated to the same effect:

> The second submission is that the plan is contrary to the purposes of the CCAA. Courts have recognized that the purpose of the CCAA is to enable compromises to be made for the common benefit of the creditors and the company and to keep the company alive and out of the hands of liquidators.

[18] Encompassed in this is the concept of saving employment if a restructuring will result in a viable enterprise. See *Diemaster Tool Inc. v. Skvortsoff (Trustee of)* (1991), 3 C.B.R. (3d) 133 (Ont. Gen. Div.). This concept has been a continuing thread in CCAA cases in this jurisdiction stretching back for at least the past 15 years, if not before.

[19] I would also note that the jurisprudence and practical application of the bankruptcy and insolvency regime in place in Canada has been constantly evolving. The early jails of what became Canada were populated to the extent of almost half their capacity by bankrupts. Rehabilitation and a fresh start for the honest but unfortunate debtor came afterwards. Most recently, the *Bankruptcy Act* was revised to the BIA in 1992 to better facilitate the rehabilitative aspect of making a proposal to creditors. At the same time, the CCAA was amended to eliminate the threshold criterion of there having to be debentures issued under a trust deed (this concept was embodied in the CCAA upon its enactment in 1933 with a view that it would only be large companies with public issues of debt securities which could apply). The size restriction was continued as there was now a threshold criterion of at least $5 million of claims against the applicant. While this restriction may appear discriminatory, it does have the practical advantage of taking into account that the costs (administrative costs including professional fees to the applicant, and indeed to the other parties who retain professionals) is a significant amount, even when viewed from the perspective of $5 million. These costs would be prohibitive in a smaller situation. Parliament was mindful of the time horizons involved in proposals under BIA where the maximum length of a proceeding including a stay is six months (including all possible extensions) whereas under CCAA, the length is in the discretion of the court judicially exercised in accordance with the facts and the circumstances of the case. Certainly sooner is better than later. However, it is fair to observe that virtually all CCAA cases which proceed go on for over six months and those with complexity frequently exceed a year.

[20] Restructurings are not now limited in practical terms to corporations merely compromising their debts with their creditors in a balance sheet exercise. Rather there has been quite an emphasis recently on operational restructuring as well so that the emerging company will have the benefit of a long term viable fix, all for the benefit of stakeholders. See *Sklar-Pepplar Furniture Corp. v. Bank of Nova Scotia* (1991), 8 C.B.R. (3d) 312 (Ont. Gen. Div.) at p. 314 where Borins J. states:

> The proposed plan exemplifies the policy and objectives of the Act as it proposes a regime for the court-supervised re-organization for the Applicant company intended to avoid the devastating social and economic effects of a creditor-initiated termination of its ongoing business operations and enabling the company to carry on its business in a manner in which it is intended to cause the least possible harm to the company, its creditors, its employees and former employees and the communities in which its carries on and carried on its business operations.

[21] The CCAA does not define "insolvent" or "insolvency". Houlden & Morawetz, *The 2004 Annotated Bankruptcy and Insolvency Act* (Toronto, Carswell; 2003) at p. 1107 (N5) states:

> In interpreting "debtor company", reference must be had to the definition of “insolvent person” in s. 2(1) of the *Bankruptcy and Insolvency Act* …
>
> To be able to use the Act, a company must be bankrupt or insolvent: *Reference re Companies’ Creditors Arrangement Act (Canada),* 16 C.B.R. 1 [1934] S.C.R. 659, [1934] 4 D.L.R. 75. The company must, in its application, admit its insolvency.

[22] It appears to have become fairly common practice for applicants and others when reference is made to insolvency in the context of the CCAA to refer to the definition of "insolvent person" in the BIA. That definition is as follows:

s. 2(1)…

> "insolvent person" means a person who is not bankrupt and who resides, carries on business or has property in Canada, and whose liability to creditors provable as claims under this Act amount to one thousand dollars, and
>
> (a) who is for any reason unable to meet his obligations as they generally become due,
>
> (b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or
>
> (c) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due.

[23] Stelco acknowledges that it does not meet the test of (b); however, it does assert that it meets the test of both (a) and (c). In addition, however, Stelco also indicates that since the CCAA does not have a reference over to the BIA in relation to the (a) definition of “debtor company” as being a company that is "(a) bankrupt or insolvent", then this term of "insolvent" should be given the meaning that the overall context of the CCAA requires. See the modern rule of statutory interpretation which directs the court to take a contextual and purposive approach to the language of the provision at issue as illustrated by *Bell ExpressVu Limited Partnership* v. *Rex*, [2002] 2 S.C.R. 559 at p. 580:

> Today there is only one principle or approach, namely the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[24] I note in particular that the (b), (c) and (d) aspects of the definition of "debtor company" all refer to other statutes, including the BIA; (a) does not. S. 12 of the CCAA defines "claims" with reference over to the BIA (and otherwise refers to the BIA and the *Winding-Up and Restructuring Act*). It seems to me that there is merit in considering that the test for insolvency under the CCAA may differ somewhat from that under the BIA, so as to meet the special circumstances of the CCAA and those corporations which would apply under it. In that respect, I am mindful of the above discussion regarding the time that is usually and necessarily (in the circumstances) taken in a CCAA reorganization restructuring which is engaged in coming up with a plan of compromise and arrangement. The BIA definition would appear to have been historically focussed on the question of bankruptcy – and not reorganization of a corporation under a proposal since before 1992, secured creditors could not be forced to compromise their claims, so that in practice there were no reorganizations under the former *Bankruptcy Act* unless all secured creditors voluntarily agreed to have their secured claims compromised. The BIA definition then was essentially useful for being a pre-condition to the "end" situation of a bankruptcy petition or voluntary receiving order where the upshot would be a realization on the bankrupt’s assets (not likely involving the business carried on – and certainly not by the bankrupt). Insolvency under the BIA is also important as to the Paulian action events (eg., fraudulent preferences, settlements) as to the conduct of the debtor *prior* to the bankruptcy; similarly as to the question of provincial preference legislation. Reorganization under a plan or proposal, on the contrary, is with a general objective of the applicant continuing to exist,

albeit that the CCAA may also be used to have an orderly disposition of the assets and undertaking in whole or in part.

[25] It seems to me that given the time and steps involved in a reorganization, and the condition of insolvency perforce requires an expanded meaning under the CCAA. Query whether the definition under the BIA is now sufficient in that light for the allowance of sufficient time to carry through with a realistically viable proposal within the maximum of six months allowed under the BIA? I think it sufficient to note that there would not be much sense in providing for a rehabilitation program of restructuring/reorganization under either statute if the entry test was that the applicant could not apply until a rather late stage of its financial difficulties with the rather automatic result that in situations of complexity of any material degree, the applicant would not have the financial resources sufficient to carry through to hopefully a successful end. This would indeed be contrary to the renewed emphasis of Parliament on “rescues” as exhibited by the 1992 and 1997 amendments to the CCAA and the BIA.

[26] Allow me now to examine whether Stelco has been successful in meeting the onus of demonstrating with credible evidence on a common sense basis that it is insolvent within the meaning required by the CCAA in regard to the interpretation of "debtor company" in the context and within the purpose of that legislation. To a similar effect, see *PWA Corp. v. Gemini Group Automated Distribution Systems Inc.* (1993), 103 D.L.R. (4th) 609 (Ont. C.A.), leave to appeal to S.C.C. dismissed wherein it was determined that the trial judge was correct in holding that a party was not insolvent and that the statutory definition of insolvency pursuant to the BIA definition was irrelevant to determine that issue, since the agreement in question effectively provided its own definition by implication. It seems to me that the CCAA test of insolvency advocated by Stelco and which I have determined is a proper interpretation is that the BIA definition of (a), (b) or (c) of insolvent person is acceptable with the caveat that as to (a), a financially troubled corporation is insolvent if it is reasonably expected to run out of liquidity within reasonable proximity of time as compared with the time reasonably required to implement a restructuring. That is, there should be a reasonable cushion, which cushion may be adjusted and indeed become in effect an encroachment depending upon reasonable access to DIP between financing. In the present case, Stelco accepts the view of the Union’s affiant, Michael Mackey of Deloitte and Touche that it will otherwise run out of funding by November 2004.

[27] On that basis, allow me to determine whether Stelco is insolvent on the basis of (i) what I would refer to as the CCAA test as described immediately above, (ii) BIA test (a) or (iii) BIA test (c). In doing so, I will have to take into account the fact that Stephen, albeit a very experienced and skilled person in the field of restructurings under the CCAA, unfortunately did not appreciate that the material which was given to him in Exhibit E to his affidavit was modified by the caveats in the source material that in effect indicated that based on appraisals, the fair value of the real assets acquired was in excess of the purchase price for two of the U.S. comparators. Therefore the evidence as to these comparators is significantly weakened. In addition at Q. 175-177 in his cross examination, Stephen acknowledged that it was reasonable to assume that a purchaser would "take over some liabilities, some pension liabilities and OPEB liabilities, for workers who remain with the plant." The extent of that assumption was not explored; however, I do note that there was acknowledgement on the part of the Union that such an assumption would also have a reciprocal negative effect on the purchase price.

[28] The BIA tests are disjunctive so that anyone meeting any of these tests is determined to be insolvent: see *Re Optical Recording Laboratories Inc.* (1990), 75 D.L.R. (4th) 747 (Ont. C.A.) at p. 756; *Re Viteway Natural Foods Ltd.* (1986), 63 C.B.R. (N.S.) 157 (B.C.S.C.) at p. 161. Thus, if I determine that Stelco is insolvent on *any one* of these tests, then it would be a "debtor company" entitled to apply for protection under the CCAA.

[29] In my view, the Union's position that Stelco is not insolvent under BIA (a) because it has not entirely used up its cash and cash facilities (including its credit line), that is, it is not yet as of January 29, 2004 run out of liquidity conflates inappropriately the (a) test with the (b) test. The Union's view would render the (a) test necessarily as being redundant. See *R. v. Proulx,* [2000] 1 S.C.R. 61 at p. 85 for the principle that no legislative provision ought to be interpreted in a manner which would "render it mere surplusage." Indeed the plain meaning of the phrase "unable to meet his obligations as they generally become due" requires a construction of test (a) which permits the court to take a purposive assessment of a debtor's ability to meet his future obligations. See *Re King Petroleum Ltd.* (1978), 29 C.B.R. (N.S.) 76 (Ont. S.C.) where Steele J. stated at p. 80:

> With respect to cl. (a), it was argued that at the time the disputed payments were made the company was able to meet its obligations as they generally became due because no major debts were in fact due at that time. This was premised on the fact that the moneys owed to Imperial Oil were not due until 10 days after the receipt of the statements and that the statements had not then been received. I am of the opinion that this is not a proper interpretation of cl. (a). *Clause (a) speaks in the present and future tenses and not in the past.* I am of the opinion that the company was an "insolvent person" within the meaning of cl. (a) because by the very payment-out of the money in question it placed itself in a position that it was unable to meet its obligations as they would generally become due. In other words, it had placed itself in a position that it would not be able to pay the obligations that it knew it had incurred and which it knew would become due in the immediate future. [Emphasis added.]

[30] *King* was a case involving the question in a bankruptcy scenario of whether there was a fraudulent preference during a period when the corporation was insolvent. Under those circumstances, the "immediate future" does not have the same expansive meaning that one would attribute to a time period in a restructuring forward looking situation.

[31] Stephen at paragraphs 40-49 addressed the restructuring question in general and its applicability to the Stelco situation. At paragraph 41, he outlined the significant stages as follows:

> The process of restructuring under the CCAA entails a number of different stages, the most significant of which are as follows:
>
> (a) identification of the debtor's stakeholders and their interests;
>
> (b) arranging for a process of meaningful communication;
>
> (c) dealing with immediate relationship issues arising from a CCAA filing;
>
> (d) sharing information about the issues giving rise to the debtor's need to restructure;

(e) developing restructuring alternatives; and

(f) building a consensus around a plan of restructuring.

[32] I note that January 29, 2004 is just 9-10 months away from November 2004. I accept as correct his conclusion based on his experience (and this is in accord with my own objective experience in large and complicated CCAA proceedings) that Stelco would have the liquidity problem within the time horizon indicated. In that regard, I also think it fair to observe that Stelco realistically cannot expect any increase in its credit line with its lenders or access further outside funding. To bridge the gap it must rely upon the stay to give it the uplift as to prefiling liabilities (which the Union misinterpreted as a general turnaround in its cash position without taking into account this uplift). As well, the Union was of the view that recent price increases would relieve Stelco's liquidity problems; however, the answers to undertaking in this respect indicated:

> With respect to the Business Plan, the average spot market sales price per ton was $514, and the average contract business sales price per ton was $599. The Forecast reflects an average spot market sales price per ton of $575, and average contract business sales price per ton of $611. The average spot price used in the forecast considers further announced price increases, recognizing, among other things, the timing and the extent such increases are expected to become effective. The benefit of the increase in sales prices from the Business Plan is essentially offset by the substantial increase in production costs, and in particular in raw material costs, primarily scrap and coke, as well as higher working capital levels and a higher loan balance outstanding on the CIT credit facility as of January 2004.

I accept that this is generally a cancel out or wash in all material respects.

[33] I note that $145 million of cash resources had been used from January 1, 2003 to the date of filing. Use of the credit facility of $350 million had increased from $241 million on November 30, 2003 to $293 million on the date of filing. There must be a reasonable reserve of liquidity to take into account day to day, week to week or month to month variances and also provide for unforeseen circumstances such as the breakdown of a piece of vital equipment which would significantly affect production until remedied. Trade credit had been contracting as a result of appreciation by suppliers of Stelco's financial difficulties. The DIP financing of $75 million is only available if Stelco is under CCAA protection. I also note that a shut down as a result of running out of liquidity would be complicated in the case of Stelco and that even if conditions turned around more than reasonably expected, start-up costs would be heavy and quite importantly, there would be a significant erosion of the customer base (reference should be had to the Slater Hamilton plant in this regard). One does not liquidate assets which one would not sell in the ordinary course of business to thereby artificially salvage some liquidity for the purpose of the test: see *Re Pacific Mobile Corporation; Robitaille v. Les Industries l'Islet Inc. and Banque Canadienne Nationale* (1979), 32 C.B.R. (N.S.) 209 (Que. S.C.) at p. 220. As a rough test, I note that Stelco (albeit on a consolidated basis with all subsidiaries) running significantly behind plan in 2003 from its budget of a profit of $80 million now to a projected loss of $192 million and cash has gone from a positive $209 million to a negative $114 million.

[34] Locker made the observation at paragraph 8 of his affidavit that:

> 8. Stelco has performed poorly for the past few years primarily due to an inadequate business strategy, poor utilization of assets, inefficient operations and generally weak management leadership and decision-making. This point is best supported by the fact that Stelco's local competitor, Dofasco, has generated outstanding results in the same period.

Table 1 to his affidavit would demonstrate that Dofasco has had superior profitability and cashflow performance than its "neighbour" Stelco. He went on to observe at paragraphs 36-37:

> 36. Stelco can achieve significant cost reductions through means other than cutting wages, pensions and benefits for employees and retirees. Stelco could bring its cost levels down to those of restructured U.S. mills, with the potential for lowering them below those of many U.S. mills.
>
> 37. Stelco could achieve substantial savings through productivity improvements within the mechanisms of the current collective agreements. More importantly, a major portion of this cost reduction could be achieved through constructive negotiations with the USWA in an out-of-court restructuring that does not require intervention of the courts through the vehicle of CCAA protection.

I accept his constructive comments that there is room for cost reductions and that there are substantial savings to be achieved through productivity improvements. However, I do not see anything detrimental to these discussions and negotiations by having them conducted within the umbrella of a CCAA proceeding. See my comments above regarding the CCAA in practice.

[35] But I would observe and I am mystified by Locker's observations at paragraph 12 (quoted above), that Stelco should have borrowed to fund pension obligations to avoid its current financial crisis. This presumes that the borrowed funds would not constitute an obligation to be paid back as to principal and interest, but rather that it would assume the character of a cost-free "gift".

[36] I note that Mackey, without the "laundry list" he indicates at paragraph 17 of his second affidavit, is unable to determine at paragraph 19 (for himself) whether Stelco was insolvent. Mackey was unable to avail himself of all available information in light of the Union's refusal to enter into a confidentiality agreement. He does not closely adhere to the BIA tests as they are defined. In the face of positive evidence about an applicant's financial position by an experienced person with expertise, it is not sufficient to displace this evidence by filing evidence which goes no further than raising questions: see *Anvil*, *supra* at p. 162.

[37] The Union referred me to one of my decisions *Standard Trustco Ltd. (Trustee of) v. Standard Trust Co.* (1993), 13 O.R. (3d) 7 (Gen. Div.) where I stated as to the MacGirr affidavit:

> The Trustee's cause of action is premised on MacGirr's opinion that STC was insolvent as at August 3, 1990 and therefore the STC common shares and promissory note received by Trustco in return for the Injection had no value at the time the Injection was made. Further, MacGirr ascribed no value to the opportunity which the Injection gave to Trustco to restore STC and salvage its thought to be existing $74 million investment. In stating his opinion MacGirr defined solvency as:

> (a) the ability to meet liabilities as they fall due; and
>
> (b) that assets exceed liabilities.
>
> On cross-examination MacGirr testified that in his opinion on either test STC was insolvent as at August 3, 1990 since as to (a) STC was experiencing then a negative cash flow and as to (b) the STC financial statements incorrectly reflected values. As far as (a) is concerned, I would comment that while I concur with MacGirr that at some time in the long run a company that is experiencing a negative cash flow will eventually not be able to meet liabilities as they fall due but that is not the test (which is a "present exercise"). On that current basis STC was meeting its liabilities on a timely basis.

[38] As will be seen from that expanded quote, MacGirr gave his own definitions of insolvency which are not the same as the s. 2 BIA tests (a), (b) and (c) but only a very loose paraphrase of (a) and (c) and an omission of (b). Nor was I referred to the *King* or *Proulx* cases *supra*. Further, it is obvious from the context that "*sometime in the long run…eventually*" is not a finite time in the foreseeable future.

[39] I have not given any benefit to the $313 - $363 million of improvements referred to in the affidavit of William Vaughan at paragraph 115 as those appear to be capital expenditures which will have to be accommodated within a plan of arrangement or after emergence.

[40] It seems to me that if the BIA (a) test is restrictively dealt with (as per my question to Union counsel as to how far in the future should one look on a prospective basis being answered "24 hours") then Stelco would not be insolvent under that test. However, I am of the view that that would be unduly restrictive and a proper contextual and purposive interpretation to be given when it is being used for a restructuring purpose even under BIA would be to see whether there is a reasonably foreseeable (at the time of filing) expectation that there is a looming liquidity condition or crisis which will result in the applicant running out of "cash" to pay its debts as they generally become due in the future without the benefit of the say and ancillary protection and procedure by court authorization pursuant to an order. I think this is the more appropriate interpretation of BIA (a) test in the context of a reorganization or "rescue" as opposed to a threshold to bankruptcy consideration or a fraudulent preferences proceeding. On that basis, I would find Stelco insolvent from the date of filing. Even if one were not to give the latter interpretation to the BIA (a) test, clearly for the above reasons and analysis, if one looks at the meaning of "insolvent" within the context of a CCAA reorganization or rescue solely, then of necessity, the time horizon must be such that the liquidity crisis would occur in the sense of running out of "cash" but for the grant of the CCAA order. On that basis Stelco is certainly insolvent given its limited cash resources unused, its need for a cushion, its rate of cash burn recently experienced and anticipated.

[41] What about the BIA (c) test which may be roughly referred to as an assets compared with obligations test. See *New Quebec Reglan Mines Ltd. v. Blok-Andersen*, [1993] O.J. No. 727 (Gen. Div.) as to fair value and fair market valuation. The Union observed that there was no intention by Stelco to wind itself up or proceed with a sale of some or all of its assets and undertaking and therefore some of the liabilities which Stelco and Stephen took into account would not crystallize. However, as I discussed at the time of the hearing, the (c) test is what one might reasonably call or describe as an "artificial" or notional/hypothetical test. It presumes certain things which are in fact not necessarily contemplated to take place or to be involved. In that respect, I appreciate that it may

be difficult to get one's mind around that concept and down the right avenue of that (c) test. See my views at trial in *Olympia & York Developments Ltd. (Trustee of) v. Olympia & York Realty Corp.*, [2001] O.J. No. 3394 (S.C.J.) at paragraphs 13, 21 and 33; affirmed [2003] O.J. No. 5242 (C.A.). At paragraph 33, I observed in closing:

> 33…They (and their expert witnesses) all had to contend with dealing with rambling and complicated facts and, in Section 100 BIA, a section which is difficult to administer when fmv [fair market value] in a notational or hypothetical market involves ignoring what would often be regarded as self evidence truths but at the same time appreciating that this notational or hypothetical market requires that the objects being sold have to have realistic true to life attributes recognized.

[42] The Court of Appeal stated at paragraphs 24-25 as follows:

> 24. Nor are the appellants correct to argue that the trial judge also assumed an imprudent vendor in arriving at his conclusion about the fair market value of the OYSF note would have to know that in order to realize value from the note any purchaser would immediately put OYSF and thus OYDL itself into bankruptcy to pre-empt a subsequent triggering event in favour of EIB. While this was so, and the trial judge clearly understood it, the error in this submission is that it seeks to inject into the analysis factors subjected to the circumstances of OYDL as vendor and not intrinsic to the value of the OYSF note. The calculation of fair market value does not permit this but rather must assume an unconstrained vendor.
>
> 25. The Applicants further argue that the trial judge eroded in determining the fair market value of the OYSF note by reference to a transaction which was entirely speculative because it was never considered by OYDL nor would have it been since it would have resulted in OYDL's own bankruptcy. I disagree. The transaction hypothesized by the trial judge was one between a notational, willing, prudent and informed vendor and purchaser based on factors relevant to the OYSF note itself rather than the particular circumstances of OYDL as the seller of the note. This is an entirely appropriate way to determine the fair market value of the OYSF note.

[43] Test (c) deems a person to be insolvent if "the aggregate of [its] property is not, at a fair valuation, sufficient, or of disposed at a fairly conducted sale under legal process would not be sufficient to enable payment of all [its] obligations, due and accruing due." The origins of this legislative test appear to be the decision of Spragge V-C in *Davidson v. Douglas* (1868), 15 Gr. 347 at p. 351 where he stated with respect to the solvency or insolvency of a debtor, the proper course is:

> to see and examine whether all his property, real and personal, be sufficient if presently realized for the payment of his debts, and in this view we must estimate his land, as well as his chattel property, not at what his neighbours or others may consider to be its value, but at what it would bring in the market at a forced sale, or a sale where the seller cannot await his opportunities, but must sell.

[44] In *Clarkson v. Sterling* (1887), 14 O.R. 460 (Div Ct.) at p. 463, Rose J. indicted that the sale must be fair and reasonable, but that the determination of fairness and reasonableness would depend on the facts of each case.

[45] The Union essentially relied on garnishment cases. Because of the provisions relating as to which debts may or may not be garnished, these authorities are of somewhat limited value when dealing with the test (c) question. However I would refer to one of the Union's cases *Bank of Montreal v. I. M. Krisp Foods Ltd.*, [1996] S.J. No. 655 (C.A.) where it is stated at paragraph 11:

> "11. Few phrases have been as problematic to define as "debt due or accruing due". The Shorter Oxford English Dictionary, 3rd ed. defines "accruing" as "arising in due course", but an examination of English and Canadian authority reveals that not all debts "arising in due course" are permitted to be garnisheed. (See Professor Dunlop's extensive research for his British Columbia Law Reform Commission's Report on Attachment of Debts Act, 1978 at 17 to 29 and is text Creditor-Debtor Law in Canada, 2nd ed. at 374 to 385.)

[46] In *Barsi v. Farcas*, [1924] 1 D.L.R. 1154 (Sask. C.A.), Lamont J.A. was cited for his statement at p. 522 of *Webb v. Stanton* (1883), 11 Q.B.D. 518 that: "an accruing debt, therefore, is a debt not yet actually payable, but a debt which is represented by an existing obligation."

[47] Saunders J. noted in *633746 Ont. Inc. (Trustee of) v. Salvati* (1990), 79 C.B.R. (N.S.) 72 (Ont. S.C.) at p. 81 that a sale out of the ordinary course of business would have an adverse effect on that actually realized.

[48] There was no suggestion by any of the parties that any of the assets and undertaking would have any enhanced value from that shown on the financial statements prepared according to GAAP.

[49] In *King, supra* at p. 81 Steele J. observed:

> To consider the question of insolvency under cl. (c) I must look to the aggregate property of the company and come to a conclusion as to whether or not it would be sufficient to enable payment of all obligations due and accruing due. There are two tests to be applied: First, its fair value and, secondly, its value if disposed of at a fairly conducted sale under legal process. The balance sheet is a starting point, but the evidence relating to the fair value of the assets and what they might realize if disposed of at a fairly conducted sale under legal process must be reviewed in interpreting it. In this case, I find no difficulty in accepting the obligations shown as liabilities because they are known. I have more difficulty with respect to the assets.

[50] To my view the preferable interpretation to be given to "sufficient to enable payment of all his obligations, due and accruing due" is to be determined in the context of this test as a whole. What is being put up to satisfy those obligations is the debtor's assets and undertaking *in total*; in other words, the debtor in essence is taken as having sold everything. There would be no residual assets and undertaking to pay off any obligations which would not be encompassed by the phrase "all of his obligations, due and accruing due". Surely, there cannot be "orphan" obligations which are left hanging unsatisfied. It seems to me that the intention of "due and accruing due" was to cover off all obligations of whatever nature or kind and leave nothing in limbo.

[51] S. 121(1) and (2) of the BIA, which are incorporated by reference in s. 12 of the CCAA, provide in respect to provable claims:

> S. 121(1) All debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt or to which bankrupt may become subject before the bankrupt's discharge by reason of any obligation incurred before the day on which the bankrupt becomes bankrupt shall be deemed to be claims provable in proceedings under this Act.
>
> (2) The determination whether a contingent or unliquidated claim is a provable claim and the valuation of such claim shall be made in accordance with s. 135.

[52] *Houlden and Morawetz 2004 Annotated supra* at p. 537 (G28(3)) indicates:

> The word "liability" is a very broad one. It includes all obligations to which the bankrupt is subject on the day on which he becomes bankrupt except for contingent and unliquidated claims which are dealt with in s. 121(2).

However contingent and unliquidated claims would be encompassed by the term "obligations".

[53] In *Garden v. Newton* (1916), 29 D.L.R. 276 (Man. K.B.), Mathers C.J.K.B. observed at p. 281 that "contingent claim, that is, a claim which may or may not ripen into a debt, according as some future event does or does not happen." See *In re A Debtor (No. 64 of 1992)*, [1993] 1 W.L.R. 264 (Ch. D) at p. 268 for the definition of a "liquidated sum" which is an amount which can be readily ascertained and hence by corollary an "unliquidated claim" would be one which is not easily ascertained, but will have to be valued. In *Re Leo Gagnier* (1950), 30 C.B.R. 74 (Ont. S.C.), there appears to be a conflation of not only the (a) test with the (c) test, but also the invocation of the judicial discretion not to grant the receiving order pursuant to a bankruptcy petition, notwithstanding that "[the judge was] unable to find the debtor is bankrupt". The debtor was able to survive the (a) test as he had the practice (accepted by all his suppliers) of providing them with post dated cheques. The (c) test was not a problem since the judge found that his assets should be valued at considerably more than his obligations. However, this case does illustrate that the application of the tests present some difficulties. These difficulties are magnified when one is dealing with something more significantly complex and a great deal larger than a haberdashery store – in the case before us, a giant corporation in which, amongst other things, is engaged in a very competitive history including competition from foreign sources which have recently restructured into more cost efficient structures, having shed certain of their obligations. As well, that is without taking into account that a sale would entail significant transaction costs. Even of greater significance would be the severance and termination payments to employees not continued by the new purchaser. Lastly, it was recognized by everyone at the hearing that Stelco's plants, especially the Hamilton-Hilton works, have extremely high environmental liabilities lurking in the woodwork. Stephen observed that these obligations would be substantial, although not quantified.

[54] It is true that there are no appraisals of the plant and equipment nor of the assets and undertaking of Stelco. Given the circumstances of this case and the complexities of the market, one may realistically question whether or not the appraisals would be all that helpful or accurate.

[55] I would further observe that in the notional or hypothetical exercise of a sale, then all the obligations which would be triggered by such sale would have to be taken into account.

[56] All liabilities, contingent or unliquidated would have to be taken into account. See *King, supra* p. 81; *Salvati, supra* pp. 80-1; *Maybank Foods Inc. (Trustee of) v. Proviseuers Maritimes Ltd.* (1989), 45 B.L.R. 14 (N.S.S.C.) at p. 29; *Re Challmie* (1976), 22 C.B.R. (N.S.) 78 (B.C.S.C.) at pp. 81-2. In *Challmie* the debtor ought to have known that his guarantee was very much exposed given the perilous state of his company whose liabilities he had guaranteed. It is interesting to note what was stated in *Maybank*, even if it is rather patently obvious. Tidman J. said in respect of the branch of the company at p. 29:

> Mr. MacAdam argues also that the $4.8 million employees' severance obligation was not a liability on January 20, 1986. The *Bankruptcy Act* includes as obligations both those due and accruing due. Although the employees' severance obligation was not due and payable on January 20, 1986 it was an obligation "accruing due". The Toronto facility had experienced severe financial difficulties for some time; in fact, it was the major, if not the sole cause, of Maybank's financial difficulties. I believe it is reasonable to conclude that a reasonably astute perspective buyer of the company has a going concern would have considered that obligation on January 20, 1986 and that it would have substantially reduced the price offered by that perspective buyer. Therefore that obligation must be considered as an obligation of the company on January 20, 1986.

[57] With the greatest of respect for my colleague, I disagree with the conclusion of Ground J. in *Enterprise Capital, supra* as to the approach to be taken to "due and accruing due" when he observed at pp. 139-140:

> It therefore becomes necessary to determine whether the principle amount of the Notes constitutes an obligation "due or accruing due" as of the date of this application.
>
> There is a paucity of helpful authority on the meaning of "accruing due" for purposes of a definition of insolvency. Historically, in 1933, in *P. Lyall & Sons Construction Co. v. Baker*, [1933] O.R. 286 (Ont. C.A.), the Ontario Court of Appeal, in determining a question of set-off under the *Dominion Winding-Up Act* had to determine whether the amount claimed as set-off was a debt due or accruing due to the company in liquidation for purposes of that Act. Marsten J. at pp. 292-293 quoted from Moss J.A. in *Mail Printing Co. v. Clarkson* (1898), 25 O.R. 1 (Ont. C.A.) at p. 8:
>
> > A debt is defined to be a sum of money which is certainly, and at all event, payable without regard to the fact whether it be payable now or at a future time. And an accruing debt is a debt not yet actually payable, but a debt which is represented by an existing obligation: Per Lindley L.J. in *Webb v. Stenton* (1883), 11 Q.D.D. at p. 529.
>
> Whatever relevance such definition may have had for purposes of dealing with claims by and against companies in liquidation under the old winding-up legislation, it is apparent to me that it should not be applied to definitions of insolvency. To include every debt payable at some future date in "accruing due"

> for the purposes of insolvency tests would render numerous corporations, with long term debt due over a period of years in the future and anticipated to be paid out of future income, "insolvent" for the purposes of the BIA and therefore the CCAA. For the same reason, I do not accept the statement quoted in the Enterprise factum from the decision of the Bankruptcy Court for the Southern District of New York in *Centennial Textiles Inc., Re* 220 B.R. 165 (U.S.N.Y.D.C. 1998) that "if the present saleable value of assets are less than the amount required to pay existing debt as they mature, the debtor is insolvent". In my view, the obligations, which are to be measured against the fair valuation of a company's property as being obligations due and accruing due, must be limited to obligations currently payable or properly chargeable to the accounting period during which the test is being applied as, for example, a sinking fund payment due within the current year. Black's Law Dictionary defines "accrued liability" as "an obligation or debt which is properly chargeable in a given accounting period, but which is not yet paid or payable". The principal amount of the Notes is neither due nor accruing due in this sense.

[58] There appears to be some confusion in this analysis as to "debts" and "obligations", the latter being much broader than debts. Please see above as to my views concerning the floodgates argument under the BIA and CCAA being addressed by judicially exercised discretion even if "otherwise warranted" applications were made. I pause to note that an insolvency test under general corporate litigation need not be and likely is not identical, or indeed similar to that under these insolvency statutes. As well, it is curious to note that the cut off date is the end of the current fiscal period which could have radically different results if there were a calendar fiscal year and the application was variously made in the first week of January, mid-summer or the last day of December. Lastly, see above and below as to my views concerning the proper interpretation of this question of "accruing due".

[59] It seems to me that the phrase "accruing due" has been interpreted by the courts as broadly identifying obligations that will "become due". See *Viteway* below at pp. 163-4 – at least at some point in the future. Again, I would refer to my conclusion above that *every obligation* of the corporation in the hypothetical or notional sale must be treated as "accruing due" to avoid orphan obligations. In that context, it matters not that a wind-up pension liability may be discharged over 15 years; in a test (c) situation, it is crystallized on the date of the test. See *Optical supra* at pp. 756-7; *Re Viteway Natural Foods Ltd.* (1986), 63 C.B.R. (N.S.) 157 (B.C.S.C.) at pp. 164-63-4; *Re Consolidated Seed Exports Ltd.* (1986), 62 C.B.R. (N.S.) 156 (B.C.S.C.) at p. 163. In *Consolidated Seed,* Spencer J. at pp. 162-3 stated:

> In my opinion, a futures broker is not in that special position. The third definition of "insolvency" may apply to a futures trader at any time even though he has open long positions in the market. Even though Consolidated's long positions were not required to be closed on 10th December, the chance that they might show a profit by March 1981 or even on the following day and thus wipe out Consolidated's cash deficit cannot save it from a condition of insolvency on that day. The circumstances fit precisely within the third definition; if all Consolidated's assets had been sold on that day at a fair value, the proceeds would not have covered its obligations due and accruing due, including its

> obligations to pay in March 1981 for its long positions in rapeseed. The market prices from day to day establish a fair valuation. …
>
> The contract to buy grain at a fixed price at a future time imposes a present obligation upon a trader taking a long position in the futures market to take delivery in exchange for payment at that future time. It is true that in the practice of the market, that obligation is nearly always washed out by buying an offsetting short contract, but until that is done the obligation stands. The trader does not know who will eventually be on the opposite side of his transaction if it is not offset but all transactions are treated as if the clearing house is on the other side. It is a present obligation due at a future time. It is therefore an obligation accruing due within the meaning of the third definition of "insolvency".

[60] The possibility of an expectancy of future profits or a change in the market is not sufficient; *Consolidated Seed* at p. 162 emphasizes that the test is to be done on that day, the day of filing in the case of an application for reorganization.

[61] I see no objection to using Exhibit C to Stephen's affidavit as an aid to review the balance sheet approach to test (c). While Stephen may not have known who prepared Exhibit C, he addressed each of its components in the text of his affidavit and as such he could have mechanically prepared the exhibit himself. He was comfortable with and agreed with each of its components. Stelco's factum at paragraphs 70-1 submits as follows:

> 70. In Exhibit C to his Affidavit, Mr. Stephen addresses a variety of adjustments to the Shareholder's Equity of Stelco necessary to reflect the values of assets and liabilities as would be required to determine whether Stelco met the test of insolvency under Clause C. In cross examination of both Mr. Vaughan and Mr. Stephen only one of these adjustments was challenged – the "Possible Reductions in Capital Assets."
>
> 71. The basis of the challenge was that the comparative sales analysis was flawed. In the submission of Stelco, none of these challenges has any merit. Even if the entire adjustment relating to the value in capital assets is ignored, the remaining adjustments leave Stelco with assets worth over $600 million less than the value of its obligations due and accruing due. This fundamental fact is not challenged.

[62] Stelco went on at paragraphs 74-5 of its factum to submit:

> 74. The values relied upon by Mr. Stephen if anything, understate the extent of Stelco's insolvency. As Mr. Stephen has stated, and no one has challenged by affidavit evidence or on cross examination, in a fairly conducted sale under legal process, the value of Stelco's working capital and other assets would be further impaired by: (i) increased environmental liabilities not reflected on the financial statements, (ii) increased pension deficiencies that would be generated on a wind up of the pension plans, (iii) severance and termination claims and (iv) substantial liquidation costs that would be incurred in connection with such a sale.

> 75. No one on behalf of the USWA has presented any evidence that the capital assets of Stelco are in excess of book value on a stand alone basis. Certainly no one has suggested that these assets would be in excess of book value if the related environmental legacy costs and collective agreements could not be separated from the assets.

[63] Before turning to that exercise, I would also observe that test (c) is also disjunctive. There is an insolvency condition if the total obligation of the debtor exceed either (i) a fair valuation of its assets or (ii) the proceeds of a sale fairly conducted under legal process of its assets.

[64] As discussed above and confirmed by Stephen, if there were a sale under legal process, then it would be unlikely, especially in this circumstance that values would be enhanced; in all probability they would be depressed from book value. Stephen took the balance sheet GAAP calculated figure of equity at November 30, 2003 as $804.2 million. From that, he deducted the loss for December 2003 – January 2004 of $17 million to arrive at an equity position of $787.2 million as at the date of filing.

[65] From that, he deducted, reasonably in my view, those "booked" assets that would have no value in a test (c) sale namely: (a) $294 million of future income tax recourse which would need taxable income in the future to realize; (b) $57 million for a write-off of the Platemill which is presently hot idled (while Locker observed that it would not be prohibitive in cost to restart production, I note that neither Stephen nor Vaughn were cross examined as to the decision not to do so); and (c) the captialized deferred debt issue expense of $3.2 million which is being written off over time and therefore, truly is a "nothing". This totals $354.2 million so that the excess of value over liabilities before reflecting obligations not included in the financials directly, but which are, substantiated as to category in the notes would be $433 million.

[66] On a windup basis, there would be a pension deficiency of $1252 million; however, Stephen conservatively in my view looked at the Mercer actuary calculations on the basis of a going concern finding deficiency of $656 million. If the $1252 million windup figure had been taken, then the picture would have been even bleaker than it is as Stephen has calculated it for test (c) purposes. In addition, there are deferred pension costs of $198.7 million which under GAAP accounting calculations is allowed so as to defer recognition of past bad investment experience, but this has no realizable value. Then there is the question of Employee Future Benefits. These have been calculated as at December 31, 2003 by the Mercer actuary as $909.3 million but only $684 million has been accrued and booked on the financial statements so that there has to be an increased provision of $225.3 million. These off balance sheet adjustments total $1080 million.

[67] Taking that last adjustment into account would result in a *negative* equity of ($433 million minus $1080 million) or *negative* $647 million. On that basis without taking into account possible reductions in capital assets as dealt with in the somewhat flawed Exhibit E nor environmental and other costs discussed above, Stelco is insolvent according to the test (c). With respect to Exhibit E, I have not relied on it in any way, but it is entirely likely that a properly calculated Exhibit E would provide comparators (also being sold in the U.S. under legal process in a fairly conducted process) which tend to require a further downward adjustment. Based on test (c), Stelco is significantly, not marginally, under water.

[68] In reaching my conclusion as to the negative equity (and I find that Stephen approached that exercise fairly and constructively), please note my comments above regarding the possible

assumption of pension obligations by the purchaser being offset by a reduction of the purchase price. The 35% adjustment advocated as to pension and employee benefits in this regard is speculation by the Union. Secondly, the Union emphasized cash flow as being important in evaluation, but it must be remembered that Stelco has been negative cash flow for some time which would make that analysis unreliable and to the detriment of the Union's position. The Union treated the $773 million estimated contribution to the shortfall in the pension deficiency by the Pension Benefits Guarantee Fund as eliminating that as a Stelco obligation. That is not the case however as that Fund would be subrogated to the claims of the employees in that respect with a result that Stelco would remain liable for that $773 million. Lastly, the Union indicated that there should be a $155 million adjustment as to the negative equity in Sub Applicants when calculating Stelco's equity. While Stephen at Q. 181-2 acknowledged that there was no adjustment for that, I agree with him that there ought not to be since Stelco was being examined (and the calculations were based) on an unconsolidated basis, not on a consolidated basis.

[69] In the end result, I have concluded on the balance of probabilities that Stelco is insolvent and therefore it is a "debtor company" as at the date of filing and entitled to apply for the CCAA initial order. My conclusion is that (i) BIA test (c) strongly shows Stelco is insolvent; (ii) BIA test (a) demonstrates, to a less certain but sufficient basis, an insolvency and (iii) the "new" CCAA test again strongly supports the conclusion of insolvency. I am further of the opinion that I properly exercised my discretion in granting Stelco and the Sub Applicants the initial order on January 29, 2004 and I would confirm that as of the present date with effect on the date of filing. The Union's motion is therefore dismissed.

[70] I appreciate that all the employees (union and non-union alike) and the Union and the International have a justifiable pride in their work and their workplace – and a human concern about what the future holds for them. The pensioners are in the same position. Their respective positions can only be improved by engaging in discussion, an exchange of views and information reasonably advanced and conscientiously listened to and digested, leading to mutual problem solving, ideas and negotiations. Negative attitudes can only lead to the detriment to all stakeholders. Unfortunately there has been some finger pointing on various sides; that should be put behind everyone so that participants in this process can concentrate on the future and not inappropriately dwell on the past. I understand that there have been some discussions and interchange over the past two weeks since the hearing and that is a positive start.

J.M. Farley

Released: March 22, 20004

TAB 8

Court of Queen's Bench of Alberta

Citation: Re Canada North Group Inc, 2017 ABQB 508

Date: 20170817
Docket: 1703 12327
Registry: Edmonton

In the Matter of the
***Companies' Creditors Arrangement Act*,**
RSC 1985, c C-36, as amended

and in the Matter of a Plan of Arrangement of
Canada North Group Inc., Canada North Camps Inc.,
Campcorp Structures Ltd., D.J. Catering Ltd.,
816956 Alberta Ltd. and 1371047 Alberta Ltd.

Reasons for Decision
of the
Honourable Mr. Justice S.D. Hillier

I Introduction

[1] Canada North Camps Inc. (CNC), Campcorp Structures Ltd., D.J. Catering Ltd., 816956 Alberta Ltd. and 1371047 Alberta Ltd. (collectively, the Group) request extension of a Stay under s. 11.02(2) of the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 (*CCAA*) until November 3, 2017 and ancillary orders.

[2] The Canadian Western Bank (CWB) cross-applies for an order lifting the Stay and appointing either a full or interim Receiver pursuant to s. 243 (or ss. 47 and 244 of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 (*BIA*)), s. 13(2) of the *Judicature Act*, RSA 2000, c J-2, s. 99(a) of the *Business Corporations Act*, RSA 2000, c B-9, and s. 65(7) of the *Personal Property Security Act*, RSA 2000, c P-7.

II History

[3] The Group operates or provides a number of services including work camps in the natural resource sector, modular construction manufacturing, camp land rentals as well as real estate holdings including a golf course. CWB has been the Group's major secured creditor for a significant period of time.

[4] 1919209 Alberta Ltd. (1919) is an insolvent affiliated debtor holding company of two of the companies in the Group. It was incorporated to lease camp equipment from Weslease Income

Growth Fund LP (Weslease) and provide that camp equipment to Canada North Camps Inc. for its use. 1919's operations are integrated with those of the other applicants.

[5] CNC entered into an agreement to construct a camp on Wandering River. 1371047, and Wandering River Properties Ltd. (owned 2/3 by 1371047) subsequently purchased a parcel for that purpose. CNC joined with the local Heart Lake First Nation and formed Heart Lake CNC LP, Heart Lake Canada North Group GP Ltd., Wandering River Properties Ltd., and Canada North Group LP Holdings Ltd.

[6] An action by Max Fuel Distributors Ltd. as against Shayne McCracken arises from the operation of the camp business. The other creditors of the Group are stayed from enforcing collateral claims against Shayne McCracken.

[7] The Group's operations and profitability have been significantly impacted since 2014 by the downturn in the economy. Earlier attempts by the Group and CWB to deal with the debt and cash flow issues proved to be unsuccessful.

[8] In March 2017, the parties signed a Forbearance Agreement but problems continued. When they were unable to reach a new resolution in a full meeting on June 21, 2017, the Group issued Notices of Intention to make proposals under the *BIA* effective June 26, 2017.

[9] On July 5, 2017, Nielsen J. granted an initial Stay under s. 11.02(1) of the *CCAA*. He imposed numerous terms, including that:

- Ernst & Young be appointed as Monitor;
- R. e. I. Group Inc. be appointed as Chief Restructuring Officer (CRO);
- the Stay continue until August 3, 2017, subject to review;
- Debtor in Possession (DIP) financing from the Business Development Bank of Canada (BDC) be made available, not to exceed $1M;
- Notice of Intention proceedings under the *BIA* be "taken up" and continued under the *CCAA*.

[10] On July 27, 2017, the Group applied under s. 11.02(2) of the *CCAA* for an extension of the Stay to November 3, 2017. It also applied to add 1919 as an applicant in these proceedings.

[11] As well, it applied to expand the Stay to apply to proceedings against the entities involved in the Wandering River contract, and against Shayne McCracken.

[12] Finally, the Group applied for an increase in the DIP financing to a maximum of $2,500,000 and an interim lender's charge up to the same amount due to elevated costs associated with a significant short-term increase in work under a camps contract with the British Columbia provincial government for workers on the wildfires.

[13] The CWB cross-applied for an order lifting the Stay and appointing a full or interim Receiver.

[14] The Monitor sought approval of his First Report and activities, a suspension of limitation periods on claims, and the power to examine the parties regarding questioned transactions on lot sales prior to the *CCAA* Order (preferences) under s. 36.2 of the *CCAA*. Other interested parties also made submissions as affecting their interests.

[15] In an oral decision, this Court extended the Stay to September 29, 2017 with a review to be held on September 26, 2017. The cross-application was dismissed. The Court also issued a series of ancillary directions. The parties were advised that written reasons would be issued dealing with the main issue as to extension of the Stay or appointment of a Receiver. These are the written reasons.

III Affidavit Evidence

[16] The Group's stated preliminary plan is to return operations to profitability as demand increases, consider sale of some of its assets, and seek new financing or equity investment as required in order to provide a viable Plan of Arrangement.

[17] The Group has presented extensive affidavits from Ms. Shayne McCracken, Director and Secretary of the applicants, in support of the various applications, containing the following key assertions:

- the Group has acted in good faith and with due diligence, working closely with the CRO and cooperating with the Monitor as they gain an understanding of the business and structure;
- the Group has specifically worked with the CRO and Monitor to improve financial reporting and accounting processes;
- together they have taken initial steps to develop a Plan of Arrangement to present to creditors, including a detailed overview of assets and liabilities;
- the Group has been the subject of unsolicited investment and purchase interest, which the Group, Monitor and CRO are pursuing;
- meetings have taken place with interested parties as well as arrangements related to drawdowns on DIP financing;
- work has included contracts with the Province of British Columbia to address efforts in consequence of raging wildfires in that province.

[18] Ms. McCracken's affidavits purport to meet head on the concerns of CWB with the accounting treatment of certain accounts receivable, particularly in relation to the Grand Rapids Pipeline Project and the margining of custom negotiated deferred revenue. In late 2016, cost estimates were prepared for demobilization of the Grand Rapids camp, including removal of the camp for just over $2M and reclamation work estimated at roughly $5.36M based on detailed costing. Ms. McCracken asserted that the practice of clients assuming the costs of setting up and removing camps by advance invoicing is used by others in the camp industry.

[19] The margining of custom negotiated deferred revenue allows the Group access to necessary financing to commence work prior to being paid. Ms. McCracken found support for the accounting practice in question in the custom negotiated deferred revenue term of the margining requirement that was part of the credit agreement with CWB.

[20] Two significant receivables were placed on the books between March and May 2017 (it is unclear when they were actually posted and sent to the client) on Grand Rapids. This ostensibly led to a claim against the financing and increased CWB's exposure significantly at a time when the parties were trying to sort things out following the Forbearance Agreement in mid-March.

[21] Ms. McCracken specifically denied CWB's allegation that these invoices were provided in bad faith to artificially inflate the amount available on the operating line. She deposed that the invoicing for this work was reviewed by the Group's corporate counsel. As well, it was part of the financial reporting to CWB and there were regular conversations with account managers at CWB who were aware of the origin and nature of all significant receivables, including the Grand Rapid receivables. Ms. McCracken maintained the view that the receivables were appropriately margined as deferred revenue.

[22] Ms. McCracken noted that Grand Rapids has now raised issues with respect to payment of some of the invoices and a meeting is scheduled with it in Calgary in early August to discuss payment of those invoices.

[23] Ms. Jessica Taha filed extensive material for CWB challenging the Stay, and supporting the appointment of a Receiver. The following assertions are germane, particularly as concerns margining of receivables:

- the Group had been margining receivables for which work had not yet been done (citing Grand Rapids);
- as a result, the operating line was overdrawn by over $3.8M for work not yet done which only came to light at the June 21, 2017 meeting; subsequent information reflects that it is overdrawn by $8M;
- the Group had only performed 10% of required work on one contract and only 40% for another, and none of this was consistent with the margining as represented by the Group, and arranged between the parties dating back to 2012;
- despite representations to the contrary before Nielsen J., CWB was not aware of this prior to the June 21, 2017 meeting.

[24] Ms. Taha attested to her belief that as the level of work dropped dramatically in the economic downturn, the Group changed its approach without advising CWB, and started to render invoices for work which had not yet been done, categorizing those invoices as deferred revenue capable of margining.

[25] In response, Ms. McCracken maintained her position that the Grand Rapids deferred revenue was properly included in the financial statements. She deposed that Ms. Taha's position that deferred revenue was only permitted to be used for margining based on the percentage of the work performed is inconsistent with the supporting material provided by Ms. Taha. The Group kept their branch representatives apprised of the status of the deferred revenue inclusions in the margining calculations and none raised a concern.

[26] In counter response, CWB prepared three affidavits of senior officers at the Edmonton Main Branch deposing that they were unaware of the material amounts that were being margined without the work having been done, and each was unaware of anyone else at CWB having had such knowledge until the meeting on June 21, 2017.

[27] Glenn MacDougall, Manager of ECN Capital Corp. (ECN), also filed an affidavit. ECN is an equipment lessor and creditor of the Group. In short, he opines that the work resulting from the BC wildfires is a temporary salve on the Group's financial circumstances, and it is unlikely that the Group will be able to make a viable Plan of Arrangement. He deposed that ECN would

be materially prejudiced by the continuation of the Stay, as it will erode the value of ECN's security.

[28] With respect to expanding the Stay, Ms. McCracken deposed that direct claims against affiliates have been reviewed. The Group now seeks to expand the stay to specific affiliates where those affiliates are facing claims directly connected to the overall camp operations, in order to preserve the *status quo*, prevent unnecessary expenditures of effort on litigation, maximize recovery for all parties, and allow for an orderly determination of priority and claims.

[29] Regarding inclusion of 1919, Ms. McCracken deposed that 1919 has no revenue other than lease income from Canada North and is completely dependent on such payments to fulfill its obligations under the leases. It is included in the consolidated cash flow projections and financial statements for the Group, as it is treated as a flow through entity. The equipment it leases is essential to the uninterrupted operations of the Group.

[30] Finally, Ms. McCracken explained that the increased work for the B.C. government, although welcome, creates a cash flow issue as the work is invoiced approximately a week after completion and receipt of payment typically takes approximately four weeks from invoicing. Consequently, the Group anticipates a cash flow shortage in August 2017 that will not be met by the present DIP facility. On July 21, 2017, the interim lender approved an increase to the DIP financing to a maximum of $2,500,000.

IV Monitor's First Report

[31] The Monitor has provided a First Report, advising of various steps taken in conjunction with the CRO, highlights of which include:

General

- a new cash management procedure has been initiated to ensure efficient control of cash and cash reporting, with a review of cash flow projections;
- the Group's management and staff have been making significant efforts in all respects and are cooperating fully with the efforts of the CRO;
- based on the Monitor's own work with Group management, the Group appears to have acted in good faith and with due diligence;
- the actual end cash balance for the two weeks ending July 15, 2017 was higher than projected by over $400K and collections higher than projected by nearly $350K;
- while cash disbursements were lower, this was largely due to temporary deferrals;
- the contracts relating to the B.C. wildfires will have a significant positive impact on future cash inflows and receivables.

Accounts Receivable

- the Group has used atypical accounting practices as reflected in four areas;

- the steps being adopted in response to CWB's concerns include removing Grand Rapids and Heart Lake related receivables as a conservative strategy while quantum is reviewed;
- some but not all of the room guarantees or reservations have been reversed out.

Status of Restructuring Efforts and Related Plan

- the Group's business and operations are very complex;
- the CRO believes, based on preliminary work to date and co-operation of the management team, that there is certainly potential for a going concern plan that could provide significantly greater value to stakeholders as compared to a liquidation;
- the CRO is of the initial view that several profit and gross margin improvements have been realized by the Group due to changes to operations, staffing and other operational matters.

1919

- the leasing arrangement with Weslease has been extended for use by the Group valued at approximately $6M and listed as: three Jack+Jill dorms, two power distribution centres and one waste water treatment plant;
- expansion of the Stay to include 1919 is reasonable.

[32] As well, the Monitor and the Group have been in contact with various parties who have expressed interest in participating in a restructuring through refinancing, purchasing assets or investing in the Group.

V Law

[33] An initial Stay under s. 11.02(1) of the *CCAA* may be imposed for a maximum period of 30 days. The role of this Court on a subsequent application under s. 11.02(2) is not to re-evaluate the initial decision, but rather to consider whether the applicant has established that the current circumstances support an extension as being appropriate and that the applicant has acted, and is acting, in good faith and with due diligence, as required under s. 11.02(3).

[34] The purpose of the *CCAA* is to permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets. Appropriateness of an extension under the *CCAA* is assessed by inquiring into whether the order sought advances the policy objectives underlying the *CCAA*. A stay can be lifted if the reorganization is doomed to failure, but where the order sought realistically advances those objectives, a *CCAA* court has the discretion to grant it: ***Century Services Inc v Canada (Attorney General)***, 2010 SCC 60 at paras 15, 70, 71, [2010] 3 SCR 62.

[35] In applying for an extension, the applicant must provide evidence of at least "a kernel of a plan" which will advance the *CCAA* objectives: ***North American Tungsten Corp, Re***, 2015 BCSC 1376, 2015 CarswellBC 2232 at para 26, citing ***Azure Dynamics Corp, Re***, 2012 BCSC 781, 91 CBR (5th) 310.

[36] Pursuant to s. 11.02(3), the applicant is required to demonstrate that it has acted, and continues to act, in good faith. Honesty is at the core of "good faith": ***San Francisco Gifts Ltd., Re***, 2005 ABQB 91 at para16, 10 CBR (5th) 275.

[37] Section 11.02(3) refers to consideration of good faith and due diligence in both the past and present tense. Romaine J. in ***Alberta Treasury Branches v Tallgrass Energy Corp***, 2013 ABQB 432 at para 13, 9 CBR (6^{th}) 161 confirmed the language of s. 11.02(3), to the effect that the court needs to be satisfied that the applicant has acted in the past, and is acting, in good faith. See also ***Alexis Paragon Limited Partnership (Re)***, 2014 ABQB 65 at para 16, 9 CBR (6th) 43.

[38] By contrast, in ***Muscletech Research and Development Inc (Re***), [2006] OJ No 462 at para 4, 19 CBR (5th) 57 (Sup Ct Just), Farley J. held that the question of good faith relates to how the parties are conducting themselves in the context of the *CCAA* proceedings. Courts in subsequent cases adopted this view: ***Pacific Shores Resort & Spa Ltd (Re)***, 2011 BCSC 1775 at para 31-32, [2011] BCJ No 2482, and ***4519922 Canada Inc.(Re)***, 2015 ONSC 124 in paras 44-46, 22 CBR (6th) 44.

[39] In ***Guestlogix Inc, Re***, 2016 ONSC 1348, [2016] OJ No 1129, the Court expanded the stay to proceedings against a guarantor, noting that it was insolvent and in default of its obligations, highly integrated with the debtor company, and the debtor company would be able to include all the assets of the guarantor in a potential transaction if the guarantor were added.

[40] The Court has broad equitable jurisdiction to determine appropriate allocation among assets of administration, interim financing and directors' charges: ***Hunters Trailer& Marine, Re***, 2001 ABQB 1094, 30 CBR (4^{th}) 206. The Court in ***Canwest Publishing Inc (Re)***, 2010 ONSC 222 at para 54, 63 CBR (5th) 115 set out factors to be considered in determining priority of charges under s. 11.52 of the *CCAA* which are critical to the successful restructuring of the business:

(a) the size and complexity of the businesses being restructured;

(b) the proposed role of the beneficiaries of the charge;

(c) whether there is an unwarranted duplication of roles;

(d) whether the quantum of the proposed charge appears to be fair and reasonable;

(e) the position of the secured creditors likely to be affected by the charge; and

(f) the position of the Monitor.

[41] Section 11.2(4) of the *CCAA* provides that in deciding whether to make an order allowing DIP financing, the Court must consider:

(a) the period during which the company is expected to be subject to *CCAA* proceedings;

(b) how the company's business and financial affairs are to be managed during the proceedings;

(c) whether the company's management has the confidence of its major creditors;

(d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;

(e) the nature and value of the company's property;

(f) whether any creditor would be materially prejudiced as a result of the security or charge; and

(g) the monitor's report.

[42] In ***US Steel Canada Inc (Re)***, 2014 ONSC 6145 at paras 12-18, 20 CBR (6th) 116 the Court discussed the authority under s. 11.2 to grant priority to the DIP lender's charge to secure the DIP loan. In addition to the factors set out in s. 11.2(4), it considered the following in granting priority:

(a) notice had been given to all of the secured parties likely to be affected and broadly to all *PPSA* registrants, and other interested entities;

(b) the maximum amount of the DIP loan was appropriate based on the anticipated cash flow requirements of the applicant as reflected in its cash flow projections for the entire restructuring period, in order to continue to carry on its business during the restructuring period;

(c) the cash flows were the subject of a favourable report of the Monitor in its First Report;

(d) the Applicant's business would continue to be managed by the applicant's management with the assistance of the CRO during the restructuring period;

(e) the existing operational relationships between the applicant and its largest creditor would continue; and

(f) the DIP loan would assist in, and enhance, the restructuring process.

VI Analysis

Extension of Order

[43] Various factors were profiled by Ms. Wanke before Nielsen J. to support the Group's position that a restructuring under the *CCAA* is possible; if the objective is liquidation, then appointment of a Receiver is appropriate. Nielsen J. recognized the possibility of a successful restructuring in rejecting the application to appoint a Receiver and granting the application to impose a Stay under the *CCAA* with a Monitor and CRO. In recognizing that a lot of work had been done, he found that those supporting the steps to restructure should be given that opportunity in the collective best interest despite the prejudice of deferral and risk as regards repayment of CWB and other creditors.

[44] I now have the responsibility to measure the progress in the period leading up to expiry of the initial Stay. Without second-guessing the initial decision, I must assess the current circumstances, including the good faith and due diligence of the parties in light of steps taken to date.

[45] The legislative objective of a *CCAA* order is to provide the Court considerable scope to maintain the *status quo* for a company to make proposal arrangements to facilitate remaining in operation for a collective benefit. One may have preferred to see some further advancement on the "germ of a Plan" but I am satisfied that the CRO has begun consultations with unsolicited parties who have expressed an interest and that a structure for such a Plan is now an important priority.

[46] I am mindful that the Monitor was obliged to report on just under three weeks of activity in rendering a First Report by July 24, 2017. Various factors have impacted the lack of concrete progress on a Plan at this point, including the value of the Group as a going concern estimated at $97M (equipment, manufacturing and real estate) with diverse activities, assets and work product, the complexity of restructuring, and the need to modernize the sophistication of a family operation that is unable to operate as it has done historically.

[47] Professional advisors are now in place assisting in this required modernization. Potential investors have and continue to express interest in the Group. It appears that DIP funding has been used prudently to cover operational expenses including higher than expected professional expenses. Cash flows are quite healthy and the Group owns a number of assets of marketable value.

[48] CWB notes that Nielsen J. indicated on the initial Stay application that the Group would have to show more than a germ of a plan at the next hearing. It is not entirely surprising that three weeks did not prove long enough to complete the steps necessary to create a Plan of Arrangement. There is no allegation of delay or inertia by the Monitor or the CRO in performance of significant responsibilities undertaken since confirmation of their appointment July 5, 2017. The Monitor reported that the Group has been working with due diligence and in full cooperation. A number of competing interests require the attention of the Monitor. Having considered all of the circumstances before the Court, I am satisfied that the Group has established due diligence.

[49] It bears noting that CWB is not the only party who would be affected by receivership. Employees, other creditors, clients, and the public would also be affected. Changes have already been implemented by the CRO, as observed and reported by the Monitor.

[50] The Group has had the recent opportunity to enter into contracts with the Province of B.C. in relation to the wildfires. It appears that despite the Group's liquidity crisis – impacted by various factors, including market conditions – the business of the Group may well be salvageable. This assessment appears to be supported by: the cash flow projections, recoveries on receivables, and changes begun by the CRO in consultation with the Monitor with particular regard to increased work potential and to increase the sophistication of accounting.

[51] However, CWB takes the position that the Group has been in default of its obligations to CWB for many months. CWB extended time for the Group to find refinancing and continued to make available to the Group the operating line facility in the amount of $12,000,000, margined on accounts receivable of the Group. CWB asserts that the Group took advantage of CWB by falsely including one or more multi-million dollar accounts receivable for which the work had not yet been done.

[52] The parties disagree as to whether the law supports serious consideration of past bad faith if it is relevant to the viability of the *CCAA* proposal or its continuation.

[53] The language of s. 11.02(3) of the *CCAA* does not temporally restrict the consideration of bad faith. The wording of that provision is captured broadly in ***Tallgrass***. It would appear that ***Muscletech*** and the cases which followed it stand for the proposition that courts should look only to conduct in the context of the *CCAA* process. This represents a restrictive reading of s. 11.02(3) and the purpose of such a narrow interpretation is unclear.

[54] It is logical that past due diligence will usually have minimal relevance as a factor. However, past bad faith illuminated after *CCAA* proceedings have been initiated may undermine the confidence of creditors and the Court in the viability of *CCAA* proceedings. In my view, past bad faith may well be a relevant factor in the Court's assessment under s. 11.02(3). This is in keeping with the approach taken in ***Alexis Paragon***, 2014 ABQB 65 at paras 37-38.

[55] I note that the facts in this case are distinguishable from those in ***San Francisco*** where the alleged deception appeared to be aimed at deriving an advantage from customers through knock off products and counterfeit safety labels, rather than deriving an advantage from a financing secured creditor through accounting practices as alleged here by CWB.

[56] Again, the major issue in this regard is, and has been profiled as, the status of accounts receivable in terms of the margining of contracts for work not yet performed or not fully performed.

[57] CWB takes the position that, upon consultation with her client and corporate counsel, Ms. Wanke misrepresented the situation to Nielsen J. in her oral submissions on July 5, 2017. While this Court is not reviewing the basis for Nielsen J.'s order, the issue of margining was raised at that time and the allegation of bad faith remains a live issue. I understand the interpretation placed by CWB on the representations made in front of Nielsen J. both from Affidavits and then information provided to legal counsel. Ms. Wanke summarized her understanding as being that this was part of the camp business on the books of the Group and not a lack of good faith. I accept her expression on this review to the effect that she would have preferred to have been more familiar with the Grand Rapids contract at the time but that this issue only surfaced latterly. She said she would have stated the client's position somewhat differently, but that the net effect remains that the margining was consistent with the Group's understanding of its entitlement.

[58] CWB's concerns regarding the margining are understandable. It takes the position that while margining on deferred revenue was permissible, the Grand Rapids contracts do not qualify for that treatment according to the terms as agreed to between the parties notwithstanding the assertions advanced by the Group. CWB says there was an understanding as relates to the formula to be applied to these receivables that was violated, especially as to the two major Grand Rapids accounts issued between the end of March 2017 and beginning of May 2017. Counsel for CWB took the Court through a number of documents relating to the credit agreement between CWB and the Group to explain what the Group's reasonable understanding should have been in relation to contracts qualifying for special treatment of the accounts receivable for margining purposes.

[59] The Monitor has reviewed and discounted a number of entries as inappropriate; it will likely have to further endorse commitment to revise other receivables. The Court agrees that a commitment to revise other receivables may be appropriate. However, there are a number of priorities competing for the attention of the CRO. It is difficult to measure whether any breaches of the protocol were intentionally deceptive as distinct from aggressive and misguided. That distinction is harder to make based on duelling affidavits as distinct from oral testimony,

questioning or at minimum some objective detailed analysis by the Monitor to assist the Court's interpretation of events.

[60] I have struggled to understand the treatment of invoicing as to the records of accounts receivable, particularly as the idea of charging for work not done is rather foreign to my experience as to the entitlement to collect. So too, the deferral of the time for payment extending from 45 days to 120 days obfuscates the idea of entitlement. The matter is complicated by the risk and relative reliability of these receivables as assets, distinct from a bad or at least tainted debt that needs to be monitored for collection procedures. All of these aspects appear to arise in far greater sums for 2016 than in any previous year which, understandably, is further troubling to principals at CWB.

[61] I endorse the concerns of CWB as legitimate. Even in the absence of a finding of bad faith, the practice employed as reflected in treatment of the Grand Rapids receivables raises legitimate concerns regarding the future viability of the Group. I accept that the practice in question has resulted in margining which has led to overall debt to CWB which is incongruent with the Group's receivables as they would be represented in the normal course, as confirmed in the Monitor's First Report.

[62] I also note CWB's concern that the cash flow projection relied on by the Monitor did not take into account unpaid professional fees relating to the work toward reorganization, and the projected loss to the end of October 2017 is considerably offset only by the fortuitous and uncertain wildfire camp work. CWB's receivables, to the extent they are collectible, are being used up by payment of the professional fees and interim financing.

[63] Nevertheless, I am not prepared to conclude on the basis of the material as presented to me that the Group has failed to act in good faith to the extent of disentitling the extension sought.

[64] Clearly, the parties now disagree on the interpretation of the arrangement between them as regards margining based on deferred revenue. The issue before this Court is not the correct interpretation of the various document referred to by CWB's counsel, but rather whether the Group's reliance on its understanding amounted to bad faith. There has been no trial of the latter issue. While raising questions, the evidence adduced on this application falls short of supporting a finding of bad faith in the sense of knowing reliance on an unsupportable interpretation of the documents, or intentional concealing of the practice or any relevant financial information. This is particularly so in light of the evidence of the Group's understanding that the arrangement between CWB and the Group expressly contemplated that the Group was permitted to margin deferred revenue when no work had been done.

[65] If the CWB was not aware of the effect or extent of this type of margining, it is not clear from the evidence that the Group understood it was acting other than consistently with the intention of the parties in this regard. This view of the matter is generally supported by the Monitor's information that the sophistication of all facets of the accounting system in place has not kept up with the sophistication of its business. The CRO is working to address accounting practices which require improvement.

[66] There is undeniably a considerable difference in the parties' interpretations of the conduct and reporting. Obviously, a debtor may be motivated to maximize access to funding. The past practice here is somewhat unclear, but even if the Group exceeded the terms or protocol as generally agreed, I do not ascribe bad faith to its actions.

[67] Overall, I find that extension of the Stay is in the best interest. However, a further vigorous review must take place within a reasonable period of time.

[68] The November 3, 2017 date targeted by the Group is not reasonable in the circumstances.

[69] As such, the next hearing is set for September 26, 2017. The Court will require a Report from the Monitor at least 7 business days prior to that date.

Increase in DIP Financing

[70] Ms. McCracken suggests in her affidavit that they only need a small increase in the DIP loan to cover operations in light of healthy cash flows and significant assets.

[71] While the creditors may rightly take issue with the characterization of the increase as "small", I approve the request to increase the DIP financing from $1M to $2.5M in the form of order proposed by counsel for the Group to address the anticipated cash flow shortage resulting from welcome work during what is typically a slower season for the Group. Counsel for CWB took no issue with the form of order.

[72] At the close of submissions, counsel for CRA alerted the Court, as well as BDC in particular, that it took issue with the increase in DIP financing and that it would be applying for priority with respect to $1.14M owing to the Minister by the Group for unremitted source deductions and GST. It was seeking an order to vary so as to put the administrative charge, director's charge and interim lender charges in second place behind the CRA. In light of that information, BDC counsel indicated that the CRA's position would not impair BDC's ability to advance the DIP financing, noting that the matter would be argued at a later date.

1919

[73] The application to add 1919 was not opposed. As was the case in ***Guestlogix***, the operations of 1919 are inextricably linked to those of the Group, as it leases important equipment and provides it Canada North.

[74] I order that 1919 be added as a party included in the Group. Counsel for the Group agreed to include in the order a clause restating the allocation provision in the initial Stay Order to recognize that Welease has made this concern known at this point. Counsel for CWB did not take issue with such a provision in the order.

Approval of Monitor's First Report

[75] And at the request of the Monitor, I approve:

- his First Report and activities;
- suspend the limitation periods on claims;
- confer power to examine parties on questioned transactions regarding lot sales prior to *CCAA*.

[76] The further Report of the Monitor is required at least 7 days before the next hearing.

Expansion of Stay

[77] The Stay is expanded to apply to proceedings against Heart Lake and associated parties involved in the Grand Rapids contracts, and proceedings by Max Fuel against Ms. McCracken.

Counsel for CWB did not take issue with this. In the result, the applications for appointment of a Receiver, interim or otherwise, are dismissed.

Sealing of Confidential Information

[78] I order that the confidential information identified as such on the Court file be sealed.

Service Protocol to Reduce Costs

[79] The Monitor is to maintain a service list of parties who provide the Monitor with email addresses. Those parties may be served by email effective the date of the email. All others are to be served by the Monitor posting its and others' materials on its website, effective as at the date of posting.

VII Conclusion

[80] I have determined that it is in the collective interest to extend the *CCAA* Stay to September 29, 2017. The Order will be subject to review by me on September 26, 2017 in usual consultation with the Court Coordinator.

Heard on the 27th day of July, 2017.
Dated at the City of Edmonton, Alberta this 17th day of August, 2017.

S.D. Hillier
J.C.Q.B.A.

Appearances:

S.A. Wanke and S. Norris
DLA Piper (Canada) LLP
for the Applicants/Cross-Respondents

C.P. Russell, Q.C.
McLennan Ross LLP
for the Respondent/Cross-Applicant

D.R. Bieganek, Q.C.
Duncan Craig LLP
for the Monitor, Ernst &Young LLP

J. Oliver
Cassels Brock
for Business Development Bank of Canada

T.M. Warner
Miller Thompson
for ECN Capital Corp.

M.J. McCabe, Q.C.
Reynolds Mirth Richards & Farmer LLP
for PricewaterhouseCoopers

R.J. Wasylyshyn
Ogilvie LLP
for Weslease Income Growth Fund LP

H.M.B.Ferris
Lawson Lundell LLP
for First Island Financial Services Ltd.

G.F. Body
Justice Canada
for Canada Revenue Agency

TAB 9

I hereby certify this to be a true copy of
the original Order
Dated this 30 day of May, 2023
for Clerk of the Court

JUDICIAL CENTRE OF EDMONTON
FILED
May 30, 2023
by Email
CLERK OF THE COURT

COURT FILE NUMBER	2303 06543
COURT	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE OF	EDMONTON
	IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, as amended AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF J.W. CARR HOLDINGS LTD., SPRUCE GROVE INDUSTRIAL PARK INC., 272649 ALBERTA LTD., 279896 ALBERTA LTD., GRANDE PRAIRIE PLACE ENTERPRISES (1996) INC., 1170292 ALBERTA LTD. and 627612 ALBERTA LTD.
APPLICANTS:	J.W. CARR HOLDINGS LTD., SPRUCE GROVE INDUSTRIAL PARK INC., 272649 ALBERTA LTD., 279896 ALBERTA LTD., GRANDE PRAIRIE PLACE ENTERPRISES (1996) INC., 1170292 ALBERTA LTD. and 627612 ALBERTA LTD.
DOCUMENT	**ORDER (Expedited Sale Approval and Vesting Order Protocol) (Northridge Phase 6 & 7, O'Brien Lake & Hillcrest)**
CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT:	MLT Aikins LLP 2200, 10235 – 101st Street Edmonton, Alberta T5J 3G1 **Attention: Jeffrey M. Lee, K.C./ Mandi Deren-Dubé** Phone: (306) 975-7136/ (780) 969-3518 Fax: (306) 975-7145/ (780) 969-3549 Email: jmlee@mltaikins.com / mderendube@mltaikins.com File No.: 0159371.00008
DATE ON WHICH ORDER WAS PRONOUNCED:	May 23, 2023
NAME OF JUSTICE WHO MADE THIS ORDER:	The Honourable Justice J.T. Neilson
LOCATION OF HEARING:	Edmonton, Alberta

UPON the application of **J.W. CARR HOLDINGS LTD., SPRUCE GROVE INDUSTRIAL PARK INC., 272649 ALBERTA LTD., 279896 ALBERTA LTD., GRANDE PRAIRIE PLACE ENTERPRISES (1996) INC., 1170292 ALBERTA LTD. and 627612 ALBERTA LTD.** (collectively, the "**Applicants**") for an Order approving an expedited protocol for the granting by this Honourable Court of Sale Approval and Vesting Orders in respect of certain vacant residential lots owned by 272649 Alberta Ltd. ("**272 AB Ltd.**"), namely:

i. Hillcrest Lots – Six vacant single-family residential lots in the Hillcrest neighbourhood of Grande Prairie, Alberta (the "**Hillcrest Lots**") bearing the legal descriptions set out at paragraph 4 of the Confidential Affidavit of Kim Lissoway sworn May 15, 2023 (the "**Lissoway Affidavit**");

ii. Northridge 6 Lots - Seven vacant single-family residential lots in Phase 6 of the Northridge subdivision in Grande Prairie, Alberta (the "**Northridge 6 Lots**") bearing the legal descriptions set out at paragraph 13 of the Lissoway Affidavit;

iii. Northridge 7 Lots (Single Family) - 32 remaining vacant lots in Phase 7 of the Northridge residential subdivision in Grande Prairie, Alberta (collectively with Northridge 6 Lots, the "**Northridge Single Family Lots**") bearing the legal descriptions set out at paragraph 14 of the Lissoway Affidavit;

iv. Northridge 7 Lots (Duplex) – 4 remaining vacant lots (two titles per lot, intended for development of residential duplexes) in Phase 7 of the Northridge residential subdivision in Grande Prairie, Alberta (the "**Northridge Duplex Lots**") bearing the legal descriptions set out at paragraph 15 of the Lissoway Affidavit; and

v. O'Brien Lake – Phase 2 - 20 remaining vacant lots in the O'Brien Lake residential subdivision in Grande Prairie, Alberta (the "**O'Brien Lake Lots**") bearing the legal descriptions set out at paragraph 4 of the Confidential Affidavit of Yuri Smith sworn May 15, 2023 (the "**Smith Affidavit**").

AND UPON having read the Initial Order of the Honourable Justice J.J. Gill granted in these proceedings on April 19, 2023 (the "**Initial Order**"); the Amended and Restated Initial Order of the Honourable Justice J.T. Neilson granted in these proceedings on April 26, 2023 (the "**ARIO**"); the Lissoway Affidavit, the Smith Affidavit, the Second Report of the Monitor, and the Service List established for use in these proceedings (the "**Service List**");

IT IS HEREBY ORDERED AND DECLARED THAT:

SERVICE

1. Service of the application for this order is hereby validated and deemed good and sufficient and this application is properly returnable today.

DEFINED TERMS

2. Words and phrases contained herein which begin with capital letters but which are not otherwise defined herein shall have the corresponding meanings given to such words and phrases in the ARIO.

3. For purposes of this Order:

a) "**Encumbrances**" shall mean any and all caveats, security interests, hypothecs, pledges, mortgages, liens, trusts or deemed trusts, reservations of ownership, royalties, options, rights of pre-emption, privileges, interests, assignments, actions, judgements, executions, levies, taxes, writs of enforcement, charges, or other claims, whether contractual, statutory, financial, monetary or otherwise, whether or not they have attached or been perfected, registered or filed and whether secured, unsecured or otherwise, including, without limiting the generality of the foregoing, any encumbrances or charges created by the Initial Order or the ARIO, any charges, security interests or claims evidenced by registrations pursuant to the *Personal Property Security Act* (Alberta) or any other personal property registry system or any liens or claims of lien under the *Builders' Lien Act* (Alberta); and

b) "**Encumbrance Record Date**" shall mean May 23, 2023.

EXPEDITED SALE APPROVAL AND VESTING ORDER PROTOCOL

4. Upon 272 AB Ltd. entering into a Purchase and Sale Agreement (a "**PSA**") for a proposed transaction (the "**Proposed Transaction**") for:

a) the proposed sale of one or more of the Hillcrest Lots for a sale price equal to or greater than the satisfactory market value of the Hillcrest Lots described in the Confidential Lissoway Affidavit (the "**Satisfactory Market Value – Hillcrest Lots**");

b) the proposed sale of one or more of the Northridge Single Family Lots for a sale price equal to or greater than the satisfactory market value of the Northridge Single Family Lots described in the Confidential Lissoway Affidavit (the "**Satisfactory Market Value – Northridge Single Family Lots**");

c) the proposed sale of one or more of the Northridge Duplex Lots for a sale price equal to or greater than the satisfactory market value of the Northridge Duplex Lots described in the Confidential Lissoway Affidavit (the "**Satisfactory Market Value – Northridge Duplex Lots**");

d) the proposed sale of one or more of the O'Brien Lake Lots for a sale price equal to or greater than the satisfactory market value of the O'Brien Lake Lots described in the Confidential Smith Affidavit (the "**Satisfactory Market Value – O'Brien Lake**"); or

then 272 AB Ltd. and the Monitor shall take the steps in respect of the Proposed Transaction described below in paragraphs 5 to 10 hereof.

5. The Monitor shall deliver to 272 AB Ltd. (for filing by 272 AB Ltd. with this Court) a certificate in respect of the Proposed Transaction (the **"Sale Endorsement Certificate"**) substantially in the form of the Sale Endorsement Certificate appended to this Order as Appendix "A" hereto, whereby the Monitor:

   a) identifies any Encumbrances, or Encumbrances as being submitted for registration on the Certificate of Title to the real property to which the Sale Endorsement Certificate pertains, subsequent to the Encumbrance Record Date ("**Subsequent Encumbrances**");

   b) certifies that the Proposed Transaction has been approved in writing by the Interim Lender and the holder of the First Charge Encumbrances (as defined in the ARIO) registered against the real property to which the Sale Endorsement Certificate pertains; and

   c) certifies that:

      i. the Proposed Transaction is a transaction for the proposed sale of one or more of the Hillcrest Lots for a sale price equal to or greater than the Satisfactory Market Value – Hillcrest Lots and the Monitor approves the Proposed Transaction;

      ii. the Proposed Transaction is a transaction for the proposed sale of one or more of the Northridge Single Family Lots for a sale price equal to or greater than the Satisfactory Market Value – Northridge Single Family Lots and the Monitor approves the Proposed Transaction;

      iii. the Proposed Transaction is a transaction for the proposed sale of one or more of the Northridge Duplex Lots for a sale price equal to or greater than the Satisfactory Market Value - Northridge Duplex Lots and the Monitor approves the Proposed Transaction; or

      iv. the Proposed Transaction is a transaction for the proposed sale of one or more of the O'Brien Lake Lots for a sale price equal to or greater than the Satisfactory Market Value - O'Brien Lake and the Monitor approves the Proposed Transaction.

6. Upon its receipt from the Monitor of a signed Sale Endorsement Certificate in respect of a Proposed Transaction, 272 AB Ltd. shall be at liberty to file such signed Sale Endorsement Certificate with this Court in support of an application (the "**Expedited SAVO Application**") by

272 AB Ltd. for an expedited Sale Approval and Vesting Order in respect of the Proposed Transaction, substantially in the form of the Sale Approval and Vesting Order appended to this Order as Appendix "B" hereto (the "**Expedited SAVO**"). In support of the Expedited SAVO Application, 272 AB Ltd. shall have leave to file with this Court a copy of the Purchase & Sale Agreement pertaining to the Proposed Transaction with the purchase price (or any information which allows the reader to calculate the purchase price, such as the amount of any deposit) redacted therefrom.

7. For greater clarity, the Expedited SAVO Application:

   a) subject to paragraph 8 hereof, shall presumptively be a "without notice" application to take place without further notice to any party on the Service List (constituted as of the Encumbrance Record Date) and without further notice to any party whose interests were registered against the Certificate of Title to the real property to which the Expedited SAVO Application pertains (as of the Encumbrance Record Date);

   b) subject to paragraph 8 hereof, shall be adjudicated by this Court as a "desk application", without a hearing and by means of documents only, pursuant to Rule 6.9(1)(c) of the *Alberta Rules of Court*; and

   c) shall be referred by the Edmonton Commercial Coordinator for adjudication by the Honourable Justice J.T. Neilson (subject to Justice J.T. Neilson's availability) or, in circumstances in which the Honourable Justice J.T. Neilson is unavailable, to another Justice of this Court assigned to the Edmonton Commercial List.

NOTICE TO ENCUMBRANCE HOLDERS

8. In the event that, subsequent to the Encumbrance Record Date, an encumbrance is registered against the Certificate of Title to real property which is the subject of an Expedited SAVO Application (a "**Subsequent Encumbrance**"), then 272 AB Ltd. shall exclusively serve upon the Monitor and the holder of such Subsequent Encumbrance (the "**Subsequent Encumbrance Holder**") the Expedited SAVO Application and materials filed in support thereof, save and except for any confidential materials which 272 AB Ltd. may seek to file with this Court on a sealed basis (collectively, the "**Expedited SAVO Application Materials**"). The Subsequent Encumbrance Holder shall have seven days, from and after the date on which it is served with the Expedited SAVO Application Materials by 272 AB Ltd.(the "**Service Date**"), within which to serve upon 272 AB Ltd. and the Monitor and to file with this Court materials in reply to the Expedited SAVO Application Materials (the "**SAVO Application Reply Materials**").

9. In the event that a Subsequent Encumbrance Holder, having been served with the Expedited SAVO Application Materials, serves SAVO Application Reply Materials upon 272 AB Ltd. and the Monitor and files with this Court SAVO Application Reply Materials on or before the seventh day following the Service Date, then such SAVO Application Reply Materials shall be considered by the Court in adjudicating the Expedited SAVO Application.

10. In the event that a Subsequent Encumbrance Holder, having been served with the Expedited SAVO Application Materials, fails, on or before the seventh day following the Service Date, to serve SAVO Application Reply Materials upon 272 AB Ltd. and the Monitor and to file with this Court SAVO Application Reply Materials, then the Expedited SAVO Application shall proceed to be adjudicated by the Court as a "desk application", without a hearing and by means of documents only, pursuant to Rule 6.9(1)(cc) of the Alberta *Rules of Court* and without further notice to such Subsequent Encumbrance Holder.

MISCELLANEOUS MATTERS

11. The Applicants, the Monitor and any other interested party, shall be at liberty to apply for further advice, assistance and direction as may be necessary in order to give full force and effect to the terms of this Order.

12. This Honourable Court hereby requests the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in any of its provinces or territories or in any foreign jurisdiction, to act in aid of and to be complimentary to this Court in carrying out the terms of this Order, to give effect to this Order and to assist the Monitor and its agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such order and to provide such assistance to the Monitor, as an officer of the Court, as may be necessary or desirable to give effect to this Order or to assist the Monitor and its agents in carrying out the terms of this Order.

13. Service of this Order shall be deemed good and sufficient by serving the same on:

    a) the persons listed on the Service List;

    b) any other person served with notice of the application for this Order; and

    c) the Purchaser or the Purchaser's solicitors;

and service on any other person is hereby dispensed with.

14. Service of this Order may be effected by facsimile, electronic mail, personal delivery, or courier. Service is deemed to be effected the next business day following transmission or delivery of this Order.

James T. Neilson

Justice of the Court of King's Bench of Alberta

APPENDIX 'A' to
Expedited SAVO Protocol Order
(Northridge Phase 6 & 7,
O'Brien Lake & Hillcrest)

COURT FILE NUMBER	2303 06543
COURT	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE OF	EDMONTON
	IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, as amended AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF J.W. CARR HOLDINGS LTD., SPRUCE GROVE INDUSTRIAL PARK INC., 272649 ALBERTA LTD., 279896 ALBERTA LTD., GRANDE PRAIRIE PLACE ENTERPRISES (1996) INC., 1170292 ALBERTA LTD. and 627612 ALBERTA LTD.
APPLICANTS:	J.W. CARR HOLDINGS LTD., SPRUCE GROVE INDUSTRIAL PARK INC., 272649 ALBERTA LTD., 279896 ALBERTA LTD., GRANDE PRAIRIE PLACE ENTERPRISES (1996) INC., 1170292 ALBERTA LTD. and 627612 ALBERTA LTD.

SALE ENDORSEMENT CERTIFICATE NUMBER [NTD: Number]

To: The Court of King's Bench of Alberta

To: 272649 Alberta Ltd.

1. Ernst & Young Inc., in its capacity as court-appointed Monitor of J.W. Carr Holdings Ltd., Spruce Grove Industrial Park Inc., 272649 Alberta Ltd., 279896 Alberta Ltd., Grande Prairie Place Enterprises (1996) Inc., 1170292 Alberta Ltd. and 627612 Alberta Ltd. (the "**Monitor**") files this Sale Endorsement Certificate pursuant to the Order (Expedited Sale Approval and Vesting Order Protocol) (Northridge Phase 6 & 7, O'Brien Lake Phase 2 & Hillcrest) of the Honourable Justice J.T. Neilson granted on May 23, 2023 (the "**Expedited SAVO Protocol Order (Northridge Phase 6 & 7, O'Brien Lake Phase 2 & Hillcrest")**).

2. Words and phrases in this Sale Endorsement Certificate which begin with capital letters but which are not expressly defined herein shall have the corresponding meanings given to those words and phrases in the Expedited SAVO Protocol Order (Northridge Phase 6 & 7, O'Brien Lake Phase 2 & Hillcrest).

3. The real property to which this Sale Endorsement Certificate pertains (the "**Subject Real Property**") is legally described as follows:

   _____
   _____
   _____
   _____

4. The following is a list of all Subsequent Encumbrances which have been registered against the Certificate(s) of Title to the Subject Real Property subsequent to the Encumbrance Record Date:

   _____

   _____

5. The Monitor hereby certifies to this Court that the Proposed Transaction has been approved in writing by the Interim Lender and the holder of the First Charge Encumbrances (as defined in the ARIO) registered against the Subject Real Property.

6. The Monitor hereby certifies to this Court that:

(check applicable box)

☐ The Proposed Transaction is for the Proposed Sale of one or more of the Hillcrest Lots for a sale price equal to or greater than the satisfactory market value of the Hillcrest Lots described in the Lissoway Affidavit and the Monitor approves the Proposed Transaction.

☐ The Proposed Transaction is for the Proposed Sale of one or more of the Northridge Single Family Lots for a sale price equal to or greater than the satisfactory market value of the Northridge Single Family Lots described in the Lissoway Affidavit and the Monitor approves the Proposed Transaction;

☐ The Proposed Transaction is for the Proposed Sale of one or more of the Northridge Duplex Lots for a sale price equal to or greater than the satisfactory market value of the Northridge Duplex Lots described in the Lissoway Affidavit and the Monitor approves the Proposed Transaction; or

☐ The Proposed Transaction is for the Proposed Sale of one or more of the O'Brien Lake Lots for a sale price equal to or greater than the satisfactory market value of the O'Brien Lake Lots described in the Smith Affidavit and the Monitor approves the Proposed Transaction.

DATED at Edmonton, Alberta this _____ day of _____, 2023

Ernst & Young Inc., in its capacity as Monitor of the undertakings, property and assets of 272649 Alberta Ltd. and not in its personal capacity.

Per:_____
Name:
Title:

APPENDIX 'B' to
Expedited SAVO Protocol Order
(Northridge Phase 6 & 7
and O'Brien Lake Phase 2)

Clerk's Stamp

COURT FILE NUMBER	2303 06543
COURT	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE OF	EDMONTON
	IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, as amended AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF J.W. CARR HOLDINGS LTD., SPRUCE GROVE INDUSTRIAL PARK INC., 272649 ALBERTA LTD., 279896 ALBERTA LTD., GRANDE PRAIRIE PLACE ENTERPRISES (1996) INC., 1170292 ALBERTA LTD. and 627612 ALBERTA LTD.
APPLICANTS:	J.W. CARR HOLDINGS LTD., SPRUCE GROVE INDUSTRIAL PARK INC., 272649 ALBERTA LTD., 279896 ALBERTA LTD., GRANDE PRAIRIE PLACE ENTERPRISES (1996) INC., 1170292 ALBERTA LTD. and 627612 ALBERTA LTD.
DOCUMENT	**APPROVAL AND VESTING ORDER**
CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT:	**MLT AIKINS LLP** Suite 2200, 10135 – 101st Street NW Edmonton, AB T5J 3G1 Solicitor: Jeffrey M. Lee, K.C. / Mandi Deren-Dubé Telephone: (306) 975-7136 / (780) 969-3518 Facsimile: (306) 975-7145 / (780) 969-3549 Email: jmlee@mltaikins.com / mderendube@mltaikins.com File Number: 159371.8
DATE ON WHICH ORDER WAS PRONOUNCED:	
NAME OF JUSTICE WHO MADE THIS ORDER:	The Honourable Justice J.T. Neilson
LOCATION OF HEARING:	Edmonton, Alberta

UPON the application of **J.W. CARR HOLDINGS LTD., SPRUCE GROVE INDUSTRIAL PARK INC., 272649 ALBERTA LTD., 279896 ALBERTA LTD., GRANDE PRAIRIE PLACE ENTERPRISES (1996) INC., 1170292 ALBERTA LTD. and 627612 ALBERTA LTD.** (collectively, the "**Applicants**") for an Order approving the sale transaction (the "**Transaction**") contemplated by the PSA (as defined herein) appended to the Affidavit of Marjorie Carr, sworn [NTD: DATE] (the "[NTD: NUMBER] **Carr Affidavit**"), vesting in the purchaser, [NTD: NAME] (or its nominee) (the "**Purchaser**") all right, title and interest of 272649 ALBERTA LTD. ("**272 AB Ltd.**") in or to the Purchased Assets (as hereinafter defined);

AND UPON having read the Initial Order of the Honourable Justice J.J. Gill granted in these proceedings on April 19, 2023 (the "**Initial Order**"); the Amended and Restated Initial Order of the Honourable Justice J.T. Neilson granted in these proceedings on April 26, 2023 (the "**ARIO**"); the Sales and Investment Solicitation Process Order of the Honourable Justice J.T. Neilson granted in these proceedings on April 26, 2023 (the "**SISP Order**"); the Order (Expedited Sale Approval and Vesting Order Protocol) (Northridge Phase 6 & 7, O'Brien Lake, & Hillcrest) of the Honourable Justice J.T. Neilson granted in these proceedings on May 23, 2023 (the "**Expedited SAVO Protocol Order (Northridge, O'Brien Lake & Hillcrest**)"), the [NTD: NUMBER] Carr Affidavit and the Monitor's Sale Endorsement Certificate No. [NTD];

IT IS HEREBY ORDERED AND DECLARED THAT:

SERVICE

1. Pursuant to the Expedited SAVO Protocol Order (Northridge, O'Brien Lake & Hillcrest), service of a notice of application for this order is hereby dispensed with and this application is properly returnable today.

DEFINED TERMS

2. Capitalized terms used herein but not otherwise defined shall have the same meaning as given to such terms in the [NTD: NUMBER] Carr Affidavit.

APPROVAL OF TRANSACTION

3. The Transaction is hereby approved and execution of the Purchase and Sale Agreement dated [NTD: DATE] between 272 AB Ltd. and the Purchaser (the "**PSA**") by 272 AB Ltd. is hereby authorized and approved, with such minor amendments as 272 AB Ltd. may deem necessary. 272 AB Ltd. and/or the Monitor are hereby authorized and directed to take such additional steps and execute such additional documents as may be necessary or desirable for completion of the Transaction and conveyance of the Purchased Assets to the Purchaser (or its nominee).

VESTING OF PROPERTY

4. In this Order, the Purchased Assets are the following:

_____
_____
_____
_____

(the "**Purchased Assets**")

5. Upon delivery of a Monitor's certificate to the Purchaser (or its nominee) substantially in the form set out in **Schedule "A"** hereto (the "**Monitor's Closing Certificate**"), all right, title and interest of 272 AB Ltd. in and to the Purchased Assets shall vest absolutely in the name of the Purchaser (or its nominee), free and clear of and from any and all caveats, security interests, hypothecs, pledges, mortgages, liens, trusts or deemed trusts, reservations of ownership, royalties, options, rights of pre-emption, privileges, interests, assignments, actions, judgements, executions, levies, taxes, writs of enforcement, charges, or other claims, whether contractual, statutory, financial, monetary or otherwise, whether or not they have attached or been perfected, registered or filed and whether secured, unsecured or otherwise (collectively, "**Claims**") including, without limiting the generality of the foregoing:

   (a) any encumbrances or charges created by the Initial Order or the ARIO;

   (b) any charges, security interests or claims evidenced by registrations pursuant to the Personal Property Security Act (Alberta) or any other personal property registry system;

   (c) any liens or claims of lien under the Builders' Lien Act (Alberta); and

   (d) those Claims listed in **Schedule "B"** hereto (all of which are collectively referred to as the "**Encumbrances**", which term shall not include the permitted encumbrances, caveats, interests, easements, and restrictive covenants listed in **Schedule "C"** (collectively, "**Permitted Encumbrances**");

and for greater certainty, this Court orders that all Claims including Encumbrances other than Permitted Encumbrances, affecting, or relating to the Purchased Assets are hereby expunged, discharged and terminated as against the Purchased Assets.

6. Upon delivery of the Monitor's Closing Certificate, and upon filing of a certified copy of this Order, together with any applicable registration fees, all governmental authorities including those referred to below in this paragraph (collectively, "**Governmental Authorities**") are hereby authorized, requested and directed to accept delivery of such Monitor's Closing Certificate and certified copy of this Order as though they were originals and to register such transfers, interest authorizations, discharges and discharge statements of conveyance as may be required to convey to the Purchaser or its nominee clear title to the Purchased Assets subject only to Permitted Encumbrances. Without limiting the foregoing:

   (a) the Registrar of Land Titles ("**Land Titles Registrar**") for the lands defined below shall be and is hereby authorized, requested, and directed to forthwith:

      (i) cancel existing Certificates of Title No. [NTD: TITLE NUMBER] for those lands and premises municipally described as [NTD: CIVIC ADDRESS], Grande Prairie, Alberta, and legally described as:

      _____
      _____
      _____
      _____

      (the "**Lands**")

      (ii) issue a new Certificate of Title for the Lands in the name of the Purchaser (or its nominee), namely, [NTD: NAME OF PURCHASER OR NOMINEE];

      (iii) transfer to the New Certificate of Title the existing instruments listed in **Schedule "C"**, to this Order, and to issue and register against the New Certificate of Title such new caveats, utility rights of ways, easements or other instruments as are listed in **Schedule "C"**; and

      (iv) discharge and expunge the Encumbrances listed in **Schedule "B"** to this Order and discharge and expunge any Claims including Encumbrances (but excluding Permitted Encumbrances) which may be registered after the date of the PSA against the existing Certificate of Title to the Lands;

7. In order to effect the transfers and discharges described above, this Court directs each of the Governmental Authorities to take such steps as are necessary to give effect to the terms of this Order and the PSA. Presentment of this Order and the Monitor's Closing Certificate shall be the

sole and sufficient authority for the Governmental Authorities to make and register transfers of title or interest and cancel and discharge registrations against any of the Purchased Assets of any Claims including Encumbrances but excluding Permitted Encumbrances.

8. No authorization, approval, or other action by and no notice to or filing with any governmental authority or regulatory body exercising jurisdiction over the Purchased Assets is required for the due execution, delivery, and performance by the Applicants and the Monitor of the PSA.

9. Upon delivery of the Monitor's Closing Certificate together with a certified copy of this Order, this Order shall be immediately registered by the Land Titles Registrar notwithstanding the requirements of section 191(1) of the *Land Titles Act*, RSA 2000, c.L-7 and notwithstanding that the appeal period in respect of this Order has not elapsed. The Land Titles Registrar is hereby directed to accept all Affidavits of Corporate Signing Authority submitted by the Applicants or the Monitor in its capacity as Monitor of 272 AB Ltd. and not in its personal capacity.

10. The lawyer for 272 AB Ltd. shall distribute the sale proceeds as follows:

    (a) by paying the reasonable professional fees and disbursements of legal counsel for 272 AB Ltd. for its work solely relating to the closing of the PSA;

    (b) by paying the amount owing to the municipality in which the Purchased Asset is located with respect to municipal property taxes, assessments, penalties and interest and any other overdue charges owing to the said municipality with respect to the Purchased Asset, ranking prior to the Mortgage held by [NTD: NAME OF MORTGAGEE] (the "**Subject Mortgage**"), if any;

    (c) by paying to Canada Revenue Agency, the amount of any Goods and Services Tax ("**GST**") payable as a result of the Transaction approved by this Order, if any;

    (d) by paying the real estate commission and the GST thereon to the Selling Agent appointed pursuant to the SISP Order to market the Purchased Assets;

    (e) by paying to [NAME OF MORTGAGEE] (the "**Subject Mortgagee**") any amounts owing under and pursuant to the Subject Mortgage, to be credited toward the amounts owing to the Subject Mortgagee, subject to:

        (i) verification by the Monitor of the indebtedness owing to the Subject Mortgagee;

and

(ii) the Monitor obtaining a legal opinion from its independent legal counsel that the security on the Purchased Assets held by the Subject Mortgagee is valid and enforceable; and

(f) by paying the remainder, if any, to the Monitor, to be held in trust until further Order of this Court.

11. For the purposes of determining the nature and priority of Claims, net proceeds from sale of the Purchased Assets (to be held in an interest bearing trust account by the Monitor) shall stand in the place and stead of the Purchased Assets from and after delivery of the Monitor's Closing Certificate and all Claims including Encumbrances (but excluding Permitted Encumbrances) shall not attach to, encumber or otherwise form a charge, security interest, lien, or other Claim against the Purchased Assets and may be asserted against the net proceeds from sale of the Purchased Assets with the same priority as they had with respect to the Purchased Assets immediately prior to the sale, as if the Purchased Assets had not been sold and remained in the possession or control of the person having that possession or control immediately prior to the sale.

12. Except as expressly provided for in the PSA, the Purchaser (or its nominee) shall not, by completion of the Transaction, have liability of any kind whatsoever in respect of any Claims against the Applicants (including, without limitation, 272 AB Ltd.).

13. Upon completion of the Transaction, 272 AB Ltd. and all persons who claim by, through or under 272 AB Ltd. in respect of the Purchased Assets, and all persons or entities having any Claims of any kind whatsoever in respect of the Purchased Assets, save and except for persons entitled to the benefit of the Permitted Encumbrances, shall stand absolutely and forever barred, estopped and foreclosed from and permanently enjoined from pursuing, asserting or claiming any and all right, title, estate, interest, royalty, rental, equity of redemption or other Claim whatsoever in respect of or to the Purchased Assets, and to the extent that any such persons or entities remain in the possession or control of any of the Purchased Assets, or any artifacts, certificates, instruments or other indicia of title representing or evidencing any right, title, estate, or interest in and to the Purchased Assets, they shall forthwith deliver possession thereof to the Purchaser (or its nominee).

14. The Purchaser (or its nominee) shall be entitled to enter into and upon, hold and enjoy the Purchased Assets for its own use and benefit without any interference of or by the 272 AB Ltd., or any person claiming by, through or against 272 AB Ltd.

15. Immediately upon closing of the Transaction, holders of Permitted Encumbrances shall have no claim whatsoever against the Applicants (including, without limitation, 272 AB Ltd.) or the Monitor in respect of the Purchased Assets.

16. The Monitor is directed to file with the Court a copy of the Monitor's Closing Certificate forthwith after delivery thereof to the Purchaser (or its nominee).

MISCELLANEOUS MATTERS

17. Notwithstanding:

    (a) the pendency of these proceedings and any declaration of insolvency made herein;

    (b) the pendency of any applications for a bankruptcy order now or hereafter issued pursuant to the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c.B-3, as amended (the "**BIA**"), in respect of 272 AB Ltd., and any bankruptcy order issued pursuant to any such applications;

    (c) any assignment in bankruptcy made in respect of 272 AB Ltd.; and

    (d) the provisions of any federal or provincial statute:

    the vesting of the Purchased Assets in the Purchaser (or its nominee) pursuant to this Order shall be binding on any trustee in bankruptcy that may be appointed in respect of 272 AB Ltd. and shall not be void or voidable by creditors of 272 AB Ltd., nor shall it constitute nor be deemed to be a transfer at undervalue, settlement, fraudulent preference, assignment, fraudulent conveyance, or other reviewable transaction under the BIA or any other applicable federal or provincial legislation, nor shall it constitute oppressive or unfairly prejudicial conduct pursuant to any applicable federal or provincial legislation.

18. The Applicants, the Monitor, the Purchaser (or its nominee), and any other interested party, shall be at liberty to apply for further advice, assistance and direction as may be necessary in order to give full force and effect to the terms of this Order and to assist and aid the parties in closing the Transaction.

19. This Honourable Court hereby requests the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in any of its provinces or territories or in any foreign jurisdiction, to act in aid of and to be complimentary to this Court in carrying out the terms of this Order, to give effect to this Order and to assist the Monitor and its agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such order and to provide such assistance to the Monitor, as an

officer of the Court, as may be necessary or desirable to give effect to this Order or to assist the Monitor and its agents in carrying out the terms of this Order.

20. Service of this Order shall be deemed good and sufficient by:

(a) Serving the same on:

(i) the persons listed on the service list created in these proceedings;

(ii) any other person served with notice of the application for this Order;

(iii) the Purchaser or the Purchaser's solicitors.

and service on any other person is hereby dispensed with.

21. Service of this Order may be effected by facsimile, electronic mail, personal delivery, or courier. Service is deemed to be effected the next business day following transmission or delivery of this Order.

_____
Justice of the Court of King's Bench of Alberta

Schedule "A"

Form of Monitor's Certificate

COURT FILE NUMBER	2303 06543	Clerk's Stamp
COURT	COURT OF KING'S BENCH OF ALBERTA	
JUDICIAL CENTRE	EDMONTON	
	IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, as amended AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF J.W. CARR HOLDINGS LTD., SPRUCE GROVE INDUSTRIAL PARK INC., 272649 ALBERTA LTD., 279896 ALBERTA LTD., GRANDE PRAIRIE PLACE ENTERPRISES (1996) INC., 1170292 ALBERTA LTD. and 627612 ALBERTA LTD.	
APPLICANTS	J.W. CARR HOLDINGS LTD., SPRUCE GROVE INDUSTRIAL PARK INC., 272649 ALBERTA LTD., 279896 ALBERTA LTD., GRANDE PRAIRIE PLACE ENTERPRISES (1996) INC., 1170292 ALBERTA LTD. and 627612 ALBERTA LTD.	
DOCUMENT	**MONITOR'S CERTIFICATE**	
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	MLT AIKINS LLP Suite 2200, 10135 – 101st Street NW Edmonton, AB T5J 3G1 Solicitor: Jeffrey M. Lee, K.C. / Mandi Deren-Dubé Telephone: (306) 975-7136 / (780) 969-3518 Facsimile: (306) 975-7145 / (780) 969-3549 Email: jmlee@mltaikins.com / mderendube@mltaikins.com File Number: 159371.8	

RECITALS

1. Pursuant to an Initial Order of the Honourable Justice J.J. Gill of the Court of King's Bench of Alberta, Judicial District of Edmonton (the "**Court**") dated April 10, 2023 and an Amended and Restated Initial Order of the Honourable Justice J.T. Neilson of the Court dated April 26, 2023**,** Ernst & Young Inc. was appointed as the monitor (the "**Monitor**") of the undertakings, property and

assets of J.W. Carr Holdings Ltd., Spruce Grove Industrial Park Inc., 272649 Alberta Ltd., 279896 Alberta Ltd., Grande Prairie Place Enterprises (1996) Inc., 1170292 Alberta Ltd. and 627612 Alberta Ltd. (the "**Applicants**").

2. Pursuant to an Order of the Court dated [NTD: DATE]**,** the Court approved the agreement of purchase and sale (the "**PSA**") of certain real property of 272649 Alberta Ltd. ("**272 AB Ltd.**") between 272 AB Ltd. and [NTD: NAME OF PURCHASER] (the "**Purchaser**") and provided for the vesting in the Purchaser of all right, title and interest of 272 AB Ltd. in and to the Purchased Assets, which vesting is to be effective with respect to the Purchased Assets upon the delivery by the Monitor to the Purchaser of a certificate confirming (i) the payment by the Purchaser of the Purchase Price for the Purchased Assets and (ii) the Transaction has been completed to the satisfaction of the Monitor.

3. Unless otherwise indicated herein, capitalized terms have the meanings set out in the PSA:

THE MONITOR CERTIFIES the following:

1. The Purchaser (or its nominee) has paid and the Applicants have received the Purchase Price for the Purchased Assets payable on the Closing Date pursuant to the PSA; and

2. The Transaction has been completed to the satisfaction of the Monitor.

3. This Certificate was delivered by the Monitor at _____[Time] on _____[Date].

Ernst & Young Inc., in its capacity as Monitor of the undertakings, property and assets of 272649 Alberta Ltd. and not in its personal capacity.

Per:_____

Name:

Title:

Schedule "B"

Encumbrances

Instrument No.	Registration Date	Registration

Schedule "C"

Permitted Encumbrances

Instrument No.	Registration Date	Registration

TAB 10

I hereby certify this to be a true copy of the original Order
Dated this 21 day of June 2010
for Clerk of the Court

Action No. 1001-07852

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE OF CALGARY

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED AND *THE JUDICATURE ACT*, R.S.A. 2000, c. J-2, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF MEDICAN HOLDINGS LTD., MEDICAN DEVELOPMENTS INC., R7 INVESTMENTS LTD., MEDICAN CONSTRUCTION LTD., MEDICAN CONCRETE INC., 1090772 ALBERTA LTD., 1144233 ALBERTA LTD., 1344241 ALBERTA LTD., 9150-3755 QUEBEC INC., AXXESS (GRANDE PRAIRIE) DEVELOPMENTS LTD., AXXESS (SYLVAN LAKE) DEVELOPMENTS LTD., CANVAS (CALGARY) DEVELOPMENTS LTD., ELEMENTS (GRANDE PRAIRIE) DEVELOPMENTS LTD., HOMES BY KINGSLAND LTD., LAKE COUNTRY (SITARA) DEVELOPMENTS LTD., MEDICAN (EDMONTON TERWILLEGAR) DEVELOPMENTS LTD., MEDICAN (GRANDE PRAIRIE) HOLDINGS LTD., MEDICAN (KELOWNA MOVE) DEVELOPMENTS LTD., MEDICAN (LETHBRIDGE – FAIRMONT PARK) DEVELOPMENTS LTD., MEDICAN (RED DEER – MICHENER HILL) DEVELOPMENTS LTD., MEDICAN (SYLVAN LAKE) DEVELOPMENTS LTD., MEDICAN (WESTBANK) DEVELOPMENT LTD., MEDICAN (WESTBANK) LAND LTD., MEDICAN CONCRETE FORMING LTD., MEDICAN DEVELOPMENTS (MEDICINE HAT SOUTHWEST) INC., MEDICAN ENTERPRISES INC. / LES ENTREPRISES MEDICAN INC., MEDICAN EQUIPMENT LTD., MEDICAN FRAMING LTD., MEDICAN GENERAL CONTRACTORS LTD., MEDICAN GENERAL CONTRACTORS 2010 LTD., RIVERSTONE (MEDICINE HAT) DEVELOPMENTS LTD., SANDERSON OF FISH CREEK (CALGARY) DEVELOPMENTS LTD., SIERRAS OF EAUX CLAIRES (EDMONTON) DEVELOPMENTS LTD., SONATA RIDGE (KELOWNA) DEVELOPMENTS LTD., SYLVAN LAKE MARINA DEVELOPMENTS LTD., THE ESTATES OF VALLEYDALE DEVELOPMENTS LTD., THE LEGEND (WINNIPEG) DEVELOPMENTS LTD., and WATERCREST (SYLVAN LAKE) DEVELOPMENTS LTD.

the Petitioners

BEFORE THE HONOURABLE)
MADAM JUSTICE K.M. HORNER) At the Courts Centre in the City of Calgary, in the Province of Alberta, this 11th day of June, 2010
IN CHAMBERS)

APPROVAL AND VESTING ORDER
(Condominium Sales)

UPON the application of the Petitioners in these proceedings (collectively, the "**Medican Group**"); **AND UPON** having read the Notice of Motion of the Petitioners, dated June 10, 2010, the Affidavit of Tyrone Schneider dated June 10, 2010, the Affidavit of Ronica Cameron dated June 10, 2010 (the "**Service Affidavit**"), the Monitor's First Report, dated June 10, 2010 and such other material in the pleadings and proceedings as are deemed necessary; **AND UPON**

NOTING that the Initial Order granted in these proceedings on May 26, 2010 (the "**Initial Order**") permits the sale by the Medican Group of residential units in the ordinary course of business or otherwise with the consent of the Monitor and the DIP Lender; **AND UPON** hearing counsel for the Medican Group, the Monitor, and other interested parties; **IT IS HEREBY ORDERED AND DECLARED THAT**:

Service

1. The time for service of notice of this application is abridged to the time actually given and service of the Notice of Motion and supporting material as described in the Service Affidavit is good and sufficient, and this hearing is properly returnable before this Honourable Court today and further service thereof is hereby dispensed with.

2. All capitalized terms not otherwise defined in this Order shall have the meaning ascribed to them in the Initial Order, and the following terms shall have the following meaning:

(a) "**Beneficiaries of the Charges**" means the beneficiaries of the DIP Lending Charge, the Administration Charge, and the Directors' Charge;

(b) "**Monitor's Certificate**" means a certificate issued by the Monitor in substantially the form attached to this Order as Schedule "A";

(c) "**Net Proceeds**" means the proceeds from the sale of the Property, less amounts required to pay all reasonable and ordinary closing costs, including without limitation goods and services and other applicable sales taxes, property taxes, commissions, applicable condominium fees and legal fees and disbursements;

(d) "**Purchase and Sale Agreement**" means the agreement in writing respecting the sale of a Property from the Medican Group to a Purchaser; and

(e) "**Purchaser**" means the individual, trust, or corporation designated in the Monitor's Certificate in respect of a sale of a particular Property as the purchaser of that Property.

Approval of Sale and Vesting of Condominium Units

3. The individual sale of the residential property, whether as lots, condominium units, housing units or parking units (the "**Residential Unit**") be and is hereby authorized in accordance with the provisions of this Order.

4. The sale of a Residential Unit will not be approved by the Monitor unless: (i) the price for that Residential Unit is not less than the lowest list price permitted by agreements related to that Residential Unit; or (ii) the Medican Group, the Monitor, and all parties with a security interest in that Residential Unit (collectively, the "**Interested Parties**") agree to a lower price; or (iii) an Order is obtained from this Court, on notice to the Interested Parties, approving a lower price. The Medican Group will provide the listing price for Residential Units to the Interested Parties.

5. The sale of the Residential Unit described in the Monitor's Certificate (the "**Property**") be and is hereby approved and the Medican Group and the Monitor are hereby authorized and directed to execute all deeds, documents, and agreements, and to do all things reasonably necessary to complete the sale of the Property.

6. Upon the Monitor delivering a Monitor's Certificate in respect of the Property, together with a letter from the solicitors for the Medican Group authorizing registration of this Order, then the sale of the Property shall continue in accordance with the terms and conditions of the Purchase and Sale Agreement in respect of that Property and, subject only to the Permitted Encumbrances set forth in the Monitor's Certificate:

(a) the Property shall be vested in the name of the Purchaser free of all estate, right, title, interest, royalty, rental, and equity of redemption of the Medican Group and all persons who claim by, through or under the Medican Group in respect of the Property;

(b) the Medican Group and all persons who claim by, through or under the Medican Group shall stand absolutely barred and foreclosed from all estate, right, title, interest, royalty, rental, and equity of redemption of the Property and, to the extent that any such person remains in possession or control of any of the

Property, they shall forthwith deliver possession of same to the Purchaser or its nominee;

(c) the Purchaser shall be entitled to enter into and upon, hold and enjoy the Property for its own use and benefit without any interference of or by the Medican Group, or any person claiming by or through or against the Medican Group and/or any of the Property; and

(d) the Registrar of Land Titles in the province where the Property is located shall discharge all encumbrances (except Permitted Encumbrances) listed in the Monitor's Certificate in respect of that Property.

7. Upon the Monitor delivering a Monitor's Certificate in respect of a Property, and without limiting the generality of the foregoing, the Medican Group is authorized and empowered, in respect of that Property, to:

(a) execute and deliver such additional, related and ancillary documents and assurances governing or giving effect to the sale of the Property, which, in the Medican Group's discretion are reasonably necessary or advisable to conclude the transactions contemplated in or in furtherance of the purchase of the Property and/or this Order;

(b) discharge, or authorize the discharge of, any security registration or registrations in the Personal Property Registry of the Province where the Property is located as may be required to properly convey clear title of the Property to the Purchaser;

(c) with respect to Property located in the Province of Alberta, execute any and all instruments and documents in respect of the Property as may be required by the Registrar of the Land Titles Office of Alberta or deemed necessary by the Medican Group, and the Registrar is hereby directed, notwithstanding section 191(1) of the *Land Titles Act* (Alberta) to effect registration of any such instrument or document so executed by the Medican Group or its solicitors;

(d) with respect to Property located in the Province of Manitoba, execute any and all instruments and documents in respect of the Property as may be required by the District Registrar of the Winnipeg Land Titles Office or deemed necessary by the Medican Group, and the District Registrar is hereby directed, notwithstanding section 191(1) of *The Real Property Act* (Manitoba) to effect registration of any such instrument or document so executed by the Medican Group;

(e) with respect to Property located in the Province of British Columbia, execute any and all instruments and documents in respect of the Property as may be required by the Registrar of Land Titles of British Columbia or deemed necessary by the Medican Group, and the Registrar is hereby directed to effect registration of any such instrument or document so executed by the Medican Group; and

(f) take such steps as are deemed by the Medican Group to be necessary to give effect to or incidental to the performance of the Medican Group's obligations pursuant to the Purchase and Sale Agreement, including making any post-closing adjustments as are required.

8. Until further Order of the Honourable Court, counsel to the Medican Group, Fraser Milner Casgrain LLP, shall hold all Net Proceeds in trust and such Net Proceeds shall stand in the place and stead of the Property transferred pursuant to this Order, and all claims of whatsoever nature or kind, including without limitation, all liens, claims, encumbrances, mortgages, proprietary claims, trust claims, lease claims, royalty claims, and other interests (the "**Claims**") shall attach solely to the Net Proceeds with the same validity, priority and in the same amounts and subject to the same defences that were or may have been available when the Claims were attached to the property itself.

9. Notwithstanding paragraph 8 of this Order, the Monitor is authorized, in its sole discretion and as it deems necessary or appropriate, to direct that any or all of the Net Proceeds be paid to valid and enforceable claims that exist in respect of the Net Proceeds; provided however, that adequate provision has been made for the Beneficiaries of the Charges.

10. Any provision made for the Beneficiaries of the Charges by the Monitor pursuant to paragraph 9 hereof shall be done with the consent of the Beneficiaries of the Charges and shall be without prejudice to any subsequent application to allocate Charges pursuant to paragraph 43 of the Initial Order.

11. This Court hereby requests the aid and recognition (including assistance pursuant to Section 17 of the CCAA, as applicable) of any court or any judicial, regulatory or administrative body in any province or territory of Canada and any judicial, regulatory or administrative tribunal or other court constituted pursuant to the Parliament of Canada in carrying out the terms of this Order and the Purchase and Sale Agreement.

Miscellaneous

12. Any conveyance or transfer of Property made pursuant to the provisions of this Order and the applicable Monitor's Certificate shall be valid and enforceable and not be rendered invalid or unenforceable and the rights and remedies of the parties thereto shall not otherwise be limited or impaired in any way by: (i) the pendency of these proceedings and the declaration of insolvency made herein; (ii) any Bankruptcy Order sought or issued pursuant to the *Bankruptcy and Insolvency Act* (Canada) ("**BIA**") in respect of any of the Petitioners; or (iii) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of encumbrances, contained in any existing agreement, lease, sub-lease, offer to lease or other arrangement which binds any of the Petitioners (a "**Third Party Agreement**"), and notwithstanding any provision to the contrary in any Third Party Agreement:

(a) neither the Purchase and Sale Agreement nor any transaction contemplated hereby or coordinated therewith shall create or be deemed to constitute a breach by any of the Petitioners of any Third Party Agreement to which they are a party; and

(b) the Purchaser shall not have liability to any person whatsoever as a result of any breach of any Third Party Agreement cause by or resulting from the creation, execution, delivery or performance of the Purchase and Sale Agreement or any transaction contemplated hereby or coordinated therewith.

13. Notwithstanding (i) the pendency of these proceedings and the declaration of insolvency made herein, (ii) any Bankruptcy Order sought or issued pursuant to the BIA in respect of any of the Petitioners, and (iii) the provisions under the BIA, or any other applicable federal or provincial legislation or common law, the Purchase and Sale Agreement or any transaction contemplated hereby or coordinated therewith shall constitute legal, valid and binding obligations of the Petitioners enforceable against them in accordance with the terms thereof, and neither the Purchase and Sale Agreement nor any transaction contemplated hereby or coordinated therewith will be void or voidable at the instance of creditors and claimants and do not constitute nor shall they be deemed to constitute settlements, fraudulent preferences, assignments, fraudulent conveyances, oppressive conduct, or other reviewable transactions under the BIA, or any other applicable federal or provincial legislation or common law.

14. The Medican Group, the Monitor, an Interested Party, or any Purchaser may apply to this Court for advice and direction on notice to any party likely to be affected by the Order sought or on such notice as this Court directs.

15. The Medican Group shall serve, by courier, facsimile transmission, e-mail transmission, or ordinary post, a copy of this Order on all parties present at this application and on all parties who received notice of this application or who are presently on the service list established in these proceedings, and service on any or all other parties is hereby dispensed with. Service affected as aforesaid shall be good and sufficient service.

"K.M. Horner"

J.C.Q.B.A.

K. MCAUSLAND

ENTERED this 21st day of June, 2010

COURT SEAL

CLERK OF THE COURT

4948621_6.DOC

SCHEDULE "A" TO THE APPROVAL AND VESTING ORDER OF MADAM JUSTICE HORNER, DATED JUNE 11, 2010

Action No. 1001-07852

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE OF CALGARY

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED AND *THE JUDICATURE ACT*, R.S.A. 2000, c. J-2, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF MEDICAN HOLDINGS LTD., MEDICAN DEVELOPMENTS INC., R7 INVESTMENTS LTD., MEDICAN CONSTRUCTION LTD., MEDICAN CONCRETE INC., 1090772 ALBERTA LTD., 1144233 ALBERTA LTD., 1344241 ALBERTA LTD., 9150-3755 QUEBEC INC., AXXESS (GRANDE PRAIRIE) DEVELOPMENTS LTD., AXXESS (SYLVAN LAKE) DEVELOPMENTS LTD., CANVAS (CALGARY) DEVELOPMENTS LTD., ELEMENTS (GRANDE PRAIRIE) DEVELOPMENTS LTD., HOMES BY KINGSLAND LTD., LAKE COUNTRY (SITARA) DEVELOPMENTS LTD., MEDICAN (EDMONTON TERWILLEGAR) DEVELOPMENTS LTD., MEDICAN (GRANDE PRAIRIE) HOLDINGS LTD., MEDICAN (KELOWNA MOVE) DEVELOPMENTS LTD., MEDICAN (LETHBRIDGE – FAIRMONT PARK) DEVELOPMENTS LTD., MEDICAN (RED DEER – MICHENER HILL) DEVELOPMENTS LTD., MEDICAN (SYLVAN LAKE) DEVELOPMENTS LTD., MEDICAN (WESTBANK) DEVELOPMENT LTD., MEDICAN (WESTBANK) LAND LTD., MEDICAN CONCRETE FORMING LTD., MEDICAN DEVELOPMENTS (MEDICINE HAT SOUTHWEST) INC., MEDICAN ENTERPRISES INC. / LES ENTREPRISES MEDICAN INC., MEDICAN EQUIPMENT LTD., MEDICAN FRAMING LTD., MEDICAN GENERAL CONTRACTORS LTD., MEDICAN GENERAL CONTRACTORS 2010 LTD., RIVERSTONE (MEDICINE HAT) DEVELOPMENTS LTD., SANDERSON OF FISH CREEK (CALGARY) DEVELOPMENTS LTD., SIERRAS OF EAUX CLAIRES (EDMONTON) DEVELOPMENTS LTD., SONATA RIDGE (KELOWNA) DEVELOPMENTS LTD., SYLVAN LAKE MARINA DEVELOPMENTS LTD., THE ESTATES OF VALLEYDALE DEVELOPMENTS LTD., THE LEGEND (WINNIPEG) DEVELOPMENTS LTD., and WATERCREST (SYLVAN LAKE) DEVELOPMENTS LTD.

the Petitioners

MONITOR'S CERTIFICATE

(Re: _____)

WHEREAS the Order of Madam Justice Horner, made in these proceedings on the 11th Day of June, 2010 (the "**Order**"), authorizes RSM Richter Inc., the Monitor in these proceedings, to issue a Monitor's Certificate in respect of the sale of a Residential Unit by the Medican Group; **AND WHEREAS** all capitalized terms used in this Certificate have the meaning ascribed to them in the Order unless otherwise defined herein;

NOW THEREFORE by filing this Closing Certificate within these proceedings the Monitor hereby certifies that:

(a) I am an authorized officer of RSM Richter Inc., the Monitor in these proceedings;

(b) I have reviewed the circumstances surrounding the sale of the Residential Unit described as follows:

[insert description of the Property]

(the "**Property**")

(c) and hereby approve of its conveyance to:

[insert description of the Purchasers]

(the "**Purchasers**"),

(d) subject only to the following encumbrances remaining on title to the Property:

[insert Permitted Encumbrances]

(the "**Permitted Encumbrances**").

I make this certificate pursuant to the provisions of the Order, knowing it to be true after having made due inquiry, and not in my personal capacity.

DATED at Calgary, Alberta, this _____ day of _____, 2010.

RSM RICHTER INC., in its capacity as the Monitor in these proceedings

Per: _____
Robert Taylor

Action No. 1001-07852

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL DISTRICT OF CALGARY

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED AND *THE JUDICATURE ACT*, R.S.A. 2000, c. J-2, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF MEDICAN HOLDINGS LTD., MEDICAN DEVELOPMENTS INC., R7 INVESTMENTS LTD., MEDICAN CONSTRUCTION LTD., MEDICAN CONCRETE INC., 1090772 ALBERTA LTD., 1144233 ALBERTA LTD., 1344241 ALBERTA LTD., 9150-3755 QUEBEC INC., AXXESS (GRANDE PRAIRIE) DEVELOPMENTS LTD., AXXESS (SYLVAN LAKE) DEVELOPMENTS LTD., CANVAS (CALGARY) DEVELOPMENTS LTD., ELEMENTS (GRANDE PRAIRIE) DEVELOPMENTS LTD., HOMES BY KINGSLAND LTD., LAKE COUNTRY (SITARA) DEVELOPMENTS LTD., MEDICAN (EDMONTON TERWILLEGAR) DEVELOPMENTS LTD., MEDICAN (GRANDE PRAIRIE) HOLDINGS LTD., MEDICAN (KELOWNA MOVE) DEVELOPMENTS LTD., MEDICAN (LETHBRIDGE – FAIRMONT PARK) DEVELOPMENTS LTD., MEDICAN (RED DEER – MICHENER HILL) DEVELOPMENTS LTD., MEDICAN (SYLVAN LAKE) DEVELOPMENTS LTD., MEDICAN (WESTBANK) DEVELOPMENT LTD., MEDICAN (WESTBANK) LAND LTD., MEDICAN CONCRETE FORMING LTD., MEDICAN DEVELOPMENTS (MEDICINE HAT SOUTHWEST) INC., MEDICAN ENTERPRISES INC. / LES ENTREPRISES MEDICAN INC., MEDICAN EQUIPMENT LTD., MEDICAN FRAMING LTD., MEDICAN GENERAL CONTRACTORS LTD., MEDICAN GENERAL CONTRACTORS 2010 LTD., RIVERSTONE (MEDICINE HAT) DEVELOPMENTS LTD., SANDERSON OF FISH CREEK (CALGARY) DEVELOPMENTS LTD., SIERRAS OF EAUX CLAIRES (EDMONTON) DEVELOPMENTS LTD., SONATA RIDGE (KELOWNA) DEVELOPMENTS LTD., SYLVAN LAKE MARINA DEVELOPMENTS LTD., THE ESTATES OF VALLEYDALE DEVELOPMENTS LTD., THE LEGEND (WINNIPEG) DEVELOPMENTS LTD., and WATERCREST (SYLVAN LAKE) DEVELOPMENTS LTD.

The Petitioners

MONITOR'S CERTIFICATE
(RE: _____)

FRASER MILNER CASGRAIN LLP
Barristers and Solicitors
15th Floor Bankers Court
850 2 Street SW
Calgary, Alberta T2P 0R8

Solicitors: David W. Mann/Scott D. Kurie
Telephone: (403) 268-7097/(403) 268-3084
Facsimile: (403) 268-3100
File: 526686-1

Action No. 1001-07852

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL DISTRICT OF CALGARY

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED AND *THE JUDICATURE ACT*, R.S.A. 2000, c. J-2, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF MEDICAN HOLDINGS LTD., MEDICAN DEVELOPMENTS INC., R7 INVESTMENTS LTD., MEDICAN CONSTRUCTION LTD., MEDICAN CONCRETE INC., 1090772 ALBERTA LTD., 1144233 ALBERTA LTD., 1344241 ALBERTA LTD., 9150-3755 QUEBEC INC., AXXESS (GRANDE PRAIRIE) DEVELOPMENTS LTD., AXXESS (SYLVAN LAKE) DEVELOPMENTS LTD., CANVAS (CALGARY) DEVELOPMENTS LTD., ELEMENTS (GRANDE PRAIRIE) DEVELOPMENTS LTD., HOMES BY KINGSLAND LTD., LAKE COUNTRY (SITARA) DEVELOPMENTS LTD., MEDICAN (EDMONTON TERWILLEGAR) DEVELOPMENTS LTD., MEDICAN (GRANDE PRAIRIE) HOLDINGS LTD., MEDICAN (KELOWNA MOVE) DEVELOPMENTS LTD., MEDICAN (LETHBRIDGE – FAIRMONT PARK) DEVELOPMENTS LTD., MEDICAN (RED DEER – MICHENER HILL) DEVELOPMENTS LTD., MEDICAN (SYLVAN LAKE) DEVELOPMENTS LTD., MEDICAN (WESTBANK) DEVELOPMENT LTD., MEDICAN (WESTBANK) LAND LTD., MEDICAN CONCRETE FORMING LTD., MEDICAN DEVELOPMENTS (MEDICINE HAT SOUTHWEST) INC., MEDICAN ENTERPRISES INC. / LES ENTREPRISES MEDICAN INC., MEDICAN EQUIPMENT LTD., MEDICAN FRAMING LTD., MEDICAN GENERAL CONTRACTORS LTD., MEDICAN GENERAL CONTRACTORS 2010 LTD., RIVERSTONE (MEDICINE HAT) DEVELOPMENTS LTD., SANDERSON OF FISH CREEK (CALGARY) DEVELOPMENTS LTD., SIERRAS OF EAUX CLAIRES (EDMONTON) DEVELOPMENTS LTD., SONATA RIDGE (KELOWNA) DEVELOPMENTS LTD., SYLVAN LAKE MARINA DEVELOPMENTS LTD., THE ESTATES OF VALLEYDALE DEVELOPMENTS LTD., THE LEGEND (WINNIPEG) DEVELOPMENTS LTD., and WATERCREST (SYLVAN LAKE) DEVELOPMENTS LTD.

The Petitioners

APPROVAL AND VESTING ORDER
(Condominium Sales)

FRASER MILNER CASGRAIN LLP
Barristers and Solicitors
15th Floor Bankers Court
850 2 Street SW
Calgary, Alberta
T2P 0R8
Solicitors: David W. Mann/Scott D. Kurie
Telephone: (403) 268-7097/(403) 268-3084
Facsimile: (403) 268-3100
File: 526686-1

TAB 11

Court File No. CV-13-19866

ONTARIO

SUPERIOR COURT OF JUSTICE

THE HONOURABLE MR.	)	FRIDAY, THE 2ND
JUSTICE CAMPBELL	)	DAY OF MAY, 2014
	)	

B E T W E E N:

BANK OF MONTREAL

Applicant

- and -

PORTOFINO CORPORATION

Respondent

OMNIBUS APPROVAL AND VESTING ORDER

THIS MOTION, made by BDO Canada Limited, in its capacity as Court-appointed receiver of all of the assets, undertakings and properties of Portofino Corporation ("**Portofino**") pursuant to the Order of The Honourable Justice Thomas dated October 29, 2013 (the "**Receiver**"), for an order:

(a) prospectively authorizing the Receiver to accept an offer or offers to purchase any or all of the unsold units (the "**Unsold Units**") provided that the sale price for each Unsold Unit to which such offer(s) relates is acceptable to the Receiver having regard to the appraised value for such Unsold Unit(s) and prior sales of similar units and all other terms of the offer(s) are, in the Receiver's sole opinion, in the best interests of the stakeholders of Portofino;

(b) prospectively authorizing the execution of an agreement of purchase and sale in respect of each Unsold Unit by the Receiver, as vendor, and the purchaser of each Unsold Unit (each purchaser hereinafter referred to as the "**Purchaser**') substantially in the form of the Form of Unsold Unit Sale Agreement attached as Schedule "A" to the Sale Agreement Order, together with any amendments or

modifications thereto deemed necessary by the Receiver (each agreement hereinafter referred to as an "**Unsold Unit Sale Agreement**");

(c) prospectively approving the sale transactions (each such transaction, a "**Transaction**" and together, the "**Transactions**") in respect of the Unsold Units, more particularly described on **Schedule "A"** to this Order; and

(d) providing that, upon the delivery by the Receiver to a Purchaser of a Receiver's Certificate substantially in the form attached as Schedule "B" to this Order (the "**Receiver's Certificate**"), all of Portofino's right, title and interest in and to the Unsold Unit(s) described in each applicable Unsold Unit Sale Agreement (the "**Purchased Assets**") will vest in and to the applicable Purchaser, free and clear of any and all claims and encumbrances including those listed on Schedule "C" and in paragraph 3 of this Order, save and except for those encumbrances listed on Schedule "D" of this Order,

was heard this day at the Courthouse, 245 Windsor Avenue, Windsor, Ontario.

ON READING the Third Report of the Receiver dated April 21, 2014 and all appendices thereto (the "**Third Report**"), and the Confidential Supplement to the Third Report and all appendices thereto (the "**Confidential Supplement**") and on hearing the submissions of counsel for the Receiver, and such other persons as may be present and on noting that no other persons appeared, although properly served as appears from the affidavit of Susan Jarrell sworn April 22, 2014, filed:

1. THIS COURT ORDERS that the Receiver is hereby prospectively authorized to accept an offer or offers to purchase any or all of the Unsold Units provided that the sale price for each Unsold Unit to which such offer(s) relates is acceptable to the Receiver having regard to the appraised value for such Unsold Unit(s) and prior sales of similar units and all other terms of the offer(s) are, in the Receiver's sole opinion, in the best interests of the stakeholders of Portofino.

2. THIS COURT ORDERS AND DECLARES that each Transaction is hereby prospectively approved, and the execution of each applicable Unsold Unit Sale Agreement by the Receiver is hereby authorized and approved, with any amendments or modifications thereto deemed necessary by the Receiver. The Receiver is hereby authorized and directed to take such additional steps and execute such additional documents as may be necessary or desirable for

the completion of any Transaction and for the conveyance of the Purchased Assets to each applicable Purchaser.

3. THIS COURT ORDERS AND DECLARES that upon the delivery of a Receiver's Certificate to the Purchaser substantially in the form attached as **Schedule "B"** hereto, all of Portofino's right, title and interest in and to the Purchased Assets described in the applicable Unsold Unit Sale Agreement and listed on Exhibit "A" of the applicable Receiver's Certificate in respect of such Unsold Unit Sale Agreement shall vest absolutely in and to the Purchaser, free and clear of and from any and all security interests (whether contractual, statutory, or otherwise), hypothecs, mortgages, trusts or deemed trusts (whether contractual, statutory, or otherwise), liens, executions, levies, charges, or other financial or monetary claims, whether or not they have attached or been perfected, registered or filed and whether secured, unsecured or otherwise (collectively, the "**Claims**") including, without limiting the generality of the foregoing: (i) any encumbrances or charges created by the Order of the Honourable Justice Thomas dated October 29, 2013; (ii) all charges, security interests or claims evidenced by registrations pursuant to the *Personal Property Security Act* (Ontario) or any other personal property registry system; (iii) any Claims filed in respect of or affecting the Purchased Assets, which Claims are filed on or after the date of the granting of this Order, including without limitation, Claims in respect of the *Construction Lien Act* (Ontario); (iv) those Claims listed on **Schedule "C"** hereto in relation to the Purchased Assets (all of which are collectively referred to as the "**Encumbrances**", which term shall not include the permitted encumbrances, easements and restrictive covenants listed on **Schedule "D"** in relation to the Purchased Assets) and, for greater certainty, this Court orders that upon delivery of the applicable Receiver's Certificate all of the Encumbrances affecting or relating to the Purchased Assets shall be expunged and discharged as against the Purchased Assets.

4. THIS COURT DIRECTS that the Land Registrar in respect of the Land Registry Office for the Land Titles Division of Essex (No. 12) (the "**Land Registry**") shall register a copy of this Order along with the applicable fully completed and executed Receiver's Certificate in respect of the Purchased Assets once the Land Registrar is in receipt of same.

5. THIS COURT ORDERS that upon the registration in the Land Registry of an Application for Vesting Order in the form prescribed by the *Land Titles Act* and/or the *Land Registration Reform Act* (which will include a copy of this Order and the fully completed and executed Receiver's Certificate in respect of the Purchased Assets), the Land Registrar is hereby directed to enter the Purchaser named in the applicable Receiver's Certificate as the owner of the

Purchased Assets listed in Exhibit "A" to the Receiver's Certificate in fee simple, and is hereby directed to delete and expunge from title to the Purchased Assets all of the Claims listed in Schedule "C" hereto and in paragraph 3 of this Order.

6. THIS COURT ORDERS that for the purposes of determining the nature and priority of Claims, the net proceeds from the sale of the Purchased Assets shall stand in the place and stead of the Purchased Assets, and that from and after the delivery of the Receiver's Certificate in respect of an applicable Unsold Unit Sale Agreement, all Claims and Encumbrances shall attach to the net proceeds from the sale of the Purchased Assets with the same priority as they had with respect to the Purchased Assets immediately prior to the sale, as if the Purchased Assets had not been sold and remained in the possession or control of the person having that possession or control immediately prior to the sale.

7. THIS COURT ORDERS AND DIRECTS the Receiver to file with the Court a copy of each Receiver's Certificate, forthwith after delivery thereof, and in any event no later than thirty (30) days after the date of the closing of the Transaction detailed in each applicable Unsold Unit Sale Agreement.

8. THIS COURT ORDERS that, notwithstanding:

(a) the pendency of these proceedings;

(b) any applications for a bankruptcy order now or hereafter issued pursuant to the *Bankruptcy and Insolvency Act* (Canada) in respect of Portofino and any bankruptcy order issued pursuant to any such applications; and

(c) any assignment in bankruptcy made in respect of Portofino;

the vesting of the Purchased Assets in each applicable Purchaser pursuant to this Order shall be binding on any trustee in bankruptcy that may be appointed in respect of Portofino and shall not be void or voidable by creditors of Portofino, nor shall it constitute nor be deemed to be a settlement, fraudulent preference, assignment, fraudulent conveyance, transfer at undervalue, or other reviewable transaction under the *Bankruptcy and Insolvency Act* (Canada), the *Companies' Creditors Arrangement Act* (Canada), or any other applicable federal or provincial legislation, nor shall it constitute oppressive or unfairly prejudicial conduct pursuant to any applicable federal or provincial legislation.

9. THIS COURT ORDERS AND DECLARES that each Transaction is exempt from the application of the *Bulk Sales Act* (Ontario).

10. THIS COURT HEREBY REQUESTS the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States to give effect to this Order and to assist the Receiver and its agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Receiver, as an officer of this Court, as may be necessary or desirable to give effect to this Order or to assist the Receiver and its agents in carrying out the terms of this Order.

Justice, Superior Court of Justice

ENTERED AT WINDSOR
In Book No. 25
re Document No. 572
on May 2 20 14
by DF

Schedule "A" – Unsold Units

Legal Description

Description: Essex Standard Condominium Plan No. 122 and its appurtenant interest. The description of the condominium property is: LT 1, South Side of Sandwich Street, Pl 392 & Pt Lot 73 Concession 1 Windsor; Pt 1 Pl 12R17829; S/T Ease as set out in Schedule "A" of Declaration CE278123, Windsor Ontario (LT) (LRO#12)

Unsold Condominium Units					
Unit	**Level**		**PIN**		
1	1		01872	-	0001
2	1		01872	-	0002
3	1		01872	-	0003
4	1		01872	-	0004
5	1		01872	-	0005
6	1		01872	-	0006
3	2		01872	-	0052
4	2		01872	-	0053
4	3		01872	-	0058
9	3		01872	-	0063
1	4		01872	-	0065
2	4		01872	-	0066
8	4		01872	-	0072
8	5		01872	-	0082
1	6		01872	-	0085
3	6		01872	-	0087
1	7		01872	-	0095
4	7		01872	-	0098

Unsold Condominium Units					
Unit	Level		PIN		
8	7		01872	-	0102
3	8		01872	-	0107
4	8		01872	-	0108
5	8		01872	-	0109
6	8		01872	-	0110
1	9		01872	-	0115
3	9		01872	-	0117
4	9		01872	-	0118
6	9		01872	-	0120
1	10		01872	-	0123
2	10		01872	-	0124
8	10		01872	-	0130
1	11		01872	-	0131
2	11		01872	-	0132
4	11		01872	-	0134
5	11		01872	-	0135
1	12		01872	-	0139
2	12		01872	-	0140
1	13		01872	-	0145
2	13		01872	-	0146
3	13		01872	-	0147
1	14		01872	-	0151
2	14		01872	-	0152
3	14		01872	-	0153

Unsold Condominium Units					
Unit	Level		PIN		
4	14		01872	-	0154
1	15		01872	-	0157
2	15		01872	-	0158
3	15		01872	-	0159
5	15		01872	-	0161
1	16		01872	-	0162
2	16		01872	-	0163
3	16		01872	-	0164
5	16		01872	-	0166

Unsold Parking Units					
Unit	Level		PIN		
7	1		01872	-	0007
8	1		01872	-	0008
12	1		01872	-	0012
13	1		01872	-	0013
16	1		01872	-	0016
17	1		01872	-	0017
18	1		01872	-	0018
19	1		01872	-	0019
20	1		01872	-	0020
21	1		01872	-	0021
22	1		01872	-	0022
23	1		01872	-	0023

Unsold Parking Units					
Unit	Level		PIN		
24	1		01872	-	0024
25	1		01872	-	0025
26	1		01872	-	0026
27	1		01872	-	0027
28	1		01872	-	0028
29	1		01872	-	0029
30	1		01872	-	0030
31	1		01872	-	0031
32	1		01872	-	0032
33	1		01872	-	0033
34	1		01872	-	0034
35	1		01872	-	0035
36	1		01872	-	0036
37	1		01872	-	0037
38	1		01872	-	0038
39	1		01872	-	0039
40	1		01872	-	0040
41	1		01872	-	0041
42	1		01872	-	0042
43	1		01872	-	0043
44	1		01872	-	0044
45	1		01872	-	0045
46	1		01872	-	0046
47	1		01872	-	0047

Unsold Parking Units					
Unit	Level		PIN		
48	1		01872	-	0048
49	1		01872	-	0049

Unsold Storage Units					
Unit	Level		PIN		
2	A		01872	-	0168
1	A		01872	-	0167

Schedule "B" – Form of Receiver's Certificate

Court File No. CV-13-19866

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N :

BANK OF MONTREAL

Applicant

- and -

PORTOFINO CORPORATION

Respondent

RECEIVER'S CERTIFICATE

RECITALS

A. Pursuant to an Order of the Honourable Justice Thomas of the Ontario Superior Court of Justice (the "**Court**") dated October 29, 2013, BDO Canada Limited ("**BDO**") was appointed as the receiver (the "**Receiver**") of all of the assets, undertakings and properties Portofino ("**Portofino**").

B. Pursuant to an Order of the Court dated May 2, 2014, the Court granted an omnibus approval and vesting order (the "**Omnibus Approval and Vesting Order**"), providing for among other things:

(a) the Court's approval of this Transaction in respect of the Purchased Assets (as defined below) as described in the Sale Agreement (as defined below);

(b) the Court's authorization of the Receiver entering into the Agreement of Purchase and Sale made as of _____ [DATE OF AGREEMENT] (the "**Sale Agreement**') between the Receiver and _____[NAME OF PURCHASER] (the "**Purchaser**"); and

(c) the vesting in and to the Purchaser all of Portofino's right, title and interest in and to the lands and premises legally described on **Exhibit "A"** to this Receiver's Certificate (the "**Purchased Assets**"), with such vesting to be effective in respect of the Purchased

Assets upon the delivery by the Receiver to the Purchaser of this certificate confirming (i) the payment by the Purchaser of the purchase price for the Purchased Assets; (ii) that the conditions to closing as set out in the Sale Agreement have been satisfied or, to the extent that such conditions could be waived, have been waived by the Receiver and the Purchaser; and (iii) the transaction described in the Sale Agreement (the "**Transaction**") has been completed to the satisfaction of the Receiver.

C. Unless otherwise indicated herein, terms with initial capitals have the meanings set out in the Omnibus Approval and Vesting Order.

THE RECEIVER CERTIFIES the following:

1. The Purchaser has paid and the Receiver has received the purchase price for the Purchased Assets payable on closing pursuant to the Sale Agreement;

2. The conditions to closing as set out in the Sale Agreement have been satisfied or, to the extent such conditions could be waived, have been waived by the Receiver and the Purchaser;

3. The Transaction has been completed to the satisfaction of the Receiver;

4. In accordance with the provisions of the Omnibus Approval and Vesting Order, upon delivery by the Receiver of this Receiver's Certificate to the Purchaser, the Transaction is approved and the Purchaser is vested with all of Portofino's right, title and interest in and to the Purchased Assets; and

5. This Certificate was delivered by the Receiver at _____[TIME] on _____ [DATE].

BDO CANADA LIMITED solely in its capacity as Court-appointed receiver of Portofino Corporation and not in its personal capacity

Per: _____

Name:

Title:

Exhibit "A" to Form of Receiver's Certificate – Purchased Assets

(INSERT LEGAL DESCRIPTION AND MUNICIPAL ADDRESS FOR EACH UNSOLD UNIT COMPRISING THE PURCHASED ASSETS SUBJECT TO THE APPLICABLE UNSOLD UNIT SALE AGREEMENT)

BANK OF MONTREAL
Plaintiff

and

PORTOFINO CORPORATION
Defendant

Court File No: CV-13-19866

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at Windsor

RECEIVER'S CERTIFICATE

MILLER THOMSON LLP
One London Place
255 Queens Avenue, Suite 2010
London, ON Canada N6A 5R8

Tony Van Klink LSUC#: 29008M
Tel: 519.931.3509
Fax: 519.858.8511
Email: tvanklink@millerthomson.com

Sherry A. Kettle, LSUC #53561B
Tel: 519.931.3534
Fax: 519.858.8511
Email: skettle@millerthomson.com

Lawyers for BDO Canada Limited, Court-Appointed Receiver of Portofino Corporation

Schedule "C" – Claims to be deleted and expunged from title to the Unsold Units

Description:	Essex Standard Condominium Plan No. 122 and its appurtenant interest. The description of the condominium property is: LT 1, South Side of Sandwich Street, Pl 392 & Pt Lot 73 Concession 1 Windsor; Pt 1 Pl 12R17829; S/T Ease as set out in Schedule "A" of Declaration CE278123, Windsor Ontario (LRO#12)

Unsold Condominium Units (See Schedule "A" for individual unit descriptions)

1. Instrument No. CE185236 – Charge in the principal amount of $30,000,000 from Portofino Corporation to Bank of Montreal, registered on November 28, 2005.

2. Instrument No. CE185421 – Charge in the principal amount of $4,200,000 from Portofino Corporation to Lombard General Insurance Company of Canada, registered on November 29, 2005.

3. Instrument No. CE297353 – Charge in the principal amount of $1,000,000 from Portofino Corporation to Remo Valente Real Estate (1990) Limited, registered on October 12, 2007.

4. Instrument No. CE380280 – Notice from Portofino Corporation to Bank of Montreal, registered on June 10, 2009.

5. Instrument No. CE380282 – Postponement from Lombard General Insurance Company of Canada to Bank of Montreal, registered on June 10, 2009.

6. Instrument No. CE459564 – Notice from Portofino Corporation to Bank of Montreal, registered on February 15, 2011.

7. Instrument No. CE482047 – Charge in the principal amount of $400,000 from Portofino Corporation to Sutts Strosberg LLP, registered on August 9, 2011.

8. Instrument No. CE500568 – Charge in the principal amount of $1,540,000 from Portofino Corporation to Royal Bank of Canada, registered on December 20, 2011.

9. Instrument No. CE500569 – Notice Assignment of Rents from Portofino Corporation to Royal Bank of Canada, registered on December 20, 2011.

10. Instrument No. CE508840 – Application Change Name from Lombard General Insurance Company of Canada to Northbridge General Insurance Corporation, registered on March 1, 2012.

11. Instrument No. CE551002 – Charge in the principal amount of $524,312 from Portofino Corporation to Sutts Strosberg LLP, registered on January 10, 2013.

12. Instrument No. CE574028 – Notice from Portofino Corporation to Bank of Montreal,

	registered on July 22, 2013.
13.	Instrument No. CE584310 – Construction lien in the amount of $875,000, registered by Dante J. Capaldi and 1287678 Ontario Inc. on September 30, 2013.
14.	Instrument No. CE584311 – Construction lien in the amount of $3,000,000 registered by Andreolli Investments Inc. on September 30, 2013.
15.	Instrument No. CE587801 – Construction lien in the amount of $3,000,000 registered by Dante J. Capaldi and 1287678 Ontario Inc. on October 25, 2013.
16.	Instrument No. CE587802 – Construction lien in the amount of $875,000 registered by Andreolli Investments Inc. and Wilma Capaldi on October 25, 2013.
17.	Instrument No. CE588099 – Condo Lien/98 in the amount of $80,749 registered by Essex Standard Condominium Corporation No. 122 on October 29, 2013.
18.	Instrument No. CE588864 – Certificate registered by Dante J. Capaldi and 1287678 Ontario Inc. on November 1, 2013.
19.	Instrument No. CE588865 – Certificate registered by Andreolli Investments Inc. and Wilma Capaldi on November 1, 2013.
20.	Instrument No. CE592122 – Application Court Order registered on November 28, 2013.
Unsold Parking Units (See Schedule "A" for individual unit descriptions)	
1.	Instrument No. CE185236 – Charge in the principal amount of $30,000,000 from Portofino Corporation to Bank of Montreal, registered on November 28, 2005.
2.	Instrument No. CE185421 – Charge in the principal amount of $4,200,000 from Portofino Corporation to Lombard General Insurance Company of Canada, registered on November 29, 2005.
3.	Instrument No. CE380280 – Notice from Portofino Corporation to Bank of Montreal, registered on June 10, 2009.
4.	Instrument No. CE380282 – Postponement from Lombard General Insurance Company of Canada to Bank of Montreal, registered on June 10, 2009.
5.	Instrument No. CE459564 – Notice from Portofino Corporation to Bank of Montreal, registered on February 15, 2011.
6.	Instrument No. CE500568 – Charge in the principal amount of $1,540,000 from Portofino Corporation to Royal Bank of Canada, registered on December 20, 2011.
7.	Instrument No. CE500569 – Notice Assignment of Rents from Portofino Corporation to Royal Bank of Canada, registered on December 20, 2011.
8.	Instrument No. CE508840 – Application Change Name from Lombard General Insurance Company of Canada to Northbridge General Insurance Corporation,

registered on March 1, 2012.

9. Instrument No. CE574028 – Notice from Portofino Corporation to Bank of Montreal, registered on July 22, 2013.

10. Instrument No. CE584310 – Construction lien in the amount of $875,000, registered by Dante J. Capaldi and 1287678 Ontario Inc. on September 30, 2013.

11. Instrument No. CE584311 – Construction lien in the amount of $3,000,000 registered by Andreolli Investments Inc. on September 30, 2013.

12. Instrument No. CE587801 – Construction lien in the amount of $3,000,000 registered by Dante J. Capaldi and 1287678 Ontario Inc. on October 25, 2013.

13. Instrument No. CE587802 – Construction lien in the amount of $875,000 registered by Andreolli Investments Inc. and Wilma Capaldi on October 25, 2013.

14. Instrument No. CE588098 – Condo Lien/98 in the amount of $23,497 registered by Essex Standard Condominium Corporation No. 122 on October 29, 2013.

15. Instrument No. CE588864 – Certificate registered by Dante J. Capaldi and 1287678 Ontario Inc. on November 1, 2013.

16. Instrument No. CE588865 – Certificate registered by Andreolli Investments Inc. and Wilma Capaldi on November 1, 2013.

Unsold Storage Units (See Schedule "A" for individual unit descriptions)

1. Instrument No. CE185236 – Charge in the principal amount of $30,000,000 from Portofino Corporation to Bank of Montreal, registered on November 28, 2005.

2. Instrument No. CE185421 – Charge in the principal amount of $4,200,000 from Portofino Corporation to Lombard General Insurance Company of Canada, registered on November 29, 2005.

3. Instrument No. CE380280 – Notice from Portofino Corporation to Bank of Montreal, registered on June 10, 2009.

4. Instrument No. CE380282 – Postponement from Lombard General Insurance Company of Canada to Bank of Montreal, registered on June 10, 2009.

5. Instrument No. CE459564 – Notice from Portofino Corporation to Bank of Montreal, registered on February 15, 2011.

6. Instrument No. CE500568 – Charge in the principal amount of $1,540,000 from Portofino Corporation to Royal Bank of Canada, registered on December 20, 2011.

7. Instrument No. CE500569 – Notice Assignment of Rents from Portofino Corporation to

Royal Bank of Canada, registered on December 20, 2011.

8. Instrument No. CE508840 – Application Change Name from Lombard General Insurance Company of Canada to Northbridge General Insurance Corporation, registered on March 1, 2012.

9. Instrument No. CE574028 – Notice from Portofino Corporation to Bank of Montreal, registered on July 22, 2013.

10. Instrument No. CE584310 – Construction lien in the amount of $875,000, registered by Dante J. Capaldi and 1287678 Ontario Inc. on September 30, 2013.

11. Instrument No. CE584311 – Construction lien in the amount of $3,000,000 registered by Andreolli Investments Inc. on September 30, 2013.

12. Instrument No. CE587801 – Construction lien in the amount of $3,000,000 registered by Dante J. Capaldi and 1287678 Ontario Inc. on October 25, 2013.

13. Instrument No. CE587802 – Construction lien in the amount of $875,000 registered by Andreolli Investments Inc. and Wilma Capaldi on October 25, 2013.

14. Instrument No. CE588864 – Certificate registered by Dante J. Capaldi and 1287678 Ontario Inc. on November 1, 2013.

15. Instrument No. CE588865 – Certificate registered by Andreolli Investments Inc. and Wilma Capaldi on November 1, 2013.

Schedule "D" – Permitted Encumbrances, Easements and Restrictive Covenants related to the Unsold Units (Unsold Condominium Units, Unsold Parking Units and Unsold Storage Units)

(unaffected by the Omnibus Approval and Vesting Order)

(i) Instrument No. CE98338 – Notice from the Corporation of the City of Windsor to Portofino Riverside Tower Inc.

(ii) Instrument No. CE191717 – Notice from the Corporation of the City of Windsor to Portofino Corporation

(iii) Instrument No. CE278123 – Declaration Condo

(iv) Instrument No. ECP122 – Plan Condominium

(v) Instrument No. CE279560 – Condo By-Law/98 (By-Law No. 1)

(vi) Instrument No. CE279561 – Condo By-Law/98 (By-Law No. 2)

(vii) Instrument No. CE279607 – Condo By-Law/98 (By-Law No. 3)

(viii) Instrument No. CE279624 – Condo By-Law/98 (By-Law No. 4)

(ix) Instrument No. CE279635 – Condo By-Law/98 (By-Law No. 5)

(x) Instrument No. CE279643 – Condo By-Law/98 (By-Law No. 6)

BANK OF MONTREAL
Applicant

and

PORTOFINO CORPORATION
Respondent

Court File No: CV-13-19866

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at Windsor

OMNIBUS APPROVAL AND VESTING ORDER

MILLER THOMSON LLP
One London Place
255 Queens Avenue, Suite 2010
London, ON Canada N6A 5R8

Tony Van Klink LSUC#: 29008M
Tel: 519.931.3509
Fax: 519.858.8511
Email: tvanklink@millerthomson.com

Sherry A. Kettle, LSUC #53561B
Tel: 519.931.3534
Fax: 519.858.8511
Email: skettle@millerthomson.com

Lawyers for BDO Canada Limited, Court-Appointed Receiver of Portofino Corporation

TAB 12

COURT FILE NUMBER	2203-01087	Clerk's Stamp
COURT	COURT OF QUEEN'S BENCH OF ALBERTA	
JUDICIAL CENTRE	EDMONTON	
APPLICANT	TIMBERCREEK MORTGAGE SERVICING INC. and 2292912 ONTARIO INC.	
RESPONDENTS	SYMPHONY CONDOMINIUM LTD., ROCKWOOD MANAGEMENT LTD. and ALLEN WASNEA	
DOCUMENT	**ORDER (APPROVAL OF MARKETING PROCESS, SALE APPROVAL PROCESS, ACTIVITIES, TIMBERCREEK DISTRIBUTIONS AND SEALING)**	
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	**McMILLAN LLP** 1700, 421 – 7th Avenue S.W. Calgary, AB T2P 4K9 **Attention: Adam Maerov** Telephone: 403-215-2752 Facsimile: 403-531-4720 **Attention: Preet Saini** Telephone: 403-531-4716 Facsimile: 403-531-4720 File Number: 287823	

JUDICIAL CENTRE OF EDMONTON
FILED DIGITALLY
2203 01087
May 31, 2022
2:13 PM
CLERK OF THE COURT

DATE ON WHICH ORDER WAS PRONOUNCED: May 18, 2022

LOCATION WHERE ORDER WAS PRONOUNCED: Edmonton

NAME OF JUSTICE WHO MADE THIS ORDER: Justice G.S. Dunlop

UPON THE APPLICATION by **MNP Ltd.** in its capacity as the Court-appointed receiver and manager (the "Receiver") of the undertakings, property and assets of Symphony Condominium Ltd. (the "Debtor") for, *inter alia,* an order (1) approving a Marketing Process ("Marketing Process"), listing agreement ("Listing Agreement"), and sale approval process ("Sale Approval Process") in respect of the Symphony Units and the Foote Residence all as described in the First Report of the Receiver dated May 11, 2022 (the "Report") and the Second Confidential Report of the Receiver dated May 11, 2022 (the

"Second Confidential Report"), (2) sealing the First Confidential Report of the Receiver dated May 11, 2022, and the Second Confidential Report, (3) approving the Receiver's activities and interim statement of receipts and disbursements as described in the Report, and (4) approving one or more distributions to Timbercreek Mortgage Servicing Inc. ("Timbercreek") from the net proceeds of the sale of Symphony Units;

AND UPON HAVING READ the receivership order granted April 7, 2022 (the "Receivership Order"), the Report, the Second Confidential Report and the Affidavit of Service; **AND UPON HEARING** the submissions of counsel for the Receiver, counsel for Timbercreek and any other counsel or other interested parties present;

IT IS HEREBY ORDERED AND DECLARED THAT:

SERVICE

1. Service of notice of this application and supporting materials is hereby declared to be good and sufficient, no other person is required to have been served with notice of this application and time for service of this application is abridged to that actually given.

APPROVAL OF MARKETING PROCESS, LISTING AGREEMENT AND SALE APPROVAL PROCESS

2. The Marketing Process, the Listing Agreement, and the Sale Approval Process (as each of such terms is defined in the Report) are hereby approved. The Receiver is authorized and empowered to implement the Marketing Process and the Sale Approval Process substantially as described in the Report and the Second Confidential Report, and to proceed, carry out, and implement any corresponding sales or marketing activities related thereto, in each case substantially in accordance with the Marketing Process and the Sale Approval Process and, furthermore, the Receiver is hereby authorized to accept any offers substantially in the respective forms attached to the Report (after acceptance by the Receiver, a "Sale Agreement") to purchase one or more of the Symphony Units or the Foote Residence (as each of such terms is defined in the Report) in accordance with the Sale Approval Process. Without limiting the generality of the foregoing, the Receiver is authorized to execute any agreement, contract, deed, invoice, bill of sale, power of attorney, transfer or any other document or Receiver's closing certificate and to take any other action, which may be necessary or desirable in order to give full and complete effect to the Marketing Process and the Sale Approval Process and the Receiver shall have no liability to any persons as a result of such actions taken in accordance with this Order.

3. Any Sale Agreements entered into for the purchase and sale of any of the Symphony Units or the Foote Residence are hereby approved provided that:

   (a) The purchase price for the relevant property is within or above the applicable Value Range (as defined in the Report) specified in the Symphony Appraisal or Foote Appraisal (as defined in the Report);

   (b) The purchase price for the relevant property and the remaining terms of any Sale Agreement (collectively with the purchase price, the "Sale Terms") are approved by both the Receiver and by Timbercreek in respect of any of the Symphony Units and the Sale Terms are approved by the Receiver, by Timbercreek and by Canada ICI Capital Corporation in respect of the Foote Residence, all approvals acting reasonably; and

   (c) In addition to the foregoing, in respect of Symphony Unit 345, the Sale Terms of any Sale Agreement are approved by both Condominium Corporation 1920542 and the City of Edmonton, or by further order of this Court.

4. The Receiver is hereby authorized and empowered to apply to this Court to amend, vary, or seek any advice, directions with regard to the Marketing Process or the Sale Approval Process.

SYMPHONY UNIT AND FOOTE RESIDENCE SALES AND VESTING OF PROPERTY

5. The Receiver is authorized to market and sell the Symphony Units and the Foote Residence in accordance with the Sale Approval Process free and clear of and from any and all caveats, security interests, hypothecs, pledges, mortgages, liens, trusts or deemed trusts, reservations of ownership, royalties, options, rights of pre-emption, privileges, interests, assignments, actions, judgements, executions, levies, taxes, writs of enforcement, charges, or other claims, whether contractual, statutory, financial, monetary or otherwise, whether or not they have attached or been perfected, registered or filed and whether secured, unsecured or otherwise (collectively, "Claims") including, without limiting the generality of the foregoing:

   (a) any encumbrances or charges created by the Receivership Order;

   (b) any charges, security interests or claims evidenced by registrations pursuant to the *Personal Property Security Act* (Alberta) or any other personal property registry system;

   (c) any liens or claims of lien under the *Builders' Lien Act* (Alberta); and

(d) those Claims listed in Appendix "A" to the applicable Receiver's Closing Certificate (as defined below) (all of which are collectively referred to as the "Encumbrances", which term shall not include the permitted encumbrances, caveats, interests, easements, and restrictive covenants listed in Appendix "B" to the applicable Receiver's Closing Certificate (as defined below) (collectively, "Permitted Encumbrances")).

6. Upon the Receiver completing the sale of any of the Symphony Units or the Foote Residence to a purchaser and upon receipt of the purchase price by the Receiver and upon the Receiver filing a Receiver's Closing Certificate substantially in the form attached hereto as Schedule "A" all of the Debtor's right, title and interest in and to the purchased assets described in the applicable Receiver's Closing Certificate (the "Purchased Assets") shall vest absolutely in the purchaser named in the Receiver's Closing Certificate (the "Purchaser") free and clear of and from any and all Encumbrances and all of the Encumbrances affecting or relating to such Purchased Assets shall be expunged and discharged as against such Purchased Assets and for greater certainty, this Court orders that all Claims including Encumbrances other than Permitted Encumbrances, affecting or relating to such Purchased Assets are hereby expunged, discharged and terminated as against the Purchased Assets

7. Upon delivery of a filed Receiver's Closing Certificate, and a filed copy of this Order, together with any applicable registration fees, all governmental authorities including those referred to below in this paragraph (collectively, "Governmental Authorities") are hereby authorized, requested and directed to accept delivery of such Receiver's Closing Certificate and certified copy of this Order as though they were originals and to register such transfers, interest authorizations, discharges and discharge statements of conveyance as may be required to convey to the purchaser or its nominee clear title to the Purchased Assets subject only to Permitted Encumbrances. Without limiting the foregoing:

(a) the Registrar of Land Titles ("Land Titles Registrar") for the lands described in any filed Receiver's Closing Certificate (the "Lands") shall and is hereby authorized, requested and directed to forthwith:

(i) cancel existing Certificates of Title for the Lands and premises municipally and legally described in the applicable Receiver's Closing Certificate;

(ii) issue a new Certificate of Title for the Lands in the name of the Purchaser (or its nominee) described in the applicable Receiver's Closing Certificate;

(iii) transfer to the New Certificate of Title the existing instruments listed in Appendix "B" to the applicable Receiver's Closing Certificate, and to issue and register against the New Certificate of Title such new caveats, utility rights of ways, easements or other instruments as are described in Appendix "B" to the applicable Receiver's Closing Certificate; and

(iv) discharge and expunge the Encumbrances listed in Appendix "A" to the applicable Receiver's Closing Certificate and discharge and expunge any Claims including Encumbrances (but excluding Permitted Encumbrances) which may be registered after the date of the Sale Agreement against the existing Certificate of Title to the Lands;

(b) the Registrar of the Alberta Personal Property Registry (the "PPR Registrar") shall and is hereby directed to forthwith cancel and discharge any registrations at the Alberta Personal Property Registry (whether made before or after the date of this Order) claiming security interests (other than Permitted Encumbrances) in the estate or interest of the Debtor in any of the Purchased Assets described in the applicable Receiver's Closing Certificate which are of a kind prescribed by applicable regulations as serial-number goods.

8. In order to effect the transfers and discharges described above, this Court directs each of the Governmental Authorities to take such steps as are necessary to give effect to the terms of this Order, any Receiver's Closing Certificate and any Sale Agreement. Presentment of this Order and the applicable Receiver's Closing Certificate shall be the sole and sufficient authority for the Governmental Authorities to make and register transfers of title or interest and cancel and discharge registrations against any of the Purchased Assets described in a Receiver's Closing Certificate and of any Claims including Encumbrances but excluding Permitted Encumbrances.

9. No authorization, approval or other action by and no notice to or filing with any governmental authority or regulatory body exercising jurisdiction over any Purchased Assets is required for the due execution, delivery and performance by the Receiver of any Sale Agreement or any Receiver's Closing Certificate.

10. Upon delivery of a Receiver's Closing Certificate together with a certified copy of this Order, this Order and such Receiver's Closing Certificate shall be immediately registered by the Land Titles Registrar notwithstanding the requirements of section 191(1) of the *Land Titles Act*, RSA 2000, c.L-7 and notwithstanding that the appeal period in respect of this Order has not elapsed. The Land

Titles Registrar is hereby directed to accept all Affidavits of Corporate Signing Authority submitted by the Receiver in its capacity as Receiver of the Debtor and not in its personal capacity.

11. For the purposes of determining the nature and priority of Claims, net proceeds from sale of the Purchased Assets (to be held in an interest bearing trust account by the Receiver) shall stand in the place and stead of the Purchased Assets from and after delivery of the Receiver's Closing Certificate and all Claims including Encumbrances (but excluding Permitted Encumbrances) shall not attach to, encumber or otherwise form a charge, security interest, lien, or other Claim against the Purchased Assets and may be asserted against the net proceeds from sale of the Purchased Assets with the same priority as they had with respect to the Purchased Assets immediately prior to the sale, as if the Purchased Assets had not been sold and remained in the possession or control of the person having that possession or control immediately prior to the sale.

12. Except as expressly provided for in the applicable Sale Agreement or by section 5 of the Alberta *Employment Standards Code*, any Purchaser (or its nominee) shall not, by completion of any transaction contemplated by any Sale Agreement (a "Transaction"), have liability of any kind whatsoever in respect of any Claims against the Debtor.

13. Upon completion of a Transaction, the Debtor and all persons who claim by, through or under the Debtor in respect of any Purchased Assets, and all persons or entities having any Claims of any kind whatsoever in respect of such Purchased Assets, save and except for persons entitled to the benefit of the Permitted Encumbrances, shall stand absolutely and forever barred, estopped and foreclosed from and permanently enjoined from pursuing, asserting or claiming any and all right, title, estate, interest, royalty, rental, equity of redemption or other Claim whatsoever in respect of or to such Purchased Assets, and to the extent that any such persons or entities remain in the possession or control of any of such Purchased Assets, or any artifacts, certificates, instruments or other indicia of title representing or evidencing any right, title, estate, or interest in and to such Purchased Assets, they shall forthwith deliver possession thereof to the Purchaser (or its nominee) of such Purchased Assets.

14. The Purchaser (or its nominee) of any Purchased Assets shall be entitled to enter into and upon, hold and enjoy such Purchased Assets for its own use and benefit without any interference of or by the Debtor, or any person claiming by, through or against the Debtor.

15. Immediately upon closing of any Transaction, holders of Permitted Encumbrances in respect of the applicable Purchased Assets shall have no claim whatsoever against the Receiver.

16. The Receiver is directed to file with the Court a copy of the Receiver's Closing Certificate forthwith after delivery thereof to the applicable Purchaser (or its nominee).

MISCELLANEOUS MATTERS

17. Notwithstanding:

(a) the pendency of these proceedings and any declaration of insolvency made herein;

(b) the pendency of any applications for a bankruptcy order now or hereafter issued pursuant to the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c.B-3, as amended (the "BIA"), in respect of the Debtor, and any bankruptcy order issued pursuant to any such applications;

(c) any assignment in bankruptcy made in respect of the Debtor; and

(d) the provisions of any federal or provincial statute:

the vesting of any Purchased Assets in a Purchaser (or its nominee) pursuant to this Order and the applicable Receiver's Closing Certificate shall be binding on any trustee in bankruptcy that may be appointed in respect of the Debtor and shall not be void or voidable by creditors of the Debtor, nor shall it constitute nor be deemed to be a transfer at undervalue, settlement, fraudulent preference, assignment, fraudulent conveyance, or other reviewable transaction under the BIA or any other applicable federal or provincial legislation, nor shall it constitute oppressive or unfairly prejudicial conduct pursuant to any applicable federal or provincial legislation.

18. The Receiver, any Purchaser (or its nominee) and any other interested party, shall be at liberty to apply for further advice, assistance and direction as may be necessary in order to give full force and effect to the terms of this Order and to assist and aid the parties in closing any Transaction contemplated by a Sale Agreement.

19. This Honourable Court hereby requests the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in any of its provinces or territories or in any foreign jurisdiction, to act in aid of and to be complimentary to this Court in carrying out the terms of this Order, to give effect to this Order and to assist the Receiver and its agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such order and to provide such assistance to the Receiver, as an officer of the Court, as may be necessary or desirable to give effect to this Order or to assist the Receiver and its agents in carrying out the terms of this Order.

TIMBERCREEK DISTRIBUTIONS

20. The Receiver and its counsel are each hereby authorized to pay to Timbercreek from time to time one or more distributions from the net proceeds of the sale of any of the Symphony Units including any deposits paid in connection therewith as are required to repay amounts owing by the Debtor to Timbercreek under its secured credit facilities as described in the First Report, subject to such reasonable reserves of funds as the Receiver deems necessary for the ongoing administration of these proceedings or to satisfy applicable priority clams, including any Pre-Filing GST (as defined in the First Report) that may be payable in priority to Timbercreek's security.

TEMPORARY SEALING

21. Division 4 of Part 6 of the Alberta Rules of Court does not apply to this application.

22. The Second Confidential Report shall, until the filing of the Receiver's Closing Certificate in respect of the last Symphony Unit and the Foote Residence or as otherwise ordered by the Court, be sealed and kept confidential, to be shown only to a Justice of the Court of Queen's Bench of Alberta, and accordingly, shall be filed with the Clerk of the Court who shall keep the Second Confidential Report in a sealed envelope, which shall be clearly marked "SEALED PURSUANT TO THE ORDER OF THE HONOURABLE JUSTICE DUNLOP DATED MAY 18, 2022."

APPROVAL OF ACTIVITIES AND SRD

23. The Receiver's activities and the interim statement of receipts and disbursements for the period ended May 9, 2022 as set out in the Report are hereby ratified and approved.

SERVICE OF ORDER

24. Service of this Order shall be deemed good and sufficient by:

    (a) Serving the same on:

        (i) the persons listed on the service list created in these proceedings;

        (ii) any other person served with notice of the application for this Order;

(iii) any other parties attending or represented at the application for this Order; and

(b) Posting a copy of this Order on the Receiver's website at: https://mnpdebt.ca/en/corporate/corporate-engagements/symphony-condominium-ltd.

and service on any other person is hereby dispensed with.

25. Service of this Order may be effected by facsimile, electronic mail, personal delivery or courier. Service is deemed to be effected the next business day following transmission or delivery of this Order.

Justice of the Court of Queen's Bench of Alberta

Schedule "A"
Receiver's Closing Certificate

COURT FILE NUMBER	2203-01087	Clerk's Stamp
COURT	COURT OF QUEEN'S BENCH OF ALBERTA	
JUDICIAL CENTRE	EDMONTON	
APPLICANTS	TIMBERCREEK MORTGAGE SERVICING INC. and 2292912 ONTARIO INC.	
RESPONDENTS	SYMPHONY CONDOMINIUM LTD., ROCKWOOD MANAGEMENT LTD. and ALLEN WASNEA	
DOCUMENT	**RECEIVER'S CLOSING CERTIFICATE ([SYMPHONY UNIT #__] OR [FOOTE RESIDENCE])**	
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	**McMILLAN LLP** 1700, 421 – 7th Avenue S.W. Calgary, AB T2P 4K9 **Attention: Adam Maerov** Telephone: 403-215-2752 Facsimile: 403-531-4720 **Attention: Preet Saini** Telephone: 403-531-4716 Facsimile: 403-531-4720 File Number: 287823	

RECITALS

A. Pursuant to an Order of the Honourable Justice M.J. Lema of the Court of Queen's Bench of Alberta, Judicial District of Edmonton (the "Court") dated April 7, 2022, MNP Ltd. was appointed as the receiver (the "Receiver") of the undertakings, property and assets of Symphony Condominium Ltd. (the "Debtor").

B. Pursuant to an Order of the Court dated May 18, 2022 the Court authorized the Receiver to enter into agreements for the purchase and sale of certain properties described as the Symphony Units and the Foote Residence.

C. The Lands subject to this Receiver's Closing Certificate are:

   a. **[Insert Description of Applicable Lands]**

D. The Purchased Assets subject to this Receiver's Closing Certificate are:

   a. **[Insert Description of Applicable Purchased Assets]**

E. This Receiver's Closing Certificate is prepared in respect of a sale agreement (the "Sale Agreement") between the Receiver and **[Purchaser Name]** (the "Purchaser") dated **[Date]** and provides for the vesting in the Purchaser of the Debtor's right, title and interest in and to the Purchased Assets described herein.

F. The Encumbrances and Permitted Encumbrances applicable to the transaction contemplated by the Sale Agreement (the "Transaction") are described respectively in Appendix "A" and Appendix "B" hereto.

G. Upon the delivery by the Receiver to the Purchaser of a certificate confirming (i) the payment by the Purchaser of the Purchase Price for the Purchased Assets described herein; (ii) that the conditions to Closing as set out in the Sale Agreement have been satisfied or waived by the Receiver and the Purchaser; and (iii) the Transaction has been completed to the satisfaction of the Receiver.

THE RECEIVER CERTIFIES the following:

1. The Purchaser (or its nominee) has paid and the Receiver has received the Purchase Price for the Purchased Assets described herein payable on the Closing Date pursuant to the Sale Agreement;

2. The conditions to Closing as set out in the Sale Agreement have been satisfied or waived by the Receiver and the Purchaser (or its nominee); and

3. The Transaction has been completed to the satisfaction of the Receiver.

4. This Certificate was delivered by the Receiver at **[Time]** on **[Date]**.

MNP Ltd., in its capacity as Receiver of the undertakings, property and assets of Symphony Condominium Ltd. and not in its personal capacity.

Per;_____

Name: Vanessa Allen

Title: Senior Vice President

Appendix "A" – Encumbrances

Instrument Number	Registration Date	Instrument
To be completed	To be completed	To be completed

Appendix "B" – Permitted Encumbrances

Instrument Number	Registration Date	Instrument
To be completed	To be completed	To be completed