

COURT FILE NO.

2501-06120

COURT

COURT OF KING'S BENCH OF ALBERTA

JUDICIAL CENTRE

CALGARY

APPLICANT(S)

**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
SUNTERRA FOOD CORPORATION,
TROCHU MEAT PROCESSORS LTD.,
SUNTERRA QUALITY FOOD MARKETS
INC., SUNTERRA FARMS LTD.,
SUNWOLD FARMS LIMITED,
SUNTERRA BEEF LTD., LARIAGRA
FARMS LTD., SUNTERRA FARM
ENTERPRISES LTD., SUNTERRA
ENTERPRISES INC.**

DOCUMENT

**BOOK OF AUTHORITIES TO THE
BENCH BRIEF OF THE APPLICANTS
FOR THE APPLICATION TO BE HEARD
ON APRIL 28, 2026 AT 9:30 A.M.**

ADDRESS FOR SERVICE
AND CONTACT
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Clerk's
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TABLE OF AUTHORITIES

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2.	<i>Nortel Networks Corp. (Re)</i> (2009), 55 C.B.R. (5th) 229 , 2009 CanLII 39492 (Ont. S.C.J. [Commercial List])
3.	<i>9354-9186 Québec inc. v. Callidus Capital Corp.</i> , 2020 SCC 10
4.	<i>Re Brainhunter Inc.</i> , 2009 CarswellOnt 8207 (Ont. S.C.J. [Commercial List])
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8.	<i>Hudson's Bay Company</i> , 2025 ONSC 1804
9.	<i>In the Matter of a Plan of Compromise or Arrangement of Sandvine Corporation et al.</i> , 2024 ONSC 6199
10.	<i>Target Canada Co., Re</i> , 2015 ONSC 303
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12.	<i>Walter Energy Canada Holdings Inc., Re</i> , 2016 BCSC 107
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15.	<i>Re: Mobilicity Group</i> , 2013 ONSC 6167
16.	<i>Phoena Holdings Inc.</i> , 2023 ONSC 2118
17.	<i>Timminco Limited (Re)</i> , 2012 ONSC 506
18.	<i>Canwest Publishing Inc.</i> , 2010 ONSC 222

19.	<i>Montreal (City) v Deloitte Restructuring Inc.</i> , 2021 SCC 53
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21.	<i>In Re Hudson's Bay Company</i> , 2025 ONSC 1530
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23.	<i>U.S. Steel Canada Inc., Re</i> , 2016 ONSC 3106

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CANADA

CONSOLIDATION

CODIFICATION

Companies' Creditors Arrangement Act

Loi sur les arrangements avec les créanciers des compagnies

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

L.R.C. (1985), ch. C-36

Current to February 4, 2026

À jour au 4 février 2026

Last amended on December 12, 2024

Dernière modification le 12 décembre 2024

OFFICIAL STATUS OF CONSOLIDATIONS

Subsections 31(1) and (2) of the *Legislation Revision and Consolidation Act*, in force on June 1, 2009, provide as follows:

Published consolidation is evidence

31 (1) Every copy of a consolidated statute or consolidated regulation published by the Minister under this Act in either print or electronic form is evidence of that statute or regulation and of its contents and every copy purporting to be published by the Minister is deemed to be so published, unless the contrary is shown.

Inconsistencies in Acts

(2) In the event of an inconsistency between a consolidated statute published by the Minister under this Act and the original statute or a subsequent amendment as certified by the Clerk of the Parliaments under the *Publication of Statutes Act*, the original statute or amendment prevails to the extent of the inconsistency.

LAYOUT

The notes that appeared in the left or right margins are now in boldface text directly above the provisions to which they relate. They form no part of the enactment, but are inserted for convenience of reference only.

NOTE

This consolidation is current to February 4, 2026. The last amendments came into force on December 12, 2024. Any amendments that were not in force as of February 4, 2026 are set out at the end of this document under the heading “Amendments Not in Force”.

CARACTÈRE OFFICIEL DES CODIFICATIONS

Les paragraphes 31(1) et (2) de la *Loi sur la révision et la codification des textes législatifs*, en vigueur le 1^{er} juin 2009, prévoient ce qui suit :

Codifications comme élément de preuve

31 (1) Tout exemplaire d'une loi codifiée ou d'un règlement codifié, publié par le ministre en vertu de la présente loi sur support papier ou sur support électronique, fait foi de cette loi ou de ce règlement et de son contenu. Tout exemplaire donné comme publié par le ministre est réputé avoir été ainsi publié, sauf preuve contraire.

Incompatibilité — lois

(2) Les dispositions de la loi d'origine avec ses modifications subséquentes par le greffier des Parlements en vertu de la *Loi sur la publication des lois* l'emportent sur les dispositions incompatibles de la loi codifiée publiée par le ministre en vertu de la présente loi.

MISE EN PAGE

Les notes apparaissant auparavant dans les marges de droite ou de gauche se retrouvent maintenant en caractères gras juste au-dessus de la disposition à laquelle elles se rattachent. Elles ne font pas partie du texte, n'y figurant qu'à titre de repère ou d'information.

NOTE

Cette codification est à jour au 4 février 2026. Les dernières modifications sont entrées en vigueur le 12 décembre 2024. Toutes modifications qui n'étaient pas en vigueur au 4 février 2026 sont énoncées à la fin de ce document sous le titre « Modifications non en vigueur ».

Single judge may exercise powers, subject to appeal

(2) The powers conferred by this Act on a court may, subject to appeal as provided for in this Act, be exercised by a single judge thereof, and those powers may be exercised in chambers during term or in vacation.

R.S., c. C-25, s. 9.

Form of applications

10 (1) Applications under this Act shall be made by petition or by way of originating summons or notice of motion in accordance with the practice of the court in which the application is made.

Documents that must accompany initial application

(2) An initial application must be accompanied by

- (a) a statement indicating, on a weekly basis, the projected cash flow of the debtor company;
- (b) a report containing the prescribed representations of the debtor company regarding the preparation of the cash-flow statement; and
- (c) copies of all financial statements, audited or unaudited, prepared during the year before the application or, if no such statements were prepared in that year, a copy of the most recent such statement.

Publication ban

(3) The court may make an order prohibiting the release to the public of any cash-flow statement, or any part of a cash-flow statement, if it is satisfied that the release would unduly prejudice the debtor company and the making of the order would not unduly prejudice the company's creditors, but the court may, in the order, direct that the cash-flow statement or any part of it be made available to any person specified in the order on any terms or conditions that the court considers appropriate.

R.S., 1985, c. C-36, s. 10; 2005, c. 47, s. 127.

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.

R.S., 1985, c. C-36, s. 11; 1992, c. 27, s. 90; 1996, c. 6, s. 167; 1997, c. 12, s. 124; 2005, c. 47, s. 128.

Un seul juge peut exercer les pouvoirs, sous réserve d'appel

(2) Les pouvoirs conférés au tribunal par la présente loi peuvent être exercés par un seul de ses juges, sous réserve de l'appel prévu par la présente loi. Ces pouvoirs peuvent être exercés en chambre, soit durant une session du tribunal, soit pendant les vacances judiciaires.

S.R., ch. C-25, art. 9.

Forme des demandes

10 (1) Les demandes prévues par la présente loi peuvent être formulées par requête ou par voie d'assignation introductive d'instance ou d'avis de motion conformément à la pratique du tribunal auquel la demande est présentée.

Documents accompagnant la demande initiale

(2) La demande initiale doit être accompagnée :

- a) d'un état portant, projections à l'appui, sur l'évolution hebdomadaire de l'encaisse de la compagnie débitrice;
- b) d'un rapport contenant les observations réglementaires de la compagnie débitrice relativement à l'établissement de cet état;
- c) d'une copie des états financiers, vérifiés ou non, établis au cours de l'année précédant la demande ou, à défaut, d'une copie des états financiers les plus récents.

Interdiction de mettre l'état à la disposition du public

(3) Le tribunal peut, par ordonnance, interdire la communication au public de tout ou partie de l'état de l'évolution de l'encaisse de la compagnie débitrice s'il est convaincu que sa communication causerait un préjudice indu à celle-ci et que sa non-communication ne causerait pas de préjudice indu à ses créanciers. Il peut toutefois préciser dans l'ordonnance que tout ou partie de cet état peut être communiqué, aux conditions qu'il estime indiquées, à la personne qu'il nomme.

L.R. (1985), ch. C-36, art. 10; 2005, ch. 47, art. 127.

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.

L.R. (1985), ch. C-36, art. 11; 1992, ch. 27, art. 90; 1996, ch. 6, art. 167; 1997, ch. 12, art. 124; 2005, ch. 47, art. 128.

Relief reasonably necessary

11.001 An order made under section 11 at the same time as an order made under subsection 11.02(1) or during the period referred to in an order made under that subsection with respect to an initial application shall be limited to relief that is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period.

2019, c. 29, s. 136.

Rights of suppliers

11.01 No order made under section 11 or 11.02 has the effect of

(a) prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided after the order is made; or

(b) requiring the further advance of money or credit.

2005, c. 47, s. 128.

Stays, etc. — initial application

11.02 (1) 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.

Stays, etc. — other than initial application

(2) 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);

Redressements normalement nécessaires

11.001 L'ordonnance rendue au titre de l'article 11 en même temps que l'ordonnance rendue au titre du paragraphe 11.02(1) ou pendant la période visée dans l'ordonnance rendue au titre de ce paragraphe relativement à la demande initiale n'est limitée qu'aux redressements normalement nécessaires à la continuation de l'exploitation de la compagnie débitrice dans le cours ordinaire de ses affaires durant cette période.

2019, ch. 29, art. 136.

Droits des fournisseurs

11.01 L'ordonnance prévue aux articles 11 ou 11.02 ne peut avoir pour effet :

a) d'empêcher une personne d'exiger que soient effectués sans délai les paiements relatifs à la fourniture de marchandises ou de services, à l'utilisation de biens loués ou faisant l'objet d'une licence ou à la fourniture de toute autre contrepartie de valeur qui ont lieu après l'ordonnance;

b) d'exiger le versement de nouvelles avances de fonds ou de nouveaux crédits.

2005, ch. 47, art. 128.

Suspension : demande initiale

11.02 (1) Dans le cas d'une demande initiale visant une compagnie débitrice, le tribunal peut, par ordonnance, aux conditions qu'il peut imposer et pour la période maximale de dix jours qu'il estime nécessaire :

a) suspendre, jusqu'à nouvel ordre, toute procédure qui est ou pourrait être intentée contre la compagnie sous le régime de la *Loi sur la faillite et l'insolvabilité* ou de la *Loi sur les liquidations et les restructurations*;

b) surseoir, jusqu'à nouvel ordre, à la continuation de toute action, poursuite ou autre procédure contre la compagnie;

c) interdire, jusqu'à nouvel ordre, l'introduction de toute action, poursuite ou autre procédure contre la compagnie.

Suspension : demandes autres qu'initiales

(2) Dans le cas d'une demande, autre qu'une demande initiale, visant une compagnie débitrice, le tribunal peut, par ordonnance, aux conditions qu'il peut imposer et pour la période qu'il estime nécessaire :

a) suspendre, jusqu'à nouvel ordre, toute procédure qui est ou pourrait être intentée contre la compagnie sous le régime des lois mentionnées à l'alinéa (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.

Burden of proof on application

(3) 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.

Restriction

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

2005, c. 47, s. 128, 2007, c. 36, s. 62(F); 2019, c. 29, s. 137.

Stays — directors

11.03 (1) An order made under section 11.02 may provide that no person may commence or continue any action against a director of the company on any claim against directors that arose before the commencement of proceedings under this Act and that relates to obligations of the company if directors are under any law liable in their capacity as directors for the payment of those obligations, until a compromise or an arrangement in respect of the company, if one is filed, is sanctioned by the court or is refused by the creditors or the court.

Exception

(2) Subsection (1) does not apply in respect of an action against a director on a guarantee given by the director relating to the company's obligations or an action seeking injunctive relief against a director in relation to the company.

Persons deemed to be directors

(3) If all of the directors have resigned or have been removed by the shareholders without replacement, any person who manages or supervises the management of the business and affairs of the company is deemed to be a director for the purposes of this section.

2005, c. 47, s. 128.

b) surseoir, jusqu'à nouvel ordre, à la continuation de toute action, poursuite ou autre procédure contre la compagnie;

c) interdire, jusqu'à nouvel ordre, l'introduction de toute action, poursuite ou autre procédure contre la compagnie.

Preuve

(3) Le tribunal ne rend l'ordonnance que si :

a) le demandeur le convainc que la mesure est opportune;

b) dans le cas de l'ordonnance visée au paragraphe (2), le demandeur le convainc en outre qu'il a agi et continue d'agir de bonne foi et avec la diligence voulue.

Restriction

(4) L'ordonnance qui prévoit l'une des mesures visées aux paragraphes (1) ou (2) ne peut être rendue qu'en vertu du présent article.

2005, ch. 47, art. 128, 2007, ch. 36, art. 62(F); 2019, ch. 29, art. 137.

Suspension — administrateurs

11.03 (1) L'ordonnance prévue à l'article 11.02 peut interdire l'introduction ou la continuation de toute action contre les administrateurs de la compagnie relativement aux réclamations qui sont antérieures aux procédures intentées sous le régime de la présente loi et visent des obligations de la compagnie dont ils peuvent être, es qualités, responsables en droit, tant que la transaction ou l'arrangement, le cas échéant, n'a pas été homologué par le tribunal ou rejeté par celui-ci ou les créanciers.

Exclusion

(2) La suspension ne s'applique toutefois pas aux actions contre les administrateurs pour les garanties qu'ils ont données relativement aux obligations de la compagnie ni aux mesures de la nature d'une injonction les visant au sujet de celle-ci.

Présomption : administrateurs

(3) Si tous les administrateurs démissionnent ou sont destitués par les actionnaires sans être remplacés, quiconque dirige ou supervise les activités commerciales et les affaires internes de la compagnie est réputé un administrateur pour l'application du présent article.

2005, ch. 47, art. 128.

is satisfied that the director is unreasonably impairing or is likely to unreasonably impair the possibility of a viable compromise or arrangement being made in respect of the company or is acting or is likely to act inappropriately as a director in the circumstances.

Filling vacancy

(2) The court may, by order, fill any vacancy created under subsection (1).

1997, c. 12, s. 124; 2005, c. 47, s. 128.

Security or charge relating to director's indemnification

11.51 (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, the court may make an order declaring that all or part of the property of the company is subject to a security or charge — in an amount that the court considers appropriate — in favour of any director or officer of the company to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer of the company after the commencement of proceedings under this Act.

Priority

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

Restriction — indemnification insurance

(3) The court may not make the order if in its opinion the company could obtain adequate indemnification insurance for the director or officer at a reasonable cost.

Negligence, misconduct or fault

(4) The court shall make an order declaring that the security or charge does not apply in respect of a specific obligation or liability incurred by a director or officer if in its opinion the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct or, in Quebec, the director's or officer's gross or intentional fault.

2005, c. 47, s. 128; 2007, c. 36, s. 66.

Court may order security or charge to cover certain costs

11.52 (1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge — in an amount that the court considers appropriate — in respect of the fees and expenses of

convaincu que ce dernier, sans raisons valables, compromet ou compromettra vraisemblablement la possibilité de conclure une transaction ou un arrangement viable ou agit ou agira vraisemblablement de façon inacceptable dans les circonstances.

Vacance

(2) Le tribunal peut, par ordonnance, combler toute vacance découlant de la révocation.

1997, ch. 12, art. 124; 2005, ch. 47, art. 128.

Biens grevés d'une charge ou sûreté en faveur d'administrateurs ou de dirigeants

11.51 (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 celle-ci sont grevés d'une charge ou sûreté, d'un montant qu'il estime indiqué, en faveur d'un ou de plusieurs administrateurs ou dirigeants pour l'exécution des obligations qu'ils peuvent contracter en cette qualité après l'introduction d'une procédure sous le régime de la présente loi.

Priorité

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

Restriction — assurance

(3) Il ne peut toutefois rendre une telle ordonnance s'il estime que la compagnie peut souscrire, à un coût qu'il estime juste, une assurance permettant d'indemniser adéquatement les administrateurs ou dirigeants.

Négligence, inconduite ou faute

(4) Il déclare, dans l'ordonnance, que la charge ou sûreté ne vise pas les obligations que l'administrateur ou le dirigeant assume, selon lui, par suite de sa négligence grave ou de son inconduite délibérée ou, au Québec, par sa faute lourde ou intentionnelle.

2005, ch. 47, art. 128; 2007, ch. 36, art. 66.

Biens grevés d'une charge ou sûreté pour couvrir certains frais

11.52 (1) Le tribunal peut par ordonnance, sur préavis aux créanciers garantis qui seront vraisemblablement touchés par la charge ou sûreté, déclarer que tout ou partie des biens de la compagnie débitrice sont grevés d'une charge ou sûreté, d'un montant qu'il estime indiqué, pour couvrir :

(a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;

(b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and

(c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.

Priority

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

2005, c. 47, s. 128; 2007, c. 36, s. 66.

Bankruptcy and Insolvency Act matters

11.6 Notwithstanding the *Bankruptcy and Insolvency Act*,

(a) proceedings commenced under Part III of the *Bankruptcy and Insolvency Act* may be taken up and continued under this Act only if a proposal within the meaning of the *Bankruptcy and Insolvency Act* has not been filed under that Part; and

(b) an application under this Act by a bankrupt may only be made with the consent of inspectors referred to in section 116 of the *Bankruptcy and Insolvency Act* but no application may be made under this Act by a bankrupt whose bankruptcy has resulted from

(i) the operation of subsection 50.4(8) of the *Bankruptcy and Insolvency Act*, or

(ii) the refusal or deemed refusal by the creditors or the court, or the annulment, of a proposal under the *Bankruptcy and Insolvency Act*.

1997, c. 12, s. 124.

Court to appoint monitor

11.7 (1) When an order is made on the initial application in respect of a debtor company, the court shall at the same time appoint a person to monitor the business and financial affairs of the company. The person so appointed must be a trustee, within the meaning of subsection 2(1) of the *Bankruptcy and Insolvency Act*.

a) les débours et honoraires du contrôleur, ainsi que ceux des experts — notamment en finance et en droit — dont il retient les services dans le cadre de ses fonctions;

b) ceux des experts dont la compagnie retient les services dans le cadre de procédures intentées sous le régime de la présente loi;

c) ceux des experts dont tout autre intéressé retient les services, si, à son avis, la charge ou sûreté était nécessaire pour assurer sa participation efficace aux procédures intentées sous le régime de la présente loi.

Priorité

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

2005, ch. 47, art. 128; 2007, ch. 36, art. 66.

Lien avec la *Loi sur la faillite et l'insolvabilité*

11.6 Par dérogation à la *Loi sur la faillite et l'insolvabilité* :

a) les procédures intentées sous le régime de la partie III de cette loi ne peuvent être traitées et continuées sous le régime de la présente loi que si une proposition au sens de la *Loi sur la faillite et l'insolvabilité* n'a pas été déposée au titre de cette même partie;

b) le failli ne peut faire une demande au titre de la présente loi qu'avec l'aval des inspecteurs visés à l'article 116 de la *Loi sur la faillite et l'insolvabilité*, aucune demande ne pouvant toutefois être faite si la faillite découle, selon le cas :

(i) de l'application du paragraphe 50.4(8) de la *Loi sur la faillite et l'insolvabilité*,

(ii) du rejet — effectif ou présumé — de sa proposition par les créanciers ou le tribunal ou de l'annulation de celle-ci au titre de cette loi.

1997, ch. 12, art. 124.

Nomination du contrôleur

11.7 (1) Le tribunal qui rend une ordonnance sur la demande initiale nomme une personne pour agir à titre de contrôleur des affaires financières ou autres de la compagnie débitrice visée par la demande. Seul un syndic au sens du paragraphe 2(1) de la *Loi sur la faillite et l'insolvabilité* peut être nommé pour agir à titre de contrôleur.

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**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**

ENDORSEMENT

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 (“CDMA”) 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 CDMA 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

3

**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***

et

**Ernst & Young Inc.,
9354-9186 Québec inc.,
9354-9178 Québec inc.,
Insolvency Institute of Canada and
Canadian Association of Insolvency
and Restructuring Professionals** *Interveniers*

**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.

**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

**Ernst & Young Inc.,
9354-9186 Québec inc.,
9354-9178 Québec inc.,
Institut d'insolvabilité du Canada et
Association canadienne des professionnels
de l'insolvabilité et de la réorganisation** *Intervenants*

**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.

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, which 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.

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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 Métallurgistes*, 2013 CSC 6, [2013] 1 R.C.S. 271; *Ernst*

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

Neil A. Peden, for the appellants/intervenors 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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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 interveners 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.

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

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, as 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.

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 super-prioritaire 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 créanciers².

[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 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.

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 J.J.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']un 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 insolubles, 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 Métallus*, 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* (2^e 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* (2^e 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 [TRA-DUCTION] « 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 Equilibrium 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.

[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).

[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

[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 résiduels.

[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] 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).

d'autoriser la vente ou la disposition des actifs d'une compagnie débitrice hors du cours ordinaire de ses affaires³. 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* (4^e 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] 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,

[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 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.

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 manoeuvre 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 n° 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 (*Metcalf & 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* (4^e 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 « jouer 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 procèderont 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 [TRA-DUCTION] « 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 to 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 faire⁴. 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".

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.

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 type⁵. 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 Une autre exception a été codifiée dans les modifications apportées en 2019 à la LACC qui créent le par. 11.2(5) (voir *Loi n° 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 [TRANSLATION] « 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.

[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.

[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,

[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] 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] 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 tenter 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.

...

... 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. v. 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.

...

... 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/intervenors 9354-9186 Québec inc. and 9354-9178 Québec inc.: Davies Ward Phillips & Vineberg, Montréal.

Solicitors for the appellants/intervenors 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 intervenor 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.

4

**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 BRAINHUNTER INC., BRAINHUNTER
CANADA INC., BRAINHUNTER (OTTAWA) INC., PROTEC
EMPLOYMENT SERVICES LTD., TREKLOGIC INC.**

APPLICANTS

BEFORE: MORAWETZ J.

COUNSEL: Jay Swartz and Jim Bunting, for the Applicants

G. Moffat, for Deloitte & Touche Inc., Monitor

Joseph Bellissimo, for Roynat Capital Inc.

Peter J. Osborne, for R. N. Singh and Purchaser

Edmond Lamek, for the Toronto-Dominion Bank

D. Dowdall, for Noteholders

D. Ullmann, for Procom Consultants Group Inc.

**HEARD &
DECIDED: DECEMBER 11, 2009**

ENDORSEMENT

[1] At the conclusion of the hearing on December 11, 2009, I granted the motion with reasons to follow. These are the reasons.

[2] The Applicants brought this motion for an extension of the Stay Period, approval of the Bid Process and approval of the Stalking Horse APA between TalentPoint Inc., 2223945 Ontario Ltd., 2223947 Ontario Ltd., and 2223956 Ontario Ltd., as purchasers (collectively, the “Purchasers”) and each of the Applicants, as vendors.

[3] The affidavit of Mr. Jewitt and the Report of the Monitor dated December 1, 2009 provide a detailed summary of the events that lead to the bringing of this motion.

[4] The Monitor recommends that the motion be granted.

[5] The motion is also supported by TD Bank, Roynat, and the Noteholders. These parties have the significant economic interest in the Applicants.

[6] Counsel on behalf of Mr. Singh and the proposed Purchasers also supports the motion.

[7] Opposition has been voiced by counsel on behalf of Procom Consultants Group Inc., a business competitor to the Applicants and a party that has expressed interest in possibly bidding for the assets of the Applicants.

[8] The Bid Process, which provides for an auction process, and the proposed Stalking Horse APA have been considered by Breakwall, the independent Special Committee of the Board and the Monitor.

[9] Counsel to the Applicants submitted that, absent the certainty that the Applicants’ business will continue as a going concern which is created by the Stalking Horse APA and the Bid Process, substantial damage would result to the Applicants’ business due to the potential loss of clients, contractors and employees.

[10] The Monitor agrees with this assessment. The Monitor has also indicated that it is of the view that the Bid Process is a fair and open process and the best method to either identify the Stalking Horse APA as the highest and best bid for the Applicants’ assets or to produce an offer for the Applicants’ assets that is superior to the Stalking Horse APA.

[11] It is acknowledged that the proposed purchaser under the Stalking Horse APA is an insider and a related party. The Monitor is aware of the complications that arise by having an insider being a bidder. The Monitor has indicated that it is of the view that any competing bids can be evaluated and compared with the Stalking Horse APA, even though the bids may not be based on a standard template.

[12] Counsel on behalf of Procom takes issue with the \$700,000 break fee which has been provided for in the Stalking Horse APA. He submits that it is neither fair nor necessary to have a break fee. Counsel submits that the break fee will have a chilling effect on the sales process as it will require his client to in effect outbid Mr. Singh’s group by in excess of \$700,000 before its bid could be considered. The break fee is approximately 2.5% of the total consideration.

[13] The use of a stalking horse bid process has become quite popular in recent CCAA filings. In *Re Nortel Networks Corp.* [2009] O.J. No. 3169, I approved a stalking horse sale process and set out four factors (the “Nortel Criteria”) the court should consider in the exercise of its general statutory discretion to determine whether to authorize a sale process:

- (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?

[14] The Nortel decision predates the recent amendments to the CCAA. This application was filed December 2, 2009 which post-dates the amendments.

[15] Section 36 of the CCAA expressly permits the sale of substantially all of the debtors’ assets in the absence of a plan. It also sets out certain factors to be considered on such a sale. However, the amendments do not directly assess the factors a court should consider when deciding to approve a sale process.

[16] Counsel to the Applicants submitted that a distinction should be drawn between the approval of a sales process and the approval of an actual sale in that the Nortel Criteria is engaged when considering whether to approve a sales process, while s. 36 of the CCAA is engaged when determining whether to approve a sale. Counsel also submitted that s. 36 should also be considered indirectly when applying the Nortel Criteria.

[17] I agree with these submissions. There is a distinction between the approval of the sales process and the approval of a sale. Issues can arise after approval of a sales process and prior to the approval of a sale that requires a review in the context of s. 36 of the CCAA. For example, it is only on a sale approval motion that the court can consider whether there has been any unfairness in the working out of the sales process.

[18] In this case, the Special Committee, the advisors, the key creditor groups and the Monitor all expressed support for the Applicants’ process.

[19] In my view, the Applicants have established that a sales transaction is warranted at this time and that the sale will be of benefit to the “economic community”. I am also satisfied that no better alternative has been put forward. In addition, no creditor has come forward to object to a sale of the business.

[20] With respect to the possibility that the break fee may deter other bidders, this is a business point that has been considered by the Applicants, its advisors and key creditor groups. At 2.5% of the amount of the bid, the break fee is consistent with break fees that have been approved by this court in other proceedings. The record makes it clear that the break fee issue

has been considered and, in the exercise of their business judgment, the Special Committee unanimously recommended to the Board and the Board unanimously approved the break fee. In the circumstances of this case, it is not appropriate or necessary for the court to substitute its business judgment for that of the Applicants.

[21] For the foregoing reasons, I am satisfied that the Bid Process and the Stalking Horse APA be approved.

[22] For greater certainty, a bid will not be disqualified as a Qualified Bid (or a bidder as a Qualified Bidder) for the reason that the bid does not contemplate the bidder offering employment to all or substantially all of the employees of the Applicants or assuming liabilities to employees on terms comparable to those set out in s. 5.6 of the Stalking Horse Bid. However, this may be considered as a factor in comparing the relative value of competing bids.

[23] The Applicants also seek an extension of the Stay Period to coincide with the timelines in the Bid Process. The timelines call for the transaction to close in either February or March, 2010 depending on whether there is a plan of arrangement proposed.

[24] Having reviewed the record and heard submissions, I am satisfied that the Applicants have acted, and are acting, in good faith and with due diligence and that circumstances exist that make the granting of an extension appropriate. Accordingly, the Stay Period is extended to February 8, 2010.

[25] An order shall issue to give effect to the foregoing.

MORAWETZ J.

DECIDED: December 11, 2009

REASONS: December 18, 2009

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CITATION: Tacora Resources Inc. (Re), 2023 ONSC 6126
COURT FILE NO.: CV-23-00707394-00CL
DATE: 20231030

SUPERIOR COURT OF JUSTICE – ONTARIO (COMMERCIAL LIST)

RE: **IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT
OF TACORA RESOURCES INC.**

BEFORE: KIMMEL J.

COUNSEL: *Ashley Taylor, Eliot Kolers, Lee Nicholson, Natasha Rambaran and RJ Reid*, for
the Applicant, Tacora Resources Inc.

Alan Merskey, Jane Dietrich and Ryan Jacobs, for the Monitor (FTI Consulting
Canada Inc.)

Robert Chadwick, Caroline Descours, Peter Kolla and Carlie Fox, for Cargill,
Incorporated and Cargill International Trading Pte Ltd.

Richard Swan, Sean Zweig and Alexander Payne, for the Ad Hoc Group of Senior
Noteholders and the Indenture Trustee

Natasha MacParland, for Crossingbridge Advisors, LLC

Joe Thorne, for 1128349 B.C. Ltd.

HEARD: October 24, 2023

ENDORSEMENT – COME-BACK HEARING
(ARIO AND SOLICITATION ORDER)

The Come-Back Motion

[1] The court made an initial order under the *Companies’ Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (“CCAA”) in respect of Tacora Resources Inc. (“Tacora” or the “company”) on October 10, 2023 (the “Initial Order”). The come-back hearing was originally scheduled for October 19, 2023, but was adjourned to October 24, 2023 by order dated October 13, 2023 to afford the company and the participating stakeholders additional time to address certain issues of disagreement among them, and in particular their disagreement over the terms and source of debtor in possession (“DIP”) financing that the company needs to carry out its intended restructuring efforts.

[2] The court’s October 13, 2023 order adjourning the come-back hearing also extended the expiry of the stay of proceedings provided for in the Initial Order from October 20, 2023 to October 27, 2023 (the “Stay Period”). A further stay extension order was granted on October 27, 2023

while the court's decision on this motion was under reserve, extending the Stay Period to October 31, 2023 and increasing the permitted draws under the DIP financing approved under the Initial Order by \$5 million to address the company's immediate cash needs, which the Monitor confirmed and recommended.

[3] The company seeks the following relief on the come-back motion:

- a. an amended and restated initial order (the "ARIO") to, among other things:
 - i. extend the Stay Period until and including February 9, 2024;
 - ii. authorize Tacora to borrow up to \$75,000,000 under the Cargill DIP Facility;
 - iii. approve the Greenhill Engagement Letter and the Transaction Fee Charge;
 - iv. approve the company's proposed Key Employee Retention Plan (the "KERP"), and authorize Tacora to pay the KERP Funds to the Monitor and grant the KERP Charge;
 - v. grant a sealing order over a confidential schedule to the KERP; and
 - vi. grant an increase to the quantum of the Directors' Charge,
- b. a solicitation order (the "Solicitation Order") to, among other things:
 - i. approve the proposed Solicitation Process; and
 - ii. authorize Tacora, Greenhill and the Monitor to immediately commence the Solicitation Process.

[4] Capitalized terms not otherwise defined in this endorsement shall have the meanings ascribed to them in the Initial Order and the company's proposed ARIO.

[5] The company owns and operates the Scully Mine (the "Scully Mine"), an iron ore concentrate producer located near Wabush, Newfoundland and Labrador, Canada with a production capacity of six (6) million tonnes per annum ("Mtpa").

Stakeholder Positions

The Ad Hoc Group of Noteholders

[6] An *ad hoc* group of holders of senior secured priority notes ("Senior Priority Notes") and holders of senior secured notes ("Senior Notes") of Tacora (the "AHG") oppose the relief sought by the company on the come-back motion. They comprise a substantial majority of the holders of

both series of Tacora notes¹. The total amount of all of the secured notes under both series, including accrued interest, is estimated to be almost \$270 million. The noteholders (including the AHG) are the most significant secured creditors of Tacora. They are the only stakeholders who oppose the relief sought by the company on the come-back motion.

[7] The AHG's opposition to the ARIO is primarily in respect of the requested court approval and authorization of the Cargill DIP Facility. By a cross-motion the AHG seek the court's approval of their competing DIP proposal made on October 8, 2023 (the "AHG DIP Proposal") that is provided for in their own proposed amended and restated initial order (the "AHG ARIO"). Their cross-motion also seeks various alternative relief if their request for approval of the AHG DIP Proposal and AHG ARIO is not successful (the "Alternative Relief"). The Alternative Relief would entail changes to the Cargill DIP Facility and changes to the proposed KERP and other proposed terms of the ARIO dealing with the priority of certain charges, as well as the appointment of a Chief Restructuring Officer ("CRO").

[8] The AGH only opposes one aspect of the Solicitation Order, which is that it should not only provide for the court's authorization to immediately commence the Solicitation Process but it should also include a direction that the Solicitation Process be commenced immediately.

Cargill

[9] The other significant secured creditor of Tacora is Cargill International Trading Pte Ltd. ("Cargill"), with first and second ranking secured debt of almost \$35 million.

[10] Cargill is party to various commercial arrangements and contracts with Tacora. Tacora sells 100% of the iron ore concentrate production at the Scully Mine to Cargill pursuant to an offtake agreement between Tacora, as seller, and Cargill, as buyer, dated April 5, 2017 and restated on November 9, 2018 (as amended from time to time, the "Offtake Agreement"). Pursuant to an amendment dated March 2, 2020, the term of the Offtake Agreement was extended to a life of mine contract such that Tacora is required to sell and Cargill is required to buy all iron ore concentrate produced at the Scully Mine while it remains operational.

[11] The sale of the iron ore concentrate is also subject to a stockpile agreement between Tacora, as seller, and Cargill, as buyer, dated December 17, 2019 (the "Stockpile Agreement"), which works in conjunction with the Offtake Agreement. The Offtake Agreement and other commercial arrangements between Cargill and Tacora have resulted in significant payments by Tacora to Cargill since 2019 despite Tacora's liquidity issues and financial challenges during this period.

¹ Although not in evidence, at the hearing counsel for the AHG represented the holdings of the AHG to account for approximately 86% of the total value of the Tacora senior secured notes.

[12] In or around December 2022, Tacora required additional financing to fund operations through the liquidity challenges it was facing at that time. On January 3, 2023, Tacora, as seller, and Cargill, as buyer, entered into an advance payment facility agreement (as amended from time to time, the “APF Agreement”). Pursuant to the APF Agreement, Cargill provided Tacora with an advance payment facility (the “Advance Payments Facility”) under which Cargill made advance payments under the Offtake Agreement in the total principal amount of \$30,000,000 (the “Initial Advances”) to Tacora. Until termination of the APF Agreement, Cargill is required to continue paying Tacora for iron ore concentrate under the Offtake Agreement and may not credit such deliveries against the outstanding balance of the Advance Payments Facility.

[13] Subsequently, on May 29, 2023, Tacora and Cargill entered into an Amended and Restated APF Agreement (the “Second APF Amendment”) to provide Tacora with additional liquidity. The Second APF Amendment provided for a new facility under the Advance Payments Facility whereby Cargill would make margin advances (“Margin Advances”) of up to \$25,000,000 to Tacora. The Margin Advances were primarily made to finance margin payments payable to Cargill under the Offtake Agreement. The outstanding amount of Margin Advances fluctuate daily based on the Platts Index 62% price movement. The Margin Advances rank *pari passu* with the Senior Priority Note and senior to the Senior Notes and the Initial Advances. Pursuant to the Second APF Amendment, the maturity date of the Advance Payments Facility was extended to September 12, 2023.

[14] On June 23, 2023, Tacora entered into a further amendment to the APF Agreement (the “Third APF Amendment”) to provide greater flexibility to Tacora on utilizing the new margin facility provided by the Second APF Amendment. Under the Third APF Amendment, Cargill, in its sole discretion, could make additional prepay advances (“Additional Prepay Advances” and together with the Margin Advances, the “Senior Priority Advances”) to Tacora utilizing any availability under the \$25,000,000 facility created by the Second APF Amendment. On June 29, 2023, Cargill made an Additional Prepay Advance in the amount of \$3,000,000. Additional Prepay Advances are repayable upon demand and rank *pari passu* with the Senior Priority Notes and the Margin Advances, and senior to the Senior Notes and the Initial Advances. No further Additional Prepay Advances have been made by Cargill and the only Additional Prepay Advance made to Tacora has been repaid.

[15] To further enhance the company’s liquidity position in the face of continued negative cash flow, Cargill and the company entered into a wet concentrate purchase and sale agreement (the “Wetcon Agreement”) dated July 10, 2023, whereby Cargill agreed to purchase a stockpile of 172,000 tonnes of wet concentrate located at the Scully Mine from Tacora.

[16] In connection with discussions and negotiations between Tacora’s stakeholders regarding a potential consensual recapitalization transaction, Cargill agreed to extend the maturity date of the Advance Payments Facility from time to time, most recently to October 10, 2023. At the October 24, 2023 hearing, Cargill agreed to further extend the maturity date to allow the court time to render its decision on the come-back motion and the AHG’s cross-motion.

[17] Tacora's former co-founder, Chief Operating Officer, and Chief Commercial Officer, Matt Lehtinen, was hired by Cargill in 2023 and has responsibility for Cargill's relationship with Tacora. There are Cargill employees on site on a day-to-day basis in connection with the management of the Scully Mine. Cargill has also had a representative on Tacora's board of directors ("Board") for many years. Mr. Leon Davies is a Cargill employee and was its Board appointee when the Offtake Agreement was last amended and throughout the DIP Process (defined below).

[18] Two Cargill entities are equity-holders in Tacora. Cargill is described as a "related party" under IFRS standards in Tacora's financial statements.

[19] Cargill Incorporated, an affiliate of Cargill, is the counter-party to the Cargill DIP Facility for which approval is sought under the ARIO.

[20] Cargill (in its various capacities as a stakeholder of Tacora) supports the ARIO and Solicitation Order sought by Tacora at this come-back hearing and opposes the relief sought by the AHG's cross-motion.

The Monitor and Other Noteholders

[21] The court-appointed monitor under the Initial Order, FTI Consulting Canada Inc. (the "Monitor"), supports the ARIO and Solicitation Order sought by the company, as does one of the company's Senior Secured Priority Noteholders, Crossingbridge Advisors, LLC (under a reservation of its rights more generally). The remaining noteholders (not accounted for in the AHG) have taken no position on the come-back motion or the cross-motion.

Other Stakeholders

[22] A number of other stakeholders were identified by Tacora in its initial CCAA filing.

[23] Tacora employs approximately 450 employees. Some are salaried (36%) and some are hourly (64%) and more than half of the employees are unionized. The current collective bargaining agreement is in effect until December 31, 2027. Most employees are located at the Scully Mine. Only 13 employees are located at the company's head office in Grand Rapids, Minnesota.

[24] Tacora also contracts with various local service providers that make available staff to assist Tacora with its operations on a regular basis. Certain of these contractors have staff at the Scully Mine during each shift worked by regular Tacora employees, performing either general labour or specialized tasks at the Scully Mine related to repair and maintenance.

[25] In February 2023, Tacora engaged Partners in Performance ("PIP"), a global management consulting firm, to initiate an operational stabilization and turnaround program at the Scully Mine for a period of 20 weeks, commencing on February 27, 2023. The term of PIP's consultancy agreement was extended. It has a team that are regularly on site at the Scully Mine to continue the operational stabilization and turnaround program and to assist Tacora develop and action a capital

project plan to ramp up to 6 Mtpa capacity. Tacora anticipates enlisting PIP's continued support throughout its planned restructuring process.

[26] Cargill also provides on-site consultancy support to Tacora, historically at no cost to Tacora.

[27] Tacora is a critical customer for several businesses in Wabush who provide it goods and services and who in turn, provide employment to the local community. Tacora is also party to various equipment leases.

[28] Tacora has contracts with the Wabush Lake Railway, owned by Tacora and operated by Western Labrador Rail Services Inc. ("WLRS"), and with the QNS&L Railway, owned and operated by Quebec North Shore and Labrador Railway Company, Inc ("QNS&L"). QNS&L is a wholly owned subsidiary of the Iron Ore Company of Canada, a competitor that operates another mine in the Labrador iron ore trough. WLRS and QNS&L are needed for the transportation of Tacora's iron ore concentrate from the Scully Mine to the Port.

[29] Société Ferroviaire et Portuaire de Pointe Noire s.e.c. ("SFPPN") operates the Port used by Tacora (which is the multi-user port located in Sept-Îles, Quebec) that provides facilities to unload iron ore concentrate from trains delivered from the QNS&L Railway. The use of the Port and the provision of services by SFPPN is set out in a long-term operational agreement with an effective date of December 22, 2022.

[30] On November 17, 2017, Tacora entered into an amendment and restatement of consolidation of mining leases (the "MFC Royalty") with 0778539 B.C. Ltd. (formerly MFC Bancorp Ltd.) ("MFC"), pursuant to which the parties agreed to amend and restate a lease which provided Tacora with tenure and mining rights to certain premises constituting the Scully Mine in exchange for an ongoing royalty payment based on production.

[31] Tacora has various unsecured debt obligations to the Atlantic Canada Opportunities Agency in respect of financial assistance that has been provided to it through contribution agreements entered into as part of a national initiative to support regional recovery and stimulus. Tacora also has unsecured debt obligations to the Innu Nation pursuant to an impact and benefit agreement.

[32] It is evident that there are a number of unsecured creditors and parties with whom Tacora does business who have a stake in the outcome of Tacora's restructuring efforts. None of these other stakeholders appeared or took any position in respect of the relief sought by Tacora under the proposed ARIO and Solicitation Order.

Summary of Outcome

[33] The relief requested by Tacora under the proposed ARIO and Solicitation Order (with the one change requested by the AHG) is granted. Tacora has satisfied the court of the necessary requirements for these orders to be made and the requested relief to be granted. The AHG's Cross-Motion is dismissed.

[34] As the court noted at the time of the approval of the Initial Order, this application was made by Tacora in the face of operational and liquidity challenges that it has been attempting to address since Q3 2022. It has not been able to do so to date, despite:

- a. A strategic review process that was undertaken commencing in January 2023 in furtherance of which the applicant engaged Greenhill & Co. Canada Ltd. (“Greenhill”) to assist it to, among other things, explore, review, and evaluate a broad range of alternatives including sale opportunities or additional investment into Tacora (the “Strategic Process”).
- b. Tacora’s engagement of a mining operations consultant (PIP) to, among other things, implement operational initiatives to ramp up production at the Scully Mine in February 2023.
- c. Various interim capital raises implemented to improve Tacora’s liquidity position in collaboration with its primary secured creditors who agreed to defer various debt obligations over the preceding months.
- d. Attempts since August 2023 to reach an agreement on a consensual restructuring and capitalization plan involving a third party, with the support and involvement of its primary secured creditors, the noteholders, and Cargill.

[35] Tacora’s liquidity and operational challenges and the confluence of factors that have led it to apply for protection under the CCAA transpired over the past few years since the Scully Mine first became operational in 2019 and are detailed in the supporting materials filed. No one has suggested that Tacora is not in need of urgent interim financing and court protection given its current circumstances.

[36] The terms of the Cargill DIP Facility and its implications were considered by Tacora’s Board, with the benefit of the advice and recommendations of the company’s financial advisor and investment banker, Greenhill, and of the Monitor. The Cargill DIP Facility was determined to be the superior of the two options for DIP financing that were available to Tacora; the other alternative being the AHG DIP Proposal, the terms of which the company and its advisors determined were inferior, including and primarily from a financial and economic perspective.

[37] Each of the Cargill DIP Facility and the AHG DIP Proposal contain terms that benefit the commercial interests of the counterparties and that could reduce the company’s flexibility and/or options in the context of the company’s planned Solicitation Process (the Cargill DIP Facility with respect to the preservation of the Offtake Agreement pending a transaction arising from, or the termination of, the Solicitation Process, and the AHG DIP Proposal with respect to the provisions for a topping credit bid option and stalking horse agreement). These were accounted for in the deliberations over the two options.

[38] While the Cargill DIP Facility is not the preferred DIP financing option of the AHG, it does not materially prejudice their interests, nor were they treated unfairly or were their interests unduly disregarded in the DIP Process that led up to the company’s acceptance of the Cargill DIP term sheet on October 8, 2023 and the execution of the Cargill DIP Facility.

[39] For the reasons that follow, I have found the terms of the proposed ARIO and Solicitation Order to be fair and reasonably necessary for the continued operations of Tacora in the ordinary course of business to provide stability for the company and to allow it the breathing room that it needs to try to restructure its affairs so that it can continue as a going concern. These orders are approved.

The Issues

[40] In general terms, what the court is concerned with on this come-back motion is whether the applicant has satisfied it of the requirements necessary to grant the ARIO (that includes the approval of the Cargill DIP Facility and DIP Charge) and the Solicitation Order.

[41] The issues raised for the court's consideration by the AHG cross-motion are whether the court should decline to approve the Cargill DIP Facility and replace it with the AHG DIP Proposal (under the AHG ARIO); or, whether the Alternative Relief should be ordered with corresponding amendments to the ARIO as proposed by Tacora. The issues relating to the DIP financing to be approved will be addressed first since they were the primary focus of the written and oral submissions.

Analysis

Should the Cargill DIP Financing be Approved?

[42] This *de novo* come-back hearing requires the court to consider whether the Cargill DIP Facility ought to be approved. Tacora bears the burden of the relief it seeks in this regard. Part of that burden involves dispelling the criticisms to the Cargill DIP Facility that the AHG has raised.

[43] The AHG submits that: (a) the process leading to the company's approval of the Cargill DIP Facility was inherently flawed and unfair; (b) the Cargill DIP Facility does not meet the factors in s. 11.2(4) of the CCAA, in that it seriously prejudices the senior secured noteholders; (c) the Cargill DIP Facility is being used for an improper purpose, to further leverage Cargill's own commercial interests, rather than benefit Tacora; and, in these circumstances, (d) the AHG asks the court to approve its proposed form of ARIO that includes the approval of the AHG DIP Proposal *in lieu* of the Cargill DIP Facility.

[44] These submissions will be addressed in turn. The second submission of the AHG requires the court to consider more broadly whether the applicant has satisfied its onus to demonstrate that it is appropriate for the court to approve the Cargill DIP Facility and Charge, having regard to s. 11.2 of the CCAA, in the context of which any prejudice to the only other secured creditors is one of the relevant factors.

a) The DIP Process

i. The Initiation of the DIP Process

[45] Greenhill was engaged by Tacora in January 2023 to act as financial advisor and investment banker to Tacora. It initially sought interested purchasers for Tacora, but there were no offers or expressions of interest. One potential strategic purchaser that entered into a letter of intent with Tacora and conducted due diligence later withdrew from the potential acquisition, including due to concerns about the Offtake Agreement.

[46] Greenhill turned its attention to efforts to obtain financing, and eventually directed its attention in or about late August and early September 2023 to the solicitation of DIP proposals (the “DIP Process”). Various milestones dates and other parameters were put in place for the receipt of DIP proposals. Greenhill received four proposals for DIP financing. One such proposal was not actionable, including because it specified that the renegotiation or termination of the Offtake Agreement was a precondition to the delivery of a DIP offer.

[47] Tacora and its advisors recognized that the Offtake Agreement presented some unique constraints and identified certain modifications to that agreement that would be desirable from Tacora’s perspective, including: (a) changing the term of the Offtake Agreement from life of mine to renewal-based to provide Tacora “greater flexibility”; and (b) increasing Tacora’s profit share under the Offtake Agreement. Cargill has not agreed to these or any other amendments to the Offtake Agreement.

[48] In the early part of the DIP Process Cargill submitted a non-binding DIP proposal, which expressly prevented the disclaimer of the Offtake Agreement. Cargill ultimately decided not to submit a bid capable of acceptance by the original proposal deadline that had been specified.

ii. The AHG DIP

[49] The AHG first submitted a non-binding DIP proposal on August 21, 2023 followed by a draft definitive DIP agreement on August 28, 2023. By this time, Tacora had no other actionable DIP proposals. The Board considered what the AHG was proposing, the advice and endorsement of the company’s advisors, and the recommendation of the (at that time proposed) Monitor and determined that this was the best (and also the only) option available to the company at the time.

[50] In anticipation of Tacora’s planned filing for CCAA protection on September 12, 2023, Tacora executed the AHG DIP on September 11, 2023 (the “AHG DIP”) with the unanimous approval of the Board. The AHG DIP was sent to the court on September 11, 2023 with supporting affidavits sworn by Tacora’s CEO and the managing director of Greenhill. It was provided to other key stakeholders late that evening in anticipation of the company’s planned CCAA filing the following day. In that context, Cargill received a copy of the AHG DIP.

iii. The Suspension and Resumption of the CCAA Filing and Request for Further DIP financing proposals

[51] Just prior to the company formally making its CCAA filing, it was advised that the noteholders, Cargill, and a third party had reached an agreement in principle regarding a

consensual restructuring of Tacora that obviated the need for a CCAA filing, so the filing did not proceed on September 12, 2023. To alleviate immediate cash flow concerns while those parties worked towards a binding agreement, Cargill agreed to make certain contractual payments that it had been withholding to protect what it described as its pre-filing contractual set-off rights (which the company disputed).

[52] Negotiations regarding a consensual restructuring ensued for a number of weeks. In the intervening time period, the company's funding needs changed, certain deadlines contemplated under the AHG DIP lapsed and there was a change in the composition of the members of the AHG that were prepared to provide the funding for the AHG DIP. Accordingly, while still holding out the prospect of a consensual restructuring deal, the AHG, of its own accord, sent to Tacora on September 28, 2023 a revised AHG DIP proposal to address these changed circumstances in the event of a CCAA filing.

[53] Having received a new DIP proposal from the AHG, Greenhill decided to reach out to Cargill on September 29, 2023 to see if it was willing to make a DIP proposal as well. Cargill was not told about the revised AHG DIP proposal. The AHG was not told about the reach out to Cargill.

[54] Initially, Cargill remained focused on achieving a definitive restructuring agreement. When that fell apart, Tacora was informed on October 4, 2023 that no binding agreement had been reached. In anticipation of this possibility, a hearing date had been scheduled for the initial CCAA application on October 6, 2023.

[55] Cargill² submitted a non-binding DIP proposal on October 5, 2023. At the request of the company, Cargill agreed that it would pay certain further outstanding invoices that it had been withholding to protect what it described as its pre-filing contractual set-off rights (which the company disputed) to provide cash flow to the company on the condition that the company agree not to make a CCAA filing prior to October 10, 2023. The company agreed to this.

[56] The company had been communicating with the AHG since receiving its September 28, 2023 proposed revised AHG DIP terms. On the evening of October 5, 2023, Greenhill asked both the AHG and Cargill to submit their respective best and final DIP offers by 5 p.m. on October 7, 2023. They were each made aware that the other had provided non-binding proposals.

[57] Cargill submitted a binding DIP proposal on October 7, 2023. Tacora asked for a higher amount of DIP financing, which Cargill agreed to on October 8, 2023.

² The formal contracting party is an affiliate of Cargill, Cargill International. References in this endorsement to "Cargill" in the context of the DIP Process and ultimately the execution of the Cargill DIP Facility do not attempt to distinguish between the two Cargill entities. They are both called "Cargill" but shall be read as referring to the specific entity that was involved in accordance with the context of the events described.

[58] The AHG continued to communicate with the company about the changes that it was proposing to make to the AHG DIP. It was also asked to consider making changes requested by the company. There was an exchange of emails that eventually resulted in the final revised draft AGH DIP Proposal being transmitted on Sunday October 8, 2023, which was accompanied by a redline version showing the changes to the September 11, 2023 AHG DIP. The AHG made it clear that they were prepared to stand behind the September 11, 2023 AHG DIP (that was never implemented) with necessary amendments to account for the delay in the CCAA filing etc. That continued to be their position at the hearing.

iv. The Decision to Execute the Cargill DIP Facility

[59] The October 7, 2023 Cargill DIP term sheet (with the increased funding amount that Cargill International agreed to on October 8, 2023) and the October 8, 2023 AHG DIP Proposal were compared and considered side by side at the Tacora October 8, 2023 Board meeting with the benefit of a detailed review and analysis prepared by Greenhill.

[60] Below is a summary of the comparison of costs, expenses and key terms and conditions of the AHG DIP Proposal to the Cargill DIP term sheet (ultimately accepted by the company and reflected in the Cargill DIP Facility). As a matter of convenience, this summary has been extracted from the Monitor's Pre-Filing Report dated October 9, 2023, which concluded that the Cargill DIP term sheet:

- a. requires a significantly smaller DIP amount and DIP Charge, thereby reducing the potential prejudice to existing creditors;
- b. has significantly lower costs, including lower aggregate interest, lower DIP fees and lower DIP Expenses. Greenhill's comparison indicated the cost of the Cargill DIP to be less than half the cost of the AHG DIP Proposal and that it represented an overall estimated \$7 million in cost savings;
- c. has significantly more favourable Permitted Variance parameters and similar tests under its terms, conditions and covenants;
- d. provides for significantly less potential operational disruption through the continuation of the various existing Cargill arrangements, including the margin and hedging arrangements which would likely not be available under the AHG DIP; and
- e. provides certainty in respect of the KERP.

[61] In addition to the comparison of the two DIP financing proposals that were available to the company on October 8, 2023, the Monitor compared the cost of the Cargill DIP Facility to that of other court approved interim financings, and concluded that: The cost of the Cargill DIP Facility appears to be within the range of costs, in terms of annualized interest and fees, for interim financings of similar size approved in other CCAA proceedings. The Monitor also expressed the

view that the terms of the Cargill DIP Facility are within market parameters in respect of interest and fees.

[62] Even the AHG concedes that there are elements of the Cargill DIP Facility that are more favourable to the AHG DIP Proposal. The primary “flaws” that the AHG identifies stem from the treatment and implications of the Offtake Agreement and the fact that the noteholders’ debt will be “primed” to the extent of the Cargill DIP Facility (which will be at least \$75 million and possibly as much as \$100 million). This latter consideration will be discussed in more detail in the sections of this endorsement that follow, dealing with the CCAA requirements and the claimed prejudice to the AHG. The AHG’s concerns about the Offtake Agreement also tie into the third area of criticism regarding the ulterior purpose of Cargill’s DIP Facility, which the AHG says is to protect that Offtake Agreement, and will also be discussed later in this endorsement.

[63] After going through the various features that rendered the Cargill DIP Facility superior to the AHG DIP Proposal, Mr. Bandhari of Greenhill testified in his second affidavit that it was for these reasons that the Board determined, following the advice and recommendations of the company’s advisors, that the company should proceed with the Cargill DIP Facility. All of the Board members and both Greenhill and the Monitor concluded that the terms of the Cargill DIP term sheet were superior to the revised AHG DIP Proposal. This conclusion is not seriously challenged. As noted above, the AHG’s challenges to the Cargill DIP Facility are on other grounds.

[64] It was for these reasons that on October 9, 2023 following the Board’s approval, Tacora executed the Cargill DIP Facility.

v. The Board Process and Governance Concerns

[65] The Monitor expressed the view that “there is no better alternative to the [Cargill] DIP Financing Agreement at this time”. The Monitor did not recommend the approval of the AHG DIP Proposal. The clear recommendations in both reports from the Monitor is a strong indicator of the fairness of both the process by which DIP financing was solicited, analyzed, and selected, and the terms of the Cargill DIP Agreement itself.

[66] The AHG suggests that the “*Soundair*” principles for approval of a sale (or sale process) should be applied by analogy to the court’s consideration of the DIP Process and whether it was fair and reasonable in the circumstances. No authority or precedent was offered for this suggestion and the specific factors do not directly correlate. I find that analogy to be strained and unhelpful.

[67] However, I agree with the more general suggestion that, as part of the court’s exercise of its discretion in approving the Cargill DIP Financing under the ARIO, the court can and should consider whether the DIP Process that the company and its advisors engaged in to solicit possible DIP financing options was fair and reasonable. The company also suggests that the court can and should consider whether the Board exercised its reasonable business judgment in its decision to accept the Cargill DIP agreement.

[68] The AHG points to what it describes as several serious process, governance, and substantive problems underlying the request by Tacora for the approval of the Cargill DIP Facility.

The AHG says that the DIP Process was not fair and reasonable to them because of certain timing and mechanical aspects (discussed in the next section) but also because their interests were not given due consideration by the Board and the Board was tainted by the presence of the Cargill Board nominee, Mr. Davies, such that the Board cannot be said to have exercised objective, reasonable business judgment.

[69] The AHG selectively focusses on the specific questions put to two of the witnesses who were cross-examined for this motion, divorced from the broader context of the rest of the evidence about the DIP Process and the factors considered by the Board and the company's advisors in the decision to move forward with the Cargill DIP Facility (summarized earlier in this endorsement). The AHG focusses on the evidence of:

- a. Mr. Bandhari of Greenhill, that he did not give any advice to the Board in respect of the fact that the Cargill DIP would prime the senior secured noteholders to the tune of \$75 million or more; and
- b. Mr. Davies, who acknowledged that, while he understood that the AHG would be primed by the Cargill DIP, that [priming] was not something that he and the other directors spent a great deal of time talking about.

[70] From this, the AHG asks the court to infer that when the Board was exercising its business judgement due consideration was not given to the senior noteholders' interests, and in particular that their security would be "primed" by the Cargill DIP Facility by up to \$75 million or more.

[71] This is not a reasonable inference to draw from the totality of the evidence. First, these specific statements do not support the suggested inference since the combination of the two statements is that at least one director (Mr. Davies) was aware of the "priming" implications and did not need to be told about that by Greenhill; and his evidence goes only so far as to say that a great deal of time was not spent on this topic; he does not say that it was not considered at all. Further, these specific statements are consistent with the general statements in the affidavits of Mr. Bandhari and the Monitor's Pre-Filing Report in which it is stated that the potential prejudice to existing creditors (the noteholders being the largest such group) was considered.

[72] The AHG also challenges the Board's process as inherently unfair and flawed from a governance perspective because of the role played by Mr. Davies who was the Cargill Board nominee and remained a Cargill employee throughout. He recused himself and did not vote on the approval of the Cargill DIP Facility when all of the other Board members unanimously voted in favour of it.

[73] Section 132(5) of the Ontario *Business Corporations Act*, R.S.O. 1990, c. B-16 ("OBCA") addresses circumstances where directors are required to recuse themselves. None of the circumstances are present in this situation. Thus, Mr. Davies was not required to recuse himself. He was also not required to abstain from voting on the approval of the Cargill DIP Facility, but he did. The AHG suggests that because he abstained from voting, this is a concession of a conflict of interest that should have led him not only to abstain from voting but also to recuse himself from any discussions at the Board about the Cargill DIP Facility.

[74] Merely abstaining from voting does not create a legal conflict, especially one that the OBCA does not recognize. There is no evidence that Mr. Davies' presence at the Board meetings at which the Cargill DIP Facility was discussed tainted the views of the other Board members in any way. His presence at the earlier Board meeting at which the AHG DIP was approved did not result in any dissent over the earlier approval of that financing. There is no basis on which the court can or should infer that his presence at the Board meeting(s), in these circumstances, tainted the Board process so as to undermine the Board's business judgment to proceed with the objectively superior Cargill DIP Facility.

[75] The Board, having regard to relevant factors (including the potential prejudice to other stakeholders such as the senior secured noteholders) and acting on the advice of professional advisors, exercised its reasonable business judgment in good faith and without any reasonable inference of improper involvement of the Cargill Board nominee, in deciding to approve the Cargill DIP Facility on October 8, 2023. While the Board's independent decision to approve the Cargill DIP Facility is not determinative of the ultimate decision of the court about whether to approve the Cargill DIP Facility, it is a relevant consideration. See *Crystallex International Corp, Re*, 2012 ONCA 404, 293 O.A.C. 102, at para. 85, aff'g *Crystallex International Corp, Re*, 2012 ONSC 2125, 91 C.B.R. (5th) 169, at para. 35.

vi. Other Fairness Concerns

[76] The AHG complains that there was an uneven playing field from a process perspective because Mr. Davies and others at Tacora were favouring Cargill in the DIP Process by passing on information to Cargill that gave it an unfair advantage. For this, the AGH relies upon inferences it asks the court to draw from certain exchanges between Tacora and Cargill representatives.

[77] The first exchange of text messages is between Tacora's CEO Mr. Broking and Mr. Davies, Cargill's Board nominee, on September 12, 2023 about a request for Cargill to make certain interim payments. In this text message exchange, Mr. Broking states "I love Cargill". The AGH relies upon these texts to suggest that there was an ongoing dialogue between Tacora and Cargill about the DIP proposals and a bias in favour of Cargill.

[78] Mr. Davies denies that he was involved in any discussions about the DIP financing proposals with any Cargill representatives aside from one specific conversation that he had on October 5, 2023 to see whether Cargill would consider making a DIP proposal and the direct follow up to that regarding the timing of Cargill's internal approval process for making and increasing its proposal. There is nothing in the record to indicate otherwise.

[79] Aside from the identified text message exchange, Mr. Davies' evidence, which was uncontroverted, was that: (i) he took his fiduciary duties as a Tacora director seriously; (ii) he had no involvement in Cargill's DIP proposal or its negotiation other than to encourage Cargill on behalf of Tacora to consider putting forward a DIP proposal; (iii) he shared no confidential Tacora information with Cargill; and (iv) he did not learn of the substance of Cargill's DIP proposal or the AHG's until they were both presented to Tacora's board on October 8, 2023.

[80] Next, the AHG points to the acknowledgment of Tacora's CEO Mr. Broking that he spoke to Cargill representatives between October 5 and 10, 2023. However, his testimony was that these discussions were only about operational matters and he similarly denies having been involved in any direct communications with individuals at Cargill (or the AHG) about the DIP Process or proposed terms. Mr. Broking testified that he was not involved in negotiations of the DIP proposals, and did not see the DIP term sheets until they were provided to Tacora's board on October 8. The AHG seeks to have the court infer that he must be lying about this because of his practice of deleting his text messages, even though he was examined on texts produced by others and the documents produced by the company, none of which contradict his denial of any discussions with Cargill about the DIP.

[81] Mr. Bhandari testified more generally, that although Tacora and its advisors were in discussions with the AHG after September 11 about DIP matters, he provided no details of those discussions to Cargill, and he is not aware of Tacora or any of its advisors doing so either.

[82] The evidence obtained through the r. 39.03 examinations and cross-examinations undertaken by the AHG did not reveal any improper or inappropriate contact between the company's management or Board and Cargill, nor any favoritism in relation to having a Cargill DIP Facility. The conversations taking place with Cargill in this time period were no different in substance than the conversations taking place with the AHG. There is no evidence of any sharing of information with one about what the other was proposing or considering.

[83] The AGH also complains about the fairness of the timing of the request for their final and best DIP proposal over the Canadian Thanksgiving and American Columbus Day holiday weekend. Their position at the hearing is that they were unable to finalize an amended definitive DIP Proposal in that time frame. This is notwithstanding that the company continued to offer to make their advisors available on October 6 and 7, 2023 "to discuss any remaining issues in order for the Ad Hoc Group to make an informed decision on whether to make any revisions to their proposal".

[84] The inconvenience of the timing of this is not something that the company was in a position to control. It was a function of the timing of the breakdown in the negotiations towards a consensual restructuring on October 4, 2023. Both Cargill and the AHG were given the same amount of time to finalize and submit a definitive DIP financing proposal on October 7, 2023. The AHG had been working on theirs since September 28, 2023.

[85] The AHG further complains that the DIP Process was flawed and unfair because Cargill had seen their first AHG DIP Agreement and knew the terms it needed to beat in the October round, after having declined to submit a binding proposal back in September. However, that ignores the reality of the situation which is that there had to be a further round of DIP negotiations because the AHG DIP Agreement had lapsed. In fact, it was the AHG that initiated those discussions and initiated further negotiations at the end of September.

[86] The AHG knew what they had offered and knew what the company was asking for in terms of possible improvements. They were given the same time and opportunity to make a new DIP

proposal as Cargill was on October 5, 2023. There was nothing unfair about the notice that AHG was given relative to the notice that Cargill was given for providing their DIP financing proposals. The company had to act quickly given the ongoing liquidity crisis it was facing. Absent a restructuring, it was clearly understood that the company would need to file for CCAA protection.

[87] The company put no constraints or restrictions on the AHG in terms of any further DIP proposal that they might wish to make. The company accepted, and put before the Board for consideration, the AHG DIP Proposal that was submitted on the morning of October 8, 2023 even though it was received after the deadline that had been imposed of 5 p.m. on October 7, 2023 and even though it did not come in the form of an offer that the company could accept.

[88] The AHG says that, on principle, they were not prepared to re-engage with the company on any terms other than what it considered to be “updates” to the AHG DIP. That was its explanation for not putting forward an “improved” DIP proposal over the Thanksgiving weekend or at any time prior to the October 24, 2023 come-back hearing. The need for updates implicitly recognizes that the AHG DIP had lapsed; yet, the AHG continued to assert in materials filed in advance of the come-back hearing that the AHG DIP signed on September 11, 2023 remained a binding and executable agreement on October 8, 2023.

[89] This position is untenable. The AHG itself proposed a new agreement that included not only new (updated) financial terms but also a new party (one noteholder departing and another added). The company and the AHG recognized by the end of September 2023 that the AHG DIP Agreement was no longer actionable or viable as a result of the time that had elapsed while both Cargill and the AHG were engaged in good faith efforts to try to reach a consensual restructuring.

[90] At the hearing, greater emphasis was placed by the AHG on a variation to the assertion of the continued existence of a binding AHG DIP, namely that they believed that they had an agreement that no further DIP proposals would be considered by the company from anyone else after their AHG DIP had been approved and accepted in September 2023. In other words, that the AHG had the exclusive right to be the DIP lender in any CCAA filing by the company. However, this belief is not said to be based on anything that the AHG was told by the company or its advisors or by the proposed Monitor. The AHG submitted no direct evidence on this point. The AHG DIP did not contain exclusivity for any future DIPs in a CCAA proceeding, nor did it provide a tail period.

[91] There is no objectively reasonable evidentiary basis for the asserted belief that the company would not consider any other DIP financing proposals. It appears to be based on the assertion that the September AHG DIP remained a binding agreement, an assertion that is untenable (as noted above) given that the AHG DIP was no longer capable of execution in October 2023 and the AHG had themselves acknowledged that a new agreement with amended terms was required.

[92] Tacora had the right (in fact, the obligation) to resume the DIP Process when the circumstances and timing had changed and it was planning for its CCAA filing in October 2023. It needed a binding DIP agreement to present to the court for that filing.

vii. The AHG’s Proposed Run-Off DIP Process

[93] Up until the come-back hearing, the AHG did not make any attempt after the Thanksgiving weekend, when they claim to have been under undue time pressure (and under the erroneous belief that Tacora had to negotiate solely with the AHG regarding the DIP financing), to make any new or different proposal with any materially new or improved terms, ostensibly because they did not want to lend credibility to what they considered to be a flawed DIP Process.

[94] At the come-back hearing, the AHG suggested a further alternative, that the court direct a short further run-off DIP process by which the company could solicit last and best DIP financing proposals from Cargill International, the AHG and any other interested party, for the Board to consider and make a final decision about (the “Run-Off DIP Process”). A precedent for this proposed further Run-Off DIP Process, in which each party would be given a further opportunity to submit (on a double blind basis) the best DIP proposal for the company’s consideration, is said to be found in *Crystallex* in the context of the consideration of a DIP extension. While there is no reported decision containing this direction, it is said to be the process that is referenced by Newbould J. in *Crystallex International Corporation (Re)*, 2012 ONSC 2125, 91 C.B.R. (5th) 169, at para. 21. However, there was not a similar immediacy to the company’s cash concerns when the court directed the “run off” DIP process in that case.

[95] The company and the Monitor both raised concerns about stability and delay for the company and the need to finalize the ARIO, the DIP financing, the KERP and to begin the Solicitation Process. They are concerned that the company cannot tolerate the inevitable further uncertainty and instability that the suggested Run-Off DIP Process would entail. The opportunity to make a best and last DIP financing proposal was afforded on October 5, 2023 and has passed.

[96] These concerns are valid and were left largely unanswered. The proposed Run-Off DIP Process is not a realistic option for the company in its present circumstances and could interfere with the company’s restructuring process.

[97] After the hearing, in an effort to address a concern raised by the court about there being no binding offer from the AHG that the company could accept if the court were to be inclined to grant the cross-motion and deny the request for approval of the Cargill DIP Facility, the AHG sent a new DIP proposal to the company on the morning of October 26, 2023 and asked that a case conference be convened on October 27, 2023 before the court released its decision. At the case conference, the AHG made the court aware of this offer and of an accompanying alternative to the Offtake Agreement with a new purchaser of the ore produced at the Scully Mine (the “New AHG DIP Proposal”). According to the submissions of counsel to the AHG, the New AHG DIP Proposal is similar to, but an improvement upon, the September AHG DIP. The members of the AHG behind the New AHG DIP Proposal are not the same as those behind either of the AHG DIP or the AHG DIP Proposal. The alternative offtake agreement that accompanied it is an entirely new feature.

[98] The company and the Monitor (and Cargill, although given its commercial self-interest, its concerns carry less weight on this issue) raised concerns about this New AHG DIP Proposal, which the AHG is asking the court to require the company and its Board to consider while the court’s decision regarding the approval of the Cargill DIP Facility remains under reserve. The AHG did

this without tendering any proposed evidence about this proposal and without a motion for the court to consider whether to receive any proposed “fresh” evidence. The company and the Monitor did not have sufficient time to properly consider and assess the new terms and undertake the complex comparative analysis that would be needed to understand the economic implications of the alternative offtake agreement that accompanied the New AHG Proposal. To do all of this would mean further uncertainty and delay for the company.

[99] Both the company and the Monitor indicated that the company would take the time to consider the New AHG Proposal but strenuously reiterated the earlier arguments, that the company needs the certainty of the approval now of the ARIO (including the DIP financing, and the KERP) and needs the court’s approval of the Solicitation Order so that the Solicitation Process can get underway. The company no longer has the luxury of time. Its Stay Period is expiring. It has already gone below the minimum floor of cash that it is comfortable operating with and it is forecasted to run out of during the week after the hearing. The stability of the company’s ongoing operations is dependent upon the certainty of the requested court orders and their implementation.

[100] To alleviate the concerns about delay and the company’s immediate funding needs, the AHG suggested that they would make funds available to the company under the New AHG DIP Proposal without any exit or back stop fee, if Cargill was not willing to continue funding under the Cargill DIP Facility on an interim basis while the New AHG DIP Proposal (and any further proposal from Cargill) is considered.

[101] The court is concerned that this invites an open-ended process and will lead to delay and instability that could be prejudicial to the company’s restructuring efforts. The AHG had the opportunity to submit the New AHG DIP Proposal before the come-back hearing. The presentation of this proposal after the hearing was explained to be with a view to addressing the court’s concern about the lack of any binding offer that the company could accept if the court was otherwise inclined to grant the primary relief on the cross-motion. However, presenting this New AHG DIP Proposal and accompanying alternative offtake agreement while the court’s decision was under reserve and without a proper record or any formal request for the introduction of this evidence falls outside of any recognized evidentiary or procedural mechanism. In these circumstances, consideration of the New AHG DIP Proposal could only be accommodated if the court were prepared to delay the release of its decision on the come-back motion and order the Run-Off DIP Process that the court has found (above) to be unrealistic for the company and potentially detrimental to its restructuring efforts.

[102] The company needs stability and needs to move into its Solicitation Process. The AHG already had its chance to put in its best DIP proposal and it submitted the AHG DIP Proposal which was considered and determined to be inferior to the Cargill DIP in a variety of respects. As the Monitor submitted, it is time to put a pin in the process and move forward. That is what the company did at the beginning of October when it completed its DIP Process in which each of Cargill International and the AHG had an opportunity to participate. The court is not prepared to order a re-do of that now through a further Run-Off DIP Process that will take at least a week if not longer. The company has been in a state of limbo for long enough.

[103] That said, the court is encouraged by the prospect that there could be a better DIP proposal for the company. If so, the repayment and replacement or disclaimer of the Cargill DIP Facility remain open for consideration by the company in the future. As the company, the Monitor and Cargill have pointed out, the question of whether the Offtake Agreement can be disclaimed or replaced remains an issue for another day. But at the very least, it is acknowledged that there is the possibility for this to happen in the context of a transaction or restructuring arising out of the Solicitation Process (including a credit bid from the AHG submitted in that process) or in the context of the repayment and replacement of the Cargill DIP Facility. The cost of Cargill's exit fee under the Cargill DIP Facility is the cost of the stability and the timely implementation that the company requires now.

b) The CCAA Requirements For Approval of the Cargill DIP Facility and DIP Charge

[104] The court's authority to grant the requested priority DIP charge for the Cargill DIP Facility is found in s. 11.2 of the CCAA, and must be considered in light of the factors in s. 11.2(4) of the CCAA, which provide as follows:

- (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.

[105] These factors may be equally applicable in deciding who shall be the DIP lender and on what terms DIP financing ought to be provided. See *Great Basin Gold Ltd., Re*, 2012 BCSC 1459, 94 C.B.R. (5th) 228, at para. 14. These factors and how they are satisfied in this case are reviewed in the Monitor's Pre-Filing report and the company's affidavits and they need not each be reviewed in this endorsement.

[106] The AHG's challenges to the s. 11.2(4) criteria regarding the need for governance changes during the CCAA process and the AHG's loss of confidence in existing management, flow from the criticisms of the DIP Process previously discussed. They are not borne out on the record. This section of the endorsement focuses on the primary challenge of the AHG, namely its contention that it will be materially prejudiced as a result of the proposed Cargill DIP Facility and priming Charge.

[107] The Cargill DIP Financing is conditional on the DIP Charge being granted. The only alternative funding option that would be available to the company would also require a DIP charge. Under the AHG DIP proposal, the DIP facility would have been substantially larger; the increased amount being necessary as the Advanced Payments Facility and other financing available from Cargill would no longer be available under the AHG DIP Proposal. Any prejudice to the secured creditors that may result from the granting of a DIP charge is therefore reduced under the DIP Financing Agreement as compared to the alternative AHG DIP Proposal.

[108] Material prejudice in the context of s. 11.2(4) requires consideration of how much the creditors are being primed by a priority DIP charge, not who is the priming creditor. On an objective test it is clear that the Cargill DIP Facility is far less prejudicial to creditors generally than the AHG DIP, including because the company will require significantly less financing due to the operational agreements already in place with Cargill.

[109] By letter dated October 6, 2023, the AHG communicated, amongst other things, certain concerns regarding the Applicant accepting DIP financing from the DIP Lender. Those stated concerns included potential prejudice to the AHG from such financing. The proposed Monitor took note of the concerns expressed, noting that: “[u]nder the Ad Hoc Group DIP proposal, the DIP facility would have been substantially larger” and, as a result, “[a]ny prejudice to the secured creditors that may result from the granting of a DIP charge is therefore reduced under the [Cargill] DIP Financing Agreement as compared to the alternative Ad Hoc Group DIP Proposal.”

[110] The AHG complaint that the Senior Noteholders are being “primed” ignores the fact that the AHG DIP Proposal would prime the Senior Noteholders by a larger margin than the Cargill DIP Facility.

[111] Additionally, the AHG’s argument ignores Tacora’s other creditors, including Senior Noteholders who are not part of the AHG, trade creditors, employees, lessors and other unsecured creditors. Under the AHG DIP Proposal, the company will need to realize approximately \$30 million more in connection with a restructuring transaction for these creditors to have the same recovery as under the Cargill DIP Facility due to the additional financing that will be required with the AHG DIP Proposal. Accordingly, it is clear that creditors broadly will be less prejudiced with the Cargill DIP Facility.

[112] A further instance of prejudice that the AHG identifies arises from the implications of the Offtake Agreement and the impediments that it could present to the restructuring process if interested third party purchasers or investors are dissuaded by its “life of mine” and other terms (as some already have expressed concerns about in the Solicitation Process and the earlier Strategic Process also undertaken by Greenhill prior to that). Consideration of this must begin with an acknowledgment that, while the AGH asserts that the Offtake Agreement is not commercially reasonable and that it unduly restricts the company’s restructuring efforts, that agreement was in place prior to the issuance of the notes.

[113] This motion must proceed on the basis that the Offtake Agreement is, as of the date of the hearing of this motion, a valid and enforceable agreement to which the company is a party. It is

not an entirely one-sided agreement, in that it provides a guaranteed customer and revenue stream for all of the output at the Scully Mine.

[114] The AHG has taken issue, in particular, with an event of default provision in the Cargill DIP Facility involving any termination, suspension or disclaimer of the Offtake Agreement (the “Offtake EOD”). Section 23(d) defines the Offtake EOD to be: The termination, suspension or disclaimer of the Existing Arrangements [including the Offtake Agreement], or the taking of any steps to terminate, suspend or disclaim (if permitted under the CCAA) any of the Existing Arrangements.

[115] However, this same Offtake EOD goes on to expressly indicate that an event of default shall NOT include: (i) the commencement and prosecution of the SISP (defined below), including the solicitation of an Alternative Offtake or Service Agreement, or (ii) taking any step or related action pursuant to a binding agreement entered into in respect of a Restructuring Transaction at or after the Bid Deadline, including executing such agreement, seeking court approval of such binding agreement or taking any steps in connection with consummating the Restructuring Transaction pursuant to such binding agreement in each case at or after the Bid Deadline, without prejudice to any rights that [Cargill] may have pursuant to section 32 (including subsection 32(9)(c)) of the CCAA or otherwise.

[116] Further, s. 29 of the Cargill DIP Facility requires that: The Borrower ... (in consultation with the Monitor) shall pursue a sales and investment solicitation process (the “SISP”) approved pursuant to a Court Order in respect of (a) potential Restructuring Transactions that may be available to the Borrower; and (b) offtake, service or other agreements in respect of the business of the Borrower (“Alternative Offtake and Service Agreements”) that may be available to the Borrower. In fact, the solicitation process agreed to in the Cargill DIP Facility expressly contemplates that the company shall solicit “Alternative Offtake or Services Agreements” as part of the Solicitation Process and the Solicitation Process put forward by the company for court approval contemplates soliciting interest in the “Offtake Opportunity” as part of binding bids.

[117] Reading these provisions of the Cargill DIP Facility together, the Offtake EOD does not limit the company’s ability to explore all value-maximizing alternatives, including restructuring transactions that involve either a new offtake agreement or no offtake agreement.

[118] While the company considered it to be of critical importance to its evaluation of the DIP proposals it received for it to be able to fully explore all alternatives available to it during the CCAA Proceedings, it also recognized that it would not be practical to terminate, suspend or disclaim the Offtake Agreement before the company had the means to sell its iron ore concentrate to one or more alternative customers.

[119] The practical restriction created by the Offtake EOD is that the company will not be able to enter a stalking horse agreement that contemplates the termination, suspension or disclaimer of the Offtake Agreement without either refinancing the Cargill DIP Facility or obtaining the Cargill DIP Lender’s consent. The company understood this risk when evaluating the Cargill DIP Facility.

[120] This is a thorn in the AHG's side because they made it known to the company that they intend to make a credit bid and might be interested in acting as a stalking horse bidder. While not in the original AHG DIP, the redline version of the AHG DIP Proposal submitted on October 8, 2023 indicates a new provision expressly allowing the AHG to make a stalking horse bid in the Solicitation Process. However, from the company's perspective and the perspective of the creditors as a whole (not the interests of a creditor who might also wish to be a potential purchaser), at the time that the Cargill DIP Facility was considered and approved, there had not been any advanced discussions regarding a stalking horse agreement. Under the Cargill DIP Facility, all parties will be able to participate fully in the solicitation process. In the meantime, should a stalking horse agreement be determined to be favourable, the company maintains the flexibility to refinance (repay and replace) the Cargill DIP Facility at any time.

[121] The terms of the Cargill DIP Financing do not materially prejudice the AHG in their capacity as creditors, either from the perspective of the priming of their existing security (which is less than it would be under their own AHG Financing Proposal) or from the perspective of the overall implications of the Offtake EOD and its practical implications for the restructuring process. The restriction on stalking horse agreements may be prejudicial to the AHG in their capacity as a prospective "credit bidder," but that is not of paramount concern to the interests of the stakeholders generally and is not a material prejudice to the AHG in their capacity as creditors of Tacora arising as a result of the Cargill DIP Facility and DIP Charge within the meaning of s. 11.2(4)(f) of the CCAA.

[122] In *Great Basin* (at para. 15), the court noted that when approving DIP financing it "must determine which proposal is most appropriate and most importantly, which will best serve the interests of the stakeholders of the [Applicants] as a whole by enhancing the prospects of a successful restructuring". The company notes that certain provisions of the AHG DIP Proposal were considered and identified by the company to be restrictive and to provide advantages to the AHG, such as their ability to submit a "topping credit bid" (up to the amount of their total debt) after the completion of the Solicitation Process if the successful bid does not result in full payment of the AHG's pre-filing secured debt. In other words, the AHG would have a "last look" following the final bid deadline even if the AHG did not participate in the Solicitation Process.

[123] The company had a concern that this "last look" could have a chilling effect on prospective purchasers who would be put to the time and expense of the due diligence to make a bid. Another concern identified was that such a clause could cause any interested bidder to have discussions with the AHG regarding a transaction rather than the company, its advisors, and the Monitor, which could result in a loss of control and fairness in the process.

[124] Further, the AHG DIP Proposal would require the company to appoint two (2) new directors from a slate of five (5) directors put forward by the AHG, if requested. In *Quest University, (Re)*, 2020 BCSC 318, 77 C.B.R. (6th) 117 the court recognized that a creditor's attempt to seek control through board appointments in connection with DIP financing was "unreasonable and inappropriate in the circumstances and it may significantly disadvantage other interests in this proceeding". Like the present situation, the creditor in *Quest University* had indicated an interest in purchasing the debtor's property.

[125] On balance, I find the reasons and conclusions of the company, the Monitor and Greenhill that the Cargill DIP Facility is more favourable to the company and will better serve its stakeholders than the AGH DIP Proposal would, to be well founded.

[126] In terms of some of the other factors under s. 11.2(4) of the CCAA, the Cargill DIP Facility amount lines up with the company's cash flow forecasts for the Stay Period and provides the funding for the company's anticipated business and financial affairs that are to be managed during the CCAA proceedings. The company needs the Cargill DIP Facility to commence its Solicitation Process which is intended to enhance the prospects of a viable compromise or arrangement being made in respect of the company. The Monitor recommends the approval of the Cargill DIP Facility. I am satisfied, having considered the relevant factors, that the requirements under the CCAA for the court to approve the Cargill DIP Facility and DIP Charge have been satisfied.

c) Alleged Ulterior Objectives of Cargill

[127] Courts are required to carefully and closely scrutinize financing proposals that may advance the interests of one particular stakeholder (see *Quest University*, at paras. 97–99) and “be constantly vigilant against such strategies” (see *Great Basin*, at paras. 179–81).

[128] Both Cargill and the AHG have their own commercial interests that will inevitably influence their conduct in these CCAA Proceedings.

[129] A proposed extension of DIP financing was not approved in *Essar Steel Algoma Inc. et al*, Re, 2017 ONSC 3331, 48 C.B.R. (6th) 264, because of concerns that the DIP lenders were “imposing terms to assist their position as Term Lenders” who were party to a restructuring agreement, and that “their interests are now too closely aligned with what has been proposed and that the provision of DIP lending is now being too negatively affected” (see paras. 19–24). A DIP lender wearing various hats can give rise to concerns about the potential for mischief in the management and operation of the business for its own interest with less than due regard for the interests of the other secured creditors. See *Conexus Credit Union 2006 v. Voyager Retirement II Genpar Inc.*, 2021 SKQB 273, 94 C.B.R. (6th) 190.

[130] Cargill does wear various hats in this case but none of its activities to date have given rise to any foundation for the suggestion that it will (or will have the ability under the Cargill DIP Facility to) exert control over the business of the company or the Solicitation Process in a way that will give less regard to the interests of the other secured creditors.

[131] The AHG accuses Cargill of manipulating the process to “stave off” the CCAA filing on September 12, 2023 (that would have sought approval of the AHG DIP) and appears to be suggesting that the negotiations for a consensual restructuring were a ruse to give Cargill time to put in a DIP proposal of its own to protect its Offtake Agreement. There is no evidentiary foundation for this theory.

[132] It is further alleged by the AHG that the Cargill DIP Facility is being used for the improper purpose of protecting the Offtake Agreement. It is suggested that this conclusion can be reasonably inferred, as the court did in *Quest University* (at paras. 99–100).

[133] The real concern that is expressed in the AHG's factum is that the current terms of the Offtake Agreement are not commercially reasonable, are considered to be prejudicial to Tacora, and are considered by the AHG to be prohibitive to an effective restructuring. The AHG does not like this agreement and would like Tacora to be able to rid itself of it. As a prospective purchaser, the AHG would no doubt prefer to be rid of the Offtake Agreement. This position exposes that the AHG is also commercially motivated, to try to get rid of a contractual burden of the company to advance its interests as a prospective purchaser.

[134] All participating stakeholders agree that the question of whether the Offtake Agreement is a commercially unreasonable contract and/or whether it can be disclaimed at all is not a question that is before the court to decide on this motion. The validity or enforceability of the Offtake Agreement is not properly before the court on this motion. If Cargill has arguments that the Offtake Agreement cannot be disclaimed those would be available to it irrespective of the DIP Facility terms.

[135] In the meantime, the AHG is concerned that Cargill is bootstrapping its position by building in the Offtake EOD that prevents its disclaimer except as part of the Solicitation Process. From the company's perspective, this may be realistically the most likely circumstance in the context of its restructuring in which it would want to disclaim the Offtake Agreement. But even if not so, the Offtake EOD can be eliminated if the Cargill DIP Facility is repaid. The inclusion of the Offtake EOD does not lead to the conclusion that the Cargill DIP Facility is being used for an improper purpose just because it recognizes the commercial realities of the company's existing contractual arrangements with Cargill.

[136] Various assertions are made by the AHG about the refusal by Cargill representatives to produce documents requested in r. 39.03 notices of examination. Even if the Cargill representatives who were examined are treated as "party" as opposed to non-party witnesses and subject to the usual rules of cross-examination (see *Magnotta Winery Corp. v. Ontario (Alcohol and Gaming Commission)*, 2016 ONSC 3174, at para. 11), the timing, scope and breadth of the document requests that accompanied their notices of examination were not proportionate. Further, many of the requests were for historic documents that relate to the Offtake Agreement, the very existence of which is what the AHG alleges is problematic.

[137] Based on the refusal to produce the requested documents in response to the broad requests, the AHG is asking the court to draw adverse inferences that they would have disclosed Cargill's true motives behind the Cargill DIP Facility to be to gain some advantage for itself under the Offtake Agreement. These witnesses were not obligated to produce all records responsive to the overly broad, discovery-like document requests set out in the notices of examination only delivered late in the evening on Monday, October 16, 2023 in advance of examinations scheduled for October 18 and 19, 2023. For such inferences to be drawn from a refusal to produce documents in these circumstances, there would first need to be some factual basis to which to tether the suggested inference, which there is not.

[138] The fact that Cargill has other commercial interests and contractual rights vis-à-vis Tacora does not mean that it is acting improperly for its own interest with less than due regard for the

interests of the other secured creditors when it introduces a term into its proposed DIP that recognizes those other contractual interests but also acknowledges circumstances in which they might be compromised.

[139] While it is true that it is less “messy” to have a truly independent DIP lender in a CCAA restructuring, that is not always realistic or possible. It is often the parties who are already entrenched with the debtor who have the most incentive to see its restructuring efforts succeed. It is a balance. The court does need to be vigilant to ensure that a creditor wearing more than one hat does not take advantage of its position, but for the court to make a finding that a DIP facility from that party is tainted there would need to be something more than the type of speculation and innuendo that has been suggested here.

[140] The Offtake Agreement (among other agreements with Cargill) is the sole source of revenue for Tacora. Cargill has committed to purchasing 100% of the output of the Scully Mine under the Offtake Agreement. This is why Tacora has argued that it is unlikely that it would seek to disclaim, terminate, suspend, etc. that agreement, other than in the context of a transaction arising out of the Solicitation Process, which would be exempt from the restriction in the Cargill DIP Facility on such actions.

[141] In my view, the contractual terms that have been incorporated into the Cargill DIP Facility strike the right balance to counter what is otherwise just a speculative theory of the AHG regarding improper motivations.

d) Should the Court Approve the AHG ARIIO that Includes the AHG DIP Proposal

[142] In light of all of the criticisms that it has raised to the Cargill DIP Facility, the AHG also asks the court to consider whether there is a more appropriate DIP financing option available to the company through the AHG DIP Proposal³ that the court should approve (as requested by the primary relief on the cross-motion), with an invitation to the company to agree to the AHG DIP Proposal if it wants the CCAA protection to continue.

[143] However, this requested relief is dependent upon a finding that the AHG DIP Proposal is more favourable to Tacora and its stakeholders than the Cargill DIP Facility; whereas, for the reasons outlined earlier in this endorsement, the company and its advisors, and now the court, have found the opposite to be true: the Cargill DIP Facility is more favourable to Tacora and its stakeholders than the AHG DIP Proposal. Thus, there is no basis for granting this alternative relief. Accordingly, this aspect of the cross-motion (for the approval of the AHG ARIIO) is dismissed.

³ For reasons indicated earlier, the company and its advisors have not had the opportunity to consider the New AHG DIP Proposal and it is not properly for the court for consideration at this time.

[144] In the context of the discussion about the request for the court to approve the AHG ARIO, which includes the AHG DIP Proposal, the court raised the question of its jurisdiction to make the order sought on the cross-motion, which is for an amended and restated initial order that approves alternative DIP financing to be provided by the AHG that the company would have to agree to. Similarly, the Alternative Relief sought by the AHG in respect of the Tacora proposed ARIO includes directions that would require changes to be made to the Cargill DIP Facility to remove the Offtake EOD. This relief appears to be asking the court to become involved in the contractual negotiations between parties and to impose contractual terms upon them. No authority was identified that addresses this jurisdictional question.

[145] The AHG suggested that the court has, in the past, and could in this case, simply indicate that approvals would be granted if these contractual arrangements are made and then leave it to the parties to decide whether those contractual terms will or will not be agreed to. The court was referred to *Nortel Networks Corp. (Re)*, 2010 ONSC 1708, 63 C.B.R. (5th) 44 for this proposition. That may be a tool available to the court in appropriate cases, but since I have concluded that the Cargill DIP Financing should be approved it does not arise in this case.

Should the Court Order any of the Alternative Relief Sought by the AHG on the Cross-Motion?

[146] That leaves the question of whether the court should order any of the Alternative Relief sought by the AHG. The various elements of that Alternative Relief are addressed in turn, with the conclusion that it is not necessary or appropriate to grant any of the Alternative Relief.

[147] The request for a CRO is not warranted or justified. There is precedent for appointing a CRO in a CCAA proceeding. See, for example, *Payless ShoeSource Canada Inc and Payless ShoeSource Canada GP Inc (Re)*, 2019 ONSC 1215, 68 C.B.R. (6th) 269, at paras. 30–32. However, this is not typically done over the objection of the company. Further, in this case, this request is predicated on the assertion that the AHG was unfairly treated by management and the Board in the DIP Process, and that either Tacora’s management or its Board is unreasonably impairing, or are likely to unreasonably impair, the possibility of a viable compromise or arrangement. These assertions have not been made out, for reasons outlined earlier in this endorsement.

[148] The AHG’s complaint about “how management and the Board have run the restructuring thus far” is unparticularized (aside from the complaints about the DIP Process addressed earlier in this endorsement that have not been substantiated) and premature given that the CCAA proceedings were commenced less than a month ago. There is no reason to appoint a CRO at this time. Further, no CRO has been identified and no proposed mandate been formulated. At the hearing the AHG suggested that this request be deferred for further consideration after an appropriate person and mandate had been identified. If the court had been persuaded that there was a reason to consider appointing a CRO, that approach might have been appropriate, but since no justification for doing so has been identified, there is no reason to defer the request.

[149] The KERP should not require the AHG’s approval. The AHG does not dispute that a KERP is necessary. The only concern noted by the AHG with respect to the proposed KERP is

that “a significant portion of the KERP to be proposed by Tacora will go to executive management resident in Grand Rapids, Minnesota, rather than the non-executive and operation employees (primarily located in Wabush, Newfoundland) whose contributions will be crucial to keeping Tacora operating during the CCAA process.” Tacora counters this concern by pointing out that approximately 80% of the Key Employees (27 of 34) covered by the KERP work directly at the Scully Mine in Wabush, Newfoundland, and senior management frequently travels to be on site at the Scully Mine.

[150] No specific counter-proposal for the KERP, or this aspect of it, has been advanced by the AHG. The company and its advisors are best situated to determine who the key employees are that it is at risk of losing during the CCAA process and the appropriate parameters for calculating the KERP payments that they will receive.

[151] The ancillary Post-Filing Credit Extension should not require the AHG’s approval or Court approval. The current terms require the Monitor’s approval for credit extensions that are built into the Cargill DIP Facility. If the Monitor has concerns then the court would expect those to be brought before the court and for consideration under the court’s inherent and supervisory jurisdiction over the CCAA proceedings. But if the Monitor does not have concerns, requiring the company to come back to court for specific extensions would be an added and unnecessary expense.

[152] The Greenhill Priority Transaction Fee Charge should not be subordinated. Greenhill’s fees, if earned, are entitled to a super priority. That is typically the basis on which financial advisors are incentivized to continue to work for companies involved in restructuring. Greenhill is already agreeing to defer much of its fees to coincide with the completion of a successful transaction, and to risk not receiving the deferred fees if there is no successful transaction. In the interim, while its success fee is deferred, it has agreed to be paid only a much smaller guaranteed monthly amount. It should not be put at further risk of not receiving its earned fees if there is a successful transaction by having its charge subordinated to the Senior Secured Priority Notes and ranked *pari passu* with the remaining Senior Secured Notes.

[153] The reasons for not granting the Alternative Relief are further elaborated upon as the corollary to the reasons for granting the corresponding provisions in the company’s proposed ARIO, discussed in the next section of this endorsement.

Should the Court Approve the ARIO?

[154] I will now turn to address certain aspects of the ARIO that warrant specific consideration.

[155] The main feature for which approval is required is the Cargill DIP Facility and DIP Charge. All creditors likely to be affected by the Cargill DIP Facility and DIP Charge were served with notice of the come-back hearing and only the AHG opposes this approval. That opposition is addressed in the preceding section of this endorsement.

[156] The requested approval and authorization sought for the company to draw up to the maximum amount of the Cargill DIP Facility of \$75 million and to increase the DIP Charge

accordingly, is supported by the company's Cash Flow Forecast demonstrating the need for the full amount to pay obligations as they come due, continue operations, and undertake the Solicitation Process during the proposed extended Stay Period. The Monitor supports the approval of the Cargill DIP Facility and authorization to draw up to the maximum available principal amount. The requested increase to the maximum principal amount of the DIP Facility is fair and reasonable and, for reasons previously indicated, satisfies the criteria under ss. 11.2(1) and 11.2(4) of the CCAA.

[157] As previously indicated, the court has independently determined that the Cargill DIP Facility and DIP Charge should be approved with regard to the relevant factors under s. 11.2(4) of the CCAA. The support and recommendations of the Monitor and Greenhill are relevant factors to take into account, as is the Board's approval of the Cargill DIP Facility and DIP Charge. The court "may consider, but not defer to, and is not fettered by, the recommendation of the Board." See *Crystallex* (Ont. C.A.), at para. 85.

[158] The other provisions of the ARIO for which the Court's approval are sought are reasonable and appropriate in the circumstances, because:

- a. The extension of the Stay Period from October 27, 2023 to February 9, 2024 is necessary and appropriate to allow the company's good faith pursuit of the Solicitation Process by which it hopes to identify a value maximization transaction for the benefit of Tacora stakeholders. The Solicitation Process contemplates a motion for court approval of a successful bid during the week of February 5, 2024 (subject to availability). The extension of the Stay Period to February 9, 2024 is supported by the Monitor and Cash Flow Forecasts that are, in turn, based on the Cargill DIP Facility.
- b. Section 11 of the CCAA provides the court with authority to allow debtor companies to enter into arrangements to facilitate a restructuring, which may include the retention of expert advisors like Greenhill where necessary to help with the restructuring efforts. See *Victorian Order of Nurses for Canada (Re)*, 2015 ONSC 7371, 32 C.B.R. (6th) 236, at para. 27. Courts have approved the appointment of advisors in restructuring proceedings, and corresponding charges to secure such advisors' professional fees, where such advisors' knowledge and experience is critical to assisting the debtor with a successful restructuring or is necessary to assist the debtor with a liquidation sale. See *Target Canada Co (Re)*, 2015 ONSC 303, at para. 72. Greenhill's prior experience with the company, including Greenhill's involvement running the Strategic Process starting in March of this year, along with its extensive experience in matters of this nature, makes it well-suited to this mandate. The Monitor recommends that the court approve the Greenhill Engagement Letter create of the Transaction Fee Charge, as it is of the view that the continued engagement of Greenhill to assist in the implementation of the Solicitation Process will be beneficial to the estate and its stakeholders generally and to the efficient completion of the CCAA Proceeding. The Monitor has considered the fees provided for in the Greenhill Engagement Letter and is satisfied

that they are within market parameters. The court accepts the Monitor's recommendations in this regard and the approval of the Greenhill Engagement Letter is not challenged. The Monitor supports the granting of the Transaction Fee Charge, which the court has also found to be reasonable and appropriate in the previous section of this endorsement.

- c. The initial amount of the Directors' Charge was found when the court granted the Initial Order to be appropriately "limited to projected potential uninsured obligations and to what [was] fair and reasonable for the initial 10 day period having regard to the requirements of s. 11.51 of the CCAA and the need for continuity and to keep the directors in place". In connection with the request for the grant of the ARIO, Tacora seeks to increase the quantum of the Directors' Charge to \$5,200,000. The proposed increase has been determined in consultation with the Monitor to reflect the increased potential scope of liability during these CCAA Proceedings. This increase is justified on the same basis as the Directors' Charge was considered to be appropriate when the Court granted the Initial Order. The Monitor supports Tacora's request to increase the quantum of the Directors' Charge, which it believes is reasonable and justified in relation to the quantum of the Directors' estimated potential liability.
- d. The KERP was designed to incentivize Key Employees to continue their employment with Tacora in order to continue the business as a going concern and maximize value for all stakeholders through the proposed Solicitation Process. The KERP complies with the factors to be considered in the approval of such plans (*Just Energy Group Inc et al*, 2021 ONSC 7630, 95 C.B.R. (6th) 264), in that:
 - i. It was developed by Tacora with significant input from the Monitor, and is comparable to other recent KERPs that have been approved in Canada. The Monitor supports approval of the KERP.
 - ii. If the proposed KERP is not approved, the company's CEO believes that it is likely that the Key Employees would consider and pursue other employment opportunities.
 - iii. The Key Employees have distinct and critical roles at Tacora and will allow the Company to continue operating in the ordinary course while also advancing the Solicitation Process. The company is concerned that finding qualified individuals to replace the Key Employees would be challenging, disruptive, costly, and time consuming.
 - iv. The company believes that the KERP will facilitate and encourage the continued participation of Key Employees during these CCAA Proceedings. The KERP provides for the payment of up to \$3,035,000 to 34 Key Employees (identified out of a work force of approximately 450

employees), including seven corporate personnel (the executive team and the corporate finance team) and 27 Scully Mine personnel.

- v. Individual bonuses for Key Employees range from 16% to 53% of their maximum potential annual compensation (with individual bonuses for Key Mine Employees ranging from 36% to 66% of their base salaries, and individual bonuses for Key Corporate Employees ranging between 49% and 107% of their base salaries), which will be forfeited if they resign or are terminated for just cause prior to the completion of a transaction pursuant to the Solicitation Process or the completion of the CCAA Proceedings.
- vi. The Board of Directors unanimously approved the KERP. As a proposed beneficiary of the KERP, Mr. Broking did not participate in the vote approving the KERP.

[159] The details of the KERP are set forth in Confidential Exhibit “C” to the Second Broking Affidavit. It contains sensitive personal and compensation information, which Tacora’s CEO believes may cause harm to the Key Employees and could result in a distraction for employees if such information became public and generally accessible. Tacora requests a sealing order in relation to the confidential exhibit in order to protect the personal compensation information contained therein and avoid this distraction. To grant this relief, the court must be satisfied of the test in *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 S.C.R. 522, at para. 53, as modified by *Sherman Estate v. Donovan*, 2021 SCC 25, 72 C.R. (7th) 223, at paras. 38 and 43, having regard to:

- a. The important public interest in the openness of courts and whether it poses a serious risk to some other important public interest;
- b. Whether the order sought is necessary to prevent the risk to the other identified public interest because alternative measures are not available; and
- c. As a matter of proportionality, the benefits of the sealing order outweigh its negative effects.

[160] Confidential Exhibit “C” contains individual compensation information and the amount of the proposed KERP payments for each eligible employee. Employees have a reasonable expectation that their names and salary information will be kept confidential. Conversely, disclosing this information could create a distraction for key employees who need to be focused right now on the company’s restructuring efforts. Protecting the sensitive personal compensation information of the employees is an important public interest that should be protected. The sealing order is necessary in order to protect the privacy rights of Tacora’s employees while permitting the court to consider the details of the KERP. As a matter of proportionality, the benefits of sealing Confidential Exhibit “C” outweigh its negative effects.

[161] Courts have applied the *Sierra Club* and *Sherman Estate* tests in the insolvency context and authorized sealing orders over confidential or commercially sensitive documents. See, for

example, *Ontario Securities Commission v. Bridging Finance Inc.*, 2021 ONSC 4347, 90 C.B.R. (6th) 102, at paras. 23–28; see also *Just Energy Corp, Re*, 2021 ONSC 1793 at paras. 123–24. Courts have previously granted sealing orders in respect of individual compensation arrangements relating to key employee retention plans. See *Bridging Finance*, at paras. 23–28; *Golf Town Canada Holdings Inc (Re)*, Initial Order issued September 14, 2016 [Court File No. CV-16-11527-00CL] at para. 64; *Acerus Pharmaceuticals Corporation et al (Re)*, Amended and Restated Initial Order issued February 3, 2023 [Court File No. CV-23-00693595-DDCL].

[162] Certain documents were agreed as between the parties to be designated as confidential for purposes of the examinations. Some of the documents were referred to during the examinations and a very few of them were referred to in the factums filed on these motions. This is real time litigation and the 3 C's of the Commercial List encourage parties to find practical solutions to allow cases to move forward expeditiously, as was done here through the agreement to a confidentiality protocol. The court was advised that, with the possible exception of one profit figure, none of the information from the confidential exhibits is relevant to the issues before the court. The confidentiality designations are primarily in respect of personal information.

[163] Thus, the practical solution that was adopted by the parties, of redacting the references to these exhibits in the materials filed with the court, was appropriate. Leave is granted for those filed materials to remain in redacted form. I do not believe that I have made reference in this endorsement to any of the redacted confidential information, but I invite counsel to alert the court immediately if there are any concerns in that regard.

Should the Court Approve the Solicitation Order?

[164] The remedial nature of the CCAA confers broad powers to facilitate restructurings, including the power to approve a solicitation process prior to or in the absence of a plan of compromise and arrangement. See *Nortel Networks Corporation (Re)*, 55 CBR (5th) 229, at paras. 47–48.

[165] Section 36 of the CCAA sets out certain factors to be considered by the Court in approving a sale. Section 36 does not directly address the factors a court should consider when determining whether to approve a solicitation process; however, such criteria can be evaluated in light of the considerations that will ultimately apply when seeking approval of a sale transaction, including whether the process is reasonable in the circumstances, whether the Monitor approved the process, and the extent to which the creditors were consulted. See *Brainhunter Inc (Re)*, 2009 CanLII 72333 at paras. 16–17.

[166] In *Walter Energy Canada Holdings, Inc.*, 2016 BCSC 107, 33 C.B.R. (6th) 60, at paras. 20–21, the court considered the following additional factors in approving a CCAA SISP:

- a. the fairness, transparency and integrity of the proposed process;
- b. the commercial efficacy of the proposed process in light of the specific circumstances; and

- c. whether the sales process will, in the circumstances, optimize the chances of securing the best possible price for the assets for sale.

[167] The *Walter Energy* factors have been cited with approval in subsequent decisions, including the recent CCAA proceedings of *Nordstrom Canada Retail, Inc.*, 2023 ONSC 1631 at para. 9 and *Bron Media Corp (Re)*, 2023 BCSC 1563 at para. 41.

[168] The Solicitation Process was developed by Greenhill in consultation with the Monitor, and provided to the company's secured creditors for feedback. The Solicitation Process will be run by Greenhill with assistance from the company's counsel and with the oversight of the Monitor.

[169] The Monitor has recommended that this court approve the Solicitation Process, as it believes the Solicitation Process: (a) provides for a broad, open, fair and transparent process; (b) provides for an appropriate level of independent oversight; (c) should encourage and facilitate bidding by interested parties; (d) is reasonable in the circumstances; and (e) should not discourage parties from submitting offers.

[170] In these circumstances, it is appropriate for the court to approve the Solicitation Process and grant the Solicitation Order, with the change requested by the AHG that the court not only authorizes but also direct the company and its advisors to immediately commence the Solicitation Process.

Final Disposition

[171] For the foregoing reasons, the ARIO and Solicitation Order shall issue in the forms signed by me today.

Kimmel J.

Date: October 30, 2023

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I hereby certify this to be a true copy of
the original Order
Dated this 9 day of Oct/19
[Signature]
Clerk's Stamp:
for Clerk of the Court



COURT FILE NUMBER

1901-13767

COURT

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 IN THE MATTER OF A PLAN OF
COMPROMISE OR ARRANGEMENT OF
BELLATRIX EXPLORATION LTD.

APPLICANT:

BELLATRIX EXPLORATION LTD.

DOCUMENT

STRATEGIC PROCESS APPROVAL ORDER

CONTACT INFORMATION OF
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DOCUMENT:

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**DATE ON WHICH ORDER
WAS PRONOUNCED:**

October 9, 2019

**NAME OF JUDGE WHO MADE
THIS ORDER:**

The Honourable Justice Neufeld

LOCATION OF HEARING:

Calgary, Alberta

UPON the application of Bellatrix Exploration Ltd. (the “**Applicant**”); **AND UPON** having read the Originating Application, the Affidavit of Brent A. Eshleman sworn October 2, 2019, the Affidavit of Service of Caroline Descours sworn October 2, 2019, filed, the Affidavit of Service of Andrew Harmes sworn October 7, 2019, filed, and the First Report of PricewaterhouseCoopers Inc. in its capacity as monitor of the Applicant (the “**Monitor**”); **AND UPON** hearing counsel for the Applicant, the Monitor, the Interim Lenders, National Bank of Canada, in its capacity as First Lien Agent, and such other parties present; **IT IS HEREBY ORDERED AND DECLARED THAT:**

SERVICE

1. The time for service of the notice of application for this order (the “**Order**”) is hereby abridged and deemed good and sufficient and this application is properly returnable today.

CAPITALIZED TERMS

2. Capitalized terms used but not otherwise defined in this Order shall have the meaning given to such terms in the Initial Order of this Court in these proceedings dated October 2, 2019 (the “**Initial Order**”).

SALE AND INVESTMENT SOLICITATION PROCESS

3. The sale and investment solicitation process attached as Schedule “A” to this Order (the “**Strategic Process**”) is hereby approved, and the Applicant is hereby authorized to commence the Strategic Process, in consultation with the Sale Advisor and the Monitor pursuant to the terms of the Strategic Process. The Applicant, the Monitor and the Sale Advisor (as defined in the Strategic Process) are hereby authorized and directed to perform their respective obligations and to do all things reasonably necessary to perform their obligations thereunder.
4. Each of the Monitor and the Sale Advisor, and their respective affiliates, partners, directors, employees, agents and controlling persons shall have no liability with respect to any and all losses, claims, damages or liabilities, of any nature or kind, to any person in connection

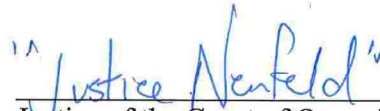
with or as a result of the Strategic Process, except to the extent such losses, claims, damages or liabilities result from the gross negligence or wilful misconduct of the Monitor or the Sale Advisor, as applicable, in performing its obligations under the Strategic Process (as determined by this Court).

5. In connection with the Strategic Process and pursuant to sections 20 and 22 of the *Personal Information Protection Act* (Alberta), the Applicant, the Sale Advisor and the Monitor are authorized and permitted to disclose personal information of identifiable individuals to prospective bidders and to their advisors, but only to the extent desirable or required to negotiate and attempt to complete one or more potential transactions (each, a “**Transaction**”). Each prospective bidder to whom such information is disclosed shall maintain and protect the privacy of such information and shall limit the use of such information to its evaluation of the Transaction, and if it does not complete a Transaction, shall: (i) return all such information to the Applicant, the Sale Advisor or the Monitor, as applicable; (ii) destroy all such information; or (iii) in the case of such information that is electronically stored, destroy all such information to the extent it is reasonably practical to do so. The purchaser of the Business or any Property shall be entitled to continue to use the personal information provided to it, and related to the Business or Property purchased, in a manner which is in all material respects identical to the prior use of such information by the Applicant, and shall return all other personal information to the Applicant, the Sale Advisor or the Monitor, as applicable, or ensure that other personal information is destroyed.

GENERAL

6. This Court hereby requests the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in any foreign jurisdiction, to give effect to this Order and to assist the Applicant, the Monitor and their respective 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 Applicant and to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Monitor in any

foreign proceeding, or to assist the Applicant and the Monitor and their respective agents in carrying out the terms of this Order.

A handwritten signature in blue ink, reading "Justice Newfeld", is written over a horizontal line.

Justice of the Court of Queen's Bench of
Alberta

SCHEDULE "A"

SALE AND INVESTMENT SOLICITATION PROCESS

[See attached.]

6991284

Sale and Investment Solicitation Process

1. This sale and investment solicitation process (the "**Strategic Process**") sets out the manner in which (i) bids and proposals for a broad range of executable transaction alternatives involving the business and assets or shares of Bellatrix Exploration Ltd. ("**Bellatrix**"), whether en bloc or any portion(s) thereof, will be solicited from interested parties, (ii) any bids and/or proposals received will be negotiated, (iii) any Successful Bid(s) (as defined below) will be selected, and (iv) the Court's approval of any Successful Bid(s) will be sought.
2. The Strategic Process shall be conducted by Bellatrix under the supervision of PricewaterhouseCoopers Inc. in its capacity as court-appointed monitor of Bellatrix (the "**Monitor**") with the assistance of BMO Capital Markets (the "**Sale Advisor**").
3. Parties who wish to have their bids and/or proposals considered shall be expected to participate in this Strategic Process as conducted by Bellatrix and the Sale Advisor.
4. The Strategic Process will be conducted (under the oversight of the Monitor) such that Bellatrix and the Sale Advisor will:
 - prepare marketing materials;
 - complete the preparation of a data room;
 - solicit interest from parties to enter into non-disclosure agreements, obtain access to the data room and begin analyzing potential transaction alternatives;
 - request that such parties submit initial non-binding expressions of interest ("**EOIs**") with a target date of on or about November 13, 2019 (which date shall be communicated and may be extended by Bellatrix with the consent of the Monitor, the "**Non-Binding EOI Bid Deadline**");
 - as appropriate, select from parties that submitted an EOI by the Non-Binding EOI Bid Deadline the parties invited to enter into the second phase of the Strategic Process (the "**Phase 2 Parties**") to conduct detailed due diligence;
 - request that Phase 2 Parties mark-up the form of transaction document(s) provided by Bellatrix; and
 - request that Phase 2 Parties submit binding offers together with a duly executed proposed transaction document(s) (the "**Binding Bid**") by 11:59 p.m. prevailing Mountain Time on a date to be determined by Bellatrix and the Sale Advisor, with the consent of the Monitor, and communicated to the Phase 2 Parties and any Potential Creditor Bidder (as defined below) (as may be extended by Bellatrix with the consent of the Monitor or further order of the Court, the "**Binding Bid Deadline**").
5. In order to constitute a Binding Bid, a bid must comply with the following:
 - it contains:
 - i. duly executed binding transaction document(s);
 - ii. the identity and contact information of the bidder;
 - iii. a blackline to the form of transaction document(s) provided by Bellatrix; and
 - iv. evidence of authorization and approval from the bidder's board of directors (or

- comparable governing body);
- it includes a letter stating that the bid is irrevocable for a period of at least 15 business days from the date of the Binding Bid Deadline, as may be extended by such bidder;
 - it provides written evidence of a firm, irrevocable financial commitment for all required funding or financing;
 - it does not include any request for or entitlement to any break fee, expense reimbursement or similar type of payment;
 - it is not conditional upon:
 - i. the outcome of unperformed due diligence by the bidder, and/or
 - ii. obtaining financing;
 - it specifies any regulatory or other third party approvals the party anticipates would be required to complete the transaction;
 - it confirms that the bidder is a Licensee (as defined in the *Oil and Gas Conservation Act (Alberta)*) in good standing with the Alberta Energy Regulator (the "AER"), or is or will be able to obtain or hold AER licenses, permits or approvals prior to the completion of the transaction;
 - it is accompanied by a cash deposit (the "**Deposit**") of 10% of the total cash purchase price contemplated by such bid, which shall be paid to the Monitor by wire transfer (to a bank account specified by the Monitor) and held in trust by the Monitor in accordance with this Strategic Process (other than with respect to a credit bid submitted by a Potential Creditor Bidder pursuant to Section 12, which shall not require a Deposit); and
 - it is received by the Binding Bid Deadline (as may be extended in accordance with Section 4 above) (other than with respect to a credit bid submitted by a Potential Creditor Bidder pursuant to Section 12, which shall not be required to be submitted by the Binding Bid Deadline).
6. Bellatrix, in consultation with the Monitor and the Sale Advisor, may waive compliance with any one or more of the requirements specified in Section 5 above and deem a non-compliant bid to be a Binding Bid, with the exception of a bid (other than a credit bid submitted by a Potential Creditor Bidder) that is received after the Binding Bid Deadline.
7. Following the Binding Bid Deadline, Bellatrix may, in consultation with the Monitor and the Sale Advisor, determine to (i) with the assistance of the Sale Advisor, continue negotiations with a selected number of bidders that have submitted Binding Bids and with any Potential Creditor Bidders, with a view to selecting one or more non-overlapping Binding Bids or credit bid as the successful bid(s) (the "**Successful Bid(s)**"), taking into account the overall value of each such bid in the judgement of Bellatrix after consultation with the Sale Advisor and the Monitor, and applicable conditions to completion, among other factors deemed appropriate by Bellatrix, in consultation with the Sale Advisor and the Monitor, and (ii) take such steps as are necessary to finalize and consummate the Successful Bid(s). Following the Binding Bid Deadline, any Potential Creditor Bidder shall be informed whether the Binding Bid does not include sufficient cash consideration to satisfy the Secured Notes (as defined below) in full in cash or otherwise assume such obligations in full and, as applicable, any such Potential Creditor Bidder shall be permitted to receive, subject to entering into a confidentiality agreement with Bellatrix, in form reasonably satisfactory to Bellatrix and the Monitor, more detailed information in respect of any such Binding Bid, including copies of the Binding Bid and any definitive agreement(s) in connection therewith. Bellatrix has no obligation to conclude a sale or other transaction arising out of this Strategic

Process and reserves the right and unfettered discretion to reject any bid or proposal (including any Binding Bid), or to complete a standalone restructuring transaction outside of the Strategic Process, subject to consultation with the Monitor. If Bellatrix does select any Successful Bid(s), it shall be under no obligation to accept the highest bid.

8. Following selection of a Successful Bid, if applicable, Bellatrix, with the assistance of its advisors, shall seek to finalize any necessary definitive agreement(s) with respect to the Successful Bid(s). Once the necessary definitive agreement(s) with respect to a Successful Bid have been finalized, as determined by Bellatrix, in consultation with the Monitor, Bellatrix may apply to the Court for an order approving such Successful Bid and authorizing Bellatrix to (i) enter into any and all necessary agreements and related documentation with respect to the Successful Bid, (ii) undertake such other actions as may be necessary to give effect to such Successful Bid, and (iii) implement the transaction(s) contemplated in such Successful Bid (a **"Transaction Approval Order"**).
9. All Deposits shall be retained by the Monitor in a trust account. If a Successful Bid is selected and a Transaction Approval Order is granted in connection therewith, any Deposit paid in connection with such Successful Bid will be non-refundable and shall, upon closing of the transaction contemplated by such Successful Bid, be applied to the purchase price to be paid in connection with such Successful Bid or be dealt with as otherwise set out in the definitive agreement(s) entered into in connection with such Successful Bid. Any Deposit delivered with a Binding Bid that is not selected as a Successful Bid, will be returned to the applicable bidder within ten (10) business days of the date upon which the Successful Bid is approved pursuant to a Transaction Approval Order or such earlier date as may be determined by Bellatrix, in consultation with the Monitor and the Sale Advisor.
10. The Sale Advisor shall be permitted, in its discretion, to provide general updates and information in respect of the Strategic Process to the First Lien Agent, the First Lien Lenders and the holders of Secured Notes, on a confidential basis upon such parties entering into confidentiality agreements with Bellatrix, in form satisfactory to Bellatrix and the Monitor.
11. Upon irrevocable confirmation in writing from National Bank of Canada, as administrative agent (the **"First Lien Agent"**) under Bellatrix's first lien credit facility (the **"First Lien Credit Facility"**), representing the lenders under the First Lien Credit Facility (the **"First Lien Lenders"**), that the First Lien Lenders will not submit any EOI or Binding Bid (including any credit bid) in the Strategic Process, and subject to the First Lien Agent and the First Lien Lenders having entered into confidentiality agreements with Bellatrix, in form satisfactory to Bellatrix and the Monitor, the Sale Advisor shall be permitted, in its sole discretion and subject to the consent of the Monitor, to consult with the First Lien Agent and the First Lien Lenders, on a strictly confidential basis, on more detailed information in respect of the Strategic Process, including in respect of any EOIs, Binding Bids and/or Successful Bids and any definitive agreement(s) in connection therewith.
12. The Sale Advisor shall, following the Non-Binding EOI Bid Deadline and/or following the Binding Bid Deadline, be permitted, in its sole discretion and subject to the consent of the Monitor, to consult with any Potential Creditor Bidder, subject to any such Potential Creditor Bidder entering into a confidentiality agreement with Bellatrix, in form reasonably satisfactory to Bellatrix and the Monitor, on more detailed information in respect of the Strategic Process, including in respect of

any EOIs, Binding Bids and/or Successful Bids and any definitive agreement(s) in connection therewith.

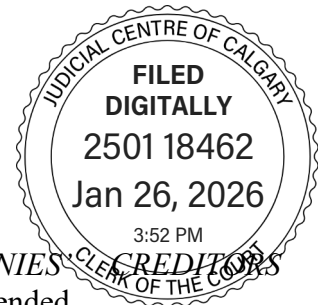
13. The holders of Bellatrix's existing secured second lien notes (the "**Second Lien Notes**") and the holders of existing secured third lien notes (the "**Third Lien Notes**", and together with the Second Lien Notes, the "**Secured Notes**") (excluding any holder of Secured Notes who participated in the Strategic Process in its individual capacity pursuant to paragraph 14 hereof) which would be entitled to cause a credit bid to be submitted in accordance with this Section 13 (each group of holders collectively a "**Potential Creditor Bidder**") shall each be permitted to participate in the Strategic Process as a credit bidder at any time during the Strategic Process (including, for greater certainty, following the Binding Bid Deadline) on the terms set forth herein and shall be permitted to conduct due diligence at any time during the Strategic Process. For the purpose of any credit bid submitted by a Potential Creditor Bidder, the Potential Creditor Bidder shall be entitled to credit against its bid any amounts owing to it under the Second Lien Notes or the Third Lien Notes, as applicable, provided that no Potential Creditor Bidder's bid can exceed the aggregate value of their applicable Secured Notes plus all obligations ranking in priority to their applicable Secured Notes. A Potential Creditor Bidder's credit bid must include at least sufficient cash consideration to satisfy any priority payments required to be paid that rank ahead of their Secured Notes or otherwise assume or satisfy such obligations. In addition, in respect of a Potential Creditor Bidder in respect of the Second Lien Notes, such Potential Creditor Bidder's bid must also include sufficient cash consideration to satisfy the New Money Notes (as defined in the note indenture governing the Second Lien Notes) in full in cash or otherwise assume such obligations in full. For certainty, a Potential Creditor Bidder shall provide written evidence of all required funding or financing to advance the cash consideration necessary to satisfy such priority payments and the New Money Notes in full in cash or otherwise assume such obligations in full, and that any such credit bid shall not be conditional upon obtaining financing, acceptable to each of the Sale Advisor and the Monitor in their sole discretion.
14. For clarity, a party that is a holder of Second Lien Notes or of Third Lien Notes that is not a Potential Creditor Bidder may participate in the Strategic Process in its individual capacity on the same terms applicable to parties that are non-Potential Creditor Bidders, provided it complies with all applicable requirements in this Strategic Process (including, without limitation, those set out in Sections 4 and 5 hereof) and in such case, such holder of Second Lien Notes or of Third Lien Notes shall not be provided with any confidential information with respect to the Strategic Process, including information pertaining to any submitted EOIs or Binding Bids, that may otherwise be provided to a holder of Secured Notes or a Potential Creditor Bidder pursuant to the terms hereof.
15. Any amendments to this Strategic Process may only be made by Bellatrix with the written consent of the Monitor, or by further order of the Court.

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**Order
Rule 9.1**

COURT FILE NO. 2501-18462
COURT COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE CALGARY



IN THE MATTER OF THE COMPANIES' CREDITORS
ARRANGEMENT ACT, RSC 1985, c C-36, as amended

AND IN THE MATTER OF A PLAN OF COMPROMISE OR
ARRANGEMENT OF CANACOL ENERGY LTD., 2654044
ALBERTA LTD., CANACOL ENERGY ULC, 2498003 ALBERTA
ULC, CANTANA ENERGY GMBH, CNE OIL & GAS S.R.L,
CANACOL ENERGY COLOMBIA S.A.S., SHONA HOLDING
GMBH, CNE ENERGY S.A.S., and CNE OIL & GAS S.A.S

APPLICANTS CANACOL ENERGY LTD., 2654044 ALBERTA LTD., CANACOL
ENERGY ULC, 2498003 ALBERTA ULC, CANTANA ENERGY
GMBH, CNE OIL & GAS S.R.L, CANACOL ENERGY COLOMBIA
S.A.S., SHONA HOLDING GMBH, CNE ENERGY S.A.S., and CNE
OIL & GAS S.A.S.

DOCUMENT **SALES PROCESS APPROVAL AND OTHER RELIEF ORDER**

ADDRESS FOR
SERVICE AND
CONTACT
INFORMATION
OF PARTY
FILING THIS
DOCUMENT

Gowling WLG (Canada) LLP
1 First Canadian Place
100 King Street West, Suite 1600
Toronto ON M5X 1G5
Attn: **Clifton Prophet/ Sam Gabor/ Katherine Yurkovich**
Telephone (416) 862-3509/ (403) 298-1946/ (416) 862-4342
Facsimile (416) 862-7661
Email: clifton.prophet@gowlingwlg.com /
sam.gabor@gowlingwlg.com / kate.yurkovich@gowlingwlg.com
File No. G10088627

DATE ON WHICH ORDER WAS PRONOUNCED: Monday, January 26, 2026

LOCATION AT WHICH ORDER WAS MADE: Calgary Courts Centre

NAME OF JUSTICE WHO MADE THIS ORDER: The Honourable Justice M. H. Bourque

WHERE UPON the application of Canacol Energy Ltd., 2654044 Alberta Ltd., Canacol Energy ULC, 2498003 Alberta ULC, Cantana Energy GMBH, CNE Oil & Gas S.R.L, Canacol Energy Colombia S.A.S., Shona Holding GMBH, CNE Energy S.A.S., and CNE Oil & Gas S.A.S. (collectively, the “**Applicants**”); **AND UPON** having read the Affidavit of Jason Bednar sworn January 9, 2026 (the “**Bednar Affidavit #5**”); **AND UPON** hearing from counsel for the Applicants, counsel for KPMG Inc. in its capacity as the Court-appointed monitor in these proceedings (in such capacity, the “**Monitor**”), counsel for the ad hoc committee of the Applicants’ senior unsecured noteholders (in such capacity, the “**Ad Hoc Committee**”) providing the Applicants with debtor-in-possession interim financing pursuant to section 11.2 of the *Companies’ Creditors Arrangement Act* (Canada) (in such capacities, the “**DIP Lenders**”) and counsel for any other party in attendance; **AND UPON** reading the Third Report of the Monitor dated January 13, 2026 (“**Third Report**”); **AND UPON** reviewing the Affidavit of Service of Arriane Tano sworn January 12, 2026; **AND UPON** the application being heard on January 16, 2026; **IT IS HEREBY ORDERED AND DECLARED THAT:**

SERVICE AND DEFINITIONS

1. The time for service of the notice of application for this order (this “**Order**”) is hereby abridged and deemed good and sufficient and this application is properly returnable today, and no person other than those persons served is entitled to service of the notice of the application.

2. Capitalized terms used in this Order and not otherwise defined herein shall have the meanings ascribed to them in the SISP or Second Amended and Restated Initial Order of this Court dated December 11, 2025 (the “**SARIO**”).

STAY EXTENSION

3. The Stay Period is hereby extended up to and including June 27, 2026.

SALE AND INVESTMENT SOLICITATION PROCESS

4. The sale and investment solicitation process attached as Schedule “A” hereto (the “**SISP**”) is hereby approved and each of the Applicants, the Sale Advisor (as defined below) and Monitor are authorized and directed to implement the SISP pursuant to the terms thereof. The Applicants, the Sale Advisor and the Monitor are hereby authorized and directed to perform their respective obligations and to do all things as are reasonably necessary to conduct and give full effect to the SISP and carry out their respective obligations thereunder, subject to prior approval of the Court being obtained before completion of any transaction(s) pursuant to the SISP.
5. The Applicants, the Sale Advisor and the Monitor and their respective affiliates, partners, directors, employees, legal advisors, agents and controlling persons, shall have no liability with respect to any and all losses, claims, damages or liabilities whatsoever to any person or party in connection with or as a result of the SISP, except to the extent of losses, claims, damages or liabilities that arise or result from the fraud, gross negligence or wilful misconduct of the Applicants, the Sale Advisor or the Monitor, as the case may be, in performing their respective obligations under the SISP, as determined by this Court.

RETENTION OF SALE ADVISOR

6. The Applicants are hereby authorized to engage Moelis & Company LLC as the Applicants’ sale advisor (the “**Sale Advisor**”) pursuant to the terms of the Engagement Letter between the Applicants and the Sale Advisor dated January 3, 2026 (the “**Engagement Letter**”), an unredacted copy of which is appended as Confidential Exhibit

1 to the Bednar Affidavit. The Engagement Letter is approved, *nunc pro tunc* to the date of the Engagement Letter, and the Applicants are authorized and directed to do all things as are reasonably necessary to conduct and give effect to the Engagement Letter and carry out their obligations thereunder, including payment of amounts due to be paid pursuant to the terms of the Engagement Letter.

PROTECTION OF PERSONAL INFORMATION

7. Pursuant to section 20(e) of the *Personal Information Protection Act* (Alberta), and any similar legislation in any other applicable jurisdictions, the Applicants, the Sale Advisor and/or the Monitor and their respective advisors are hereby authorized and permitted to disclose and transfer to prospective SISP participants that are party to a non-disclosure agreement with the Applicants (each, a “**SISP Participant**”) and their respective advisors personal information of identifiable individuals, but only to the extent required to negotiate or attempt to complete a transaction pursuant to the SISP (a “**Transaction**”). Each SISP Participant to whom such personal information is disclosed shall maintain and protect the privacy of such information and limit the use of such information to the SISP Participant’s evaluation for the purpose of effecting a Transaction, and, if a SISP Participant does not complete a Transaction, shall return all such information to the Applicants or the Monitor, or, in the alternative, destroy all such information and provide confirmation of its destruction if requested by the Applicants or the Monitor. Any Successful Bidder shall maintain and protect the privacy of such information and, upon closing of the Transaction(s) contemplated in the Successful Bid(s), shall be entitled to use the personal information provided to it that is related to the Business and/or Property acquired pursuant to the SISP in a manner that is in all material respects identical to the prior use of such information by the Applicants, and shall return all other personal information to the Monitor or the Applicants, or ensure that all other personal information is destroyed and provide confirmation of its destruction if requested by the Monitor or the Applicants.

SEALING

8. Confidential Exhibit 1 to the Bednar Affidavit shall be sealed and kept confidential until the earlier of (i) the consummation of a Transaction under the SISP, and (ii) further Order of this Court, to be shown only to a Justice of the Court of King's Bench of Alberta, and accordingly, shall be filed with the Clerk of the Court who shall keep the Confidential Exhibit in a sealed envelope, which shall be clearly marked with the style of cause in this action and a notice stating:

SEALED PURSUANT TO THE ORDER OF THE
HONOURABLE JUSTICE M. H. BOURQUE DATED JANUARY
16, 2026 (THE "SISP ORDER"). TO REMAIN SEALED UNDER
ACTION NO. 2501-18462 UNTIL THE FILING OF A
CERTIFICATE OF THE MONITOR CONFIRMING THE
COMPLETION OF A TRANSACTION IN ACCORDANCE
WITH THE SISP ORDER OR FURTHER ORDER OF THE
COURT.

APPROVAL OF REPORTS AND ACTIVITIES OF MONITOR

9. The Third Report is approved, and the actions, conduct and activities of the Monitor set out therein are approved.

GENERAL

10. The Applicants and Monitor may apply to this court for advice and directions with respect to the discharge of their duties under or the interpretation of this Order or the SISP at any time.
11. Service of this Order shall be deemed to be achieved by delivering a copy of this Order to those parties listed on the Service List prepared by counsel to the Applicants.
12. This Court hereby requests the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada, the United States of America, Colombia or in any other foreign jurisdiction, to give effect to this Order and to assist the Applicants, the Monitor and their respective 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 Applicants and to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Monitor in any foreign proceeding, or to assist the Applicants, and the Monitor and their respective agents in carrying out the terms of this Order.

13. Any interested party may apply to this Court to vary or amend this Order on not less than 7 days' notice to the Service List maintained by the Applicants in this proceeding and to any other party likely to be affected by the order sought or upon such other notice, if any, as this Court may order
14. This Order and all of its provisions are effective as of 12:01 a.m. Mountain Standard Time on the date of this Order.



Justice of the Court of King's Bench of Alberta

SCHEDULE "A"
SALE AND INVESTMENT SOLICITATION PROCESS

SALE AND INVESTMENT SOLICITATION PROCESS

INTRODUCTION

On November 18, 2025, the Court of King's Bench of Alberta (the "**Court**") granted an initial order (the "**Initial Order**"), among other things, granting protection to Canacol Energy Ltd. ("**Canacol**") and 2654044 Alberta Ltd., Canacol Energy ULC, 2498003 Alberta ULC, Canacol Energy Colombia S.A.S., CNE Energy S.A.S., Cantana Energy GMBH, CNE Oil & Gas S.R.L., Shona Holding GMBH and CNE Oil & Gas S.A.S. (collectively together with Canacol, the "**CCAA Applicants**") under the *Companies' Creditors Arrangement Act* ("**CCAA**") and appointed KPMG Inc. as monitor (in such capacity, the "**Monitor**") in the CCAA proceedings. On November 28, 2025, the Court granted an amended and restated initial order.

On December 11, 2025, the Court granted a second amended and restated initial order (the "**SARIO**"), among other things, approving interim financing (the "**DIP Financing**") pursuant to that certain Canacol DIP Loan Commitment Letter dated December 2, 2025 (as amended and restated from time to time, the "**DIP Commitment Letter**") between the CCAA Applicants, the guarantor parties thereto, and the lender signatories thereto (the "**DIP Lenders**") who are of holders of Canacol's \$500,000,000 of 5.75% senior unsecured notes due 2028 (the "**Senior Unsecured Notes**") and participants in an ad hoc committee of the Senior Unsecured Notes (as may be reconstituted from time to time, the "**Ad Hoc Committee**" and the advisors to the Ad Hoc Committee, the "**Ad Hoc Committee Advisors**"),¹ and granting a super-priority charge securing all obligations owing under the DIP Commitment Letter (the "**DIP Obligations**").

On January 16, 2026, the Court granted an order (the "**SISP Approval Order**") that, among other things, (a) approved the engagement by Canacol of Moelis & Company LLC to act as sale advisor (the "**Sale Advisor**") and (b) authorized Canacol, with the assistance of the Sale Advisor and under the supervision of the Monitor, to implement a sale and investment solicitation process in accordance with the terms hereof (the "**SISP**").

Capitalized terms that are not defined herein have the meanings ascribed thereto in SARIO or the SISP Approval Order, as applicable.

The SISP is intended to solicit interest in and opportunities for a sale of, or investment in, all or substantially all of the property, assets and undertakings (the "**Property**") and/or business operations (the "**Business**") of Canacol and/or its direct and indirect subsidiaries and affiliates (collectively, the "**Canacol Entities**") in each case that constitute an Acceptable Transaction (as defined herein). Such opportunities may include one or more of a restructuring, recapitalization or other form of reorganization of the Business and affairs of the Canacol Entities as a going concern,

¹ The Ad Hoc Committee Advisors are: Cassels Brock & Blackwell LLP, Davis Polk & Wardwell LLP, Houlihan Lokey Assessoria Financeira Ltda, Garrigues S.L.P., and such other advisors as may be retained by the Ad Hoc Committee.

or a sale of all, substantially all or one or more components of the Canacol Entities' Property and Business as a going concern or otherwise.

The SISP will be conducted by Canacol through the Sale Advisor and under the supervision of the Monitor.

Parties who wish to have their bids and/or proposals considered shall be expected to participate in this SISP as conducted by the Sale Advisor.

OPPORTUNITY

1. The SISP is intended to solicit interest in, and opportunities for a sale of, or investment in, all or part of the Canacol Entities' Property or Business (the "**Opportunity**").
2. In order to maximize the number of participants that may have an interest in the Opportunity, the SISP will provide for the solicitation of interest for:
 - a. the sale of the Canacol Entities' interest in the Property. In particular, interested parties may submit proposals to acquire all or substantially all of the Property of the Canacol Entities (a "**Sale Proposal**"); and
 - b. an investment in the Canacol Entities' Business as a going concern. Such proposals for the Business may take the form of an investment in the Business including by way of a plan of compromise or arrangement pursuant to the CCAA (an "**Investment Proposal**").
3. Except to the extent otherwise set forth in a definitive sale or investment agreement with a Successful Bidder (as defined herein), any Sale Proposal or any Investment Proposal will be made on an "as is, where is" basis and without surviving representations or warranties of any kind, nature, or description by the Monitor, the Sale Advisor or the Canacol Entities, or any of their respective affiliates, agents, advisors or estates, and, in the event of a sale, all of the right, title and interest of the Canacol Entities in and to the Property to be acquired will be sold free and clear of all pledges, liens, security interests, encumbrances, claims, charges, options, and interests therein and thereon pursuant to court orders, except as otherwise provided in such court orders.

SOLICITATION OF INTEREST

4. As soon as reasonably practicable following the SISP Approval Order, the Sale Advisor shall, in consultation with Canacol and the Monitor:
 - a. prepare: (i) in consultation with the Ad Hoc Committee, a process summary (the "**Teaser Letter**") describing the Opportunity, outlining the process under the SISP and inviting recipients of the Teaser Letter to express their interest in the Property or Business pursuant to the SISP, and a confidential information memorandum ("**CIM**"); and (ii) through the assistance of Canacol's counsel, a non-disclosure

agreement in form and substance satisfactory to Canacol and the Monitor (an “NDA”);

- b. gather and review all required due diligence material to be provided to interested parties and establish a secure, electronic data room (the “**Data Room**”), which will be maintained and administered by the Sale Advisor during the SISP;
 - c. prepare a list of potential bidders, including: (i) parties that have approached Canacol, the Sale Advisor, the Monitor, the Ad Hoc Committee or other stakeholder of Canacol, indicating an interest in the Opportunity; and (ii) local and international strategic and financial parties who the Sale Advisor, in consultation with Canacol, the Monitor and the Ad Hoc Committee believe may be interested in purchasing all or part of the Business or Property or investing in Canacol pursuant to the SISP (collectively, the “**Known Potential Bidders**”);
 - d. cause a notice of the SISP (the “**Notice**”) to be published in the *Globe and Mail* (National Edition), and/or other industry publications determined to be beneficial or appropriate, once approved by the Court; and
 - e. send the Teaser Letter and NDA, in form acceptable to the Monitor and the Sale Advisor, to all Known Potential Bidders and to any other party who requests a copy of the Teaser Letter and NDA or who is identified to the Sale Advisor by Canacol, the Monitor, the DIP Lenders, the Ad Hoc Committee or such other stakeholder of Canacol as a potential bidder as soon as reasonably practicable after such request or identification, as applicable.
5. As soon as reasonably practicable following the SISP Approval Order, (i) Canacol shall, in consultation with the Ad Hoc Committee, issue a press release setting out the information contained in the Notice and such other relevant information that Canacol, in consultation with the Sale Advisor and the Monitor, considers appropriate and (ii) the Monitor shall post a copy of the Notice on its Website.

PHASE 1: NON-BINDING LETTERS OF INTENT

Qualified Bidders

6. Any party who expresses a desire to participate in the SISP (a “**Potential Bidder**”) must, prior to being given any additional information beyond the Teaser Letter such as the CIM or access to the Data Room, provide to the Sale Advisor written confirmation of the identity of the Potential Bidder, the contact information for such Potential Bidder, and full disclosure of the direct and indirect principals and equity holders of the Potential Bidder, and such other information that will enable Canacol, the Sale Advisor and the Monitor to determine that such person is likely based on the availability of financing, experience and other considerations, to be able to consummate a sale or investment pursuant to the SISP.

7. If a Potential Bidder has delivered the NDA and the confirmation contemplated in paragraph 6 above with disclosure that is satisfactory to Canacol, in consultation with the Sale Advisor and the Monitor, then such Potential Bidder will be deemed to be a “**Phase 1 Qualified Bidder**”.
8. At any time during Phase 1 of the SISP, Canacol, in consultation with the Sale Advisor and the Ad Hoc Committee, and with the consent of the Monitor, may in its reasonable business judgement eliminate a Phase 1 Qualified Bidder from the SISP, in which case such bidder will be eliminated from the SISP and will no longer be a “Phase 1 Qualified Bidder” for the purposes of the SISP.

Due Diligence

9. The Sale Advisor, in consultation with Canacol and the Monitor, subject to competitive and other business considerations, will afford each Phase 1 Qualified Bidder such access to due diligence materials through the Data Room and information relating to the Property and Business as it deems appropriate. Due diligence access may further include management presentations with the participation of the Monitor and Canacol where appropriate, on-site inspections, and other matters which a Phase 1 Qualified Bidder may reasonably request and to which the Sale Advisor, in its reasonable business judgment and in consultation with Canacol and the Monitor, may agree. The Sale Advisor will designate a representative to coordinate all reasonable requests for additional information and due diligence access from Phase 1 Qualified Bidders and the manner in which such requests must be communicated. Further and for the avoidance of doubt, selected due diligence materials may be withheld from certain Phase 1 Qualified Bidders if Canacol, in consultation with the Sale Advisor and the Monitor, determines such information to represent proprietary or commercially sensitive competitive information.
10. Phase 1 Qualified Bidders must rely solely on their own independent review, investigation and/or inspection of all information relating to the Property and Business in connection with their participation in the SISP and any transaction they enter into with Canacol.

Submission of Non-Binding Letters of Intent

11. A Phase 1 Qualified Bidder who wishes to pursue the Opportunity further must deliver an executed letter of intent (“**LOI**”), identifying such bidder’s interest in each specific Property or Business, to the Sale Advisor and the Monitor at the addresses specified in Schedule “A” hereto (including by email or fax transmission), so as to be received by them not later than 5:00 PM (Mountain Daylight Time) on or before March 9, 2026 (the “**Phase 1 Bid Deadline**”). Copies of each LOI (including Qualified LOIs) received by the Sale Advisor and/or Monitor will be circulated to the Ad Hoc Committee Advisors, Macquarie (as defined herein) and the advisors to the RCF Lenders (as defined herein) (the “**RCF Lender Advisors**”), promptly following the Phase 1 Bid Deadline.
12. An LOI so submitted will be considered a qualified LOI (a “**Qualified LOI**”) only if all of the following conditions are satisfied:

- a. it is submitted to the Sale Advisor and the Monitor on or before the Phase 1 Bid Deadline by a Phase 1 Qualified Bidder;
- b. it contains an indication of whether the Phase 1 Qualified Bidder is making a:
 - i. Sale Proposal; or
 - ii. an Investment Proposal;
- c. in the case of a Sale Proposal, it identifies or contains the following:
 - i. the aggregate and net purchase price, in US dollars, including details of any liabilities to be assumed by the Phase 1 Qualified Bidder, key assumptions supporting the valuation, and any proposed deductions;
 - ii. a description of the Property that is expected to be subject to the transaction and any of the Property, obligations or liabilities for each Property expected to be excluded;
 - iii. a specific indication of the financial capability (including analysis of the Phase 1 Qualified Bidder's current available cash liquidity, summary of key covenants and or restrictions on such liquidity), together with evidence of such capability, of the Phase 1 Qualified Bidder and the expected structure and financing of the transaction;
 - iv. a detailed outline of any additional due diligence required to be conducted in order to submit a final and binding offer;
 - v. an acknowledgement that any Sale Proposal transaction will be on an "as-is, where-is" basis;
 - vi. all conditions to closing that the Phase 1 Qualified Bidder may wish to impose;
 - vii. an acknowledgement that any Sale Proposal transaction will need to provide for the payment of allowed pre-petition claims from social security institutes in Colombia, withholding taxes payable in Colombia and incurred through the closing date of the transaction and the payment of certain Colombian creditors deemed to be necessary by Canacol, with the consent of the Monitor, for the operation of the Canacol Entities in Colombia;
 - viii. a description of the conditions and approvals required for a final and binding offer and the expected timeline for same;
 - ix. an acknowledgement that the Sale Proposal may be shared on a confidential basis with the Ad Hoc Committee, Macquarie and the RCF Lenders and

such other stakeholders of Canacol as Canacol and the Monitor may determine necessary, and their respective advisors; and

- x. any other terms or conditions of the Sale Proposal that the Phase 1 Qualified Bidder believes are material to the proposed transaction;
- d. in the case of an Investment Proposal, it identifies or contains the following:
- i. a description of how the Phase 1 Qualified Bidder proposes to structure the proposed investment in the Business;
 - ii. the aggregate amount of the equity and/or debt investment to be made in the Business in US dollars and key assumptions supporting the valuation;
 - iii. the underlying assumptions regarding the pro forma capital structure and proposed recovery to creditors;
 - iv. a specific indication of the sources of capital for the Phase 1 Qualified Bidder and the structure and financing of the proposed transaction;
 - v. a description of the conditions and approvals required for a final and binding offer and the expected timeline for same;
 - vi. an outline of any additional due diligence required to be conducted in order to submit a final and binding offer and expected timeline for same;
 - vii. an acknowledgement that any Investment Proposal is made on an “as-is, where-is” basis;
 - viii. an acknowledgement that any Investment Proposal transaction will need to provide for the payment of allowed pre-petition claims from social security institutes in Colombia, withholding taxes payable in Colombia and incurred through the closing date of the transaction, and the payment of certain Colombian creditors deemed to be necessary by Canacol, with the consent of the Monitor, for the operation of the Canacol Entities in Colombia;
 - ix. all conditions to closing that the Phase 1 Qualified Bidder may wish to impose;
 - x. an acknowledgement that the Investment Proposal may be shared on a confidential basis with the Ad Hoc Committee, Macquarie and the RCF Lenders and such other stakeholders of Canacol as Canacol and the Monitor may determine necessary, and their respective advisors; and
 - xi. any other terms or conditions of the Investment Proposal that the Phase 1 Qualified Bidder believes are material to the proposed transaction; and

- e. in the case of either a Sale Proposal or an Investment Proposal:
 - i. it does not contain any requirement or provision for a break fee or reimbursement of expenses associated with submitting the Sale Proposal or Investment Proposal, conducting due diligence in respect thereof or otherwise.
- 13. Canacol, in consultation with the Sale Advisor, and with the consent of the Monitor and the Ad Hoc Committee, may waive compliance with any one or more of the requirements specified above and deem such non-compliant bids to be a Qualified LOI. For the avoidance of doubt, the completion of any Sale Proposal or Investment Proposal shall be subject to the approval of the Court and the requirement of approval of the Court may not be waived.

Assessment of Phase 1 Bids

- 14. Following the Phase 1 Bid Deadline, Canacol will assess the Qualified LOIs in consultation with the Sale Advisor, the Monitor, the Ad Hoc Committee, Macquarie and the RCF Lenders. If it is determined by Canacol, with the consent of the Monitor and Ad Hoc Committee, that a Phase 1 Qualified Bidder that has submitted a Qualified LOI: (a) has a bona fide interest in completing a Sale Proposal or Investment Proposal (as the case may be); and (b) has the financial capability (based on availability of financing, experience and other considerations) to consummate such a transaction based on the financial information provided, then such Phase 1 Qualified Bidder will be deemed to be a **“Phase 2 Qualified Bidder”**, provided that Canacol may, in consultation with the Sale Advisor, Macquarie and the RCF Lenders and with the consent of the Monitor and the Ad Hoc Committee, limit the number of Phase 2 Qualified Bidders (and thereby eliminate some Phase 1 Qualified Bidders from the process). Only Phase 2 Qualified Bidders shall be permitted to proceed to Phase 2 of the SISP. If it is determined by Canacol, with the consent of the Monitor and Ad Hoc Committee, that no Phase 1 Qualified Bidder has submitted a Qualified LOI, the SISP shall be terminated.
- 15. Notwithstanding anything contained herein, within 5 days after the Phase 1 Bid Deadline, and provided that the SISP has not otherwise been terminated in accordance with its terms, each of the DIP Lenders, the members of the Ad Hoc Committee, Macquarie, each of the RCF Lenders and members of the senior management team of Canacol shall notify the Sale Advisor and the Monitor in writing whether it intends to bid or otherwise support or participate in a third party bid to be made in Phase 2 of the SISP. If a notice of intention to bid or support or participate in a bid is received by the Sale Advisor and the Monitor, each such party who delivered such a notice shall be deemed to be a Phase 2 Qualified Bidder and shall, thereafter, immediately lose any consultation or consent rights otherwise provided herein and, in the case of Canacol, be excluded from all internal communications and decision making by Canacol, its board, or their respective advisors as it relates to the SISP; provided that, with respect to members of the Ad Hoc Committee, any of the DIP Lenders, Macquarie and/or any of the RCF Lenders that provide the notice described herein, any such consultation or consent rights lost by those parties, as applicable, shall be

reinstated upon the withdrawal by those parties of, or rejection of, any such bid. Subject to such reinstatement, references to DIP Lenders, Ad Hoc Committee, Macquarie, RCF Lenders or to Canacol from this point in the SISF forward (including the Auction Procedures at Schedule “B” hereto) shall exclude any parties, lenders, members, employees, consultants who are deemed to be a Phase 2 Qualified Bidder.

16. The Sale Advisor, in consultation with Canacol, the Monitor, and the Ad Hoc Committee, will prepare a bid process letter for Phase 2 (the “**Bid Process Letter**”), which will include a draft purchase/investment agreement (the “**Draft Purchase/Investment Agreement**”) which will be made available in the Data Room, and the Bid Process Letter will be sent to all Phase 2 Qualified Bidders who are invited to participate in Phase 2. The process set out in the Bid Process Letter may, with the consent of the Ad Hoc Committee and the Monitor, include a stalking horse bid from a Phase 2 Qualified Bidder (on customary terms including bid protections) to be proposed as part of Phase 2.

PHASE 2: FORMAL BINDING OFFERS

17. Phase 2 Qualified Bidders that wish to make a formal Sale Proposal or an Investment Proposal shall submit to the Sale Advisor and the Monitor at the address specified in Schedule “A” hereto (including by email or fax transmission), a sealed binding offer that complies with all of the following requirements, so as to be received by them by 5:00 pm. (Mountain Daylight Time) on April 6, 2026 (the “**Phase 2 Bid Deadline**”):

- a. it complies with all of the requirements set forth in respect of the Phase 1 Qualified LOIs;
- b. the proposed purchase price or consideration provides for: (i) the payment in full in cash on closing of all amounts outstanding that are secured by each of the Charges (other than the DIP Charge, which is addressed in next clause); (ii) the payment in full in cash on closing of the DIP Obligations then outstanding, unless otherwise agreed to by the DIP Lenders in accordance with the DIP Commitment Letter; (iii) the payment in full in cash on closing of all allowed claims under that certain Credit and Guarantee Agreement dated as of September 3, 2024, by and among Canacol, as Borrower, the guarantors party thereto, the Lenders party thereto, the Hedge Providers from time to time party thereto, the Issuing Banks from time to time party thereto, and Macquarie Bank Ltd. (“**Macquarie**”), as Administrative Agent and Collateral Agent, unless otherwise agreed to by the Macquarie in its sole discretion; (iv) the payment in full in cash or the assumption of all obligations ranking in priority to unsecured claims against the CCAA Applicants; (v) the payment in full in cash of all allowed pre-petition claims from social security institutes in Colombia, withholding taxes payable in Colombia and incurred through the closing date of the transaction, and the payment of certain Colombian creditors deemed to be necessary by Canacol, with the consent of the Monitor, for the operation of the Canacol Entities in Colombia; and (vi) unless the proposed purchase price is sufficient to repay in full in cash all obligations outstanding under the Senior Unsecured Notes and the proven claims of other unsecured creditors of Canacol,

consideration to the holders of Senior Unsecured Notes in form and amount acceptable to the Ad Hoc Committee in its sole discretion (collectively, an “**Acceptable Transaction**”);

- c. it contains: (i) duly executed binding transaction document(s) generally in the form of the Draft Purchase/Investment Agreement; and (ii) a blackline to the Draft Purchase/Investment Agreement;
- d. it contains evidence of authorization and approval from the Phase 2 Qualified Bidder’s board of directors (or comparable governing body) and/or shareholders, as necessary and applicable;
- e. it (either individually or in combination with other bids that make up one bid) is an offer to purchase or make an investment in some or all of the Property or Business on terms and conditions reasonably acceptable to Canacol and the Monitor;
- f. it includes a letter stating that the Phase 2 Qualified Bidder’s offer is irrevocable until the selection of the Successful Bidder (as defined herein), provided that if such Phase 2 Qualified Bidder is selected as the Successful Bidder, its offer shall remain irrevocable until the earlier of: (i) the closing of the transaction with the Successful Bidder, and (ii) 30 days from the Sale Approval Application (as defined herein), subject to further extensions as may be agreed to under the applicable transaction agreement(s);
- g. it provides written evidence of a firm, irrevocable financial commitment for all required funding or financing, in form and substance acceptable to Canacol, the Monitor and in consultation with the Ad Hoc Committee;
- h. it is not conditional upon the outcome of unperformed due diligence by the bidder, and/or obtaining financing;
- i. it specifies any regulatory or other third party approvals that are required to be satisfied in order to complete the transaction;
- j. it fully discloses the identity of each entity that will be entering into the transaction or the financing, or that is participating or benefiting from such bid;
- k. it is accompanied by a cash deposit (the “**Deposit**”) of 10%: (i) of the purchase price offered in respect of a Sale Proposal; (ii) of the total new investment contemplated in respect of an Investment Proposal; or (iii) of the total cash consideration, which shall be paid to the Monitor by wire transfer (to a bank account specified by the Monitor) and held in trust by the Monitor in accordance with this SISF;
- l. it includes acknowledgments and representations of the Phase 2 Qualified Bidder that: (i) it has had an opportunity to conduct any and all due diligence regarding Canacol and the Property and Business prior to making its offer; (ii) it has relied

solely upon its own independent review, investigation and/or inspection of any documents, the Business and/or the Property in making its bid; (iii) it did not rely upon any written or oral statements, representations, warranties, or guarantees whatsoever made by the Sale Advisor, Canacol, the Monitor, the DIP Lenders or the members of the Ad Hoc Committee, or any of their respective advisors or representatives, whether express, implied, statutory or otherwise, regarding the Business, Property, or Canacol, or the accuracy or completeness of any information provided in connection therewith, except as expressly stated in the definitive transaction agreement(s) signed by Canacol; (iv) it has not engaged in any collusion with respect to the SISP; and (v) it acknowledges that the completion of its Sale Proposal or Investment Proposal, as applicable, is subject to the approval of the Court;

- m. demonstrates that it is capable of being consummated by no later than June 30, 2026, as may be extended with the consent of Canacol, the Monitor and the Ad Hoc Committee (the “**Outside Date**”); and
 - n. it is received by the Phase 2 Bid Deadline.
18. Copies of each Phase 2 Bid received by the Sale Advisor and/or Monitor will be circulated to the Ad Hoc Committee Advisors, Macquarie and the RCF Lender Advisors, promptly following the Phase 2 Bid Deadline.
19. Following the Phase 2 Bid Deadline, Canacol, in consultation with the Sale Advisor, the Monitor, the Ad Hoc Committee, Macquarie and the RCF Lenders, will assess the Phase 2 Bids received with respect to the Property or Business. Canacol, in consultation with the Sale Advisor, and with the consent of the Monitor and the Ad Hoc Committee, will designate the most competitive bids that comply with the foregoing requirements to be “**Phase 2 Qualified Bids**”. Only Phase 2 Qualified Bidders whose bids have been designated as Phase 2 Qualified Bids are eligible to become the Successful Bidder(s).
20. Canacol, with the consent of the Monitor and the Ad Hoc Committee, may waive strict compliance with any one or more of the requirements specified above and deem such non-compliant bids to be a Phase 2 Qualified Bid, provided that Canacol may not waive compliance with the requirements contained in subsection 17.b without the consent of the DIP Lenders, Macquarie and the Ad Hoc Committee, as applicable each in their sole discretion.
21. The Sale Advisor, upon receiving instructions from Canacol, and within five (5) business days of the Phase 2 Bid Deadline (or such later time as may be agreed to by Canacol, the Monitor and the Ad Hoc Committee), shall notify each Phase 2 Qualified Bidder in writing as to whether its bid constitutes a Phase 2 Qualified Bid.
22. Without limiting anything else herein, Canacol, in consultation with the Sale Advisor, the Ad Hoc Committee and the Monitor, may aggregate separate bids from unaffiliated Phase 2 Qualified Bidders to create one or more “Phase 2 Qualified Bid(s)”, subject to the

requirements contained in subsection 17.b that require the consent of the DIP Lenders, Macquarie and the Ad Hoc Committee, as applicable each in their sole discretion.

Evaluation of Competing Bids

23. A Phase 2 Qualified Bid will be evaluated based upon several factors, including, without limitation, whether the proposed purchase price or consideration provided under such Phase 2 Qualified Bid is equal to or greater than the proposed purchase price or consideration necessary to be an Acceptable Transaction under subsection 17.b unless agreed to otherwise by the DIP Lenders, Macquarie and the Ad Hoc Committee, as applicable, each in their sole discretion, and other items such as the net value and form of consideration to be provided by such bid, the identity and circumstances of the Phase 2 Qualified Bidder, any conditions attached to the bid and the expected feasibility of such conditions, the proposed transaction documents, factors affecting the speed, certainty and value of the transaction, the assets included or excluded from the bid, any related restructuring costs, the likelihood and timing of consummating such transactions, and the ability of the bidder to finance and ultimately consummate the proposed transaction by the Outside Date, each as evaluated by Canacol, in consultation with the Sale Advisor, the Monitor and the Ad Hoc Committee.
24. If no Phase 2 Qualified Bids are received by the Phase 2 Bid Deadline, the SISP shall be terminated.

Selection of Successful Bid

25. If one or more Phase 2 Qualified Bids has been received, Canacol, in consultation with the Sale Advisor, the Monitor, the Ad Hoc Committee, Macquarie and the RCF Lenders: (a) will review and evaluate each Phase 2 Qualified Bid, and shall be permitted to negotiate the terms of any Phase 2 Qualified Bid with the applicable Phase 2 Qualified Bidder, and such Phase 2 Qualified Bid may be amended, modified or varied as a result of such negotiations, and (b) will, with the consent of the Ad Hoc Committee, identify the highest or otherwise best bid or bids (the “**Successful Bid**”), and the Phase 2 Qualified Bidder making such Successful Bid (the “**Successful Bidder**”) for any particular Property or the Business in whole or part. For greater certainty, a Successful Bid must contain a purchase price and/or such other consideration to be paid by the Successful Bidder that is equal to or greater than the purchase price or consideration necessary to qualify as an Acceptable Transaction under subsection 17.b unless agreed to otherwise by the DIP Lenders, Macquarie and the Ad Hoc Committee, each as applicable, in their sole discretion. The determination of any Successful Bid by Canacol shall be subject to approval by the Court.
26. If two or more Phase 2 Qualified Bids has been received, Canacol may, with the consent of the Monitor and the Ad Hoc Committee, proceed with an auction process to determine the Successful Bid (the “**Auction**”), which Auction shall be administered in accordance with the terms set forth in **Schedule “B”** hereto. Forthwith upon determining to proceed with an Auction, Canacol shall provide written notice to each Phase 2 Qualified Bidder,

along with copies of all Phase 2 Qualified Bids and a statement by Canacol specifying which Phase 2 Qualified Bid is the leading bid and the start date of the Auction.

27. Canacol, with the consent of the Monitor and the Ad Hoc Committee, (i) shall have no obligation to select a Successful Bid; and (ii) reserves the right to reject any or all Phase 2 Qualified Bids.

Sale Approval Hearing

28. At the hearing of the application to approve any transaction with a Successful Bidder (the “**Sale Approval Application**”), Canacol shall seek, among other things, approval from the Court to consummate any Successful Bid. All of the Phase 2 Qualified Bids other than the Successful Bid, if any, shall be deemed rejected by Canacol on and as of the date of approval of the Successful Bid by the Court.
29. Any Deposit delivered with a Phase 2 Qualified Bid that is not selected as a Successful Bid, will be returned to the applicable bidder within ten (10) business days of the date on which the Successful Bid is approved by the Court, or such earlier date as may be determined by the Monitor, in consultation with Canacol and the Sale Advisor.

CONFIDENTIALITY, STAKEHOLDER/BIDDER COMMUNICATION AND ACCESS TO INFORMATION

30. All information provided by Canacol to parties pursuant to this SISP is confidential and shall be subject to an applicable NDA or such other confidentiality agreement between Canacol and such party.
31. Except as otherwise permitted herein, participants and prospective participants in the SISP shall not be permitted to receive any information that is not made generally available to all participants relating to the number or identity of Potential Bidders, Phase 1 Qualified Bidders, LOIs, Phase 2 Qualified Bidders, Phase 2 Qualified Bids, the details of any bids submitted or the details of any confidential discussions or correspondence between Canacol and/or the Sale Advisor, and/or the Monitor and/or the DIP Lenders and/or the Ad Hoc Committee and/or Macquarie and/or the RCF Lenders, and such other bidders or Potential Bidders in connection with the SISP. Canacol may however, with the consent of the applicable participants and the Monitor, and in consultation with the Ad Hoc Committee disclose such information to other bidders for the purpose of seeking to combine separate bids from Phase 1 Qualified Bidders or Phase 2 Qualified Bidders. Further, Canacol and the Monitor may disclose such information to the Ad Hoc Committee Advisors, the Ad Hoc Committee, Macquarie, the RCF Lenders and the RCF Lender Advisors in accordance with this SISP.
32. Except as otherwise permitted herein: (a) all discussions regarding a Sale Proposal, Investment Proposal, LOI or Phase 2 Bid should be directed through the Sale Advisor and/or the Monitor; and (b) under no circumstances should the management or any employee or director of Canacol or any stakeholder of Canacol, other than members of the

Ad Hoc Committee, the Ad Hoc Committee Advisors, Macquarie, the RCF Lenders and the RCF Lender Advisors, be contacted directly without the prior written consent of the Monitor and/or the Sale Advisor. Any such unauthorized contact or communication could result in exclusion of the interested party from the SISP.

33. Except as otherwise permitted herein, if it is determined by Canacol, in consultation with the Sale Advisor and the Ad Hoc Committee and with the consent of the Monitor, that it would be worthwhile to facilitate a discussion between a Phase 1 Qualified Bidder or Phase 2 Qualified Bidder (as applicable, depending on the stage of the SISP) and a stakeholder or other third party as a consequence of a condition to closing or potential closing condition identified by such bidder, Canacol may provide such bidder with the opportunity to meet with the relevant stakeholder or third party to discuss such condition or potential condition, with a view to enabling such bidder to seek to satisfy the condition or assess whether the condition is not required or can be waived. Any such meetings or other form of communication will take place on terms and conditions considered appropriate by the Monitor. The Monitor must be present (which may be by videoconference or teleconference) at all such meetings.
34. For greater certainty, nothing herein shall preclude a stakeholder from contacting potential bidders to advise that Canacol has commenced a SISP and that they should contact the Sale Advisor or the Monitor if they are interested.

SUPERVISION OF THE SISP

35. The Monitor will oversee, in all respects, the conduct of the SISP by Canacol and, without limitation to that supervisory role, the Monitor will participate in the SISP in the manner set out herein, and is entitled to receive all information in relation to the SISP.
36. This SISP does not, and will not be interpreted to create any contractual or other legal relationship between Canacol and any Phase 1 Qualified Bidder, any Phase 2 Qualified Bidder or any other party, other than as specifically set forth in any definitive agreement that may be signed by Canacol.
37. Without limiting the preceding paragraph, neither the Monitor nor the Sale Advisor shall have any liability whatsoever to any person or party, including without limitation, any Potential Bidder, Phase 1 Qualified Bidder, Phase 2 Qualified Bidder, the Successful Bidder, or any other creditor or other stakeholder of the Canacol Entities, for any act or omission related to the process contemplated by this SISP, except to the extent such act or omission is the result of gross negligence or willful misconduct by the Monitor or Sale Advisor. By submitting a bid, each Phase 1 Qualified Bidder, Phase 2 Qualified Bidder, or Successful Bidder shall be deemed to have agreed that it has no claim against the Monitor or Sale Advisor for any reason whatsoever, except to the extent such claim is the result of gross negligence or willful misconduct of the Monitor or Sale Advisor.
38. Participants in the SISP are responsible for all costs, expenses and liabilities incurred by them in connection with the submission of any LOI, bid, due diligence activities, and any

further negotiations or other actions whether or not they lead to the consummation of a transaction.

39. Canacol shall have the right to modify the SISP with the prior written approval of the Monitor and the Ad Hoc Committee if, in its reasonable business judgment, such modification will enhance the process or better achieve the objectives of the SISP; provided that the service list in these CCAA proceedings shall be advised of any substantive modification to the procedures set forth herein and any such party or Canacol have an opportunity to seek the intervention of the Court, as appropriate, to address any such substantive modifications.

Schedule “A”

Sale Advisor

Moelis & Company LLC

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Monitor

KPMG Inc. in its capacity as Monitor of Canacol and the other CCAA Applicants
Attention: Paul van Eyk (pvaneyk@kpmg.ca) / Duncan Lau (duncanlau@kpmg.ca)

With a copy to:

Bennett Jones LLP, counsel to Monitor
Attention: Raj Sahni (sahnir@bennettjones.com)

SCHEDULE “B”: AUCTION PROCEDURES

All capitalized terms used and not otherwise defined in this Schedule "B", have the respective meanings ascribed to them in the SISP.

1. **Auction.** If Canacol receives more than one Phase 2 Qualified Bid, Canacol may, with the consent of the Monitor and the Ad Hoc Committee, conduct and administer an Auction in accordance with the terms of the SISP. Instructions to participate in the Auction (including details regarding location and start time) will be provided to Qualified Parties (as defined herein) not less than 48 hours prior to the Auction.
2. **Participation.** Only parties that provided a Phase 2 Qualified Bid by the Phase 2 Bid Deadline (collectively, the “**Qualified Parties**”), shall be eligible to participate in the Auction. No later than 5:00 p.m. Eastern Standard Time on the day prior to the Auction, each Qualified Party must inform Canacol whether it intends to participate in the Auction. Canacol will promptly thereafter inform in writing the Monitor, Ad Hoc Committee, Macquarie, the lenders under that certain revolving credit and guaranty agreement dated as of February 14, 2023 (as same may have been amended or restated) between among others, Canacol, as borrower and Deutsche Bank Trust Company Americas, as administrative agent (the “**RCF Lenders**”), and each Qualified Party who has expressed its intent to participate in the Auction of the identity of all Qualified Parties that have indicated their intent to participate in the Auction.
3. **Auction Procedures.** The Auction shall be governed by the following procedures:
 - (a) **Attendance.** Only Canacol, the Qualified Parties, the Monitor, the Sale Advisor, the DIP Lenders, Ad Hoc Committee, RCF Lenders, Macquarie and each of their respective advisors (the “**Permitted Participants**”) will be entitled to attend the Auction, and only the Qualified Parties will be entitled to make any subsequent Overbids (as defined below) at the Auction;
 - (b) **No Collusion.** Each Qualified Party participating at the Auction shall be required to confirm on the record at the Auction that: (i) it has not engaged in any collusion with respect to the Auction and the bid process; and (ii) its bid is a good-faith *bona fide* offer and it intends to consummate the proposed transaction if selected as the Successful Bid (as defined below);
 - (c) **Minimum Overbid.** The Auction shall begin with the Qualified Bid that represents the highest or otherwise best Qualified Bid as determined by Canacol, in consultation with the Sale Advisor and the Ad Hoc Committee and with the consent of the Monitor (the “**Initial Bid**”), and any bid made at the Auction by a Qualified Party subsequent to Canacol’s announcement of the Initial Bid (each, an “**Overbid**”), must proceed in minimum additional cash increments of USD\$1,000,000;
 - (d) **Bidding Disclosure.** The Auction shall be conducted such that all bids will be made and received in one group conference room, on an open basis, and all Qualified

Parties and Permitted Participants will be entitled to be present for all bidding with the understanding that the true identity of each Qualified Party will be fully disclosed to all other Qualified Parties and that all material terms of each subsequent bid will be fully disclosed to all other Qualified Parties and the Permitted Participants throughout the entire Auction; provided, however, that Canacol, in its discretion, may establish separate conference rooms to permit interim discussions between Canacol, the Monitor, the DIP Lenders, the Ad Hoc Committee, Macquarie, the RCF Lenders and individual Qualified Parties with the understanding that all formal bids will be delivered in one group conference, on an open basis;

- (e) **Bidding Conclusion.** The Auction shall continue in one or more rounds and will conclude after each participating Qualified Party has had the opportunity to submit one or more additional bids with full knowledge and written confirmation of the then-existing highest bid(s); and
- (f) **No Post-Auction Bids.** No bids will be considered for any purpose after the Auction has concluded.

Selection of Successful Bid

- 4. **Selection.** Before the conclusion of the Auction, Canacol, in consultation with the Monitor, the Sale Advisor, the Ad Hoc Committee, Macquarie and the RCF Lenders, will:
 - (a) review each Qualified Bid, considering the factors set out in Section 17 of the SISP and, among other things, (i) the amount of consideration being offered and, if applicable, the proposed form, composition and allocation of same, (ii) the value of any assumption of liabilities or waiver of liabilities not otherwise accounted for in prong (i) above; (iii) the likelihood of the Qualified Party's ability to close a transaction by the Outside Date (including factors such as the transaction structure and execution risk, including conditions to, timing of, and certainty of closing; termination provisions; availability of financing and financial wherewithal to meet all commitments; and required governmental, regulatory or other approvals), (iv) the likelihood of the Court's approval of the Successful Bid, (v) the net benefit to Canacol and its stakeholders and (vi) any other factors Canacol may, consistent with its fiduciary duties, reasonably deem relevant; and (b) with the consent of the Monitor and the Ad Hoc Committee, identify the highest or otherwise best bid received at the Auction (the "**Successful Bid**" and the Qualified Party making such bid, the "**Successful Party**"). For greater certainty, a Successful Bid must contain a purchase price and/or such other consideration to be paid by the Successful Party that is equal to or greater than the purchase price or consideration necessary to qualify as an Acceptable Transaction under subsection 17.b unless agreed to otherwise by the DIP Lenders, Macquarie and the Ad Hoc Committee, each as applicable, in their sole discretion. The determination of any Successful Bid by Canacol shall be subject to approval by the Court.

5. **Acknowledgement.** The Successful Party shall complete and execute all agreements, contracts, instruments or other documents evidencing and containing the terms and conditions upon which the Successful Bid was made within five business days of the Successful Bid being selected as such, unless extended by Canacol, with the consent of the Monitor and the Ad Hoc Committee.

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CITATION: Hudson's Bay Company, 2025 ONSC 1804
COURT FILE NO.: CV-25-00738613-00CL
DATE: 20250319

**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, Elizabeth Pillon, Maria Konyukhova, Britnney Ketwaroo, Philip Yang and Nick Avis*, for the Applicants
Davis Bish, for Cadillac Fairview
Evan Cobb, for Bank of America
Linc Rogers and Caitlin McIntyre for Restore Capital LLC
Chad Kopach, for EY in the Receivership of Woodbine Mall Holdings Inc.
Lou Brzezinski, Alexandra Teodorescu and Nadav Amar, for TK Elevator (Canada) Ltd.
Haddon Murray, for Cominar Real Estate Investment Trust & Chanel ULC
Andrew Winton and Annecy Pang, for KingSett Capital Inc.
Sean Zweig, Michael Shakra and Thomas Gray, for the Court-appointed Monitor
Trevor Courtis and Heather Meredith, for Bank of Montreal and Desjardins Financial Security Life Assurance Company
Gilles Benchaya and Mandy Wu, for Restore Capital LLC and Bank of America
James D. Bunting, for Ivanhoe Cambridge Inc.
Robert J. Chadwick, Joseph Pasquariello and Andrew Harmes, for RioCan Real Estate Investment Trust
Tushara Weerasooriya, Jeffrey Levine and Guneev Bhinder, for B.H. Multi Com Corporation, B.H. Multi Color Corporation & Richline Group Canada Inc.
Gregg Galardi, US Counsel for File Agent (Restore Capital LLC) as DIP Lender
Isaac Belland, for LVMH Moet Hennessy Louis Vuitton SA
Jake Harris, for the DIP Lenders
Matthew Cressatti, for the Trustees of the Congregation of Knox's Church, Toronto
D.J. Miller and Andrew Nesbitt, for Oxford Properties Group, OMERS Realty Management Corporation, Yorkdale Shopping Centre Holdings Inc., Scarborough Town Centre Holdings Inc., Montez Hillcrest Inc., Hillcrest Holdings Inc.,

Kingsway Garden Holdings Inc. Oxford Properties Retail Holdings Inc., Oxford Properties Retail Holdings II Inc., OMERS Realty Corporation, Oxford Properties Retail Limited Partnership, CPPIB Upper Canada Mall Inc., CPP Investment Board Read Estate Holdings Inc.

Calvin Horsten, for Toronto-Dominion Bank

George Benchetrit, for Nike Retail Services Inc. and PVH Canada Inc.

Linda Galessiere, for Ivanhoe Cambridge II Inc./Jones Lang LaSalle Incorporation, Morguard Investments Limited and Salthill Property Managements Inc.

Steven Weitz and Dilina Lallani, for Ferragamo Canada Inc.

David Ullman and Brendan Jones, for Bentall Green Oak, Primaris REIT, Quadreal Property Group

David Preger and Stephen Posen, for 100 Metropolitan Portfolio, Mantella & Sons
Shayne Kukulowicz and Monique Sassi, for the Proposed Liquidator

Andrew J. Hatnay, Robert Drake and Abir Shamim, for certain HBC Employees and Retirees

Ken Rosenberg, Max Starnino, Emily Lawrence and Evan Snyder, for The Financial Services Regulatory Authority of Ontario

Sam Rogers, for Investment Management Corporation of Ontario

Kelly Smith Wayland, for the Department of Justice (Canada)

Jodi Nesbitt, for UNIFOR Local 240

HEARD: March 19, 2025

ENDORSEMENT

OSBORNE J.

1. This is further to my Endorsement made in this matter on March 17, 2025, and further to the continuation of the comeback hearing yesterday, March 19, 2025.
2. Counsel for the Applicants advised the Court that good faith discussions between the Applicants on the one hand, and creditors, landlords and other stakeholders on the other hand, were continuing as facilitated by the Court-appointed Monitor.
3. Counsel advised that the parties were attempting to resolve a number of the matters that were contested at the hearing earlier this week related to the scope of relief sought by the Applicants at the comeback hearing. As a result, the Applicants requested, with the concurrence and support of other parties and with the recommendation of the Monitor, a further brief adjournment of this matter to conclude those discussions.
4. The Service List has been served. No party opposes the request, and several parties actively support it.

5. Defined terms in this Endorsement have the meaning given to them in my earlier Endorsements made in this proceeding or the motion materials unless otherwise stated.

6. In the circumstances, I am prepared to grant a brief adjournment. As indicated in Court at the conclusion of the hearing today, this matter will be continued on **Friday, March 21, 2025 at 10:00 AM at the Courthouse.**

7. As with earlier hearings in this matter, and with a view to maximizing accessibility and minimizing cost, those parties unable to attend in person at the courthouse tomorrow may attend remotely via Zoom link (the same Zoom link used for the hearing yesterday).

8. The continuation of the stay of proceedings and the balance of the relief sought on the motions summarized above will be addressed at that time.

9. In the interim, the Applicants request certain relief by way of amendments to the Initial Order. All of the relief sought is included in the prayer for relief in the Notice of Motion of the Applicants returnable March 17, 2025, supported by the Affidavit of Jennifer Bewley sworn March 14, 2025 (the “Second Bewley Affidavit”) on which the Applicants rely, and is fully described in the First Report of the Monitor dated March 16, 2025.

10. This relief is also unopposed by any party, supported by many stakeholders and recommended by the Monitor.

11. First, the stay of proceedings is extended to and including March 21, 2025 or such later date as this Court may order, pursuant to sections 11.02(2) and (3) of the CCAA. The present circumstances are such that the proposed extension is appropriate. I am satisfied that the Applicants have acted and continue to act in good faith and with due diligence. The Applicants and the Monitor confirm that the Company has sufficient liquidity to fund operations through the proposed stay extension period.

12. Second, the quantum of the Directors’ Charge is increased to \$49,200,000 pursuant to sections 11.51 and 11.52 of the CCAA. While this amount is significant, it reflects, to a very large extent, the business of the Applicants as a major national retailer with the attendant HST remittance obligations, as well as payroll deduction remittance obligations in respect of the approximately 9,400 employees, and the maximum potential exposure related thereto. The Monitor supports the proposed increase and the quantum.

13. Third, the relative priorities of the Administration Charge, the Directors’ Charge and the DIP Charge as established in the Initial Order at para. 40, are amended, such that they shall be as follows:

- a. with respect to Property other than the Loan Parties’ Property, the Administration Charge shall rank first to a maximum amount of \$2,800,000, and the Directors’ Charge shall rank second to a maximum amount of \$49,200,000; and
- b. with respect to the Loan Parties’ Property, subject in all cases to the Priority Waterfall (as defined in the DIP Term Sheet), as amongst themselves, the priorities of the Charges shall be as follows:

Priority Ranking	ABL Priority Collateral	Pathlight Priority Collateral	Other Collateral (as defined in the DIP Agreement)
1 st	Administration Charge (to the maximum amount of \$2,800,000).	Administration Charge (to the maximum amount of \$2,800,000).	Administration Charge (to the maximum amount of \$2,800,000).
2 nd	All amounts owing under the Revolving Credit Facility and FILO Credit Facility (other than Excess ABL Obligations).	All amounts owing under the Pathlight Credit Facility (other than Excess Term Loan Obligations).	Directors' Charge (to the maximum amount of \$13,500,000).
3 rd	Directors' Charge (to the maximum amount of \$13,500,000).	All amounts owing under the Revolving Credit Facility and FILO Credit Facility (other than Excess ABL Obligations).	DIP Lenders' Charge.
4 th	DIP Lenders' Charge.	Directors' Charge (to the maximum amount of \$13,500,000)	Directors' Charge (to the maximum amount of \$35,700,000).
5 th	Directors' Charge (to the maximum amount of \$35,700,000).	DIP Lenders' Charge.	
6 th	Term Loan Obligations (other than Excess Term Loan Obligations).	Directors' Charge (to the maximum amount of \$35,700,000).	

14. Third, the proposed engagement of Reflect Advisors, LLC ("Reflect") as financial advisor to Hudson's Bay, according to the terms of the proposed Reflect Engagement Agreement, is approved, and the Applicants are authorized to enter into and perform that Agreement. Paragraph 31 of the Initial Order is amended to include Reflect within the existing Administration Charge as a beneficiary thereof.

15. The Court has the discretion pursuant to section 11 of the CCAA to permit debtor companies to enter into arrangements to facilitate a restructuring. Such arrangements may include the retention of expert advisors where necessary to assist with restructuring efforts: *Victorian Order of Nurses for Canada (Re)*, 2015 ONSC 7371 at para. 27.

16. Such agreements are often approved in the context of CCAA proceedings, where the Court is satisfied that such is appropriate, upon consideration of the following factors, among others:

- a. whether the debtor and the court officer overseeing the proceedings believe that the quantum in nature of the remuneration are fair and reasonable;
- b. whether the financial advisor has industry experience and/or familiarity with the business of the debtor;
- c. whether any proposed success fee is necessary to incentivize the financial advisor; and
- d. the complexity of the debtor's business, and whether that complicates any monetization or restructuring efforts.

See: *Just Energy Corp., Re*, 2021 ONSC 1793 at para. 113; *Danier Leather Inc. Re*, 2016 ONSC 1044 at para. 47, citing *Sino-Forest Corporation (Re)*, 2012 ONSC 2063 at paras. 46-47; and *Colossus Minerals Inc (Re)*, 2014 ONSC 514 at paras. 30-36.

17. Courts have considered similar factors when determining whether to grant a charge to secure the fees of a financial advisor: *Payless ShoeSource Canada Inc and Payless ShoeSource Canada GP Inc (Re)*, 2019 ONSC 1215 at paras. 30-33; and *Target Canada Co., Re*, 2015 ONSC 303 at paras. 72-75.

18. Here, the Monitor supports the engagement of Reflect and its inclusion as a beneficiary in the Administration Charge. There will be no increase to the quantum of that Charge as a result thereof.

19. Reflect has worked extensively with the Company since its engagement in February 2025 and has been involved in the consideration of strategic alternatives and restructuring options and the development of pro forma financial models.

20. I note that, as set out at paras. 86-90 of the Second Bewley Affidavit and Exhibit "F" thereto (being an unredacted copy of the Reflect Engagement Letter), the proposed Reflect Engagement Letter includes a monthly flat fee for the first two months and hourly fees thereafter, but Reflect does not earn any success fees or other fees contingent on certain milestones being achieved in any restructuring.

21. I am satisfied that, in the challenging and rapidly evolving circumstances of this case, its work will be accretive to the efforts of the Applicants, and that the above-noted factors are satisfied here.

22. For all of these reasons, the relief sought today is granted.

23. Order to go in the form signed by me which has immediate effect without the necessity of issuing and entering.

Osborne J.

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CITATION: In the Matter of a Plan of Compromise or Arrangement of Sandvine Corporation
et al., 2024 ONSC 6199

COURT FILE NO.: CV-24-00730836-00CL

DATE: 20241107

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
SANDVINE CORPORATION, SANDVINE HOLDINGS UK LIMITED, PROCERA
NETWORKS, INC., PROCERA HOLDING, INC., NEW PROCERA GP COMPANY AND
SANDVINE OP (UK) LTD (collectively, the “Applicants”)**

RE: SANDVINE CORPORATION, SANDVINE HOLDINGS UK LIMITED,
PROCERA NETWORKS, INC., PROCERA HOLDING, INC., NEW PROCERA
GP COMPANY AND SANDVINE OP (UK) LTD., Applicants

BEFORE: Peter J. Osborne J.

COUNSEL: *Marc Wasserman, Jeremy Dacks, Martino Calvaruso and Karin Sachar*, Counsel
to the Applicants

Noah Goldstein and Murtaza Tallat, Proposed Court-appointed Monitor

Shayne Kukulowicz, Joseph J. Bellissimo and Alec Hoy, Counsel to the proposed
Court-appointed Monitor

Andrew Harmes, Counsel to Acquiom Agency Services LLC, as Co-
administrative Agent and Collateral Agent

HEARD: November 7, 2024

ENDORSEMENT

Relief Sought

1. Sandvine Corporation (“Sandvine Canada”), and the other applicant companies (collectively, the “Applicants” and together with the partnership Procera II LP and certain non-filing entities, “Sandvine” or the “Company”), seeks an initial order (the “Initial Order”) and related relief under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the “CCAA”).

2. In particular, the Applicants seek an urgent stay of proceedings (the “Stay of Proceedings”) for the permitted initial ten-day period (the “Initial Stay Period”) under s. 11.02(2) of the CCAA, an extension of the Stay of Proceedings to certain Non-Applicant Stay Parties (as defined below),

the appointment of KSV Restructuring Inc. as monitor (the “Proposed Monitor”), along with certain other relief necessary to preserve the Applicants’ business and stakeholder value during the Initial Stay Period.

3. The six other corporations that are wholly owned Sandvine subsidiaries that are not Applicants but are integral to Sandvine’s integrated global operations (the “Non-Applicant Stay Parties”) include Sandvine Sweden A.B. (“Sandvine Sweden”), Sandvine Singapore Pte. Ltd., Sandvine Japan K.K., Sandvine Technologies (India) Private Limited, Sandvine Technologies Malaysia Sdn Bhd, and Sandvine Australia PTY Ltd.

Background to Application

4. The Applicants rely on the Affidavit of Jeffrey A. Kupp sworn November 6, 2024 together with Exhibits thereto, and the Pre-Filing Report of KSV Restructuring Inc. as Proposed Monitor dated November 6, 2024. Defined terms in this Endorsement have the meaning given to them in the Application materials and/or the Pre-Filing Report, unless otherwise stated. References in this Endorsement to dollar amounts are expressed in United States currency.

5. Sandvine is a Canadian application and network optimization company headquartered in Waterloo, Ontario, which provides quality of experience (“QoE”) analysis and performance optimization software applications to its customers, the majority of whom consist of telecommunications service providers around the world. Sandvine operates in approximately 54 countries. Sandvine has approximately 500 employees and contractors and its products allow its customers to understand the application traffic flowing in their networks with significantly higher accuracy compared to other products on the market.

6. Sandvine’s software products generate meta data about the quality and usage of over-the-top (“OTT”) at (i.e., Netflix, Amazon Prime and YouTube) by subscribers. While Sandvine historically also sold proprietary computer hardware to support its software products, it is currently transitioning to a software-only business and today no longer offers hardware services other than limited ongoing maintenance and related support.

7. On February 27, 2024, Sandvine Canada and certain of the other Sandvine entities were designated on the US Department of Commerce’s Entity List (the “Entity List”), which resulted in the added entities being subject to export restrictions which materially impacted Sandvine’s business. To mitigate these impacts, Sandvine submitted a Request for Emergency Authorization to the U.S. Department of Commerce Bureau of Industry and Security (“BIS”), which was granted and subsequently extended to December 31, 2024.

8. On May 1, 2024, Sandvine submitted a proposal for removal from the Entity List, which removal ultimately occurred on October 23, 2024. In conjunction with these requests and discussions, Sandvine has reoriented its business model and will cease operating in non-democratic countries or countries where the threat to digital rights is too high. Sandvine is also making other significant changes to its governance and business model in consultation with BIS and other interagency partners of the U.S. government.

9. Sandvine's business has been significantly impacted by the Entity List designation, as the countries that Sandvine has exited (and is in the process of exiting) represent approximately 45% of Sandvine's 2023 revenue. Sandvine's top line revenue is projected to be reduced by approximately 50% compared to its 2023 revenue due to the country exits and customer attrition related to the Entity List dynamic. In light of potential defaults stemming from the Entity List designation and related impacts, earlier this year Sandvine negotiated a reorganization with its Lenders, pursuant to which the Lenders became the indirect owners of Sandvine and Sandvine's debt was reduced by approximately USD \$92 million (the "June 2024 Reorganization").

10. Despite these reductions, Sandvine remained over-leveraged and required additional short-term funding, as well as a plan to address the operational restructuring of its business, including the country exits. Sandvine and certain of the Existing Loan Lenders (as defined below) have therefore negotiated further agreements regarding the financing and restructuring of Sandvine, which provide for: (i) USD \$45 million in new money financing under the DDTL Facility (as defined below), including a commitment to provide any undrawn portion as a DIP Facility (as defined below) in the event of court-supervised restructuring proceedings; (ii) a restructuring support agreement (the "RSA") with approximately 97% of the Existing Loan Lenders; (iii) an agreement by such Existing Loan Lenders to forbear from any default remedies under the First Lien Credit Agreement (as defined below) and other debt documents; and (iv) a proposed transaction, to be tested through a sales process, whereby Sandvine's funded debt obligations would be converted into a 50% equity share of a restructured company and new first lien financing, and Existing Loan Lenders that provided new money commitments would receive 50% equity of the restructured company as consideration for such commitments. The proposed transaction would result in a USD \$337 million reduction of Sandvine's current debt of approximately USD \$421 million (in outstanding principal).

11. The RSA requires Sandvine to commence a restructuring proceeding by November 15, 2024, failing which the RSA can be terminated, and the Consenting Stakeholders (as defined below) could commence enforcement proceedings with respect to the DDTL Credit Agreement (as defined below), which would in turn constitute an event of default under the First Lien Credit Agreement. Sandvine would not be able to pay or otherwise satisfy the amounts due under these agreements and is therefore insolvent.

12. The Applicants require immediate CCAA protection so that they will have the necessary breathing space to complete the last step of their balance sheet restructuring, continue to access needed liquidity from the Existing Loan Lenders, and have the time and resources to implement orderly exits from high-risk jurisdictions and restructure their operations accordingly.

13. Prior to the June 2024 Reorganization, Sandvine's primary debt obligations consisted of two secured credit facilities jointly issued to Sandvine Canada and Procera US as borrowers (the "Borrowers") totalling USD \$504 million in debt: (i) the "First Lien Credit Agreement" between the Borrowers, the First Lien Guarantors, the lenders party thereto (the "First Lien Lenders"), and Jeffries Finance LLC ("Jeffries") as Administrative Agent and Collateral Agent, which prior to June 28, 2024, had an outstanding principal of approximately USD \$394 million; and (ii) the "Second Lien Credit Agreement" between the Borrowers, the Second Lien Guarantors, the lenders

party thereto (the “Second Lien Lenders,” and together with the First Lien Lenders, the “Lenders”) and Barings Finance LLC as Administrative Agent and Collateral Agent, which, prior to June 28, 2024, had an outstanding principal of USD \$110 million.

14. The Lenders subsequently became the ultimate owners of Sandvine pursuant to the June 2024 Reorganization. As part of the June 2024 Reorganization, the Obligations under the Second Lien Credit Agreement were settled and extinguished in exchange for: (i) the issuance by the Borrowers of USD \$18 million of Term Loans under the amended First Lien Credit Agreement to the Second Lien Lenders (on a pro rata basis); and (ii) the issuance of Class C limited partner interests in Procera II LP to the Second Lien Lenders (on a pro rata basis). Sandvine’s debt obligations following the June 2024 Reorganization therefore consisted of terms loans in under the First Lien Credit Facility of approximately USD \$412 million.

15. Additionally, Sandvine has 17 cash collateralized letters of credit totaling approximately USD \$7.2 million, all of which were issued to secure future performance obligations by Sandvine for products and services pre-paid by its customers.

16. At present, Sandvine has drawn USD \$20 million under the DDTL Facility.

17. I observe that, as set out in the Application materials and in the Pre-Filing report of the Proposed Monitor, the Lenders, who are owed approximately \$431.8 million in principal secured debt, are the largest economic stakeholders. 97% of the Lenders have entered into the RSA and support both this CCAA Application and the substantive relief being sought today and at the proposed comeback hearing, including (as further discussed below), approval of the DIP Facility, the proposed SISF, the proposed stalking horse transaction, and the various related Charges ranking in priority to the security granted by the Sandvine Entities in favour of the Lenders.

Jurisdiction

18. Subsection 9(1) of the CCAA provides that an application for a stay of proceedings under the CCAA may be made to the court that has jurisdiction in the province in which the head office or chief place of business of the company in Canada is situated, or, if the company has no place of business in Canada, in any province within which any assets of the company are situated: *Target Canada Co. (Re)*, 2015 ONSC 303 (“*Target*”) paras. 26 to 30; *Bed Bath & Beyond Canada Limited (Re)*, 2023 ONSC 1014 (“*BBB*”) at para. 25.

19. Each of the Applicants fulfils these requirements. Sandvine Canada is incorporated in Canada and headquartered in Waterloo, while the remaining applicants each have assets in Canada in the form of funds on deposit in Canadian bank accounts and funds currently being held on retainer in Canada by counsel. A number of courts have held that funds deposited in bank accounts or held on retainer in this manner are sufficient to satisfy the CCAA jurisdiction requirements and have cautioned that the court must not engage in “a qualitative or detailed analysis of the Canadian assets”: *Global Light Telecommunications Inc., (Re)*, 2004 BCSC 745 at para. 17; see also *CanWest Global Communications Corp. (Re)*, 2009 CanLII 55114 (ONSC) (“*CanWest*”) at para. 30. In reference to funds held on retainer by counsel, see *Syncreon Group B.V. (Re)*, 2019 ONSC 5774 at para. 27; and *LTL Management LLC (Re)*, 2021 ONSC 8357 at para. 13.

20. Further, Ontario is the proper forum for the restructuring. Ontario is the chief place of business of the Applicants as a whole, given that: (i) the majority of Sandvine’s North American Employees are in Canada; (ii) the majority of Sandvine’s assets (in particular the majority of its IP assets, cash, customer accounts receivable, inventory, fixed assets, and real estate investments) are in Canada; (iii) Sandvine’s General Counsel resides in Canada; (iv) Sandvine is operationally dependent on the shared services provided by the Accounting and A/R teams, each of which is primarily located in Canada; (v) Sandvine Canada issues all customer invoices; (vi) approximately two-thirds of Sandvine’s customer receipts are deposited into Sandvine Canada’s Canadian bank accounts; (vii) in 2023, Sandvine Canada generated approximately two-thirds of Sandvine’s revenue; (viii) approximately 69% of Sandvine’s customers contract with Sandvine Canada; (ix) the majority of Sandvine’s patents are held by Sandvine Canada; and (x) Sandvine Canada is party to the majority of Sandvine’s shared services agreements.

21. Canadian courts have accepted that a multinational enterprise such as the Applicants’ business must be restructured as a global unit, even where operating units are located in foreign jurisdictions: See, e.g., *Ted Baker Canada Inc. et al (Re)*, (April 26, 2024), Ont S.C.J. [Commercial List], Court File No. CV-24-718993-00CL at para. 28, in which the court held that the requirements of s. 9(1) of the CCAA were satisfied on the basis that the applicants, which included both Canadian and U.S. entities, maintained their head office and much of their business activities in Ontario. See also *Ghana Gold Corp (Re)*, 2013 ONSC 3284 at para. 56, in which the court included foreign applicants within a CCAA proceedings on the grounds that doing so was “critical to a restructuring.”

22. If the proposed Initial Order is granted, Sandvine intends to commence a recognition proceeding under Chapter 15 of the US Bankruptcy Code in the United States Bankruptcy Court for the Northern District of Texas to ensure that actions taken in relation to US entities and US property will be under the supervision of the US courts.

The Applicants are Insolvent

23. The CCAA applies to a “debtor company” or affiliated debtor companies where the total amount of claims against the debtor or its affiliates exceeds \$5 million. The Applicants are each a “company” for the purposes of s. 2 of the CCAA as they do business in or have assets in Canada: *Lydian International Limited (Re)*, 2019 ONSC 7473 at para. 35-36 (“*Lydian*”).

24. A “debtor company” means, *inter alia*, a company that is insolvent: CCAA, ss. 2 and 3(1). The CCAA defines a “debtor company” as, among other things, any company that is insolvent or has committed an act of bankruptcy within the meaning of the *Bankruptcy and Insolvency Act* (“BIA”).

25. The determination of whether a company is insolvent requires consideration of the definition of “insolvent person” in the BIA, and the expanded concept of insolvency adopted in *Stelco Inc., Re*, 2004 CarswellOnt 1211 at para. 26 (“*Stelco*”), in which this Court held that a debtor is insolvent where there is a looming liquidity crisis such that it is reasonably foreseeable that the debtor will run out of cash unless its business is restructured. This approach to the insolvency criterion has been applied in other cases, including *Target* at para. 26; *Just Energy Corp. (Re)*,

2021 ONSC 1793 (“Just Energy”) at paras. 48 to 51; and *Nordstrom Canada Retail, Inc. (Re)*, 2023 ONSC 1422 (“Nordstrom”) at para. 26.

26. I am satisfied that the Applicants here face a liquidity crisis consistent with the *Stelco* test. If they do not commence restructuring proceedings by November 15, 2024, the Applicants would be unable to fulfil their obligations under the First Lien Credit Agreement and the DDTL Credit Agreement. Each of the Applicants is either a borrower or guarantor under those agreements or is the general partner of a guarantor.

27. Accordingly, the Applicants are corporations that collectively owe over \$5 million in outstanding liabilities. They have delivered the documents and financial statements required under s. 10(2) of the CCAA.

Stay of Proceedings

28. Section 11.02(1) of the CCAA provides that the Court may order a stay of proceedings on an initial CCAA application for a period of not more than 10 days. Section 11.001 of the CCAA provides that relief granted on an initial CCAA application shall be limited to relief that is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that initial 10-day period.

29. In *Lydian*, Chief Justice Morawetz stated that the Initial Stay Period preserves the status quo and allows for operations to be stabilized and negotiations to occur, followed by requests for expanded relief on proper notice to affected parties at the full comeback hearing. Whether particular relief is necessary to stabilize a debtor company’s operations during the Initial Stay Period is an inherently factual determination, based on all of the circumstances of the particular debtor.

30. All of the relief requested in this first-day application meets these criteria. Each aspect of the relief sought by the Applicants in the Initial Stay Period is interdependent, and collectively the relief is critical to allow the Applicants to properly respond to their current circumstances.

31. As set out in the Pre-Filing Report of the Proposed Monitor, the customers of Sandvine include over 130 of the largest global communications service providers, serving hundreds of millions of network users. Any disruption in the services provided by Sandvine could and likely would have serious implications for the continuity and security of services provided by customers of Sandvine, including many of the largest internet service providers in Canada and globally.

32. A stay of proceedings is clearly necessary here if any form of restructuring process is to be successful. The relief sought today is limited to what is reasonably necessary.

33. I further observe that the Applicants have included in these first day materials disclosure of the relief that will be sought on the comeback hearing, if the Initial Order sought today is granted, including approval of a sales and investment solicitation process (“SISP”) with a proposed stalking horse agreement.

34. Finally in this regard, the Applicants have prepared a Cash Flow Forecast for the 13-week period from November 3, 2024 to February 1, 2025, which has been reviewed by the Proposed Monitor. Its statutory report on the Forecast is attached to the Pre-Filing Report as Appendix “C”.

The Stay should be Extended to Procera II LP

35. I am also satisfied that the stay and the protections and authorizations proposed in the draft Initial Order should be extended to Procera II LP. The CCAA expressly applies by its terms to debtor companies but not partnerships. Where the functions and operations of partnerships are integral and closely related to the business and operations of the Applicants, the CCAA Court has the jurisdiction to extend the protection of the stay of proceedings to those partnerships in order to ensure that the purposes of the CCAA can be achieved. Such relief has been granted on multiple occasions. See: *Target*, at paras. 42 and 43; *Just Energy*, at para. 116; and *BBB*, at para. 28.

36. The Applicants submit that it is appropriate to extend the stay of proceedings to Procera II LP. I agree. As guarantor under the Credit Facilities and the ultimate parent company of the Sandvine operating entities (and the vehicle through which certain of the Existing Loan Lenders currently own Sandvine), Procera II LP is insolvent, and the extension of the benefit of the stay of proceedings and the protections and authorizations of the Initial Order to Procera II LP is necessary to maintain stability and value in the CCAA process and to complete the proposed Restructuring Transactions.

The Stay should be Extended to the Non-Applicant Stay Parties

37. I am also satisfied that the stay should be extended to the Non-Applicant Stay Parties. The authority of the Court to extend a stay to non-filing affiliates is derived from the broad jurisdiction given to the Court under ss. 11 and 11.01(2) of the CCAA and is commonly granted as part of CCAA proceedings, including to foreign non-applicant affiliates: *Chalice Brands Ltd (Re)*, 2023 ONSC 3174, at para. 35.

38. In *JTI-Macdonald Corp.*, this Court outlined the factors determining when it is appropriate to extend a CCAA stay over non-filing affiliates, including where the business of the non-filing affiliate is significantly intertwined with that of the debtors and extending the stay would help maintain stability during the CCAA process: *JTI-Macdonald Corp. (Re)*, 2019 ONSC 1625 at para. 15 (“*JTI-Macdonald*”).

39. The test as articulated in *JTI-Macdonald* is met here. The business and operations of the Non-Filing Affiliates are functionally and operationally integrated with those of the Applicants, and these entities provide research and development, sales, customer success in marketing services. The Non-Applicant Stay Parties together have approximately 294 employees constituting over half of Sandvine’s global workforce. I am satisfied that the extension of the stay to the Non-Applicant Stay Parties is therefore necessary to maintain stability and value in the CCAA process.

Appointment of KSV as Monitor

40. The Applicants propose to have KSV Restructuring Inc. (“KSV”) appointed as the Monitor. KSV is a “trustee” within the meaning of subsection 2(1) of the BIA, is established and

qualified, and has consented to act as Monitor. The involvement of KSV as the court-appointed Monitor will lend stability and assurance to the Applicants' stakeholders. KSV is not subject to any of the restrictions set out in s. 11.7(2) of the CCAA.

41. I am satisfied that KSV should be appointed as Monitor in these CCAA Proceedings.

The Charges and the DIP

The DIP and DIP Facility

42. The DIP Lenders have agreed to provide the proposed DIP Facility up to the amount of USD \$30 million. The Applicants seek an interim financing charge to secure that DIP Facility pursuant to s. 11.2 of the CCAA. The DIP Charge is proposed to be secured against the Property as defined in the Initial Order, and to rank behind the Administration Charge and the Directors Charge and *pari passu* with amounts owed with respect to the DDTL Tranche A Loans and DDTL Tranche B Loans.

43. Section 11.2(4) of the CCAA sets out a non-exhaustive list of criteria that the Court must consider in deciding whether to grant a DIP lender's charge. Those criteria apply to the period during which the Applicants are expected to be subject to CCAA proceedings, how the Applicants' business and financial affairs are to be managed during the proceedings, whether the Applicants' management has the confidence of its major creditors, whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the Applicants, the nature and value of the Applicants' property, whether any creditor would be materially prejudiced as a result of the security or charge, and whether the monitor supports the charge.

44. When an application for interim financing is made at the same time as an initial application, the applicant must additionally satisfy the Court 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: s. 11.2(5).

45. It is important that an applicant meet the criteria in section 11.2(1) as well as those in s. 11.2(4). (See *CanWest Publishing Inc., Re*, 2010 ONSC 222 ("*CanWest II*") at paras. 42-44).

46. These factors favour the requested relief here. Sandvine will need access to debtor-in-possession financing during the CCAA proceedings to continue to operate its business and administer its insolvency and has no other immediate options to provide it with the liquidity it needs. Approving the DIP Facility and DIP Lenders' Charge at this time will provide necessary certainty and stability for Sandvine and its stakeholders – including customers and vendors – that funding will be available to complete the transactions contemplated by the RSA (including any superior transaction received as part of the proposed sale process).

47. As noted above, the DIP Facility (and Charge) are supported by the Lenders and recommended by the Proposed Monitor who is of the professional opinion that the DIP Facility terms are reasonable in the circumstances, and comparable to other DIP facilities approved by Canadian courts in CCAA proceedings (see comparison chart attached to the Report as Appendix "D").

48. Granting the DIP Charge at this time will ensure that the authorizations required to access the DIP Facility are put in place at commencement of the CCAA Proceedings, and that the Applicants can seek to have the DIP Charge recognized in a timely manner in the concurrent Chapter 15 proceedings. Further, the relief sought is appropriately limited, as the proposed Initial Order prohibits Sandvine from drawing on the DIP Facility unless approved at the comeback hearing. Sandvine intends to seek that authorization to draw on the DIP Facility at the Comeback Hearing.

Administration Charge

49. The Applicants are seeking an Administration Charge in favour of the Monitor, its Canadian and US Counsel, counsel to the Applicant in Canada and the US, and GLC, as security for their respective fees and disbursements (in the case of GLC, to the extent of the Monthly Advisory Fees, to a maximum of USD \$2.5 million for the duration of the Initial Stay Period.

50. The Administration Charge was developed in consultation with the Proposed Monitor and is proposed to be secured by the Property with first priority over all other charges and security interests.

51. The Court has jurisdiction to grant an administration charge under s. 11.52 of the CCAA. It is to consider: the size and complexity of the business being restructured, the proposed role of the beneficiaries of the charge, whether there is an unwarranted duplication of roles, whether the quantum of the proposed charge appears to be fair and reasonable, the position of the secured creditors likely to be affected by the charge, and the position of the Monitor. (See *CanWest*, at para. 54).

52. The proposed Administration Charge sought for the initial 10-day period meets this test and is appropriate. It is supported by the Proposed Monitor.

The Directors' Charge

53. The Court has jurisdiction to grant a directors' charge under s. 11.51 of the CCAA, provided notice is given to the secured creditors who are likely to be affected by it.

54. To ensure the stability of the business during the restructuring period, the Applicants need the ongoing assistance of their directors, managers and officers, who have considerable institutional knowledge and specialized expertise. They seek a priority directors' charge in favour of the Sandvine Entities directors, managers and officers for the Initial Stay Period, ranking subordinate to the Administration Charge, but in priority to the DIP Charge and all other interests. The managers include the managers of the Cayman entity, Procera II LP, whose roles and responsibilities largely mirror those of directors of Canadian corporations. The Applicants propose a directors' charge in the amount of \$4.44 million.

55. While there is available liability insurance, the policies will likely not provide sufficient coverage for potential liability that the directors, managers and officers could incur in relation to the CCAA proceedings.

56. The Monitor supports the Applicants' request for the directors' charge. I am satisfied it is appropriate here.

57. The directors' charge is approved.

Engagement of the Financial Advisor

58. On June 29, 2024, Sandvine engaged GLC Investment Advisors & Co., LLC and GLC Securities, LLC (collectively "GLC") as its independent financial advisor. The Applicants seek the approval of this engagement *nunc pro tunc*.

59. The Court has the jurisdiction to approve the engagement of the Financial Advisor under s. 11 of the CCAA, and Courts have approved the engagement of a financial advisor in order to assist the debtors in achieving the objectives of the CCAA, to assist the debtors' management in dealing with a crisis situation, and to allow management to focus on the debtor's continued operations: *Walter Energy Canada Holdings, Inc., (Re)*, 2016 BCSC 107 at paras. 35, 39-43 and 48.

60. GLC has significant experience as a financial advisor in North American restructuring and capital market transactions and was instrumental in assisting with both the negotiations that led to the execution of the RSA and the preparations for these CCAA proceedings. GLC's continued involvement, including running the proposed sales process on behalf of Sandvine, will be critical to the successful completion of a going concern restructuring transaction that will maximize value for stakeholders.

61. The GLC retainer and the terms of the Engagement Letter are supported by the Lenders and recommended by the Proposed Monitor who is of the opinion that the terms and in particular the fees are appropriate and comparable to the fees for similar engagements.

Pre-Filing Payments to Critical Third Parties

62. The Applicants seek authorization, with the consent of the Monitor, to make payments of pre-filing amounts to certain critical third parties. Sandvine relies on several third-party software providers for: (i) products it imbeds into its App QoE software and (ii) for products used in its internal operations, many of which are critical to Sandvine's business and its ability to serve customers.

63. Third-party software for Sandvine's internal needs include, among other things, security solutions for Sandvine's internal IT networks, customer relationship management (CRM) software, software to integrate the Company's IT applications, data storage and business intelligence products, video and messaging software programs for online collaboration, Enterprise Resource Planning (ERP) and finance software, shipping and logistics services, as well as export control and denied party screening essential to complying with export laws. Sandvine also relies on third-party suppliers who provide hardware that is critical for its business.

64. In addition, the proposed Initial Order provides that the Applicants can pay pre-filing amounts to other critical third parties up to a maximum aggregate amount of USD \$250,000 with the consent of the Monitor.

65. The Court has exercised its jurisdiction on multiple occasions to grant similar relief in other cases: See, for example, *Target*, at paras. 62-65; *Nordstrom*, at paras. 50-53; *Just Energy*, at para. 99; *Original Traders Energy Ltd. and 2496750 Ontario Inc. (Re)*, 2023 ONSC 753 at paras. 72-74; and *Boreal Capital* at paras. 20-22.

66. The factors that courts have considered in determining whether to grant such authorization include: (a) whether the goods and services are integral to the business of the applicants; (b) the applicants' dependency on the uninterrupted supply of the goods or services; (c) the fact that no payments will be made without the consent of the Monitor (which is a requirement under the proposed Initial Order); and (d) the effect on the debtors' operations and ability to restructure if it could not make such payments: *Index Energy Mills Road Corporation (Re)*, 2017 ONSC 4944 at para. 31.

67. These factors are fulfilled in this case, as these categories of suppliers are fundamental to the continuing operations of the Applicant.

Foreign Representative and Foreign Recognition

68. Because the Applicants have operations, assets and valuable business in the US, the Applicants intend to initiate a proceeding under Chapter 15 of Title 11 of the US Bankruptcy Code seeking an order to recognize and enforce orders made in these CCAA proceedings in the US and protect against any potential adverse action taken by US-based creditors (the "Chapter 15 Proceedings").

69. Jurisdiction to appoint any person or body to act as a representative for the purpose of having these CCAA proceedings recognized in any jurisdiction outside Canada, including but not limited to the United States, is found in s. 56 of the CCAA. I am satisfied that the relief sought in this regard is appropriate. (See *Caesars Entertainment Operating Company Inc., Re*, 2015 ONSC 712 at para. 38; and *Payless Holdings LLC, Re*, 2017 ONSC 2242 at para. 35).

70. As noted, US proceedings are contemplated here to enforce the stay of proceedings established by the initial order if granted today, with the result that it is necessary to seek recognition of the initial order by the United States Bankruptcy Court.

71. Courts have consistently encouraged, and do encourage, comity and cooperation between courts in cross-border insolvencies.

72. Here, the operations of the Applicants are functionally and operationally integrated, such that the US business cannot operate independently of the Canadian business. I am satisfied that an order authorizing Sandvine Canada to act as a foreign representative in respect of this proceeding, for the purpose of seeking seek recognition of the orders of this Court in the United States, is appropriate and in the best interests of stakeholders.

Initial Order and Comeback Hearing

73. For all of these reasons, the Initial Order is granted. Order to go in the form signed by me today which is effective immediately and without the necessity of issuing and entering.

74. The comeback hearing shall take place on Friday, November 15, 2024 for commencing at 2:00 PM via Zoom in order to accommodate stakeholders who are located across Canada and the United States.

Osborne J.

Date: November 7, 2024

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CITATION: Target Canada Co. (Re), 2015 ONSC 303

COURT FILE NO.: CV-15-10832-00CL

DATE: 2015-01-16

SUPERIOR COURT OF JUSTICE - ONTARIO

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 TARGET CANADA CO., TARGET CANADA
HEALTH CO., TARGET CANADA MOBILE GP CO., TARGET CANADA
PHARMACY (BC) CORP., TARGET CANADA PHARMACY (ONTARIO)
CORP., TARGET CANADA PHARMACY CORP., TARGET CANADA
PHARMACY (SK) CORP., and TARGET CANADA PROPERTY LLC.

BEFORE: Regional Senior Justice Morawetz

COUNSEL: *Tracy Sandler and Jeremy Dacks*, for the Target Canada Co., Target Canada
Health Co., Target Canada Mobile GP Co., Target Canada Pharmacy (BC) Corp.,
Target Canada Pharmacy (Ontario) Corp., Target Canada Pharmacy Corp., Target
Canada Pharmacy (SK) Corp., and Target Canada Property LLC (the
“Applicants”)

Jay Swartz, for the Target Corporation

Alan Mark, Melaney Wagner, and Jesse Mighton, for the Proposed Monitor,
Alvarez and Marsal Canada ULC (“Alvarez”)

Terry O’Sullivan, for The Honourable J. Ground, Trustee of the Proposed
Employee Trust

Susan Philpott, for the Proposed Employee Representative Counsel for employees
of the Applicants

HEARD and ENDORSED: January 15, 2015

REASONS: January 16, 2015

ENDORSEMENT

[1] Target Canada Co. (“TCC”) and the other applicants listed above (the “Applicants”) seek relief under the *Companies’ Creditors Arrangement Act*, R.S.C., 1985, c. C-36, as amended (the “CCAA”). While the limited partnerships listed in Schedule “A” to the draft Order (the “Partnerships”) are not applicants in this proceeding, the Applicants seek to have a stay of

proceedings and other benefits of an initial order under the CCAA extended to the Partnerships, which are related to or carry on operations that are integral to the business of the Applicants.

[2] TCC is a large Canadian retailer. It is the Canadian operating subsidiary of Target Corporation, one of the largest retailers in the United States. The other Applicants are either corporations or partners of the Partnerships formed to carry on specific aspects of TCC's Canadian retail business (such as the Canadian pharmacy operations) or finance leasehold improvements in leased Canadian stores operated by TCC. The Applicants, therefore, do not represent the entire Target enterprise; the Applicants consist solely of entities that are integral to the Canadian retail operations. Together, they are referred as the "Target Canada Entities".

[3] In early 2011, Target Corporation determined to expand its retail operations into Canada, undertaking a significant investment (in the form of both debt and equity) in TCC and certain of its affiliates in order to permit TCC to establish and operate Canadian retail stores. As of today, TCC operates 133 stores, with at least one store in every province of Canada. All but three of these stores are leased.

[4] Due to a number of factors, the expansion into Canada has proven to be substantially less successful than expected. Canadian operations have shown significant losses in every quarter since stores opened. Projections demonstrate little or no prospect of improvement within a reasonable time.

[5] After exploring multiple solutions over a number of months and engaging in extensive consultations with its professional advisors, Target Corporation concluded that, in the interest of all of its stakeholders, the responsible course of action is to cease funding the Canadian operations.

[6] Without ongoing investment from Target Corporation, TCC and the other Target Canada Entities cannot continue to operate and are clearly insolvent. Due to the magnitude and complexity of the operations of the Target Canada Entities, the Applicants are seeking a stay of proceedings under the CCAA in order to accomplish a fair, orderly and controlled wind-down of their operations. The Target Canada Entities have indicated that they intend to treat all of their stakeholders as fairly and equitably as the circumstances allow, particularly the approximately 17,600 employees of the Target Canada Entities.

[7] The Applicants are of the view that an orderly wind-down under Court supervision, with the benefit of inherent jurisdiction of the CCAA, and the oversight of the proposed monitor, provides a framework in which the Target Canada Entities can, among other things:

- a) Pursue initiatives such as the sale of real estate portfolios and the sale of inventory;
- b) Develop and implement support mechanisms for employees as vulnerable stakeholders affected by the wind-down, particularly (i) an employee trust (the "Employee Trust") funded by Target Corporation; (ii) an employee representative counsel to safeguard employee interests; and (iii) a key

employee retention plan (the “KERP”) to provide essential employees who agree to continue their employment and to contribute their services and expertise to the Target Canada Entities during the orderly wind-down;

- c) Create a level playing field to ensure that all affected stakeholders are treated as fairly and equitably as the circumstances allow; and
- d) Avoid the significant maneuvering among creditors and other stakeholders that could be detrimental to all stakeholders, in the absence of a court-supervised proceeding.

[8] The Applicants are of the view that these factors are entirely consistent with the well-established purpose of a CCAA stay: to give a debtor the “breathing room” required to restructure with a view to maximizing recoveries, whether the restructuring takes place as a going concern or as an orderly liquidation or wind-down.

[9] TCC is an indirect, wholly-owned subsidiary of Target Corporation and is the operating company through which the Canadian retail operations are carried out. TCC is a Nova Scotia unlimited liability company. It is directly owned by Nicollet Enterprise 1 S. à r.l. (“NE1”), an entity organized under the laws of Luxembourg. Target Corporation (which is incorporated under the laws of the State of Minnesota) owns NE1 through several other entities.

[10] TCC operates from a corporate headquarters in Mississauga, Ontario. As of January 12, 2015, TCC employed approximately 17,600 people, almost all of whom work in Canada. TCC’s employees are not represented by a union, and there is no registered pension plan for employees.

[11] The other Target Canada Entities are all either: (i) direct or indirect subsidiaries of TCC with responsibilities for specific aspects of the Canadian retail operation; or (ii) affiliates of TCC that have been involved in the financing of certain leasehold improvements.

[12] A typical TCC store has a footprint in the range of 80,000 to 125,000 total retail square feet and is located in a shopping mall or large strip mall. TCC is usually the anchor tenant. Each TCC store typically contains an in-store Target brand pharmacy, Target Mobile kiosk and a Starbucks café. Each store typically employs approximately 100 – 150 people, described as “Team Members” and “Team Leaders”, with a total of approximately 16,700 employed at the “store level” of TCC’s retail operations.

[13] TCC owns three distribution centres (two in Ontario and one in Alberta) to support its retail operations. These centres are operated by a third party service provider. TCC also leases a variety of warehouse and office spaces.

[14] In every quarter since TCC opened its first store, TCC has faced lower than expected sales and greater than expected losses. As reported in Target Corporation’s Consolidated Financial Statements, the Canadian segment of the Target business has suffered a significant loss in every quarter since TCC opened stores in Canada.

[15] TCC is completely operationally funded by its ultimate parent, Target Corporation, and related entities. It is projected that TCC's cumulative pre-tax losses from the date of its entry into the Canadian market to the end of the 2014 fiscal year (ending January 31, 2015) will be more than \$2.5 billion. In his affidavit, Mr. Mark Wong, General Counsel and Secretary of TCC, states that this is more than triple the loss originally expected for this period. Further, if TCC's operations are not wound down, it is projected that they would remain unprofitable for at least 5 years and would require significant and continued funding from Target Corporation during that period.

[16] TCC attributes its failure to achieve expected profitability to a number of principal factors, including: issues of scale; supply chain difficulties; pricing and product mix issues; and the absence of a Canadian online retail presence.

[17] Following a detailed review of TCC's operations, the Board of Directors of Target Corporation decided that it is in the best interests of the business of Target Corporation and its subsidiaries to discontinue Canadian operations.

[18] Based on the stand-alone financial statements prepared for TCC as of November 1, 2014 (which consolidated financial results of TCC and its subsidiaries), TCC had total assets of approximately \$5.408 billion and total liabilities of approximately \$5.118 billion. Mr. Wong states that this does not reflect a significant impairment charge that will likely be incurred at fiscal year end due to TCC's financial situation.

[19] Mr. Wong states that TCC's operational funding is provided by Target Corporation. As of November 1, 2014, NE1 (TCC's direct parent) had provided equity capital to TCC in the amount of approximately \$2.5 billion. As a result of continuing and significant losses in TCC's operations, NE1 has been required to make an additional equity investment of \$62 million since November 1, 2014.

[20] NE1 has also lent funds to TCC under a Loan Facility with a maximum amount of \$4 billion. TCC owed NE1 approximately \$3.1 billion under this Facility as of January 2, 2015. The Loan Facility is unsecured. On January 14, 2015, NE1 agreed to subordinate all amounts owing by TCC to NE1 under this Loan Facility to payment in full of proven claims against TCC.

[21] As at November 1, 2014, Target Canada Property LLC ("TCC Propco") had assets of approximately \$1.632 billion and total liabilities of approximately \$1.643 billion. Mr. Wong states that this does not reflect a significant impairment charge that will likely be incurred at fiscal year end due to TCC Propco's financial situation. TCC Propco has also borrowed approximately \$1.5 billion from Target Canada Property LP and TCC Propco also owes U.S. \$89 million to Target Corporation under a Demand Promissory Note.

[22] TCC has subleased almost all the retail store leases to TCC Propco, which then made real estate improvements and sub-sub leased the properties back to TCC. Under this arrangement, upon termination of any of these sub-leases, a "make whole" payment becomes owing from TCC to TCC Propco.

[23] Mr. Wong states that without further funding and financial support from Target Corporation, the Target Canada Entities are unable to meet their liabilities as they become due, including TCC's next payroll (due January 16, 2015). The Target Canada Entities, therefore state that they are insolvent.

[24] Mr. Wong also states that given the size and complexity of TCC's operations and the numerous stakeholders involved in the business, including employees, suppliers, landlords, franchisees and others, the Target Canada Entities have determined that a controlled wind-down of their operations and liquidation under the protection of the CCAA, under Court supervision and with the assistance of the proposed monitor, is the only practical method available to ensure a fair and orderly process for all stakeholders. Further, Mr. Wong states that TCC and Target Corporation seek to benefit from the framework and the flexibility provided by the CCAA in effecting a controlled and orderly wind-down of the Canadian operations, in a manner that treats stakeholders as fairly and as equitably as the circumstances allow.

[25] On this initial hearing, the issues are as follows:

- a) Does this court have jurisdiction to grant the CCAA relief requested?
 - a) Should the stay be extended to the Partnerships?
 - b) Should the stay be extended to "Co-tenants" and rights of third party tenants?
 - c) Should the stay extend to Target Corporation and its U.S. subsidiaries in relation to claims that are derivative of claims against the Target Canada Entities?
 - d) Should the Court approve protections for employees?
 - e) Is it appropriate to allow payment of certain pre-filing amounts?
 - f) Does this court have the jurisdiction to authorize pre-filing claims to "critical" suppliers;
 - g) Should the court should exercise its discretion to authorize the Applicants to seek proposals from liquidators and approve the financial advisor and real estate advisor engagement?
 - h) Should the court exercise its discretion to approve the Court-ordered charges?

[26] "Insolvent" is not expressly defined in the CCAA. However, for the purposes of the CCAA, a debtor is insolvent if it meets the definition of an "insolvent person" in section 2 of the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3 ("BIA") or if it is "insolvent" as described in *Stelco Inc. (Re)*, [2004] O.J. No. 1257, [Stelco], leave to appeal refused, [2004] O.J. No. 1903, leave to appeal to S.C.C. refused [2004] S.C.C.A. No. 336, where Farley, J. found that "insolvency" includes a corporation "reasonably expected to run out of liquidity within [a]

reasonable proximity of time as compared with the time reasonably required to implement a restructuring” (at para 26). The decision of Farley, J. in *Stelco* was followed in *Priszm Income Fund (Re)*, [2011] O.J. No. 1491 (SCJ), 2011 and *Canwest Global Communications Corp. (Re)*, [2009] O.J. No. 4286, (SCJ) [*Canwest*].

[27] Having reviewed the record and hearing submissions, I am satisfied that the Target Canada Entities are all insolvent and are debtor companies to which the CCAA applies, either by reference to the definition of “insolvent person” under the *Bankruptcy and Insolvency Act* (the “BIA”) or under the test developed by Farley J. in *Stelco*.

[28] I also accept the submission of counsel to the Applicants that without the continued financial support of Target Corporation, the Target Canada Entities face too many legal and business impediments and too much uncertainty to wind-down their operations without the “breathing space” afforded by a stay of proceedings or other available relief under the CCAA.

[29] I am also satisfied that this Court has jurisdiction over the proceeding. Section 9(1) of the CCAA provides that an application may be made to the court that has jurisdiction in (a) the province in which the head office or chief place of business of the company in Canada is situated; or (b) any province in which the company’s assets are situated, if there is no place of business in Canada.

[30] In this case, the head office and corporate headquarters of TCC is located in Mississauga, Ontario, where approximately 800 employees work. Moreover, the chief place of business of the Target Canada Entities is Ontario. A number of office locations are in Ontario; 2 of TCC’s 3 primary distribution centres are located in Ontario; 55 of the TCC retail stores operate in Ontario; and almost half the employees that support TCC’s operations work in Ontario.

[31] The Target Canada Entities state that the purpose for seeking the proposed initial order in these proceedings is to effect a fair, controlled and orderly wind-down of their Canadian retail business with a view to developing a plan of compromise or arrangement to present to their creditors as part of these proceedings. I accept the submissions of counsel to the Applicants that although there is no prospect that a restructured “going concern” solution involving the Target Canada Entities will result, the use of the protections and flexibility afforded by the CCAA is entirely appropriate in these circumstances. In arriving at this conclusion, I have noted the comments of the Supreme Court of Canada in *Century Services Inc. v. Canada (Attorney General)*, [2010] SCC 50 (“*Century Services*”) that “courts frequently observe that the CCAA is skeletal in nature”, and does not “contain a comprehensive code that lays out all that is permitted or barred”. The flexibility of the CCAA, particularly in the context of large and complex restructurings, allows for innovation and creativity, in contrast to the more “rules-based” approach of the BIA.

[32] Prior to the 2009 amendments to the CCAA, Canadian courts accepted that, in appropriate circumstances, debtor companies were entitled to seek the protection of the CCAA where the outcome was not going to be a going concern restructuring, but instead, a “liquidation” or wind-down of the debtor companies’ assets or business.

[33] The 2009 amendments did not expressly address whether the CCAA could be used generally to wind-down the business of a debtor company. However, I am satisfied that the enactment of section 36 of the CCAA, which establishes a process for a debtor company to sell assets outside the ordinary course of business while under CCAA protection, is consistent with the principle that the CCAA can be a vehicle to downsize or wind-down a debtor company's business.

[34] In this case, the sheer magnitude and complexity of the Target Canada Entities business, including the number of stakeholders whose interests are affected, are, in my view, suited to the flexible framework and scope for innovation offered by this "skeletal" legislation.

[35] The required audited financial statements are contained in the record.

[36] The required cash flow statements are contained in the record.

[37] Pursuant to s. 11.02 of the CCAA, the court may make an order staying proceedings, restraining further proceedings, or prohibiting the commencement of proceedings, "on any terms that it may impose" and "effective for the period that the court considers necessary" provided the stay is no longer than 30 days. The Target Canada Entities, in this case, seek a stay of proceedings up to and including February 13, 2015.

[38] Certain of the corporate Target Canada Entities (TCC, TCC Health and TCC Mobile) act as general or limited partners in the partnerships. The Applicants submit that it is appropriate to extend the stay of proceedings to the Partnerships on the basis that each performs key functions in relation to the Target Canada Entities' businesses.

[39] The Applicants also seek to extend the stay to Target Canada Property LP which was formerly the sub-leasee/sub-sub lessor under the sub-sub lease back arrangement entered into by TCC to finance the leasehold improvements in its leased stores. The Applicants contend that the extension of the stay to Target Canada Property LP is necessary in order to safeguard it against any residual claims that may be asserted against it as a result of TCC Propco's insolvency and filing under the CCAA.

[40] I am satisfied that it is appropriate that an initial order extending the protection of a CCAA stay of proceedings under section 11.02(1) of the CCAA should be granted.

[41] Pursuant to section 11.7(1) of the CCAA, Alvarez & Marsal Inc. is appointed as Monitor.

[42] It is well established that the court has the jurisdiction to extend the protection of the stay of proceedings to Partnerships in order to ensure that the purposes of the CCAA can be achieved (see: *Lehndorff General Partner Ltd.* (1993), 17 CBR (3d) 24 (Ont. Gen. Div.); *Re Prism Income Fund*, 2011 ONSC 2061; *Re Canwest Publishing Inc.* 2010 ONSC 222 ("Canwest Publishing") and *Re Canwest Global Communications Corp.*, 2009 CarswellOnt 6184 ("Canwest Global").

[43] In these circumstances, I am also satisfied that it is appropriate to extend the stay to the Partnerships as requested.

[44] The Applicants also seek landlord protection in relation to third party tenants. Many retail leases of non-anchored tenants provide that tenants have certain rights against their landlords if the anchor tenant in a particular shopping mall or centre becomes insolvent or ceases operations. In order to alleviate the prejudice to TCC's landlords if any such non-anchored tenants attempt to exercise these rights, the Applicants request an extension of the stay of proceedings (the "Co-Tenancy Stay") to all rights of these third party tenants against the landlords that arise out of the insolvency of the Target Canada Entities or as a result of any steps taken by the Target Canada Entities pursuant to the Initial Order.

[45] The Applicants contend that the authority to grant the Co-Tenancy Stay derives from the broad jurisdiction under sections 11 and 11.02(1) of the CCAA to make an initial order on any terms that the court may impose. Counsel references *Re T. Eaton Co.*, 1997 CarswellOnt 1914 (Gen. Div.) as a precedent where a stay of proceedings of the same nature as the Co-Tenancy Stay was granted by the court in Eaton's second CCAA proceeding. The Court noted that, if tenants were permitted to exercise these "co-tenancy" rights during the stay, the claims of the landlord against the debtor company would greatly increase, with a potentially detrimental impact on the restructuring efforts of the debtor company.

[46] In these proceedings, the Target Canada Entities propose, as part of the orderly wind-down of their businesses, to engage a financial advisor and a real estate advisor with a view to implementing a sales process for some or all of its real estate portfolio. The Applicants submit that it is premature to determine whether this process will be successful, whether any leases will be conveyed to third party purchasers for value and whether the Target Canada Entities can successfully develop and implement a plan that their stakeholders, including their landlords, will accept. The Applicants further contend that while this process is being resolved and the orderly wind-down is underway, the Co-Tenancy Stay is required to postpone the contractual rights of these tenants for a finite period. The Applicants contend that any prejudice to the third party tenants' clients is significantly outweighed by the benefits of the Co-Tenancy Stay to all of the stakeholders of the Target Canada Entities during the wind-down period.

[47] The Applicants therefore submit that it is both necessary and appropriate to grant the Co-Tenancy Stay in these circumstances.

[48] I am satisfied the Court has the jurisdiction to grant such a stay. In my view, it is appropriate to preserve the status quo at this time. To the extent that the affected parties wish to challenge the broad nature of this stay, the same can be addressed at the "comeback hearing".

[49] The Applicants also request that the benefit of the stay of proceedings be extended (subject to certain exceptions related to the cash management system) to Target Corporation and its U.S. subsidiaries in relation to claims against these entities that are derivative of the primary liability of the Target Canada Entities.

[50] I am satisfied that the Court has the jurisdiction to grant such a stay. In my view, it is appropriate to preserve the status quo at this time and the stay is granted, again, subject to the proviso that affected parties can challenge the broad nature of the stay at a comeback hearing directed to this issue.

[51] With respect to the protection of employees, it is noted that TCC employs approximately 17,600 individuals.

[52] Mr. Wong contends that TCC and Target Corporation have always considered their employees to be integral to the Target brand and business. However, the orderly wind-down of the Target Canada Entities' business means that the vast majority of TCC employees will receive a notice immediately after the CCAA filing that their employment is to be terminated as part of the wind-down process.

[53] In order to provide a measure of financial security during the orderly wind-down and to diminish financial hardship that TCC employees may suffer, Target Corporation has agreed to fund an Employee Trust to a maximum of \$70 million.

[54] The Applicants seek court approval of the Employee Trust which provides for payment to eligible employees of certain amounts, such as the balance of working notice following termination. Counsel contends that the Employee Trust was developed in consultation with the proposed monitor, who is the administrator of the trust, and is supported by the proposed Representative Counsel. The proposed trustee is The Honourable J. Ground. The Employee Trust is exclusively funded by Target Corporation and the costs associated with administering the Employee Trust will be borne by the Employee Trust, not the estate of Target Canada Entities. Target Corporation has agreed not to seek to recover from the Target Canada Entities estates any amounts paid out to employee beneficiaries under the Employee Trust.

[55] In my view, it is questionable as to whether court authorization is required to implement the provisions of the Employee Trust. It is the third party, Target Corporation, that is funding the expenses for the Employee Trust and not one of the debtor Applicants. However, I do recognize that the implementation of the Employee Trust is intertwined with this proceeding and is beneficial to the employees of the Applicants. To the extent that Target Corporation requires a court order authorizing the implementation of the employee trust, the same is granted.

[56] The Applicants seek the approval of a KERP and the granting of a court ordered charge up to the aggregate amount of \$6.5 million as security for payments under the KERP. It is proposed that the KERP Charge will rank after the Administration Charge but before the Directors' Charge.

[57] The approval of a KERP and related KERP Charge is in the discretion of the Court. KERPs have been approved in numerous CCAA proceedings, including *Re Nortel Networks Corp.*, 2009 CarswellOnt 1330 (S.C.J.) [*Nortel Networks (KERP)*], and *Re Grant Forest Products Inc.*, 2009 CarswellOnt 4699 (Ont. S.C.J.). In *U.S. Steel Canada Inc.*, 2014 ONSC 6145, I recently approved the KERP for employees whose continued services were critical to the stability of the business and for the implementation of the marketing process and whose services

could not easily be replaced due, in part, to the significant integration between the debtor company and its U.S. parent.

[58] In this case, the KERP was developed by the Target Canada Entities in consultation with the proposed monitor. The proposed KERP and KERP Charge benefits between 21 and 26 key management employees and approximately 520 store-level management employees.

[59] Having reviewed the record, I am of the view that it is appropriate to approve the KERP and the KERP Charge. In arriving at this conclusion, I have taken into account the submissions of counsel to the Applicants as to the importance of having stability among the key employees in the liquidation process that lies ahead.

[60] The Applicants also request the Court to appoint Koskie Minsky LLP as employee representative counsel (the "Employee Representative Counsel"), with Ms. Susan Philpott acting as senior counsel. The Applicants contend that the Employee Representative Counsel will ensure that employee interests are adequately protected throughout the proceeding, including by assisting with the Employee Trust. The Applicants contend that at this stage of the proceeding, the employees have a common interest in the CCAA proceedings and there appears to be no material conflict existing between individual or groups of employees. Moreover, employees will be entitled to opt out, if desired.

[61] I am satisfied that section 11 of the CCAA and the *Rules of Civil Procedure* confer broad jurisdiction on the court to appoint Representative Counsel for vulnerable stakeholder groups such as employee or investors (see *Re Nortel Networks Corp.*, 2009 CarswellOnt 3028 (S.C.J.) (Nortel Networks Representative Counsel)). In my view, it is appropriate to approve the appointment of Employee Representative Counsel and to provide for the payment of fees for such counsel by the Applicants. In arriving at this conclusion, I have taken into account:

- (i) the vulnerability and resources of the groups sought to be represented;
- (ii) the social benefit to be derived from the representation of the groups;
- (iii) the avoidance of multiplicity of legal retainers; and
- (iv) the balance of convenience and whether it is fair and just to creditors of the estate.

[62] The Applicants also seek authorization, if necessary, and with the consent of the Monitor, to make payments for pre-filing amounts owing and arrears to certain critical third parties that provide services integral to TCC's ability to operate during and implement its controlled and orderly wind-down process.

[63] Although the objective of the CCAA is to maintain the status quo while an insolvent company attempts to negotiate a plan of arrangement with its creditors, the courts have expressly acknowledged that preservation of the status quo does not necessarily entail the preservation of the relative pre-stay debt status of each creditor.

[64] The Target Canada Entities seek authorization to pay pre-filing amounts to certain specific categories of suppliers, if necessary and with the consent of the Monitor. These include:

- a) Logistics and supply chain providers;
- b) Providers of credit, debt and gift card processing related services; and
- c) Other suppliers up to a maximum aggregate amount of \$10 million, if, in the opinion of the Target Canada Entities, the supplier is critical to the orderly wind-down of the business.

[65] In my view, having reviewed the record, I am satisfied that it is appropriate to grant this requested relief in respect of critical suppliers.

[66] In order to maximize recovery for all stakeholders, TCC indicates that it intends to liquidate its inventory and attempt to sell the real estate portfolio, either en bloc, in groups, or on an individual property basis. The Applicants therefore seek authorization to solicit proposals from liquidators with a view to entering into an agreement for the liquidation of the Target Canada Entities inventory in a liquidation process.

[67] TCC's liquidity position continues to deteriorate. According to Mr. Wong, TCC and its subsidiaries have an immediate need for funding in order to satisfy obligations that are coming due, including payroll obligations that are due on January 16, 2015. Mr. Wong states that Target Corporation and its subsidiaries are no longer willing to provide continued funding to TCC and its subsidiaries outside of a CCAA proceeding. Target Corporation (the "DIP Lender") has agreed to provide TCC and its subsidiaries (collectively, the "Borrower") with an interim financing facility (the "DIP Facility") on terms advantageous to the Applicants in the form of a revolving credit facility in an amount up to U.S. \$175 million. Counsel points out that no fees are payable under the DIP Facility and interest is to be charged at what they consider to be the favourable rate of 5%. Mr. Wong also states that it is anticipated that the amount of the DIP Facility will be sufficient to accommodate the anticipated liquidity requirements of the Borrower during the orderly wind-down process.

[68] The DIP Facility is to be secured by a security interest on all of the real and personal property owned, leased or hereafter acquired by the Borrower. The Applicants request a court-ordered charge on the property of the Borrower to secure the amount actually borrowed under the DIP Facility (the "DIP Lenders Charge"). The DIP Lenders Charge will rank in priority to all unsecured claims, but subordinate to the Administration Charge, the KERP Charge and the Directors' Charge.

[69] The authority to grant an interim financing charge is set out at section 11.2 of the CCAA. Section 11.2(4) sets out certain factors to be considered by the court in deciding whether to grant the DIP Financing Charge.

[70] The Target Canada Entities did not seek alternative DIP Financing proposals based on their belief that the DIP Facility was being offered on more favourable terms than any other

potentially available third party financing. The Target Canada Entities are of the view that the DIP Facility is in the best interests of the Target Canada Entities and their stakeholders. I accept this submission and grant the relief as requested.

[71] Accordingly, the DIP Lenders' Charge is granted in the amount up to U.S. \$175 million and the DIP Facility is approved.

[72] Section 11 of the CCAA provides the court with the authority to allow the debtor company to enter into arrangements to facilitate a restructuring under the CCAA. The Target Canada Entities wish to retain Lazard and Northwest to assist them during the CCAA proceeding. Both the Target Canada Entities and the Monitor believe that the quantum and nature of the remuneration to be paid to Lazard and Northwest is fair and reasonable. In these circumstances, I am satisfied that it is appropriate to approve the engagement of Lazard and Northwest.

[73] With respect to the Administration Charge, the Applicants are requesting that the Monitor, along with its counsel, counsel to the Target Canada Entities, independent counsel to the Directors, the Employee Representative Counsel, Lazard and Northwest be protected by a court ordered charge and all the property of the Target Canada Entities up to a maximum amount of \$6.75 million as security for their respective fees and disbursements (the "Administration Charge"). Certain fees that may be payable to Lazard are proposed to be protected by a Financial Advisor Subordinated Charge.

[74] In *Canwest Publishing Inc.*, 2010 ONSC 222, Pepall J. (as she then was) provided a non-exhaustive list of factors to be considered in approving an administration charge, including:

- a. The size and complexity of the business 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.

[75] Having reviewed the record, I am satisfied, that it is appropriate to approve the Administration Charge and the Financial Advisor Subordinated Charge.

[76] The Applicants seek a Directors' and Officers' charge in the amount of up to \$64 million. The Directors Charge is proposed to be secured by the property of the Target Canada Entities and to rank behind the Administration Charge and the KERP Charge, but ahead of the DIP Lenders' Charge.

[77] Pursuant to section 11.51 of the CCAA, the court has specific authority to grant a “super priority” charge to the directors and officers of a company as security for the indemnity provided by the company in respect of certain obligations.

[78] I accept the submissions of counsel to the Applicants that the requested Directors’ Charge is reasonable given the nature of the Target Canada Entities retail business, the number of employees in Canada and the corresponding potential exposure of the directors and officers to personal liability. Accordingly, the Directors’ Charge is granted.

[79] In the result, I am satisfied that it is appropriate to grant the Initial Order in these proceedings.

[80] The stay of proceedings is in effect until February 13, 2015.

[81] A comeback hearing is to be scheduled on or prior to February 13, 2015. I recognize that there are many aspects of the Initial Order that go beyond the usual first day provisions. I have determined that it is appropriate to grant this broad relief at this time so as to ensure that the status quo is maintained.

[82] The comeback hearing is to be a “true” comeback hearing. In moving to set aside or vary any provisions of this order, moving parties do not have to overcome any onus of demonstrating that the order should be set aside or varied.

[83] Finally, a copy of Lazard’s engagement letter (the “Lazard Engagement Letter”) is attached as Confidential Appendix “A” to the Monitor’s pre-filing report. The Applicants request that the Lazard Engagement Letter be sealed, as the fee structure contemplated in the Lazard Engagement Letter could potentially influence the structure of bids received in the sales process.

[84] Having considered the principles set out in *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 211 D.L.R (4th) 193 2 S.C.R. 522, I am satisfied that it is appropriate in the circumstances to seal Confidential Appendix “A” to the Monitor’s pre-filing report.

[85] The Initial Order has been signed in the form presented.

Regional Senior Justice Morawetz

Date: January 16, 2015

11

CITATION: *Boreal Capital Partners Ltd et al. (Re)*, 2021 ONSC 7802
COURT FILE NO.: CV-21-00672654-00CL
DATE: 2021-11-29

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-

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF
BOREAL CAPITAL PARTNERS LTD., JRB-331 SHEDDON HOLDINGS LTD.,
2123068 ONTARIO LIMITED, JRB-109 REYNOLDS HOLDINGS LTD., JRB-339
CHURCH HOLDINGS LTD., JRB-147 CHURCH HOLDINGS LTD, Applicants

BEFORE: Penny J.

COUNSEL: Rebecca L. Kennedy, Rachel Nicholson and Puya Fesharaki, for the Applicants

Peter J. Osborne, Alex Morrison and Greg Adams, for the proposed Monitor,
Ernst & Young Inc.

Daniel Shapira and Jessica Sorbara, for the DIP Lender, Halmont Properties
Corporation

James MacLellan and Bevan Brooksbank, for Trisura Guarantee Insurance
Company

HEARD (by videoconference in Toronto): November 25, 2021

ENDORSEMENT

Overview

- [1] This is an application for an initial order and other related relief under the *Companies Creditors Arrangement Act*, RSC 1985, c C-36.
- [2] This matter came before me at 2:00 PM on Thursday, November 25, 2021. After reviewing the application record and at the conclusion of oral submissions, I issued the initial order sought, with reasons to follow. These are the reasons.
- [3] The principal issues on the application are whether:
 - (a) the applicants meet the criteria to obtain relief under the CCAA;
 - (b) the court should grant a stay of proceedings, and whether this court should extend the stay of proceedings to the partnership entities involved in the enterprise;

- (c) the court should authorize the payment of certain pre-filing amounts to critical suppliers;
- (d) the court should approve the proposed interim debtor in possession financing;
- (e) the court should appoint Ernst & Young Inc. as the monitor of the applicants in these proceedings;
- (f) the court should approve the administration charge; and
- (g) the court should appoint Kesmark as the chief restructuring officer in these proceedings.

Background

- [4] In 2016, Roppongi Investments Ltd. (owned by Timothy Price) entered into a 50:50 property development partnership with JRB Capital Group Ltd. (owned by Jonathan Bowman) with the objective of developing residential real estate projects in Oakville, Ontario through Boreal Capital Partners Ltd. which would act as the general partner of Boreal Capital Partners LP, (collectively Boreal).
- [5] For each project, Boreal established a general partner and limited partner structure. There are five projects:
 - (1) the 331 Sheddon Avenue project is a 20-unit residential condominium development project. The project's completion has been delayed but it is currently at an advanced stage of construction;
 - (2) the 159 Trafalgar Road project is a potential commercial office development project. The lands for the project have been acquired and requisite permits and approvals obtained, but construction has not yet commenced at the project site;
 - (3) the 109 Reynolds Street project is a 23-unit residential condominium development. The lands for the project have been acquired and requisite permits and approvals obtained, but construction has not yet commenced at the project site;
 - (4) the 339 Church Street project is a 24-unit residential condominium development. The lands for the project have been acquired and requisite permits and approvals obtained, but construction has not yet commenced at the project site; and
 - (5) the 147 Church Street project is currently in the land assembly stage. The lands for the project have been acquired and requisite permits and approvals obtained, but construction has not yet commenced at the project site.
- [6] In August 2020, these Boreal entities faced financial and operational difficulty. Boreal required additional financing on an urgent basis to complete 331 Sheddon because the major secured creditor, Meridian Credit Union Limited, refused to provide additional

financing. Roppongi also identified various alleged deficiencies in JRB's management of the Boreal entities.

- [7] As a result, Roppongi arranged for Halmont Properties Corporation to provide subordinated financing to complete 331 Sheddon. In addition, Mr. Randal Froebelius, a nominee of Roppongi and Halmont, took over the management role of the Boreal entities from JRB. Shortly thereafter, Kesmark Estates Ltd., a company managed by Mr. Froebelius, was appointed as general partner of Boreal LP. The general partner of each of the project partnerships remained but were subject to review, oversight and approval of all decisions by Mr. Froebelius.
- [8] Relations between Roppongi and JRB continued to deteriorate, which ultimately led to a resolution by Boreal LP in September 2021 to replace all the project partnerships' general partner with Kesmark and to terminate various construction and design management contracts with JRB.
- [9] In May 2021, in order to avoid immediate enforcement action by Meridian, Halmont took an assignment of the obligations owing to Meridian and advanced additional funds to ensure that the Boreal entities could continue operating.
- [10] However, on November 5, 2021 Halmont gave notice of various breaches by the Boreal entities of their obligations and stipulated that any further advances to the Boreal entities would be on a day to day basis and at Halmont's sole discretion. Ultimately, Halmont advised that it would not make any further advances to the Boreal entities outside of a formal restructuring process.
- [11] In sum, the principal assets of the Boreal entities are the real property relating to the various projects (all in various stages of active development). Halmont is the principal secured creditor, with separate charges registered against most of the real property owned by the Boreal entities. As of November 24, 2021, the Boreal entities' aggregate indebtedness to Halmont was \$44,820,666 (which includes a small unsecured portion of less than \$100,000).
- [12] The applicants are insolvent and are currently operating at a financial deficit of approximately \$8.9 million on a consolidated basis. They have relied on Halmont as the lender of last resort since October 2020, as no other lender would provide financing to the Boreal entities given their imperiled financial state. The applicants are in default of their obligations owing to Halmont.
- [13] Other secured creditors of the Boreal entities include Trisura Guarantee Insurance Company, Roppongi Investments Ltd. and Canadian Western Bank, with charges registered against real properties owned by various Boreal entities. This application was made on notice to Halmont, Trisura and Roppongi, all of which support the relief being sought.

Analysis

Do the applicants meet the criteria to obtain relief under the CCAA?

- [14] The applicants are insolvent. Both the test under the BIA and the expanded *Stelco* test are satisfied in this case. The applicants' liabilities materially exceed their assets and they are experiencing an operational deficit: the applicants are unable to pay liabilities that are currently due and those coming due. In addition, the applicants are exposed to significant financial risk arising from claims of unsecured creditors and other stakeholders that the applicants will be unable to pay without interim financing. This includes a host of potential claims relating to delay or frustration of the development of the projects, such as by contractors and potential end users of the condominium units. The statutory financial threshold is not in issue.

Should the court grant the stay of proceedings and should the court extend the stay of proceedings to the partnership entities involved in the enterprise?

- [15] Section 11.02(1) permits the court to grant an initial stay of up to 10 days on an application for an initial order, provided the stay is appropriate and the applicants have acted with due diligence and in good faith. Under s. 11.001, other relief granted under s. 11 of the CCAA at the same time as an initial order under s. 11.02(1) must be limited "to relief that is reasonably necessary for the continued operation of the debtor company in the ordinary course of business during that period."
- [16] Absent exceptional circumstances, the relief granted during the initial stay period should be limited and where possible, the status quo should be maintained during that period. The initial stay period allows for operations to be stabilized and negotiations to occur, followed by requests for expanded relief on proper notice to affected parties at the full comeback hearing. Whether particular relief is necessary to stabilize a debtor company's operations during the initial stay period is a factual determination, based on all of the circumstances of the particular debtor. There are no "hard and fast" rules: *Re Lydian International Limited*, 2019 ONSC 7473 [Commercial List].
- [17] Here, the applicants are experiencing a liquidity crisis and are unable to meet their obligations generally as they become due. The applicants intend to continue operations and consult with their stakeholders in good faith if they are granted protection. Therefore, it is appropriate for this Court to grant the requested stay of proceedings in favour of the applicants.
- [18] The CCAA applies to debtor companies, not partnerships. Nevertheless, where the operations of partnerships are integral and closely related to the operations of the applicants, it is well-established that the court has the jurisdiction to extend the protection of the stay of proceedings to those partnerships in order to ensure that the purposes of the CCAA can be achieved.
- [19] The individual project partnerships are not applicants in this proceeding. The business and operations of the applicants are, however, deeply integrated with the partnerships at all

levels. Omitting the partnerships from relief would frustrate the objective of seeking respite for the applicants under the CCAA.

Should the court authorize the payment of certain pre-filing amounts to critical suppliers?

- [20] The applicants seek authority, with the consent of the Monitor, to make payments, including pre-filing amounts owing and in arrears, to certain third parties that provide services that are integral to the Boreal entities' ability to operate. This is a measure designed to ensure that the Boreal entities can continue regular business operations during the post-filing period and efficiently complete certain projects.
- [21] The court has jurisdiction to make any orders that it thinks appropriate under s. 11 of the CCAA. Payment to critical suppliers, including provision for the payment of pre-filing amounts to suppliers whose services are viewed as critical to the post-filing operations of the debtor, is necessary to achieve the purposes for which the initial order is being granted.
- [22] A supplier is "critical" to the debtor company's post-filing operations where the particular goods or services are sufficiently integrated into the debtor company's operations that it would be materially disruptive to the debtor's operations and restructuring for the particular supplier to cease providing such services. I agree that in the circumstances, the Monitor is best suited to determine when any supplier of the Boreal entities is "critical" such that pre-filing payments should be permitted.

Should the court approve the proposed interim debtor in possession financing?

- [23] Section 11.2 of the CCAA gives the court authority to approve debtor-in-possession ("DIP") financing. The court may also make an order granting a priority charge to the DIP provider over the debtor's property. The security or charge may not secure pre-filing obligations.
- [24] As noted above, under the recent CCAA amendments, when an application for interim financing is made at the same time as an initial application, the applicant must satisfy the court 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" [i.e. the initial stay period].
- [25] In this case, the DIP facility and related DIP lender's charge are essential elements of the measures required during the initial stay period to ensure the survival of the Boreal entities' businesses and operations until the comeback hearing.
- [26] The Boreal entities urgently require interim financing to provide stability, continue operations, and restructure their business. The only potential financier is their existing lender of last resort, Halmont, which has agreed to provide the DIP facility. It is appropriate for the DIP lender's charge to be secured on the Boreal entities' property given that all of the Boreal entities will derive benefit from the DIP facility proceeds. The amount sought for the initial charge is exactly calibrated to the anticipated cash needs for the next ten days. The initial draw of \$2.6 million is required to allow the Boreal entities to pay specified

amounts that are expected to be due during the initial stay period - amounts specified in the Cash Flow Forecast.

- [27] Finally, no viable compromise or arrangement is possible without the DIP facility. Without the immediate liquidity provided by the initial DIP facility draw, the applicants' business is in serious jeopardy and will not survive beyond the initial stay period.

Should the court appoint Ernst & Young Inc. as the monitor of the applicants in these proceedings?

- [28] Ernst & Young has consented to act as monitor in these CCAA proceedings. It is a trustee within the meaning of subsection 2(1) of the BIA. E&Y is not subject to any of the restrictions as to who may be appointed as monitor set out in section 11.7(2) of the CCAA.

Should the court approve the administration charge?

- [29] Section 11.52 of the CCAA gives the court jurisdiction to grant a priority charge for the fees and expenses of financial, legal and other advisors or experts. In determining whether to approve an administration charge, the Court must consider: (a) the size and complexity of the businesses under CCAA protection; (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 is fair and reasonable; (e) the position of secured creditors likely to be affected by the charge; and (f) the position of the Monitor. These factors have been applied in numerous proceedings.
- [30] The Monitor, its counsel, the applicant's counsel and the DIP lender's counsel are essential to the operation of these CCAA proceedings. It is unlikely that these advisors will participate in the CCAA proceedings without the administration charge. Furthermore, the quantum of the proposed administration charge in the initial order is limited to what is "reasonably necessary" for the initial stay period, given the demands on the advisors leading up to the filing together with likely further demands prior to the comeback hearing.

Should the court appoint Kesmark as the chief restructuring officer in these proceedings and grant the requested protections?

- [31] The court has the statutory authority to make an order appointing a CRO under s. 11 of the CCAA. These appointments may be made where the proposed CRO has expertise which will assist the applicants (and the Monitor) in achieving the objectives of the CCAA.
- [32] Kesmark's expertise and continued participation are critical to achieving the objectives of the CCAA in the circumstances by permitting the Boreal entities to continue their operations and plan a restructuring. Kesmark is not an "insider" of management and has the existing institutional knowledge, expertise and proven track-record to fulfill the obligations of a CRO. This appointment is supported by the Monitor.
- [33] CROs may also be granted certain protections from liability in the execution of their duties in a similar manner to court-appointed monitors. Providing protections in the proposed initial order to Kesmark as CRO will ensure Kesmark can: (i) continue acting as the general

partner of the partnerships, (ii) continue the business normalization efforts it has undertaken since its appointment; and, (iii) manage and oversee the projects and conduct the day-to-day business of the Boreal entities.

Conclusion

[34] For all these reasons, the initial order is granted.

Penny J.

Date: 2021-11-29

12

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Walter Energy Canada Holdings, Inc. (Re)*,
2016 BCSC 107

Date: 20160126
Docket: S1510120
Registry: Vancouver

**In the Matter of the *Companies' Creditors Arrangement Act*,
R.S.C. 1985, c. C-36 as Amended**

And

**In the Matter of the *Business Corporations Act*,
S.B.C. 2002, c. 57, as Amended**

And

**In the Matter of a Plan of Compromise or Arrangement
of Walter Energy Canada Holdings, Inc. and the Other
Petitioners Listed on Schedule "A"**

Before: The Honourable Madam Justice Fitzpatrick

Reasons for Judgment

Counsel for the Petitioners:

Marc Wasserman
Mary I.A. Buttery
Tijana Gavric
Joshua Hurwitz

Counsel for United Mine Workers of America
1974 Pension Plan and Trust:

John Sandrelli
Tevia Jeffries

Counsel for Steering Committee of First Lien
Creditors of Walter Energy, Inc.:

Matthew Nied

Counsel for Her Majesty the Queen in Right
of the Province of British Columbia:

Aaron Welch

Counsel for Morgan Stanley Senior Funding,
Inc.:

Kathryn Esaw

Counsel for KPMG Inc., Monitor:

Peter Reardon
Wael Rostom
Caitlin Fell

Counsel for Canada Revenue Agency:

Neva Beckie

Counsel for the United States Steel Workers,
Local 1-424:

Stephanie Drake

Place and Date of Hearing and Ruling given
to Parties with Written Reasons to Follow:

Vancouver, B.C.
January 5, 2016

Place and Date of Written Reasons:

Vancouver, B.C.
January 26, 2016

Introduction and Background

[1] On December 7, 2015, I granted an initial order in favour of the petitioners, pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended ("CCAA").

[2] The "Walter Group" is a major exporter of metallurgical coal for the steel industry, with mines and operations in the U.S., Canada and the U.K. The petitioners comprise part of the Canadian arm of the Walter Group and are known as the "Walter Canada Group". The Canadian entities were acquired by the Walter Group only recently in 2011.

[3] The Canadian operations principally include the Brule and Willow Creek coal mines, located near Chetwynd, B.C., and the Wolverine coal mine, near Tumbler Ridge, B.C. The mine operations are conducted through various limited partnerships. The petitioners include the Canadian parent holding company and the general partners of the partnerships. Given the complex corporate structure of the Walter Canada Group, the initial order also included stay provisions relating to the partnerships: *Lehndorff General Partner Ltd. (Re)* (1993), 9 B.L.R. (2d) 275 (Ont. Gen. Div.); *Asset Engineering LP v. Forest & Marine Financial Limited Partnership*, 2009 BCCA 319 at para. 21.

[4] The timing of the Canadian acquisition could not have been worse. Since 2011, the market for metallurgical coal has fallen dramatically. This in turn led to financial difficulties in all three jurisdictions in which the Walter Group operated. The three Canadian mines were placed in care and maintenance between April 2013 and June 2014. The mines remain in this state today, at an estimated annual cost in excess of \$16 million. Similarly, the U.K. mines were idled in 2015. In July 2015, the U.S. companies in the Walter Group filed and sought creditor protection by filing a proceeding under Chapter 11 of the U.S. *Bankruptcy Code*. It is my understanding that the U.S. entities have coal mining operations in Alabama and West Virginia.

[5] From the time of the granting of the initial order, it was apparent that the outcome of the U.S. proceedings would have a substantial impact on the Walter

Canada Group. A sales process completed in the U.S. proceeding is anticipated to result in a transfer of the U.S. assets to a stalking horse bidder sometime early this year. This is significant because the U.S. companies have historically supported the Canadian operations with funding and provided essential management services. This is a relevant factor in terms of the proposed relief, as I will discuss below.

[6] The Walter Canada Group faces various significant contingent liabilities. The various entities are liable under a 2011 credit agreement of approximately \$22.6 million in undrawn letters of credit for post-mining reclamation obligations. Estimated reclamation costs for all three mines exceed this amount. Further obligations potentially arise with respect to the now laid-off employees of the Wolverine mine, who are represented by the United Steelworkers, Local 1-424 (the "Union"). If these employees are not recalled before April 2016, the Wolverine partnership faces an estimated claim of \$11.3 million. As I will discuss below, an even more significant contingent liability has also recently been advanced.

[7] This anticipated "parting of the ways" as between the U.S. and Canadian entities in turn prompted the filing of this proceeding, which is intended to provide the petitioners with time to develop a restructuring plan. The principal goal of that plan, as I will describe below, is to complete a going concern sale of the Canadian operations as soon as possible. Fortunately, as of early December 2015, the Walter Canada Group has slightly in excess of US\$40.5 million in cash resources to fund the restructuring efforts. However, ongoing operating costs remain high and are now compounded by the restructuring costs.

[8] As was appropriate, the petitioners did not seek extensive orders on December 7, 2015, given the lack of service on certain major stakeholders. A stay was granted on that date, together with other ancillary relief. KPMG Inc. was appointed as the monitor (the "Monitor").

[9] The petitioners now seek relief that will set them on a path to a potential restructuring; essentially, an equity and/or debt restructuring or alternatively, a sale and liquidation of their assets. That relief includes approving a sale and solicitation

process and the appointment of further professionals to manage that process and complete other necessary management functions. They also seek a key employee retention plan. Finally, the petitioners seek an extension of the stay to early April 2016.

[10] For obvious reasons, the financial and environmental issues associated with the coal mines loom large in this matter. For that reason, the Walter Canada Group has engaged in discussions with the provincial regulators, being the B.C. Ministry of Energy and Mines and the B.C. Ministry of the Environment, concerning the environmental issues and the proposed restructuring plan. No issues arise from the regulators' perspective at this time in terms of the relief on this application. Other stakeholders have responded to the application and contributed to the final terms of the relief sought.

[11] The stakeholders appearing on this application are largely supportive of the relief sought, save for two.

[12] Firstly, the United Mine Workers of America 1974 Pension Plan and Trust (the "1974 Pension Plan") opposes certain aspects of the relief sought as to who should be appointed to conduct the sales process.

[13] The status of the 1974 Pension Plan arises from somewhat unusual circumstances. One of the U.S. entities, Jim Walter Resources, Inc. ("JWR") is a party to a collective bargaining agreement with the 1974 Pension Plan (the "CBA"). In late December 2015, the U.S. bankruptcy court issued a decision that allowed JWR to reject the CBA. The court also ordered that the sale of the U.S. assets would be free and clear of any liabilities under the CBA. As a result, the 1974 Pension Plan has filed a proof of claim in the U.S. proceedings advancing a contingent claim against JWR with respect to a potential "withdrawal liability" under U.S. law of approximately US\$900 million. The U.S. law in question is the *Employee Retirement Income Security Act of 1974*, 29 USC § 101, as amended, which is commonly referred to as "ERISA".

[14] The 1974 Pension Plan alleges that it is only a matter of time before JWR formally rejects the CBA. In that event, the 1974 Pension Plan contends that *ERISA* provides that all companies under common control with JWR are jointly and severally liable for this withdrawal liability, and that some of the entities in the Walter Canada Group come within this provision.

[15] It is apparent at this time that neither the Walter Canada Group nor the Monitor has had an opportunity to assess the 1974 Pension Plan's contingent claim. No claims process has even been contemplated at this time. Nevertheless, the standing of the 1974 Pension Plan to make submissions on this application is not seriously contested.

[16] Secondly, the Union only opposes an extension of the stay of certain proceedings underway in this court and the Labour Relations Board in relation to some of its employee claims, which it wishes to continue to litigate.

[17] At the conclusion of the hearing, I granted the orders sought by the petitioners, with reasons to follow. Hence, these reasons.

The Sale and Investment Solicitation Process ("SISP")

[18] The proposed SISP has been developed by the Walter Canada Group in consultation with the Monitor. By this process, bidders may submit a letter of intent or bid for a restructuring, recapitalization or other form of reorganization of the business and affairs of the Walter Canada Group as a going concern, or a purchase of any or all equity interests held by Walter Energy Canada. Alternatively, any bid may relate to a purchase of all or substantially all, or any portion of the Walter Canada Group assets (including the Brule, Willow Creek and Wolverine mines).

[19] It is intended that the SISP will be led by a chief restructuring officer (the "CRO"), implemented by a financial advisor (both as discussed below) and supervised by the Monitor.

[20] Approvals of SISPs are a common feature in CCAA restructuring proceedings. The Walter Canada Group refers to *CCM Master Qualified Fund v. blutip Power Technologies*, 2012 ONSC 1750. At para. 6, Brown J. (as he then was) stated that in reviewing a proposed sale process, the court should consider:

- (i) the fairness, transparency and integrity of the proposed process;
- (ii) the commercial efficacy of the proposed process in light of the specific circumstances facing the receiver; and,
- (iii) whether the sales process will optimize the chances, in the particular circumstances, of securing the best possible price for the assets up for sale.

[21] Although the court in *CCM Master Qualified Fund* was considering a sales process proposed by a receiver, I agree that these factors are also applicable when assessing the reasonableness of a proposed sales process in a CCAA proceeding: see *PCAS Patient Care Automation Services Inc. (Re)*, 2012 ONSC 2840 at paras. 17-19.

[22] In this case, the proposed timelines would see a deadline of March 18 for letters of intent, due diligence thereafter with a bid deadline of May 27 and a target closing date of June 30, 2016. In my view, the timeline is reasonable, particularly with regard to the need to move as quickly as possible to preserve cash resources pending a sale or investment; or, in the worst case scenario, to allow the Walter Canada Group to close the mines permanently. There is sufficient flexibility built into the SISP to allow the person conducting it to amend these deadlines if the circumstances justify it.

[23] The SISP proposed here is consistent with similar sales processes approved in other Canadian insolvency proceedings. In addition, I agree with the Monitor's assessment that the SISP represents the best opportunity for the Walter Canada Group to successfully restructure as a going concern, if such an opportunity should arise.

[24] No stakeholder, including the 1974 Pension Plan, opposed this relief. All concerned recognize the need to monetize, if possible, the assets held by the Walter Canada Group. I conclude that the proposed SISP is reasonable and it is approved.

Appointment of Financial Advisor and CRO

[25] The more contentious issues are who should conduct the SISP and manage the operations of the Walter Canada Group pending a transaction and what their compensation should be.

[26] The Walter Canada Group seeks the appointment of a financial advisor and CRO to assist with the implementation of the SISP.

[27] In restructuring proceedings it is not unusual that professionals are engaged to advance the restructuring where the existing management is either unable or unwilling to bring the required expertise to bear. In such circumstances, courts have granted enhanced powers to the monitor; otherwise, the appointment of a CRO and/or financial advisor can be considered.

[28] A consideration of this issue requires some context in terms of the current governance status of the Walter Canada Group. At present, there is only one remaining director, who is based in West Virginia. The petitioners' counsel does not anticipate his long-term involvement in these proceedings and expects he will resign once the U.S. sale completes. Similarly, the petitioners have been largely instructed to date by William Harvey. Mr. Harvey is the executive vice-president and chief financial officer of Walter Energy Canada Holdings, Inc., one of the petitioners. He lives in Birmingham, Alabama. As with the director, the petitioners' counsel expects him to resign in the near future.

[29] The only other high level employee does reside in British Columbia, but his expertise is more toward operational matters, particularly regarding environmental and regulatory issues.

[30] Accordingly, there is a legitimate risk that the Walter Canada Group ship may become rudderless in the midst of these proceedings and most significantly, in the midst of the very important sales and solicitation process. This risk is exacerbated by the fact that the management support traditionally provided by the U.S. entities will not be provided after the sale of the U.S. assets. Significant work must be done to effect a transition of those shared services in order to allow the Canadian operations to continue running smoothly. It is anticipated that the CRO will play a key role in assisting in this transition of the shared services.

[31] In these circumstances, I am satisfied that professional advisors are not just desirable, but indeed necessary, in order to have a chance for a successful restructuring. Both appointments ensure that the SISP will be implemented by professionals who will enhance the likelihood that it generates maximum value for the Walter Canada Group's stakeholders. In addition, the appointment of a CRO will allow the Canadian operations to continue in an orderly fashion, pending a transaction.

[32] The proposal is to retain PJT Partners LP ("PJT") as a financial advisor and investment banker to implement the SISP. PJT is a natural choice given that it had already been retained in the context of the U.S. proceedings to market the Walter Group's assets, which of course indirectly included the Walter Canada Group's assets. As such, PJT is familiar with the assets in this jurisdiction, knowledge that will no doubt be of great assistance in respect of the SISP.

[33] In addition, the proposal is to retain BlueTree Advisors Inc. as the CRO, by which it would provide the services of William E. Aziz. Mr. Aziz is a well-known figure in the Canadian insolvency community; in particular, he is well known for having provided chief restructuring services in other proceedings (see for example *Mobility Group (Re)*, 2013 ONSC 6167 at para. 17). No question arises as to his extensive qualifications to fulfil this role.

[34] The materials as to how Mr. Aziz was selected were somewhat thin, which raised some concerns from the 1974 Pension Plan as to the appropriateness of his

involvement. However, after submissions by the petitioners' counsel, I am satisfied that there was a thorough consideration of potential candidates and their particular qualifications to undertake what will no doubt be a time-consuming and complex assignment. In that regard, I accept the recommendations of the petitioners that Mr. Aziz is the most qualified candidate.

[35] The Monitor was involved in the process by which PJT and BlueTree/Mr. Aziz were selected. It has reviewed both proposals and supports that both PJT and BlueTree are necessary appointments that will result in the Walter Canada Group obtaining the necessary expertise to proceed with its restructuring efforts. In that sense, such appointments fulfill the requirements of being "appropriate", in the sense that that expertise will assist the debtor in achieving the objectives of the CCAA: see s. 11; *ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd.*, 2007 SKQB 121 at para. 19.

[36] The 1974 Pension Plan does not mount any serious argument against the need for such appointments, other than to note that the costs of these retainers will result in a very expensive process going forward. The matter of PJT and the CRO's compensation was the subject of some negative comment by the 1974 Pension Plan. However, the 1974 Pension Plan did not suggest any alternate way of proceeding with the SISP and the operations generally. When pressed by the Court on the subject, the 1974 Pension Plan acknowledged that time was of the essence in implementing the SISP and it did not contend that a further delay was warranted to canvas other options.

[37] PJT is to receive a monthly work fee of US\$100,000, although some savings are achieved since this amount will not be charged until the completion of the U.S. sale. In addition, PJT will receive a capital raising fee based on the different types of financing that might be arranged. Lastly, PJT is entitled to a transaction or success fee, based on the consideration received from any transaction.

[38] At the outset of the application, the proposed compensation for the CRO was similar to that of PJT. The CRO was to obtain a monthly work fee of US\$75,000. In

addition, the CRO was to receive a transaction or success fee based on the consideration received from any transaction. After further consideration by the petitioners and BlueTree, this proposed compensation was subsequently renegotiated so as to limit the success fee to \$1 million upon the happening of a “triggering event” (essentially, a recapitalization, refinancing, acquisition or sale of assets or liabilities).

[39] To secure the success fees of PJT and the CRO, the Walter Canada Group seeks a charge of up to a maximum of \$10 million, with each being secured to a limit of half that amount. Any other fees payable by the Walter Canada Group to PJT and the CRO would be secured by the Administration Charge granted in the initial order.

[40] The jurisdiction to grant charges for such professional fees is found in s. 11.52 of the CCAA:

11.52(1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge — in an amount that the court considers appropriate — in respect of the fees and expenses of

- (a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor’s duties;
- (b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and
- (c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.

[41] In *U.S. Steel Canada Inc. (Re)*, 2014 ONSC 6145 at para. 22, Justice Wilton-Siegel commented on the necessity of such a charge in a restructuring, as it is usually required to ensure the involvement of these professionals and achieve the best possible outcome for the stakeholders. I concur in that sentiment here, as the involvement of PJT and BlueTree is premised on this charge being granted.

[42] In *Canwest Publishing Inc.*, 2010 ONSC 222 at para. 54, Justice Pepall (as she then was) set out a non-exhaustive list of factors to consider when determining

whether the proposed compensation is appropriate and whether charges should be granted for that compensation:

- (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.

[43] I am satisfied that the Walter Canada Group's assets and operations are significantly complex so as to justify both these appointments and the proposed compensation. I have already referred to the significant regulatory and environmental issues that arise. In addition, relevant employment issues are already present. Any transaction relating to these assets and operations will be anything but straightforward.

[44] The factors relating to the proposed role of the professionals and whether there is unwarranted duplication can be addressed at the same time. As conceded by the petitioners' and Monitor's counsel, there will undoubtedly be some duplication with the involvement of the Monitor, PJT and the CRO. However, the issue is whether there is *unwarranted* duplication of effort. I am satisfied that the process has been crafted in a fashion that recognizes the respective roles of these professionals but also allows for a coordinated effort that will assist each of them in achieving their specific goals. Each has a distinct focus and I would expect that their joint enterprise will produce a better result overall.

[45] Any consideration of compensation will inevitably be driven by the particular facts that arise in the proceedings in issue. Even so, I have not been referred to any material that indicates that the proposed compensation and charge in favour of PJT and the CRO are inconsistent with compensation structures and protections approved in other similarly complex insolvency proceedings. In that regard, I accept

the petitioners' submissions that the task ahead justifies both the amount of the fees to be charged and the protections afforded by the charge. In short, I find that the proposed compensation is fair and reasonable in these circumstances.

[46] The secured creditors likely to be affected by the charges for PJT and the CRO's fees have been given notice and do not oppose the relief being sought.

[47] Finally, the Monitor is of the view that the agreed compensation of PJT and the CRO and the charge in their favour are appropriate.

[48] In summary, all circumstances support the relief sought. Accordingly, I conclude that it is appropriate to appoint the CRO and approve the engagement of PJT on the terms sought. In addition, I grant a charge in favour of PJT and the CRO to a maximum of \$10 million to secure their compensation beyond the monthly work fees, subject to the Administration Charge, the Director's Charge and the KERP Charge (as discussed below).

Key Employee Retention Plan ("KERP")

[49] The Walter Canada Group also seeks approval of a KERP, for what it describes as a "key" employee needed to maintain the Canadian operations while the SISP is being conducted. In addition, Mr. Harvey states that this employee has specific information which the CRO, PJT and the Monitor will need to draw on during the implementation of the SISP.

[50] The detailed terms of the KERP are contained in a letter attached to Mr. Harvey's affidavit #3 sworn December 31, 2015. In the course of submissions, the Walter Canada Group sought an order to seal this affidavit, on the basis that the affidavit and attached exhibit contained sensitive information, being the identity of the employee and the compensation proposed to be paid to him.

[51] I was satisfied that a sealing order should be granted with respect to this affidavit, based on the potential disclosure of this personal information to the public: see *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41 at

para. 53; *Sahlin v. The Nature Trust of British Columbia*, 2010 BCCA 516 at para. 6. A sealing order was granted on January 5, 2016.

[52] The proposed KERP must be considered in the context of earlier events. This individual was to receive a retention bonus from the U.S. entities; however, this amount is now not likely to be paid. In addition, just prior to the commencement of these proceedings, this person was given a salary increase to reflect his additional responsibilities, including those arising from the loss of support and the shared services from the U.S. entities. This new salary level has not been disclosed to the court or the stakeholders.

[53] The Walter Canada Group has proposed that this employee be paid a retention bonus on the occurrence of a “triggering event”, provided he remains an active employee providing management and other services. The defined triggering events are such that the retention bonus is likely to be paid whatever the outcome might be. In addition, to secure the payment of the KERP to this employee, Walter Energy Canada seeks a charge up to the maximum amount of the retention bonus.

[54] The amount of the retention bonus is large. It has been disclosed in the sealed affidavit but has not been disclosed to certain stakeholders, including the 1974 Pension Plan. The Monitor states in its report:

The combination of the salary increase and proposed retention bonus ... were designed to replace the retention bonus previously promised to the KERP Participant by Walter Energy U.S.

[55] I did not understand the submissions of the 1974 Pension Plan to be that the granting of a KERP for this employee was inappropriate. Rather, the concern related to the amount of the retention bonus, which is to be considered in the context of the earlier salary raise. At the end of the day, the 1974 Pension Plan was content to leave a consideration of the level of compensation to the Court, given the sealing of the affidavit.

[56] The authority to approve a KERP is found in the courts' general statutory jurisdiction under s. 11 of the CCAA to grant relief if "appropriate": see *U.S. Steel Canada* at para. 27.

[57] As noted by the court in *Timminco Ltd. (Re)*, 2012 ONSC 506 at para. 72, KERPs have been approved in numerous insolvency proceedings, particularly where the retention of certain employees was deemed critical to a successful restructuring.

[58] Factors to be considered by the court in approving a KERP will vary from case to case, but some factors will generally be present. See for example, *Grant Forest Products Inc. (Re)* (2009), 57 C.B.R. (5th) 128 (Ont. S.C.J.); and *U.S. Steel Canada* at paras. 28-33.

[59] I will discuss those factors and the relevant evidence on this application, as follows:

- a) Is this employee important to the restructuring process?: In its report, the Monitor states that this employee is the most senior remaining executive in the Walter Canada Group, with extensive knowledge of its assets and operations. He was involved in the development of the Wolverine mine and has extensive knowledge of all three mines. He also has strong relationships in the communities in which the mines are located, with the Group's suppliers and with the regulatory authorities. In that sense, this person's expertise will enhance the efforts of the other professionals to be involved, including PJT, the CRO and the Monitor: *U.S. Steel* at para. 28;
- b) Does the employee have specialized knowledge that cannot be easily replaced?: I accept that the background and expertise of this employee is such that it would be virtually impossible to replace him if he left the employ of the Walter Canada Group: *U.S. Steel* at para. 29;
- c) Will the employee consider other employment options if the KERP is not approved?: There is no evidence here on this point, but I presume

that the KERP is more a prophylactic measure, rather than a reactionary one. In any event, this is but one factor and I would adopt the comments of Justice Newbould in *Grant Forest Products* at paras. 13-15, that a “potential” loss of this person’s employment is a factor to be considered;

- d) Was the KERP developed through a consultative process involving the Monitor and other professionals?: The Monitor has reviewed the proposed KERP, but does not appear to have been involved in the process. Mr. Harvey confirms the business decision of the Walter Canada Group to raise this employee’s salary and propose the KERP. The business judgment of the board and management is entitled to some deference in these circumstances: *Grant Forest Products* at para. 18; *U.S. Steel Canada* at para. 31; and
- e) Does the Monitor support the KERP and a charge?: The answer to this question is a resounding “yes”. As to the amount, the Monitor notes that the amount of the retention bonus is at the “high end” of other KERP amounts of which it is aware. However, the Monitor supports the KERP amount even in light of the earlier salary increase and after considering the value and type of assets under this person’s supervision and the critical nature of his involvement in the restructuring. As this Court’s officer, the views of the Monitor are also entitled to considerable deference by this Court: *U.S. Steel* at para. 32.

[60] In summary, the petitioners’ counsel described the involvement of this individual in the CCAA restructuring process as “essential” or “critical”. These sentiments are echoed by the Monitor, who supports the proposed KERP and charge to secure it. The Monitor’s report states that this individual’s ongoing employment will be “highly beneficial” to the Walter Canada Group’s restructuring efforts, and that this employee is “critical” to the care and maintenance operations at

the mines, the transitioning of the shared services from the U.S. and finally, assisting with efforts under the SISP.

[61] What I take from these submissions is that a loss of this person's expertise either now or during the course of the CCAA process would be extremely detrimental to the chances of a successful restructuring. In my view, it is more than evident that there is serious risk to the stakeholders if this person does not remain engaged in the process. Such a result would be directly opposed to the objectives of the CCAA. I find that such relief is appropriate and therefore, the KERP and charge to secure the KERP are approved.

Cash Collateralization / Intercompany Charge

[62] Pursuant to the initial order, the Walter Canada Group was authorized and directed to cash collateralize all letters of credit secured by the 2011 credit agreement within 15 days of any demand to do so from the administrative agent, Morgan Stanley Senior Funding Inc. ("Morgan Stanley"). This order was made on the basis of representations by the Monitor's counsel that it had obtained a legal opinion that the security held by Morgan Stanley was valid and enforceable against the Walter Canada Group.

[63] On December 9, 2015, Morgan Stanley demanded the cash collateralization of approximately \$22.6 million of undrawn letters of credit. On December 21, 2015, Morgan Stanley requested that the Walter Canada Group enter into a cash collateral agreement (the "Cash Collateral Agreement") to formalize these arrangements.

[64] The Walter Canada Group seeks the approval of the Cash Collateral Agreement, which provides for the establishment of a bank account containing the cash collateral and confirms Morgan Stanley's pre-filing first-ranking security interest in the cash in the bank account. The cash collateralization is intended to relate to letters of credit issued on behalf of Brule Coal Partnership, Walter Canadian Coal Partnership, Wolverine Coal Partnership and Willow Creek Coal Partnership. However, only the Brule Coal Partnership has sufficient cash to collateralize all these letters of credit.

[65] Accordingly, the Walter Canada Group seeks an intercompany charge in favour of Brule Coal Partnership, and any member of the Walter Canada Group, to the extent that a member of the Walter Canada Group makes any payment or incurs or discharges any obligation on behalf of any other member of the Walter Canada Group in respect of obligations under the letters of credit. The intercompany charge is proposed to rank behind all of the other court-ordered charges granted in these proceedings, including the charges for PJT and the CRO and the KERP.

[66] No objection is raised in respect of this relief. The Monitor is of the view that the intercompany charge is appropriate.

[67] In my view, this relief is simply a formalization of the earlier authorization regarding the trusting up of these contingent obligations. On that basis, I approve the Cash Collateral Agreement. I also approve the intercompany charge in favour of the Brule Coal Partnership, on the basis that it is necessary to preserve the *status quo* as between the various members of the Walter Canada Group who will potentially benefit from the use of this Partnership's funds. Such a charge will, as stated by the Monitor, protect the interests of creditors as against the individual entities within the Walter Canada Group.

Stay Extension

[68] In order to implement the SISP, and further its restructuring efforts in general, the Walter Canada Group is seeking an extension of the stay and other relief granted in the initial order until April 5, 2016.

[69] Section 11.02(2) and (3) of the CCAA authorizes the court to make an order extending a stay of proceedings granted in the initial application. In this case, the evidence, together with the conclusions of the Monitor, support that an extension is appropriate and that the petitioners are acting in good faith and with due diligence. No stakeholder has suggested otherwise.

[70] As noted above, it is anticipated that the Walter Canada Group will have sufficient liquidity to continue operating throughout the requested stay period.

[71] Further, as the Phase 1 deadline in the SISP is March 18 2016, an extension of the stay until April 5, 2016 will provide sufficient time for PJT to solicit, and the CRO (in consultation with the Monitor and PJT) to consider, any letters of intent. At that time, the process may continue to Phase 2 of the SISP, if the CRO, in consultation with the Monitor and PJT, deems it advisable. In any event, at the time of the next court date, there will be a formal update to the court and the stakeholders on the progress under the SISP.

[72] The only issue relating to the extension of the stay arises from the submissions of the Union, who represents the employees at the Wolverine mine owned and operated by the Wolverine Coal Partnership (“Wolverine LP”). The Union wishes to continue with certain outstanding legal proceedings outstanding against Wolverine LP, as follows:

- a) In June 2015, the B.C. Labour Relations Board (the “Board”) found that Wolverine LP was in breach of s. 54 of the *Labour Relations Code*, R.S.B.C. 1996, c. 224 (the “Code”). The Board ordered Wolverine LP to pay \$771,378.70 into trust by way of remedy. This was estimated to be the amount of damages owed by Wolverine LP, but the Union took the position that further amounts are owed. In any event, this amount was paid and is currently held in trust;
- b) In November 2015, Wolverine LP filed a proceeding in this court seeking a judicial review of the Board’s decision on the s. 54 issue. As a result, the final determination of the damages arising from the *Code* breach has not yet occurred and may never occur if Wolverine LP succeeds in its judicial review; and
- c) Following layoffs in April 2014, the Union claimed that a “northern allowance” was payable by Wolverine LP to the employees, including those on layoff. This claim was rejected at arbitration, and upheld on review at the Board. In February 2015, the Union filed a proceeding in this court seeking a judicial review of the Board’s decision.

[73] The Union's counsel has referred me to my earlier decision in *Yukon Zinc Corporation (Re)*, 2015 BCSC 1961. There, I summarized the principles that govern applications by a creditor to lift the stay of proceedings to litigate claims:

[26] There is also no controversy concerning the principles which govern applications by creditors under the CCAA to lift the stay of proceedings to litigate claims in other courts or forums, other than by the procedures in place in the restructuring proceedings:

- a) the lifting of the stay is discretionary: *Canwest Global Communications Corp.*, 2011 ONSC 2215, at paras. 19, 27;
- b) there are no statutory guidelines and the applicant faces a "very heavy onus" in making such an application: *Canwest Global Communications Corp. (Re)* (2009), 61 C.B.R. (5th) 200, at para. 32, 183 A.C.W.S. (3d) (Ont. S.C.J.) ("*Canwest* (2009)"), as applied in *Azure Dynamics Corporation (Re)*, 2012 BCSC 781, at para. 5 and *505396 B.C. Ltd. (Re)*, 2013 BCSC 1580, at para. 19;
- c) there are no set circumstances where a stay will or will not be lifted, although examples of situations where the courts have lifted stay orders are set out in *Canwest* (2009) at para. 33;
- d) relevant factors will include the status of the CCAA proceedings and what impact the lifting of the stay will have on the proceedings. The court may consider whether there are sound reasons for doing so consistent with the objectives of the CCAA, including a consideration of the relative prejudice to parties and, where relevant, the merits of the proposed action: *Canwest* (2009) at para. 32;
- e) particularly where the issue is one which is engaged by a claims process in place, it must be remembered that one of the objectives of the CCAA is to promote a streamlined process to determine claims that reduces expense and delay; and
- f) as an overarching consideration, the court must consider whether it is in the interests of justice to lift the stay: *Canwest* (2009); *Azure Dynamics* at para. 28.

[74] I concluded that the Union had not met the "heavy onus" on it to justify the lifting of the stay to allow these various proceedings to continue. My specific reasons are:

- a) The Union argues that the materials are essentially already assembled and that these judicial reviews can be scheduled for short chambers matters. As such, the Union argues that there is "minimal prejudice" to Wolverine LP. While this may be so, proceeding with these matters will

inevitably detract both managerial and legal focus from the primary task at hand, namely to implement the SISP, and as such, potentially interfere with the restructuring efforts;

- b) The Union argues that any purchaser of Wolverine LP's mine will inherit outstanding employee obligations pursuant to the *Code*. Accordingly, the Union argues that it will be more attractive to a buyer for the mine to have all outstanding employee claims resolved. Again, while this may come to pass, such an argument presupposes an outcome that is anything less than clear at this time. Such a rationale is clearly premature;
- c) The Union argues that it is unable to distribute the \$771,378.70 to its members until Wolverine LP's judicial review is addressed. Frankly, I see this delay as the only real prejudice to the Union members. However, on the other hand, one might argue that the Union members are in a favourable position with these monies being held in trust as opposed to being unsecured creditors of Wolverine. In any event, the Union's claim to these monies has not yet been determined and arises from a dispute that dates back to April 2014. Therefore, there is no settled liability that would allow such payment to be made; and
- d) The Union claims that these matters must be determined "in any event" and that they should be determined "sooner rather than later". However, the outcome of the SISP may significantly affect what recovery any creditor may hope to achieve in this restructuring. In the happy circumstance where there will be monies to distribute, I expect that a claims process will be implemented to determine valid claims, not only in respect of the Union's claims, but all creditors.

[75] In summary, there is nothing to elevate the Union's claims such that it is imperative that they be determined now. There is nothing to justify the distraction and expense of proceeding with these actions to the detriment of the restructuring

efforts. If it should come to pass that monies will be distributed to creditors, such as the Union, then I expect that the usual claims process will be implemented to decide the validity of those claims.

[76] In the meantime, if it becomes necessary to determine the validity of these claims quickly (such as to clarify potential successor claims for a purchaser), the Union will be at liberty to renew its application to lift the stay for that purpose.

[77] Accordingly, I grant an extension of the stay of proceedings and other ancillary relief until April 5, 2016.

“Fitzpatrick J.”

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CITATION: *Mizrahi Commercial (The One) LP et al.*, 2025 ONSC 2672
COURT FILE NOs.: CV-23-00707839-00CL and CV-25-00740512-00CL
DATE: 20250430

ONTARIO - SUPERIOR COURT OF JUSTICE – COMMERCIAL LIST

IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 243 OF THE
BANKRUPTCY AND INSOLVENCY ACT, R.S.C. 1985, c. B-3, AS AMENDED, AND SECTION
101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990, c. C.43, AS AMENDED

RE: **KEB HANA BANK as Trustee of IGIS GLOBAL PRIVATE PLACEMENT
REAL ESTATE FUND NO. 301 and as trustee of IGIS GLOBAL PRIVATE
PLACEMENT REAL ESTATE FUND NO. 434, Applicant**

AND:

**MIZRAHI COMMERCIAL (THE ONE) LP, MIZRAHI DEVELOPMENT
GROUP (THE ONE) INC., and MIZRAHI COMMERCIAL (THE ONE) GP
INC., Respondents**

and

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

RE: **MIZRAHI DEVELOPMENT GROUP (THE ONE) INC., and MIZRAHI
COMMERCIAL (THE ONE) GP INC.**

BEFORE: Peter J. Osborne J.

COUNSEL: *Brendan O'Neill, Christopher Armstrong, Mark Dunn and Jennifer Linde*, for
Alvarez & Marsal Canada Inc., in its capacity as Receiver

Jeremy Dacks and Michael De Lellis, for KEB Hana Bank / Senior Secured
Lenders

Jennifer Stam, for Proposed CRO

Britt Shales, for CERIECO Canada Corp.

David Bish, Nina Perfetto and David W. Levangie, for Coco International Inc. and
12823543 Canada Ltd.

Jerome R. Morse, David M. Trafford, Steven Weisz and Dilina Lallani, for
Mizrahi Inc.

Adam Slavens, for Tarion Warranty Corporation

Michael Hochberg, for Core Architects Inc.

Harvey Chaiton, for Aviva Insurance

Jeffrey A.L. Kriwetz, for Chateau Yorkville Corp.

HEARD: April 22, 2025

REASONS FOR DECISION

1. Last week, on April 22, 2025, I granted three orders in these two related proceedings:
 - a. in the Receivership Proceeding (CV-23-00707839-00CL), a Discharge Order discharging the Receiver and granting corollary relief;
 - b. in a new CCAA Proceeding (CV-25-00740512-00CL), an Initial Order; and
 - c. also in the new CCAA Proceeding, an Order approving a Transaction with Tridel Builders Inc. for the continued construction of The One, together with related relief.
2. Those three orders were granted at the conclusion of the hearing of the motions with reasons to follow. These are those reasons.
3. This Endorsement applies equally to each of the two above-noted Proceedings. Defined terms in this Endorsement have the meaning given to them in the Application materials (CCAA) or the motion materials (Receivership), unless otherwise stated.
4. These matters arise out of the construction (and related financing defaults) of The One, a development project at the marquee intersection of Yonge and Bloor Streets in Toronto, including an 85 storey condominium, hotel and retail tower and related amenities. The Receiver was originally appointed on October 18, 2023 to bring stability and appropriate oversight to the Project with a view to ensuring that construction of the Project would continue and recoveries could be maximized. Accordingly, the Receivership Proceeding has been ongoing for some time, with the full involvement of all stakeholders.
5. These matters were originally returnable on March 17, 2025. I granted an adjournment at the request of Mizrahi Inc. to allow that party a sufficient opportunity to file responding materials in opposition to certain elements of the relief sought.
6. Upon the return of these matters on April 22, 2025, the parties advised that the objections of Mizrahi Inc. had been resolved with the result that all of the relief sought was proceeding on a

consent or unopposed basis, save for Château Yorkville Corp. which requested an adjournment. That adjournment request is addressed below. Other than that, the CCAA Application and the motion within the Receivership Application were supported by the Receiver and proposed Monitor and the fulcrum creditor KEB Hana Bank and the Senior Secured Lenders, and were not opposed by any other stakeholder.

Adjournment Request

7. At the outset of the hearing, a party new to these proceedings, Château Yorkville Corp., appeared to request an adjournment of the motions “to a date no earlier than June 16, 2025” (i.e., almost two months) and an order abridging the time for service and validating service of its motion. One business day before the hearing of these motions, it filed a Notice of Motion and Affidavit of Antony DeFrancesco sworn April 17, 2025, on which it relies.

8. Notwithstanding the late filing of materials, I heard the motion for an adjournment. Château Yorkville requested an adjournment of the motion for approval of the Transaction on the basis that now, following completion of the SISP and the selection of Tridel, it has submitted to the Monitor a “transaction structure and indicative execution path” which includes the assignment or acquisition of existing secured debt, the provision of funds to support project completion, and a long-term asset stewardship plan. It has filed a redacted copy of a funding support letter in an amount exceeding CAD \$1.4 billion. It is also filed a redacted copy of a financing term sheet.

9. Château Yorkville submitted that due to the short timelines between the filing of the CCAA Application on April 3 and the return date of April 22, there had “not been a meaningful window to fully engage with the Receiver, Court Monitor, or other interested parties”.

10. The motion for adjournment was strongly opposed by the Receiver/Proposed Monitor and the Senior Secured Lenders. It was not supported by any other stakeholder.

11. After hearing submissions with respect to the proposed adjournment, including from counsel on behalf of Château Yorkville, whose candour and forthrightness I acknowledge, I dismissed the motion for a further adjournment.

12. Château Yorkville has not appeared in these proceedings previously. The SISP that resulted in the selection of Tridel and the request for Transaction approval today has been ongoing for many months. I approved the SISP almost a year ago on June 6, 2024. Château Yorkville did not participate in the SISP at all. The Phase 1 Bid Deadline established under the SISP was July 30, 2024. Château Yorkville did not submit a bid or even execute the non-disclosure agreement to access any of the available due diligence information. Nor did it make even informal inquiries or contact the Receiver, the Senior Secured Lenders, or their professional advisors about the Project at all.

13. The Receiver publicly disclosed the selection of Tridel’s bid under the SISP and outlined its key terms approximately four months ago.

14. In my view, to grant the requested adjournment now would undermine the integrity of a Court-authorized sales process, well publicized and noticed, and pursuant to which stakeholders, including but not limited to other bidders, devoted very significant financial and professional

resources, all in accordance with the approved timelines. It would be unfair to the stakeholders and other bidders to re-open the process now.

15. Given the sheer scale of the Project, the necessity to avoid delays and disruption to the construction schedule to accelerate completion and maximize recoveries, and the very significant interest costs accruing on a project with a value of approximately \$2 billion, a further delay of two months is prejudicial.

16. Moreover, even today, Château Yorkville does not have an unconditional commitment for the necessary financing. The Term Sheet attached to the DeFrancesco affidavit as Exhibit “A” is expressly according to its terms “non-binding”.

17. Even if it did have an unconditional financing commitment, the CDN \$1.4 billion of financing that Château Yorkville submits that it can raise is in any event not sufficient to fund the Transaction Proposal as defined in the SISP, and it is materially short of any amount required to satisfy both the \$1.2 billion minimum bid threshold established under the SISP and the cost of construction to complete the Project. It is also materially below the amount required to provide value to any secured creditors beyond the Senior Secured Lenders. It is for these reasons, among others, that those parties oppose the adjournment request.

18. For all of these reasons, I denied the motion for a further adjournment and proceeded to hear the motion in the Receivership Proceeding and the CCAA Application.

Motion for Discharge of the Receiver

19. The Receiver seeks to be discharged in its capacity as such, subject to the completion of certain incidental matters as fully set out in the motion materials required to complete the administration of the Receivership Proceeding, and coincident with the CCAA Application.

20. The Receiver’s Charge and the Receiver’s Borrowings Charge are proposed to survive the discharge and remain in full force and effect with the priorities set out in the CCAA Initial Order, also requested today and discussed below.

21. The Lien Charges as defined in the Lien Regularization Order would also continue, subject to the resolution of the related Lien Claims in accordance with the procedures already established. Finally, the charge in favour of the Royal Bank of Canada would also survive the discharge and remain in full force and effect attached to the RBC Collateral with the priority set out in the CCAA Initial Order.

22. The Unresolved Lien Claims and the Unresolved Receivership Claims would also not be released.

23. The basis for the proposed discharge is fully set out in the motion materials.

24. This Court routinely grants orders discharging receivers on terms similar to those sought here. I am satisfied that such relief is appropriate where the Receivership Proceedings are transitioning to the CCAA Proceedings in accordance with the terms of the proposed CCAA Initial Order. The terms and corollary relief are also appropriate.

25. Mizrahi Inc. does not oppose the discharge but requested out of an abundance of caution clarification as to its effect on the payment motion and cross-motion pending and scheduled to be heard in June of this year. That has been agreed with the Receiver. Accordingly, the relief sought on the within Application and motion is without prejudice to the claims, defences and positions of MI and the Receiver in their ongoing dispute scheduled to be heard by the Court in June 2025, or thereafter, including MI's positions that it is entitled to a trust claim over the proceeds of sale or deposits paid by existing Unit purchasers, and that MI can advance a set-off claim arising from the disclaimer of the Mediator's Proposal and the Exclusive Listing Agreement. It is acknowledged that nothing in the foregoing reservation of rights will detract from the release provided for in paragraph 12 of the Discharge Order.

26. For all of these reasons, I am satisfied that a discharge of the Receiver is appropriate.

27. Finally, I am satisfied that the Receiver's Reports, including the Joint Eighth Report of the Receiver and Pre-Filing Report of the Proposed Monitor (the "Joint Report") and the conduct and activities of the Receiver as set out therein are appropriate and should be approved. Those activities are consistent with the terms of the original Appointment Order and have been accretive to the progress of the Receivership Proceeding to date.

28. The fees and disbursements of the Receiver and its counsel are fully described in the fee affidavits filed. I am satisfied that the fees are appropriate, consistent with market rates for similar services, and correlate to the activities set out in the Joint Report (as well as the earlier Reports of the Receiver 1-7) and described above. There is no opposition from any party, including but not limited to the Senior Secured Lenders, to the requested fee approval. Those fees and disbursements are approved: *Bank of Nova Scotia v. Diemer*.

CCAA Application

29. The Applicants, by and through the Receiver, seek an Initial Order pursuant to the CCAA in the draft form submitted. It is proposed that the firm currently acting as the Receiver, Alvarez & Marsal Canada Inc. be appointed as Monitor, and that FAAN Advisors Group Inc. be appointed as Chief Restructuring Officer of the Companies.

30. This relief is also supported by the Senior Secured Lenders, and is not opposed by any other party (save for Château Yorkville, the adjournment request of which I addressed above).

31. I am satisfied that this relief is appropriate for the reasons set out in the motion materials, including but not limited to the reasons set out in the Joint Report dated April 3, 2025.

32. Each of the Applicants are debtor companies to which the CCAA applies - where the total claims exceed \$5 million. There is no issue that the Companies, including the Beneficial Owner, are insolvent and already subject to the Receivership Order as a result of their inability to repay their significant secured debt obligations owing to the Senior Secured Lenders and other subordinate secured lenders.

33. I recognize that the Beneficial Owner is a limited partnership and not a "debtor company". However, it is well established that this Court has the jurisdiction to extend CCAA protection to partnerships to achieve the purposes of the CCAA where the operations of a partnership are integral

and closely tied to the operations of the business of the debtor. See, for example, *Target*, *Just Energy*, *Nordstrom* and *BBB Canada Ltd.*, among others.

34. The requirements of section 10(2) of the CCAA have been complied with, and the 20 week cash flow forecast is appended to the Joint Report.

35. This Court is the appropriate forum for the CCAA Proceedings as contemplated in section 9(1), as the head office and principal place of business of each of the Applicants is Toronto.

36. A&M is qualified to act as Monitor as provided for in section 11.7 of the CCAA. It has consented to act in that capacity, and is not affected by any of the restrictions set out in section 11.7(2). A&M is particularly well-suited for the role of Monitor here given not only its extensive experience acting as a Court-appointed Monitor in CCAA proceedings, but its extensive experience with this Project in particular, given that it has been the Receiver.

37. I am also satisfied that FAAN should be appointed as CRO, pursuant to section 11 of the CCAA. It is familiar with the Project and has been engaged as a financial advisor to the Senior Secured Lenders since July, 2024. I am satisfied that its expertise will assist the debtors in achieving the objectives of the CCAA and continuing operation of the business during the restructuring process. The CRO will, with guidance from Tridel, make decisions on behalf of the Companies relating to the development of the Project in consultation with the Monitor and the Senior Secured Lenders, where appropriate.

38. The Applicants propose an initial stay of proceedings to and including August 15, 2025. The Companies will have sufficient liquidity to continue operations through that period with funding under the DIP Credit Agreement.

39. The CCAA contemplates that a stay granted on an initial application may not exceed 10 days in duration, and that the relief be limited to that which is reasonably necessary during that 10 day period. The rationale for the interim and short duration nature of that relief is to avoid procedural and substantive unfairness that can arise from the fact that such relief is typically granted on an *ex parte* or limited notice basis. Accordingly, it is appropriate to grant only that relief absolutely necessary and to provide all affected parties with the ability to return to Court on an expedited basis to take such positions as may be appropriate on the comeback hearing.

40. None of those imperatives applies here. The Companies have been the subject of (highly public and publicized) Court-supervised Receivership Proceedings for more than 18 months. Existing relief already granted by this Court has included the same or substantially similar relief is that being sought under the proposed Initial Order. All parties on the Service List in the Receivership Proceedings, all known creditors, subcontractors and trades engaged on the Project, and Unit purchasers for whom the Receiver has an email address were provided with full notice of the Application. None opposes the relief sought today.

41. Moreover, the Transaction for which approval is sought today, and the contemplated transition from the Receivership Proceedings to the CCAA Proceedings, were first reported to all stakeholders in the publicly available Sixth Report of the Receiver dated December 11, 2024 to which the Term Sheet in respect of the Transaction was appended.

42. This Court has previously exercised its discretion to issue a stay of proceedings beyond the 10 day period on a CCAA conversion application. See, for example: *Joriki Topco Inc.*, *The Body Shop Canada Limited*, *Re Tribalscale Inc.* and *Re Medifocus Inc.*

43. I am satisfied that a stay exceeding 10 days is warranted here and that no party is prejudiced thereby. Indeed, I am satisfied that requiring a 10 day comeback hearing would serve no practical purpose and would unnecessarily increase costs. I also observe that the proposed form of Order contains the usual comeback clause enabling any affected party to seek the advice and directions of the Court, on an expedited basis if necessary.

44. I am further satisfied that it is appropriate to extend the stay to the Developers (including MI, SKYGRiD and Tridel). Stay protection has been granted in many cases in favour of third parties where such is necessary and appropriate to facilitate restructuring efforts. I am satisfied that extending the stay to the third parties here will assist in maintaining stability and value during the restructuring proceedings. The protections in favour of the Developers are limited to that which is necessary to ensure that the construction of the Project continues uninterrupted.

45. For the same reasons that justify an extended stay, I am satisfied that the Monitor should be exempt from certain notice and creditors list requirements under the CCAA. Put simply, all of the affected parties are already well on notice and involved to the extent they wish to be, as a result of the Receivership Proceedings that have been ongoing for approximately 18 months.

46. The proposed order contemplates that payments for ongoing construction and other services related to the Project will continue to be made by the Companies with the consent of the Monitor. That is appropriate here and the Companies require the authority to make pre-filing payments to facilitate the orderly transition from the Receivership Proceedings and prevent any prejudice to parties who have supplied goods and services during the Receivership Proceedings and ensure that those goods and services that are integral to the ongoing construction of the Project continue to be provided in the normal course.

47. During the Receivership Proceedings, the Receiver sought and obtained several Orders from this Court to address the filing and resolution of Lien Claims and contribute to ensuring the ongoing construction of the Project. The Companies will continue to require the benefit of those Orders in the context of the CCAA proceedings.

48. The Applicants propose an Administration Charge in the amount of \$3.5 million, to rank *pari passu* with the Receiver's Charge granted in the Receivership Proceedings. I am satisfied that such is appropriate here, as contemplated in section 11.52 of the CCAA. I have considered the factors recognized as being relevant to a consideration of whether an administration charge should be approved, including the size and complexity of the business being restructured, the proposed role of the beneficiaries of the charge, whether there is an unwarranted duplication of roles, whether the quantum of the proposed charge appears to be fair and reasonable, the position of the secured creditors likely to be affected, and the position of the Monitor. All of those factors support the proposed charge here.

49. I am similarly satisfied that the proposed DIP Credit Agreement and DIP Lenders' Charge should be approved. Put simply, significant additional funding is required to complete the Project.

The Senior Secured Lenders have confirmed that they are prepared to provide that financing by way of the DIP Credit Agreement. Accordingly, the Companies request approval of the DIP Credit Agreement and authorization to borrow up to \$615 million plus interest, fees and expenses thereunder.

50. That quantum is significant, to state the obvious. I have considered the factors set out in section 11.2(4) of the *CCAA* relevant to a determination of whether a priming charge in connection with interim financing should be approved. Pepall, J observed in *CanWest Publishing* the importance of meeting the criteria set out in section 11.2(1) as well as those found in section 11.2(4).

51. Consideration of all of those criteria supports the approval of the DIP Lenders' Charge. Notice has been given to all secured creditors. The DIP Credit Agreement provides for sufficient funding to ensure that the Companies can complete construction of the Project and finance these *CCAA* Proceedings.

52. The DIP Lender is not prepared to advance additional funds without the security of a Court-ordered priority charge under the *CCAA*, and the DIP Credit Agreement is the only source of funding available to complete the construction of the Project for the benefit of stakeholders.

53. The DIP Lenders' Charge does not secure a pre-filing obligation, including because the funds advanced under the RFCA are secured only by the Receiver's Borrowings Charge which is being continued in the *CCAA* Proceedings. The Proposed Monitor is of the view that the economic and other terms of the DIP Credit Agreement are appropriate, including because no fees are being charged by the DIP Lender, and the interest rate is less than that payable under the RFCA and well below rates charged in other relatively recent real estate development insolvency proceedings.

54. The Receiver also requested a sealing order in respect of Confidential Appendix "1" to the Joint Report which contains a confidential summary of the letters of intent received in the SISP. Such sealing relief may be granted pursuant to section 137(2) of the *Courts of Justice Act*. This Court has on many occasions granted sealing orders in respect of bids or summaries of bids received in a sales process.

55. I am satisfied that the factors set out by the Supreme Court of Canada in *Sierra Club* and refined in *Sherman Estate* have been met here. The LOI summary contains commercially sensitive information that could and very likely would negatively impact realization efforts in respect of the Project, including as relates to the estimated value of the individual components of the Project, financial and other details concerning the LOIs submitted, and other information that could undermine the Transaction. The sealing order is subject to further order of the Court.

56. In addition, the requested authorization to change the names and registered addresses of the Companies is appropriate here. The proposed changes will facilitate marketing efforts and more accurately reflect the involvement in and ownership of the Project. Such relief is authorized pursuant to section 186(2) of the Ontario *Business Corporations Act*. The Ontario Business Registry was served with the Application materials and does not appear today to oppose the relief sought.

57. I am also satisfied that the proposed Transaction should be approved, and the Transaction Approval Order should be granted pursuant to the exercise of the broad discretion provided to this Court in section 11 of the CCAA. The Transaction does not involve the sale or disposition of assets, but rather a commercial arrangement whereby Tridel, a preeminent developer particularly in the condominium sector, has been engaged to complete the construction, development and ultimate realization of value from the Project in exchange for a fee. Such a transaction was expressly contemplated in the previously approved SISP.

58. Notwithstanding that the non-exhaustive list of factors set out in section 36(3) of the CCAA may not technically apply in the circumstances, they are relevant by analogy, and I have considered all of them together with the *Soundair Principles* in the exercise of my section 11 discretion. Finally, I have considered the *Nortel* factors relevant to whether a sale or transaction should be authorized in a CCAA proceeding in the absence of a plan of arrangement. Those factors too, are satisfied here.

59. The proposed Transaction is clearly warranted at this time. Many decisions relating to the development of the Project that did not directly impact the Schedule were suspended pending the outcome of the SISP. Now that Tridel has been selected, it is appropriate to proceed with the Transaction so that the critical decisions regarding the development, marketing and monetization of the Project can be made on a timely basis.

60. The solicitation process was reasonable and was completed in accordance with the terms of the Court-approved SISP. The Broker completed a broad canvas of the market, contacting 91 selected parties about the opportunity, sending a form of NDA and promotional video to over 4000 potentially interested parties, entering into NDAs with 53 parties of which 50 accessed the data room and resulted in the receipt of 11 LOIs. Four Development Proposals resulted that were determined to be Qualified LOIs. No Transaction Proposal submitted was determined to be a Qualified LOI.

61. The Transaction benefits stakeholders in that it represents the best chance of maximizing the value of the Project and ensuring its completion for the benefit of all stakeholders, including the Senior Secured Lenders, trades and suppliers, the City and Unit purchasers, among others.

62. I observe that notwithstanding the view of the Receiver and Proposed Monitor that the Transaction will maximize value, the expectation is that the Senior Secured Lenders will not recover their outstanding pre-receivership secured debt of more than \$1.2 billion in full, with the result that it is unlikely that there will be recoveries for subordinate secured or unsecured lenders. However, the Receiver and Proposed Monitor are of the view that there was no viable proposal submitted in the SISP that would have resulted in a different outcome.

63. The Receiver and Proposed Monitor submit, and I accept, that the fees payable to Tridel are fair and reasonable. The fee structure is competitive with other Development Proposals received in the SISP and was further negotiated.

64. The Receiver and Proposed Monitor fully support the Transaction and were integrally involved in the negotiation of its terms. Key stakeholders, including certain of the Companies' secured creditors, were consulted or provided confidential updates as the process continued. The

Senior Secured Lenders support the Transaction and are willing to provide further funding to the Project if the Transaction is approved. As noted, no viable alternative funding proposal was received.

65. I am satisfied that the Tridel Charge should be granted as security for the Tridel Charge Obligations, which charge is to rank subordinate to the Administration Charge, the Receiver's Charge, the DIP Lender's Charge and the Receiver's Borrowings Charge. Authority to grant such a charge flows from section 11 of the CCAA, and in particular, section 11.52(1)(b). Here, Tridel would not be prepared to enter into the Transaction absent a Court-ordered priority charge securing certain of its fees payable in connection therewith. Given the sheer scale and complexity of this project, that is reasonable.

66. I am further satisfied that the proposed Tridel Reconfiguration Plan should be approved. This Court approved an earlier Reconfiguration Plan in June, 2024 to reconfigure certain floors in the Project to accommodate an additional 88 Units. Tridel reviewed that Reconfiguration Plan during the SISP as fully set out in the Joint Report, and as part of its Development Proposal proposed a further reconfiguration of certain floors to reduce the total number of Units by 27, resulting in a net total of 476 Units.

67. The Receiver and Proposed Monitor have been fully involved with the further proposed reconfiguration and supports it, as do the Senior Secured Lenders. The specific design changes associated with the reduction in Units are expected to optimize the number of larger Units, while balancing the velocity of sales of such Units, and are anticipated to generate meaningful additional incremental value, with minimal impact on the Schedule. The parties have assured me that the proposed Tridel Reconfiguration Plan will not result in any material delays or the necessity for changes to municipal approvals.

68. I recognize that the Tridel Reconfiguration Plan will impact certain existing Unit Purchasers. In most cases, Equivalent Units will be available to the extent the relevant CSAs are ultimately affirmed. The Receiver has disclaimed the CSAs where Qualified Units are not available, and notice of the Tridel Reconfiguration Plan has been given to Unit purchasers. None appeared at the hearing of these motions to oppose. None of the disclaimers has been opposed. Accordingly, I am satisfied that the Tridel Reconfiguration Plan should be approved pursuant to section 11 of the CCAA as it will allow for the maximization of value in respect of the Residential Component of the Project.

69. For all of these reasons, and as stated at the conclusion of the hearing of the motion and Application, I granted the requested Receivership Discharge Order, the CCAA Initial Order and the Transaction Approval Order. They have immediate effect without the necessity of issuing and entering.

Osborne J.

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SUPERIOR COURT OF JUSTICE

COUNSEL SLIP

COURT FILE NO.: _____ - _____ DATE: December 20 2022

NO. ON LIST: _____

TITLE OF PROCEEDING: **CROSS BORDER – CONFIDENTIAL MATTER**

BEFORE JUSTICE: **JUSTICE CONWAY**

PARTICIPANT INFORMATION

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ENDORSEMENT OF JUSTICE CONWAY:

All defined terms used in this Endorsement shall, unless otherwise defined, have the meanings ascribed to them in the Factum of DCL Corporation dated December 20, 2022.

[1] The Applicant seeks an initial order under the CCAA. The Application is made together with corresponding Chapter 11 Proceedings in the U.S. for the Applicant's U.S.-based related parties.

[2] The DCL Group is in the business of supplying pigments and dispersions to customers in the coatings, plastics, and digital printing markets. The DCL Group operates six manufacturing facilities throughout Canada, the U.S., the Netherlands, and the United Kingdom. Three of those facilities are located in Ontario – the New Toronto Plant, the Mississauga Plant and the Ajax Plant. The Ajax Distribution Centre is located next to the Ajax Plant.

[3] The Applicant has 206 employees in its operating facilities. It employs key members of the executive management team for the DCL Group who work out of the DCL Head Office and/or the U.S. facilities. The proposed Chief Restructuring Officer works out of both the DCL Head Office and the New York office of Ankura Consulting Group LLC.

[4] In terms of its debt structure, as of July 31, 2022, the DCL Group had outstanding secured debt of \$90 million pursuant to a term loan (\$11.6 million owed by the Applicant). It also has a maximum \$55 million revolving ABL credit facility, \$40 million of which was owed by the Applicant. The ABL Credit Facility was restructured on December 16, 2022 such that DCL US is the sole borrower under that facility. It repaid the Applicant \$40 million and the Applicant's borrowings under the ABL Credit Facility were reduced to zero. Mr. Davido of Ankura, the proposed CRO, explains that this was done for various reasons including to pay down and align the indebtedness under the ABL Credit Facility with the party that owns the DCL Group's primary working capital assets. Completing the transaction was also a precondition to securing the required DIP Financing.

[5] The Applicant's unsecured debt includes an earnout payment of over \$9 million to KNRV and \$11.9 million to third-party vendors and trade creditors as of December 9, 2022. According to Mr. Davido, the Applicant is unable to pay its obligations generally as they become due. However, it is current on its statutory obligations to employees and HST.

[6] The applications under the CCAA and Chapter 11 are being made due to the liquidity crisis faced by the DCL Group. The business has been impacted by factors including higher input costs due to inflation, supply chain issues, and difficulties in retaining and recruiting employees. The Applicant is heavily burdened with secured debt. The Applicant seeks the stability afforded by a CCAA stay to secure additional financing and pursue a going concern solution for its business. While discussions have occurred with a potential stalking horse purchaser, no agreement has been reached yet and the Applicant is not seeking any relief today related to a sale or other process.

[7] I am satisfied that the Applicant is a company to which the CCAA applies. Based on the record before me, the Applicant is incorporated in Ontario, is unable to meet its obligations as they generally become due and has claims in excess of \$5 million against it. Its head office is in Toronto. It has complied with the filings required under s. 10(2) of the CCAA.

[8] The Applicant seeks to have the stay extended to DCL US but only with respect to the DCL Inventory located in the Distribution Centres in Ontario. I agree that the stay should be extended given the integration between the two companies, the purchase arrangements between them for that inventory, and the material value of that inventory to the business.

[9] I approve the appointment of the CRO pursuant to s. 11 of the CCAA. Mr. Davido's expertise in restructuring is evident from the record, as well as his familiarity with the problems faced by the DCL Group. He can assist with the cross-border dimension of this restructuring. His involvement will enable the Applicant to focus on the continued operation of the business during the restructuring process.

[10] With respect to the DIP Facility, I am satisfied that \$4 million to be financed during the initial period is limited to "what is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period", as required by s. 11.2(5) of the CCAA (the Applicant initially sought \$5 million but agreed to reduce it to \$4 million for the initial stay period). The DIP Charge is also acceptable considering the factors set out in s. 11.2(4) of the CCAA. At this point, none of the charges will rank ahead of any secured party not served with the Application. I note that the Applicant is already underway in its restructuring efforts, the CRO will be overseeing those efforts and the existing secured lenders are supportive of the financing. The proposed Monitor is supportive of the terms of the DIP Facility.

[11] Under the DIP Facility, the Applicant will be required to guarantee the obligations of DCL US. This is a requirement of the DIP financing that the Applicant urgently requires. According to the proposed Monitor, the borrowing of DCL US is tied to its asset base and realization on those assets should be sufficient to repay the debt. Also, there is a provision in the credit agreement that the guarantee will only be called on after the proceeds of the US Borrowers' collateral has been applied to the debt. Significantly, the Monitor also points out that prior to the restructuring of the Prepetition ABL Facility described above, the Applicant would have continued to be liable for the full \$40 million in any event – and that amount has now been assumed by DCL US.

[12] There are three charges sought today. The first is the Administration Charge of \$175,000, which is acceptable. I am granting it under s. 11.52 of the CCAA. The second is the Directors' Charge of \$1 million, which has been calculated with reference to their exposure during the initial ten day period. It will apply only if insurance is not available. I approve it under s. 11.51 of the CCAA.

[13] The third is the Intercompany Charge (and the related Intercompany Agreements pursuant to which DCL US buys the inventory from the Applicant and makes intercompany payments to the Applicant). I advised counsel that I was not prepared to approve those agreements or the charge in the initial order and that I did not see any reason that it needed to be included at this early stage. They have agreed to defer seeking that approval to the comeback hearing.

[14] I have reviewed the form of order with counsel. They have made the amendments that I required. Order to go as signed by me and attached to this Endorsement. This order is effective from today's date and is enforceable without the need for entry and filing.

[15] Counsel are directed to file all materials with the court office and upload them to CaseLines forthwith.

[16] The comeback hearing on this matter is scheduled for **December 30, 2022 at 3 p.m. before me for one hour (confirmed with the Commercial List office).**

A handwritten signature in blue ink, appearing to read "Conway J.", is located at the bottom left of the page.

15

CITATION: Re: Mobilicity Group 2013 ONSC 6167
COURT FILE NO.: 13-CV-16274-OOCL
DATE: 20131004

**SUPERIOR COURT OF JUSTICE - ONTARIO
COMMERCIAL LIST**

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF
8440522 CANADA INC., DATA & AUDIO-VISUAL ENTERPRISES WIRELESS
INC., AND DATA & AUDIO-VISUAL ENTERPRISES HOLDINGS
INCORPORATION

BEFORE: Newbould J.

COUNSEL: Robert Frank, Virginie Gauthier and Evan Cobb, for applicants
David C. Moore for The Catalyst Capital Group Inc.
John Porter and Leanne M. Williams, for Ernst & Young Inc, the proposed
Monitor
Robert J. Chadwick and Brendan O'Neill, for the proposed DIP lender and the ad
hoc Committee of Noteholders
Kevin P. McElcheran and James D. Gage, for Quadrangle, a shareholder and for
subordinated note holders
Janice Wright, for Equity Financial Trust Company, as Trustee and Collateral
Agent under the First Lien Notes, Trustee under the Unsecured Senior Notes, and
Collateral Agent under the Bridge Notes

DATE HEARD: September 30, 2013

[1] On September 30, the applicants ("Mobilicity Group") applied for protection under the CCAA. At the conclusion of the hearing I ordered that the application should be granted for reasons to follow, and an Initial Order was signed. These are my reasons.

Background facts

[2] The Mobilicity Group consists of Data & Audio-Visual Enterprises Wireless Inc., the operating company ("Wireless" or "Mobilicity"), its holding company Data & Audio-Visual

Enterprises Holdings Inc. (“Holdings”) and 8440522 Canada Inc., wholly owned by Wireless and which has no material assets or liabilities.

[3] Mobilicity carries on business as a Canadian wireless telecommunications carrier. It provides cellular service to Canadians in five urban markets: Ottawa, Toronto, Calgary, Edmonton and Vancouver and has roaming agreements with third party service providers to provide continuity of service outside of these markets. Mobilicity also offers hardware (handsets and accessories) to its customers.

[4] Mobilicity was founded on the concept of offering low cost cellular services to value-conscious consumers seeking less expensive cellular services than those offered by the established players in the market, being Bell Canada Inc., TELUS Corporation and Rogers Communications Inc.

[5] In addition to four corporately-owned stores, the Mobilicity dealer network consists of approximately 314 points of distribution which include approximately 94 “platinum-level” stores that exclusively sell Mobilicity-branded services and only offer wireless-related products at their stores, and approximately 150 “gold” and “silver” level stores that sell Mobilicity-branded services, but also sell non-wireless related products. With the exception of the four corporately owned stores, these points of distribution are operated independently from the Mobilicity Group and are compensated for sales on a commission basis 45 days after the end of the month in which a subscriber is signed on, subject to certain customer retention requirements. These dealers often operate with very low liquidity and any disruption to the stream of revenue derived from commissions would cause many of them to cease operations due to a lack of funding

[6] Mobilicity operates on a “pay in advance” billing system which provides set monthly plans for its subscribers. Mobilicity has approximately 194,000 subscribers who together generate gross revenues of approximately \$6.3 million per month.

[7] Mobilicity's business model provides for outsourcing of certain business functions: network building and maintenance, real-time billing and rating, provisioning systems, handset logistics and distribution and call centre operations. Suppliers of such business functions include: Ericsson Canada Inc., Amdocs Canadian Managed Services Inc. and Ingram Micro Inc.

[8] The single most significant capital expenditure made by Mobilicity was the acquisition of its 10 spectrum licenses from the Government of Canada effective in 2009. Mobilicity acquired the spectrum licenses for \$243 million using funds contributed by Holdings.

[9] After purchasing the spectrum licences, Mobilicity incurred significant costs by establishing an office, hiring a management team to develop the wireless carrier business, and contracting with Ericsson Canada Inc. to build a network system.

Outstanding indebtedness

[10] In aggregate, the Mobilicity Group has raised in excess of \$400 million in debt financing to fund capital expenditures and operations since 2008. A description of that indebtedness is below:

- a. Wireless is the borrower under certain first lien notes issued in a principal amount of \$195,000,000 due April 29, 2018. Holdings is a guarantor of the first lien notes and each of Wireless and Holdings has entered into a general security agreement in connection with the first lien notes. The Catalyst Capital Group Inc. ("Catalyst") holds approximately 32% of the first lien notes.
- b. Wireless is the borrower of \$43.25 million in second lien notes (the "Bridge Notes") due September 30, 2013. These Bridge Notes are also guaranteed by Holdings and the obligations thereunder are secured by the assets of Wireless and

Holdings. The Bridge Notes rank behind the first lien notes in right of payment and the security on the Bridge Notes is subordinate to the first lien notes security.

- c. Holdings has issued 15% Senior Unsecured Debentures in the total principal amount of \$95 million due September 25, 2018. As of July 31, 2013, the amount outstanding on the Unsecured Senior Notes (including payment in kind interest) was approximately \$154.4 million.
- d. Holdings has also issued 12% Convertible Unsecured Notes due September 25, 2018. Initially, convertible notes in the principal amount of \$59,741,000 were issued (the “Unsecured Pari Passu Notes”). Subsequently, additional convertible notes in the principal amount of \$35,000,000 were issued (the “Unsecured Subordinated Notes”). The Unsecured Subordinated Notes rank subordinate in right of payment to the Unsecured Pari Passu Notes and the Unsecured Senior Notes and the Unsecured Pari Passu Notes rank pari passu in right of payment with the Unsecured Senior Notes. As of July 31, 2013, the amount outstanding on the Unsecured Pari Passu Notes and the Unsecured Subordinated Notes (including payment in kind interest) respectively, was approximately \$88.4 million and approximately \$38.6 million.

[11] The cash interest payment under the above described indebtedness is a payment of over \$9 million on the first lien notes which became due on September 30, 2013, the date of the Initial Order.

Mobilicity Group’s financial difficulties

[12] Wireless telecom start-ups are highly capital-intensive. As indicated by the substantial indebtedness incurred by the Mobilicity Group to date, significant fixed costs must be incurred before revenue can be generated. During the period where a wireless carrier is building its

customer base, revenue is typically insufficient to cover previously incurred investments and ongoing operating costs. It can take several years for a customer base to be adequately built to provide profitability. The applicants submit that Mobilicity ran out of “financial runway” before profitability was achieved and it now faces an imminent liquidity crisis.

[13] For the seven months ended July 31, 2013, the Mobilicity Group recognized revenue of \$46,864,490. During that period, the Mobilicity Group recorded a net loss of \$71,958,543. As of July 31, 2013, the Mobilicity Group had on a consolidated basis accumulated a net deficit of \$431,807,958.

[14] In July 2012, the Mobilicity Group engaged National Bank and Canaccord Genuity (together, the “financial advisors”) as their financial advisors in an effort to raise additional financing.

[15] With the assistance of the financial advisors, the Mobilicity Group solicited more than 30 potential investors in an attempt to raise financing. In this regard, an investor roadshow was completed in August and September of 2012 without success.

[16] The Bridge Notes facility was entered into on February 6, 2013 to allow Mobilicity to continue operations while it pursued strategic alternatives. The Bridge note lenders are the first lien note holders other than Catalyst, and certain existing holders of Unsecured Senior Notes. Catalyst has started oppression proceedings attacking the Bridge Notes facility.

[17] Mr. William Aziz was retained in late April of 2013 through BlueTree Advisors II Inc. as Chief Restructuring Officer to provide assistance in dealing with restructuring matters. Mr. Aziz has extensive experience in the area of corporate restructuring.

[18] The Mobilicity Group proposed alternative plans of arrangement earlier this year. During the course of those proceedings, a transaction was agreed to sell the Mobilicity Group to TELUS

Corporation for \$380 million pursuant to a plan of arrangement under the *Canada Business Corporations Act*. The plan of arrangement was approved on May 28, 2013. However, On June 4, 2013, the Minister of Industry announced that TELUS Corporation's application to transfer the spectrum licenses would not be approved at that time. Accordingly, the TELUS transaction was not completed.

[19] The Mobilicity Group has continued to engage with potential acquirers. As part of those efforts, the Mobilicity Group solicited and received an expression of interest and engaged in detailed discussions with a significant U.S.-based wireless service provider. However, after significant due diligence these discussions did not ultimately result in a binding offer due to uncertainty surrounding the Government's upcoming spectrum auction.

[20] In the two weeks preceding this application the Mobilicity Group developed a transaction structure for a proposed transaction with a prospective purchaser, which is currently being considered by Industry Canada. The government's assent to the proposed transaction was not obtained prior to this application being made.

Analysis

[21] It is clear from the affidavit of Mr. Aziz that the Mobilicity Group is insolvent and that without the protection of the CCAA, a shutdown of operations would be inevitable as the Mobilicity Group will cease to be able to pay its trade creditors in the ordinary course and will cease to be able to make interest payments on its outstanding debt securities. Thus the applicants are entitled to relief under the CCAA.

[22] The Initial Order contained provisions permitting a charge for directors and an administration charge. These were not opposed except as to part of the administrative charge discussed below. The applicants also sought authorization to continue the engagement of the financial advisors who had initially been retained in 2012, which was not opposed, and approval

of KERP agreements for a small number of employees, also not opposed. The Monitor supported these provisions and they appeared to be reasonable, and were approved.

[23] I will deal with issues that were raised by Catalyst, not in opposition to the Initial Order, but in opposition to certain parts of it.

DIP financing

[24] The Mobilicity Group has obtained a \$30 million DIP facility available in five tranches, to be used only in accordance with the cash flow forecasts of the applicants. They seek approval of this facility and a charge to secure the facility. The facility was obtained after a solicitation process undertaken by the Mobilicity Group and its financial advisors, described in some particularity in Mr. Aziz's affidavit. The lenders are the holders of the second lien notes under the Bridge Loan and other unsecured lenders of the Mobilicity Group.

[25] The DIP financing ranks *pari passu* with the Bridge Notes, and subordinate to the first lien notes, with the exception of cash interest payments under the DIP Financing. Since the DIP financing ranks subordinate to the first lien notes, the holders of the first lien notes, including Catalyst, will not be adversely affected by the DIP Financing.

[26] In the solicitation process, the Mobilicity Group received DIP financing proposals from not less than four parties, including existing creditors as well as third parties with no prior financial involvement with the Mobilicity Group. One such proposal was provided by the holders of the Bridge Notes and another was provided by Catalyst. The Mobilicity Group engaged its financial advisors and legal counsel to assist in the evaluation of the DIP Financing options that were presented.

[27] Upon review, the Mobilicity Group determined, with advice from its advisors, that the proposals provided by the non-creditor third parties likely could not be implemented. Therefore,

the financial advisors held discussions with the holders of the Bridge Notes and Catalyst to obtain what the Mobilicity Group believed to be the best available offer from each party either in the form of a final definitive term sheet or definitive agreements. These discussions occurred over the course of several weeks.

[28] The financial advisors and counsel to the Mobilicity Group evaluated these DIP financing options, including the Catalyst DIP term sheet, based upon, among other things, quantum, conditions, price, ranking and execution risk and provided their expert views to the board of directors of the Mobilicity Group. After consideration of the DIP financing options, and after considering the advice of its legal and financial advisors, the board of directors of the Mobilicity Group concluded that the DIP financing option presented by the holders of the Bridge Notes was the best available option.

[29] Catalyst contends that the DIP lending should not be approved at this time. It points to the cash flow forecast of the applicants that indicates that no DIP borrowing will be required until the week ending November 8, 2013 and says that there is time to give consideration to other DIP facilities that might be available. Mr. Moore said that he expects to obtain instructions from Catalyst to propose DIP financing that will rank equally as the DIP lending proposed by the applicants but provide more money and on better terms than that provided for in the proposal before the court.

[30] Mr. Moore relies on the statement of Blair. J. (as he then was) in *Re Royal Oak Mines Inc.* (1999), 6 C.B.R. (4th) 314 that extraordinary relief such as DIP financing with super priority status should be kept in the Initial Order to what is reasonably necessary to meet the debtor's urgent needs during the sorting out period. Each case, of course, depends on its particular facts. Unlike *Royal Oak*, the proposed DIP financing does not give the DIP lender super priority of the kind in *Royal Oak*. It will rank behind the first lien notes held by Mr. Moore's client. The issue is whether approval of DIP financing is necessary at this time.

[31] As to that question, I accept the position of Mobilicity that it is important that now that the CCAA proceedings have commenced, approving a DIP facility will provide some assurance of stability to the market place, including the customers of Mobilicity and its suppliers and dealers. If no DIP financing were approved, there is a serious risk that customers of Mobilicity, who do not have long term contracts, will go elsewhere. That would negatively affect the cash flow of Mobilicity and the assumption that advances under the DIP loan would not be required until November.

[32] Should this DIP facility be approved with its proposed security? In my view it should. On the record before me, the facility was approved by the board of directors of the Mobilicity Group with the benefit of expert advice after a process undertaken to obtain bids for the loan. I recognize that board approval is a factor that may be taken into account but it is not determinative. See *Re Crystallex* (2012), 91 C.B.R. (5th) 207 (C.A.) at para. 85.

[33] The factors in s.11.2 (4) of the CCAA must be considered. I will deal with each of them.

- (a) The period during which the company is expected to be subject to the CCAA proceedings.

[34] Mobilicity hopes to be able to enter into a transaction with a proposed purchaser within a relatively short period of time. The applicants submit that it is reasonable to estimate that the proceedings could last to February, 2014 and that subject to its conditions, the DIP facility can provide funding until that time.

- (b) How the company's business and financial affairs are to be managed during the proceedings.

[35] The Mobilicity Group retained Mr. Aziz in April, 2013 as its CRO, and he will continue in that capacity. He is a person of known ability. The business will continue to be run on a day to day basis by management who are looking for stability to enable it to keep its customer base.

(c) Whether the company's management has the confidence of its major creditors.

[36] Catalyst, as the holder of approximately 34% of the first lien notes, says it has no confidence in Mr. Aziz or the way that it alleges the Mobilicity Group has ignored the different interests of Mobilicity and its holding company. That is the subject of its claim for oppression. However, the balance of first lien note holders, all of the Bridge Note holders, approximately 92% of the unsecured debenture holders and all of the holders of the pari passu notes support the company's management and the approval of the DIP facility. That is, holders of \$444 million of the Mobilicity Group's debt, or 88% of that debt, support management and the DIP facility.

(d) Whether the loan would enhance the prospects of a viable compromise or arrangement.

[37] The Mobilicity Group's preferred course is to achieve a going concern transaction that will be of benefit to all stakeholders, including the first lien note holders. The DIP facility permits some stability and breathing room to enable this to happen.

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

[38] The earlier TELUS deal was for \$380 plus assumption of obligations of the company. If the value of the Mobilicity Group is anywhere near that size, the \$30 million DIP facility appears reasonable, particularly as it is to be drawn down in tranches when needed.

(f) Whether any creditor would be materially prejudiced as a result of the security.

[39] No creditors will be materially prejudiced as a result of the DIP facility charge. The secured creditors likely to be affected by the charge have consented to it. The charge is junior to the security granted to the holders of first lien notes and is subordinate to any encumbrances that may have priority over the first lien notes either by contract or by operation of law.

(g) The position of the Monitor as set out in its report.

[40] In its pre-filing report, E & Y, the proposed Monitor, has reviewed the process leading to the DIP facility and its terms. It states that it is of the view that the DIP facility charge is required and is reasonable in the circumstances in view of the applicants' liquidity needs.

[41] In all of the circumstances, I approved the DIP facility and its charge. There is a come-back clause in the Initial Order, which Catalyst may or may not wish to utilize. I would observe that if Catalyst seeks to have a DIP facility proposed by it to replace the approved DIP facility, some consideration of the *Soundair* and *Crown Trust Co. v. Rosenberg* principles may be appropriate.

Stay of oppression action

[42] The Initial Order sought by the applicants contained a usual stay order preventing the commencement or continuance of proceedings against or in respect of the applicants and the Monitor. Included in the protection were the DIP lenders, the holders of Bridge Notes and the Collateral Agent under the Bridge notes. The applicants submitted, and I agree with them, that this expanded group was appropriate in the circumstances as the holders of Bridge Notes and the Trustee have each been named in the oppression application brought by Catalyst. The holders of the Bridge Notes and the Trustee are parties to the oppression application by Catalyst solely due to their lending arrangements with the applicants and, as a result, the applicants are central parties to that litigation and would need to participate actively in any steps taken in that litigation. Further, any continuation of the oppression application against the holders of the

Bridge Notes and the Trustee would distract from the goals of these proceedings and also result in unwarranted expenditure of resources by the holders of the Bridge Notes and the Trustee, each of which are indemnified in a customary manner by the applicants for these types of expenditures. As the DIP lenders are also Bridge Note holders and as such parties are stepping into a similar financial position as the Bridge Note holders, the extension of the stay to those parties is appropriate and reasonable. See *Sino- Forest Corp. (Re)*, (May 8, 2012), Toronto CV-12-9667-00CL (Ont. S.C.J.); *Timminco Ltd. Re.*, 2012 ONSC 2515 at paras. 23 and 24.

[43] Catalyst contended, however, that the stay provisions should exclude its oppression application. Why this is so is not clear. Mr. Moore said there had been no steps taken in the application since the August cross-examination of Mr. Aziz, and that Catalyst would undertake not to take further steps until the come-back date. I see no reason why the oppression application should be excluded from the stay contained in the Initial Order. It may be that Catalyst will be paid out in the near future if the transaction now on the table can be concluded. In any event, it is open to any party to apply to lift a stay on proper grounds. Catalyst is no different.

Ad hoc committee charge

[44] The Initial Order contains an administration charge to cover fees and disbursements to be paid out to the Monitor and its counsel, counsel to the applicants, counsel to the DIP lenders and counsel to the ad hoc committee of Noteholders. Catalyst contends that there is no basis for counsel for the ad hoc committee of Noteholders to be included in this charge or to be paid by the applicant.

[45] In this case, counsel to the DIP lenders is also counsel to the ad hoc committee of noteholders. That committee includes the balance of the first lien noteholders other than Catalyst who are the Bridge Note holders. It was the Bridge Notes that permitted the Mobilicity Group to continue since February of this year. Those noteholders making up the ad hoc committee have been working in a supportive capacity in an attempt to have the Mobilicity Group re-organized in

a constructive way. I am satisfied that the ad hoc committee has been of assistance to the process and that the charge is appropriate and necessary. I would also note that the administrative charge is junior to the first lien notes and thus the security position of Catalyst is not affected by the charge. As well the administrative charge is supported by the proposed Monitor.

Appointment of chief restructuring officer

[46] The Initial Order authorizes the applicants to continue the engagement of William Aziz as the chief restructuring officer of the Mobilicity Group on the terms set out in the CRO engagement letter. This letter has been sealed as confidential. Catalyst said it should see the letter and until then no order should be made. On the day before this application was heard, counsel for the Mobilicity Group offered to send the complete record to counsel for Catalyst if an undertaking was given that the material would be kept confidential prior to the hearing. Mr. Moore objected to such a pre-condition and was served shortly before the hearing with the application record without the confidential documents.

[47] Catalyst contends that no order should be made until it has had a chance to see the terms of the engagement letter. I do not think this wise. To proceed with the CCAA process without the continuation of Mr. Aziz as the chief restructuring officer would send the entirely wrong signal to all stakeholders, let alone the Government of Canada with whom Mr. Aziz has been dealing regarding a proposed transaction.

[48] Mr. Aziz has a thorough knowledge of the affairs of the Mobilicity Group, having been its chief restructuring officer since April of this year. He has been central to the efforts of the applicants to restructure. He is very knowledgeable and experienced. In is appropriate that his engagement now be continued. The proposed Monitor has reviewed the engagement letter and is of the view that the fee arrangement is reasonable and consistent with the fee arrangements in other engagements of similar size, scope and complexity.

[49] Counsel for the applicants and Catalyst were agreeable to working out an appropriate confidentiality arrangement. Once Catalyst has seen the engagement letter for Mr. Aziz, it will be entitled if so advised to bring whatever come-back motion it thinks appropriate.

[50] The Initial Order as signed contains provisions as discussed in this endorsement.

Newbould J.

Released: October 4, 2013

CITATION: Re: Mobilicity 2013 ONSC 6167
COURT FILE NO.: 13-CV-16274-OOCL
DATE: 20131004

**SUPERIOR COURT OF JUSTICE - ONTARIO
COMMERCIAL LIST**

BETWEEN:

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

AND IN THE MATTER OF A PLAN OF
COMPROMISE OR ARRANGEMENT OF
8440522 CANADA INC., DATA & AUDIO-
VISUAL ENTERPRISES WIRELESS INC.,
AND DATA & AUDIO-VISUAL
ENTERPRISES HOLDINGS
INCORPORATION

REASONS FOR JUDGMENT

Newbould J.

Released: October 4, 2013

16

SUPERIOR COURT OF JUSTICE - ONTARIO

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 PHOENA HOLDINGS INC., PHOENA INC., ELMCLIFFE INVESTMENTS INC., ELMCLIFFE INVESTMENTS [NO. 2] INC., AND CTI HOLDINGS (OSOYOOS) INC.

BEFORE: Chief Justice G.B. Morawetz

COUNSEL: *Gina Rhodes and Kyla Mahar*, for the Applicants

Rebecca Kennedy and Puya Fesharaki, for Ernst & Young Inc., Monitor

Joseph Bellissimo, for Cortland Credit Lending Corporation, the DIP Lender

HEARD: April 4, 2023

ENDORSEMENT

[1] At the conclusion of the hearing, I granted the Initial Order with reasons to follow. These are the reasons.

[2] This Application was brought by Phoena Holdings Inc. (“Phoena Holdings”), Phoena Inc. (“Phoena”), Elmcliffe Investments Inc. (“Elmcliffe”), Elmcliffe Investments [No. 2] Inc. (“Elmcliffe Investments No. 2”) and CTI Holdings (Osoyoos) Inc. (“CTI”) (collectively, the “Applicants” or the “Phoena Group”) for an initial order pursuant to the *Companies’ Creditors Arrangement Act*, R.S.C. 1985, c-C. 36, as amended (the “CCAA”). Capitalized terms used herein and not otherwise defined shall have the meanings ascribed to them in the Affidavit of Cornelis Melissen sworn April 3, 2023 (the “Melissen Affidavit”) in support of this Application. The Report of Ernst & Young Inc., as proposed monitor, was also filed in support of this Application.

[3] The Applicants seek an Order (the “Initial Order”) which includes the following relief:

- (a) Granting an initial stay of proceedings (the “Stay of Proceedings”) until April 14, 2023 (the “Stay Period”);
- (b) Appointing Ernst & Young Inc. (“EY”) as Monitor (the “Monitor”);

- (c) Appointing Darren Mr. Karasiuk as chief restructuring advisor of the Applicants (the “Chief Restructuring Advisor”);
- (d) Granting an Administration Charge in the amount of \$200,000 (the “Administration Charge”);
- (e) Approving the DIP Term Sheet dated April 3, 2023 between the Applicants and Cortland Credit Lending Corporation (the “DIP Lender” or “Cortland”) for DIP financing (the “DIP Loan”), authorizing borrowings under the DIP Loan in an amount up to \$1,200,000 (plus interest, fees and expenses), and granting a charge in favour of the DIP Lender (the “DIP Lender’s Charge”); and
- (f) Granting a directors’ charge in favour of the directors and officers of the Applicants in the amount of \$450,000 (“Directors’ Charge” and together with the DIP Lender’s Charge and the Administration Charge, the “Priority Charges”).

[4] There was no opposition to the requested relief. The Monitor supported the position of the Applicants.

[5] The Phoena Group is a licenced producer and distributor of cannabis with operations located in Vaughan and Fenwick, Ontario.

[6] The Phoena Group business was purchased by Marshall Fields International B.V. (“Marshall”) in the CannTrust CCAA Proceedings in March 2022. Phoena Holdings previously operated as CannTrust Equity Inc. (“CannTrust Equity”), and Phoena Inc. previously operated as CannTrust Inc.

[7] The Phoena Group has been unable to revive the business and generate a profit since emerging from the CannTrust CCAA Proceedings.

[8] The Applicants have incurred substantial losses since emerging from the CannTrust CCAA Proceedings. The Applicants are in default of the terms of the Cortland Credit Agreement and owe Cortland approximately \$18.8 million under the Cortland Facility.

[9] The Phoena Group is insolvent and faces a liquidity crisis. The Applicants’ liquidity has been fully depleted and they cannot maintain operations without additional financing under the proposed DIP Term Sheet.

[10] The Applicants believe a liquidation and orderly wind-down of the Applicants under the CCAA is in the best interests of the Applicants’ creditors and other stakeholders.

[11] The Applicants submit that this realization process under the CCAA will ensure timely and cost-effective realization on assets without damaging the value of the Phoena Group, which could happen with an alternative approach due to the regulated nature of the cannabis industry.

[12] The Phoena Group incurred substantial losses in its fiscal year ended December 31, 2022. For the fiscal year ended December 31, 2022, the Phoena Group had a net loss of \$24.8 million based on gross revenue of \$13.2 million. For the one-month period ending January 31, 2023, the Phoena Group had a \$317,000 loss on gross revenue of \$1.2 million. The Phoena Group is not able to meet its obligations as they become due.

[13] The Applicants believe it is necessary to significantly write down the carrying values of certain assets, including inventory, biological assets and right-to-use assets, due to impairment. If such adjustments for impairment were made to the balance sheet, the Applicants' liabilities would significantly exceed their assets.

[14] The Applicants, with the assistance of the Monitor, plan to solicit bids from professional third-party liquidators in respect of the liquidation of the inventory, equipment and fixtures located in and/or forming part of the Property (the "Liquidation Solicitation Process"), and then select the liquidator that they believe will best assist in maximizing the proceeds from these assets, subject to Court approval.

[15] The Applicants, in consultation with the Monitor, also intend to solicit listing agreements from real estate brokers in respect of the Fenwick Facility and then select the real estate broker that they believe will assist in maximizing the proceeds from the Fenwick Facility, subject to Court approval.

[16] Counsel submits, and I agree, that the Applicants are "debtor companies" within the meaning of the CCAA for the following reasons:

- (a) Each of the Applicants was incorporated under the legislature of a province in Canada, and are each a "company" within the meaning of the CCAA;
- (b) The Applicants' debts exceed \$5 million dollars. Specifically, the aggregate amount of the Applicants' liabilities is estimated to be approximately \$77 million including approximately \$18.8 million owing to Cortland, as first secured creditor; and
- (c) The Applicants are insolvent because they are unable to meet their obligations as they become due. Moreover, once necessary write downs are made to the Applicants' balance sheet, the Applicants' liabilities would significantly exceed their assets.

[17] The Applicants submit that given their current financial condition and the looming liquidity that they face, the Stay of Proceedings at this time is in the best interests of the Phoena Group and their stakeholders and is both necessary and appropriate as is the form of the Initial Order.

[18] The Applicants further submit that the Stay of Proceedings should be extended to the Phoena Group's directors and officers so that they may focus on the CCAA proceedings, including the liquidation and orderly wind-down of the Applicants' business.

[19] I am satisfied that the Stay of Proceedings should be granted.

[20] I am also satisfied that EY should be appointed as Monitor.

[21] On March 31, 2023, the Applicants executed an engagement letter to retain Mr. Mr. Karasiuk to act as the Chief Restructuring Advisor and seek Court approval of the appointment so Mr. Mr. Karasiuk can oversee and assist the Applicants in these CCAA Proceedings.

[22] Phoena Group is of the view that the engagement of the Chief Restructuring Advisor will assist in the wind-down process to maximize proceeds available for distribution to creditors. The Proposed Monitor supports the appointment of Mr. Karasiuk as Chief Restructuring Advisor.

[23] The appointment of Mr. Karasiuk as Chief Restructuring Advisor is approved.

[24] The Applicants also seek a first-ranking priority Administration Charge over the Applicants' Property (as defined in the Initial Order) in the maximum amount of \$200,000 in favour of the Monitor, counsel to the Monitor, and counsel to the Applicants (collectively, the "Professionals Group"), to secure payment of their professional fees and disbursements, whether incurred before or after the date of the Initial Order.

[25] I am satisfied that the quantum of the proposed Administration Charge is reasonable and necessary and is in line with the nature and size of the Applicants' business and the involvement required by the Professionals Group. The Administration Charge is approved.

[26] The Applicants also seek approval of the DIP Loan and the second-ranking DIP Lender's Charge over the Applicants' Property (as defined in the Initial Order) in favour of the DIP Lender, to secure amounts borrowed by the Applicants under the terms of the DIP Loan.

[27] Section 11.2 of the CCAA allows the Court to grant the DIP Loan and the DIP Lender's Charge that ranks in priority to the Applicants' secured creditors, on notice to those secured creditors that would be affected and in an amount that the Court considers appropriate having regard to the Applicants' Cash Flow Forecast.

[28] When the Phoena Group realized that it had a looming liquidity crisis, it initiated discussions with its senior secured creditor, Cortland, to provide DIP Loan. The Applicants and their counsel negotiated with the DIP Lender and its counsel to settle committed terms for the DIP Loan.

[29] Pursuant to the Cash Flow Forecast, the Applicants will not have sufficient funds to get through the initial Stay Period absent interim financing being approved and the DIP Lender's Charge being granted by the Court.

[30] Counsel to the Applicants submit that the following additional factors support the approval of the DIP Commitment Letter and the granting of the DIP Lender's Charge:

- (a) The availability of the DIP Loan is contingent on an order of this Court approving same and the DIP Lender's Charge;
- (b) The necessity of the DIP Loan is demonstrated and supported by the Cash Flow Forecast;
- (c) In the absence of the DIP Loan, the Applicants will be unable to continue to carry on business. In particular and as indicated in the Cash Flow Forecast, without interim financing, the Applicants will not have sufficient funds to get through the initial Stay Period.

[31] The DIP Term Sheet provides that the interest rate for the DIP Loan is 20% per annum. Notwithstanding the 20% interest rate, the Applicants and the Monitor submit that the interest rate is reasonable in the circumstances. No party objected. I am prepared to approve the DIP Term Sheet and DIP Charge. However, in my view, the approval of a DIP Loan carrying a 20% interest rate is unique to the circumstances of this case. This approval shall have no precedential value.

[32] The Applicants seek a Directors' Charge on the Applicants' Property in favour of the Applicants' current officers and directors in priority to all other charges other than the Administration Charge and the DIP Lender's Charge, up to a maximum amount of \$450,000.

[33] While the Phoenia Group's directors and officers have the benefit of a D&O insurance policy that provides them with coverage for certain claims and liabilities that may arise, these policies contain exclusions and exceptions to such coverage, and is set to expire on April 30, 2023.

[34] The Directors' Charge is intended to address potential claims that may be brought against directors and officers.

[35] The Applicants and the Monitor are of the view that the quantum of the Directors' Charge is reasonably necessary at this time to address circumstances that could lead to potential directors' liability prior to the Comeback Hearing.

[36] In my view, the Directors Charge is necessary at this time and it is approved.

[37] The requested relief is granted and the Initial Order has been signed.

Chief Justice G.B. Morawetz

Date: April 4, 2023

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CITATION: Timminco Limited (Re), 2012 ONSC 506
COURT FILE NO.: CV-12-9539-00CL
DATE: 20120202

SUPERIOR COURT OF JUSTICE – ONTARIO

(COMMERCIAL LIST)

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

RE: **IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT
OF TIMMINCO LIMITED AND BÉCANCOUR SILICON INC., Applicants**

BEFORE: **MORAWETZ J.**

COUNSEL: **A. J. Taylor, M. Konyukhova and K. Esaw, for the Applicants**

**D.W. Ellickson, for Communications, Energy and Paperworkers' Union of
Canada**

C. Sinclair, for United Steelworkers' Union

K. Peters, for AMG Advance Metallurgical Group NV

M. Bailey, for Superintendent of Financial Services (Ontario)

S. Weisz, for FTI Consulting Canada Inc.

A. Kauffman, for Investissement Quebec

HEARD: **January 12, 2012**

RELEASED: **January 16, 2012**

REASONS: **February 2, 2012**

ENDORSEMENT

[1] This motion was heard on January 12, 2012. On January 16, 2012, the following endorsement was released:

Motion granted. Reasons will follow. Order to go subject to proviso that the Sealing Order is subject to modification, if necessary, after reasons provided.

[2] These are those reasons.

Background

[3] On January 3, 2012, Timminco Limited (“Timminco”) and Bécancour Silicon Inc. (“BSI”) (collectively, the “Timminco Entities”) applied for and obtained relief under the *Companies’ Creditors Arrangement Act* (the “CCAA”).

[4] In my endorsement of January 3, 2012, (*Timminco Limited (Re)*, 2012 ONSC 106), I stated at [11]: “I am satisfied that the record establishes that the Timminco Entities are insolvent and are ‘debtor companies’ to which the CCAA applies”.

[5] On the initial motion, the Applicants also requested an “Administration Charge” and a “Directors’ and Officers’ Charge” (“D&O Charge”), both of which were granted.

[6] The Timminco Entities requested that the Administration Charge rank ahead of the existing security interest of Investissement Quebec (“IQ”) but behind all other security interests, trusts, liens, charges and encumbrances, claims of secured creditors, statutory or otherwise, including any deemed trust created under the *Ontario Pension Benefit Act* (the “PBA”) or the *Quebec Supplemental Pensions Plans Act* (the “QSPPA”) (collectively, the “Encumbrances”) in favour of any persons that have not been served with this application.

[7] IQ had been served and did not object to the Administration Charge and the D&O Charge.

[8] At [35] of my endorsement, I noted that the Timminco Entities had indicated their intention to return to court to seek an order granting super priority ranking for both the Administration Charge and the D&O Charge ahead of the Encumbrances.

[9] The Timminco Entities now bring this motion for an order:

- (a) suspending the Timminco Entities’ obligations to make special payments with respect to the pension plans (as defined in the Notice of Motion);
- (b) granting super priority to the Administration Charge and the D&O Charge;
- (c) approving key employee retention plans (the “KERPs”) offered by the Timminco Entities to certain employees deemed critical to a successful restructuring and a charge on the current and future assets, undertakings and properties of the Timminco Entities to secure the Timminco Entities’ obligations under the KERPs (the “KERP Charge”); and
- (d) sealing the confidential supplement (the “Confidential Supplement”) to the First Report of FTI Consulting Canada Inc. (the “Monitor”).

[10] If granted, the effect of the proposed Court-ordered charges in relation to each other would be:

- first, the Administration Charge to the maximum amount of \$1 million;
- second, the KERP Charge (in the maximum amount of \$269,000); and
- third, the D&O Charge (in the maximum amount of \$400,000).

[11] The requested relief was recommended and supported by the Monitor. IQ also supported the requested relief. It was, however, opposed by the Communications, Energy and Paperworkers' Union of Canada ("CEP"). The position put forth by counsel to CEP was supported by counsel for the United Steelworkers' Union ("USW").

[12] The motion materials were served on all personal property security registrants in Ontario and in Quebec: the members of the Pension Plan Committees for the Bécancour Union Pension Plan and the Bécancour Non-Union Pension Plan; the Financial Services Commission of Ontario; the Regie de Rentes du Quebec; the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union; and La Section Locale 184 de Syndicat Canadien des Communications, De L'Energie et du Papier; and various government entities, including Ontario and Quebec environmental agencies and federal and provincial taxing authorities.

[13] Counsel to the Applicants identified the issues on the motion as follows:

- (a) Should this court grant increased priority to the Administration Charge and the D&O Charge?
- (b) Should this court grant an order suspending the Timminco Entities' obligations to make the pension contributions with respect to the pension plans?
- (c) Should this court approve the KERPs and grant the KERPs Charge?
- (d) Should this court seal the Confidential Supplement?

[14] It was not disputed that the court has the jurisdiction and discretion to order a super priority charge in the context of a CCAA proceeding. However, counsel to CEP submits that this is an extraordinary measure, and that the onus is on the party seeking such an order to satisfy the court that such an order ought to be awarded in the circumstances.

[15] The affidavit of Peter A.M. Kalins, sworn January 5, 2012, provides information relating to the request to suspend the payment of certain pension contributions. Paragraphs 14-28 read as follows:

14. The Timminco Entities sponsor the following three pension plans (collectively, the "**Pension Plans**");

- (a) the Retirement Pension Plan for The Haley Plant Hourly Employees of Timminco Metals, A Division of Timminco Limited (Ontario Registration Number 0589648) (the “**Haley Pension Plan**”);
- (b) the Régime de rentes pour les employés non syndiqués de Silicium Bécancour Inc. (Québec Registration Number 26042) (the “**Bécancour Non-Union Pension Plan**”); and
- (c) the Régime de rentes pour les employés syndiqués de Silicium Bécancour Inc. (Québec Registration Number 32063) (the “**Bécancour Union Pension Plan**”).

Haley Pension Plan

15. The Haley Pension plan, sponsored and administered by Timminco, applies to former hourly employees at Timminco’s magnesium facility in Haley, Ontario.

16. The Haley Pension Plan was terminated effective as of August 1, 2008 and accordingly, no normal cost contributions are payable in connection with the Haley Pension Plan. As required by the Ontario *Pension Benefits Act* (the “**PBA**”), a wind-up valuation in respect of the Haley Pension Plan was filed with the Financial Services Commission of Ontario (“**FSCO**”) detailing the plan’s funded status as of the wind-up date, and each year thereafter. As of August 1, 2008, the Haley Pension Plan was in a deficit position on a wind-up basis of \$5,606,700. The PBA requires that the wind-up deficit be paid down in equal annual installments payable annually in advance over a period of no more than five years.

17. As of August 1, 2010, the date of the most recently filed valuation report, the Haley Pension Plan had a wind-up deficit of \$3,922,700. Contributions to the Haley Pension Plan are payable annually in advance every August 1. Contributions in respect of the period from August 1, 2008 to July 31, 2011 totalling \$4,712,400 were remitted to the plan. Contributions in respect of the period from August 1, 2011 to July 31, 2012 were estimated to be \$1,598,500 and have not been remitted to the plan.

18. According to preliminary estimates calculated by the Haley Pension Plan’s actuaries, despite Timminco having made contributions of approximately \$4,712,400 during the period from August 1, 2008 to July 31, 2011, as of August 1, 2011, the deficit remaining in the Haley Pension Plan is \$3,102,900.

Bécancour Non-Union Pension Plan

19. The Bécancour Non-Union Pension Plan, sponsored by BSI, is an on-going pension plan with both defined benefit (“**DB**”) and defined contribution provisions. The plan has four active members and 32 retired and deferred vested members (including surviving spouses).

20. The most recently filed actuarial valuation of the Bécancour Non-Union Pension Plan performed for funding purposes was performed as of September 30, 2010. As of September 30, 2010, the solvency deficit in the Bécancour Non-Union Pension Plan was \$3,239,600.

21. In 2011, normal cost contributions payable to this plan totaled approximately \$9,525 per month (or 16.8% of payroll). Amortization payments owing to this plan totaled approximately \$41,710 per month. All contributions in respect of the plan were paid when due in accordance with the *Québec Supplemental Pension Plans Act* (the “QSPPA”) and regulations.

Bécancour Union Pension Plan

22. The BSI-sponsored Bécancour Union Pension Plan is an on-going DB pension plan with two active members and 98 retired and deferred vested members (including surviving spouses).

23. The most recently filed actuarial valuation performed for funding purposes was performed as of September 30, 2010. As of September 30, 2010, the solvency deficit in the Bécancour Union Pension Plan was \$7,939,500.

24. In 2011, normal cost contributions payable to the plan totaled approximately \$7,083 per month (or 14.7% of payroll). Amortization payments owing to this plan totaled approximately \$95,300 per month. All contributions in respect of the plan were paid when due in accordance with the QSPPA and regulations.

25. BSI unionized employees have the option to transfer their employment to QSLP, under the form of the existing collective bargaining agreement. In the event of such transfer, their pension membership in the Bécancour Union Pension Plan will be transferred to the Quebec Silicon Union Pension Plan (as defined and described in greater detail in the Initial Order Affidavit). Also, in the event that any BSI non-union employees transfer employment to QSLP, their pension membership in the Bécancour Non-Union Pension Plan would be transferred to the Quebec Silicon Non-Union Pension Plan (as defined and described in greater detail in the Initial Order Affidavit). I am advised by Andrea Boctor of Stikeman Elliott LLP, counsel to the Timminco Entities, and do verily believe that if all of the active members of the Bécancour Union Pension Plan and the Bécancour Non-Union Pension Plan transfer their employment to QSLP, the Régie des rentes du Québec would have the authority to order that the plans be wound up.

Pension Plan Deficiencies and the Timminco Entities’ CCAA Proceedings

26. The assets of the Pension Plans have been severely impacted by market volatility and decreasing long-term interest rates in recent years, resulting in increased deficiencies in the Pension Plans. As a result, the special payments payable with respect to the Haley Plan also increased. As at 2010, total annual special payments for the final three years of the wind-up of the Haley Pension Plan were \$1,598,500 for 2010, \$1,397,000 for 2011 and \$1,162,000 for 2012, payable in advance annually every August 1. By contrast, in 2011 total annual special payments to the Haley Pension Plan for the remaining two years of the wind-up increased to \$1,728,700 for each of 2011 and 2012.

Suspension of Certain Pension Contributions

27. As is evident from the Cashflow Forecast, the Timminco Entities do not have the funds necessary to make any contributions to the Pension Plans other than (a) contributions in respect of normal cost, (b) contributions to the defined contribution provision of the BSI Non-Union Pension Plan, and (c) employee contributions deducted from pay (together, the “**Normal Cost Contributions**”). Timminco currently owes approximately \$1.6 million in respect of special payments to the Haley Pension Plan. In addition, assuming the Bécancour Non-Union Pension Plan and the Bécancour Union Pension Plan are not terminated, as at January 31, 2012, the Timminco Entities will owe approximately \$140,000 in respect of amortization payments under those plans. If the Timminco Entities are required to make the pension contributions other than Normal Cost Contributions (the “**Pension Contributions**”), they will not have sufficient funds to continue operating and will be forced to cease operating to the detriment of their stakeholders, including their employees and pensioners.

28. The Timminco Entities intend to make all normal cost contributions when due. However, management of the Timminco Entities does not anticipate an improvement in their cashflows that would permit the making of Pension Contributions with respect to the Pension Plans during these CCAA proceedings.

The Position of CEP and USW

[16] Counsel to CEP submits that the super priority charge sought by the Timminco Entities would have the effect of subordinating the rights of, *inter alia*, the pension plans, including the statutory trusts that are created pursuant to the QSPPA. In considering this matter, I have proceeded on the basis that this submission extends to the PBA as well.

[17] In order to grant a super priority charge, counsel to CEP, supported by USW, submits that the Timminco Entities must show that the application of provincial legislation “would frustrate the company’s ability to restructure and avoid bankruptcy”. (See *Indalex (Re)*, 2011 ONCA 265 at para. 181.)

[18] Counsel to CEP takes the position that the evidence provided by the Timminco Entities falls short of showing the necessity of the super priority charge. Presently, counsel contends that the Applicants have not provided any plan for the purpose of restructuring the Timminco Entities and, absent a restructuring proposal, the affected creditors, including the pension plans, have no

reason to believe that their interests will be protected through the issuance of the orders being sought.

[19] Counsel to CEP takes the position that the Timminco Entities are requesting extraordinary relief without providing the necessary facts to justify same. Counsel further contends that the Timminco Entities must “wear two hats” and act both in their corporate interest and in the best interest of the pension plan and cannot simply ignore their obligations to the pension plans in favour of the corporation. (See *Indalex (Re)*, *supra*, at para. 129.)

[20] Counsel to CEP goes on to submit that, where the “two hats” gives rise to a conflict of interest, if a corporation favours its corporate interest rather than its obligations to its fiduciaries, there will be consequences. In *Indalex (Re)*, *supra*, the court found that the corporation seeking CCAA protection had acted in a manner that revealed a conflict with the duties it owed the beneficiaries of pension plans and ordered the corporation to pay the special payments it owed the plans (See *Indalex (Re)*, *supra*, at paras. 140 and 207.)

[21] In this case, counsel to CEP submits that, given the lack of evidentiary support for the super priority charge, the risk of conflicting interests and the importance of the Timminco Entities’ fiduciary duties to the pension plans, the super priority charge ought not to be granted.

[22] Although counsel to CEP acknowledges that the court has the discretion in the context of the CCAA to make orders that override provincial legislation, such discretion must be exercised through a careful weighing of the facts before the court. Only where the applicant proves it is necessary in the context and consistent with the objects of the CCAA may a judge make an order overriding provincial legislation. (See *Indalex (Re)*, *supra*, at paras. 179 and 189.)

[23] In the circumstances of this case, counsel to CEP argues that the position of any super priority charge ordered by the court should rank after the pension plans.

[24] CEP also takes the position that the Timminco Entities’ obligations to the pension plans should not be suspended. Counsel notes that the Timminco Entities have contractual obligations through the collective agreement and pension plan documents to make contributions to the pension plans and, as well, the Timminco Entities owe statutory duties to the beneficiaries of the pension funds pursuant to the QSPPA. Counsel further points out that s. 49 of the QSPPA provides that any contributions and accrued interest not paid into the pension fund are deemed to be held in trust for the employer.

[25] In addition, counsel takes the position that the Court of Appeal for Ontario in *Indalex (Re)*, *supra*, confirmed that, in the context of Ontario legislation, all of the contributions an employee owes a pension fund, including the special payments, are subject to the deemed trust provision of the PBA.

[26] In this case, counsel to CEP points out that the special payments the Timminco Entities seek to suspend in the amount of \$95,300 per month to the Bécancour Union Pension Plan, and of \$47,743 to the Silicium Union Pension Plan, are payments that are to be held in trust for the beneficiaries of the pension plans. Thus, they argue that the Timminco Entities have a fiduciary

obligation to the beneficiaries of the pension plans to hold the funds in trust. Further, the Timminco Entities' request to suspend the special payments to the Bécancour Union Pension Plan and the Quebec Silicon Union Pension Plan reveals that its interests are in conflict.

[27] Counsel also submits that the Timminco Entities have not pointed to a particular reason, other than generalized liquidity problems, as to why they are unable to make special payments to their pension plans.

[28] With respect to the KERPs, counsel to CEP acknowledges that the court has the power to approve a KERP, but the court must only do so when it is convinced that it is necessary to make such an order. In this case, counsel contends that the Timminco Entities have not presented any meaningful evidence on the propriety of the proposed KERPs. Counsel notes that the Timminco Entities have not named the KERPs recipients, provided any specific information regarding their involvement with the CCAA proceeding, addressed their replaceability, or set out their individual bonuses. In the circumstances, counsel submits that it would be unfair and inequitable for the court to approve the KERPs requested by the Timminco Entities.

[29] Counsel to CEP's final submission is that, in the event the KERPs are approved, they should not be sealed, but rather should be treated in the same manner as other CCAA documents through the Monitor. Alternatively, counsel to CEP submits that a copy of the KERPs should be provided to the Respondent, CEP.

The Position of the Timminco Entities

[30] At the time of the initial hearing, the Timminco Entities filed evidence establishing that they were facing severe liquidity issues as a result of, among other things, a low profit margin realized on their silicon metal sales due to a high volume, long-term supply contract at below market prices, a decrease in the demand and market price for solar grade silicon, failure to recoup their capital expenditures incurred in connection with the development of their solar grade operations, and the inability to secure additional funding. The Timminco Entities also face significant pension and environmental remediation legacy costs, and financial costs related to large outstanding debts.

[31] I accepted submissions to the effect that without the protection of the CCAA, a shutdown of operations was inevitable, which the Timminco Entities submitted would be extremely detrimental to the Timminco Entities' employees, pensioners, suppliers and customers.

[32] As at December 31, 2011, the Timminco Entities' cash balance was approximately \$2.4 million. The 30-day consolidated cash flow forecast filed at the time of the CCAA application projected that the Timminco Entities would have total receipts of approximately \$5.5 million and total operating disbursements of approximately \$7.7 million for net cash outflow of approximately \$2.2 million, leaving an ending cash position as at February 3, 2012 of an estimated \$157,000.

[33] The Timminco Entities approached their existing stakeholders and third party lenders in an effort to secure a suitable debtor-in-possession ("DIP") facility. The Timminco Entities

existing stakeholders, Bank of America NA, IQ, and AMG Advance Metallurgical Group NV, have declined to advance any funds to the Timminco Entities at this time. In addition, two third-party lenders have apparently refused to enter into negotiations regarding the provision of a DIP Facility.¹

[34] The Monitor, in its Second Report, dated January 11, 2012, extended the cash forecast through to February 17, 2012. The Second Report provides explanations for the key variances in actual receipts and disbursements as compared to the January 2, 2012 forecast.

[35] There are some timing differences but the Monitor concludes that there are no significant changes in the underlying assumptions in the January 10, 2012 forecast as compared to the January 2, 2012 forecast.

[36] The January 10 forecast projects that the ending cash position goes from positive to negative in mid-February.

[37] Counsel to the Applicants submits that, based on the latest cash flow forecast, the Timminco Entities currently estimate that additional funding will be required by mid-February in order to avoid an interruption in operations.

[38] The Timminco Entities submit that this is an appropriate case in which to grant super priority to the Administration Charge. Counsel submits that each of the proposed beneficiaries will play a critical role in the Timminco Entities' restructuring and it is unlikely that the advisors will participate in the CCAA proceedings unless the Administration Charge is granted to secure their fees and disbursements.

[39] Statutory Authority to grant such a charge derives from s. 11.52(1) of the CCAA. Subsection 11.52(2) contains the authority to grant super-priority to such a charge:

11.52(1) Court may order security or charge to cover certain costs — On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge — in an amount that the court considers appropriate — in respect of the fees and expenses of

(a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;

¹ In a subsequent motion relating to approval of a DIP Facility, the Timminco Entities acknowledged they had reached an agreement with a third-party lender with respect to providing DIP financing, subject to court approval. Further argument on this motion will be heard on February 6, 2012.

(b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and

(c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.

11.52(2) Priority — This court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

[40] Counsel also submits that the Timminco Entities require the continued involvement of their directors and officers in order to pursue a successful restructuring of their business and/or finances and, due to the significant personal exposure associated with the Timminco Entities' liabilities, it is unlikely that the directors and officers will continue their services with the Timminco Entities unless the D&O Charge is granted.

[41] Statutory authority for the granting of a D&O charge on a super priority basis derives from s. 11.51 of the CCAA:

11.51(1) Security or charge relating to director's indemnification — On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of the company is subject to a security or charge — in an amount that the court considers appropriate — in favour of any director or officer of the company to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer of the company after the commencement of proceedings under this Act.

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

(3) Restriction — indemnification insurance — The court may not make the order if in its opinion the company could obtain adequate indemnification insurance for the director or officer at a reasonable cost.

(4) Negligence, misconduct or fault — The court shall make an order declaring that the security or charge does not apply in respect of a specific obligation or liability incurred by a director or officer if in its opinion the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct or, in Quebec, the director's or officer's gross or intentional fault.

Analysis

(i) Administration Charge and D&O Charge

[42] It seems apparent that the position of the unions' is in direct conflict with the Applicants' positions.

[43] The position being put forth by counsel to the CEP and USW is clearly stated and is quite understandable. However, in my view, the position of the CEP and the USW has to be considered in the context of the practical circumstances facing the Timminco Entities. The Timminco Entities are clearly insolvent and do not have sufficient reserves to address the funding requirements of the pension plans.

[44] Counsel to the Applicants submits that without the relief requested, the Timminco Entities will be deprived of the services being provided by the beneficiaries of the charges, to the company's detriment. I accept the submissions of counsel to the Applicants that it is unlikely that the advisors will participate in the CCAA proceedings unless the Administration Charge is granted to secure their fees and disbursements. I also accept the evidence of Mr. Kalins that the role of the advisors is critical to the efforts of the Timminco Entities to restructure. To expect that the advisors will take the business risk of participating in these proceedings without the security of the charge is neither reasonable nor realistic.

[45] Likewise, I accept the submissions of counsel to the Applicants to the effect that the directors and officers will not continue their service without the D&O Charge. Again, in circumstances such as those facing the Timminco Entities, it is neither reasonable nor realistic to expect directors and officers to continue without the requested form of protection.

[46] It logically follows, in my view, that without the assistance of the advisors, and in the anticipated void caused by the lack of a governance structure, the Timminco Entities will be directionless and unable to effectively proceed with any type or form of restructuring under the CCAA.

[47] The Applicants argue that the CCAA overrides any conflicting requirements of the QSPPA and the BPA.

[48] Counsel submits that the general paramountcy of the CCAA over provincial legislation was confirmed in *ATB Financial v. Metcalf & Mansfield Alternative Investment II Corp.*, (2008), 45 C.B.R. (5th) 163 (Ont. C.A.) at para. 104. In addition, in *Nortel Networks Corporation (Re)*, the Court of Appeal held that the doctrine of paramountcy applies either where a provincial and a federal statutory position are in conflict and cannot both be complied with, or where complying with the provincial law will have the effect of frustrating the purpose of the federal law and therefore the intent of Parliament. See *Nortel Networks Corporation (Re)*, (2009), 59 C.B.R. (5th) 23 (Ont. C.A.).

[49] It has long been stated that the purpose of the CCAA is to facilitate the making of a compromise or arrangement between an insolvent debtor company and its creditors, with the purpose of allowing the business to continue. As the Court of Appeal for Ontario stated in *Stelco Inc., (Re)* (2005), 75 O.R. (3d) 5, at para. 36:

In the CCAA context, Parliament has provided a statutory framework to extend protection to a company while it holds its creditors at bay and attempts to negotiate a compromised plan of arrangement that will enable it to emerge and continue as a viable economic entity, thus benefiting society and the company in the long run, along with the company's creditors, shareholders, employees and other stakeholders. The s. 11 discretion is the engine that drives this broad and flexible statutory scheme...

[50] Further, as I indicated in *Nortel Networks Corporation (Re)*, (2009), 55 C.B.R. (5th) 229 (Ont. S.C.J.), this purpose continues to exist regardless of whether a company is actually restructuring or is continuing operations during a sales process in order to maintain maximum value and achieve the highest price for the benefit of all stakeholders. Based on this reasoning, the fact that Timminco has not provided any plan for restructuring at this time does not change the analysis.

[51] The Court of Appeal in *Indalex Ltd. (Re)* (2011), 75 C.B.R. (5th) 19 (Ont. C.A.) confirmed the CCAA court's ability to override conflicting provisions of provincial statutes where the application of the provincial legislation would frustrate the company's ability to restructure and avoid bankruptcy. The Court stated, *inter alia*, as follows (beginning at paragraph 176):

The CCAA court has the authority to grant a super-priority charge to DIP lenders in CCAA proceedings. I fully accept that the CCAA judge can make an order granting a super-priority charge that has the effect of overriding provincial legislation, including the PBA. ...

...

What of the contention that recognition of the deemed trust will cause DIP lenders to be unwilling to advance funds in CCAA proceedings? It is important to recognize that the conclusion I have reached does not mean that a finding of paramountcy will never be made. That determination must be made on a case by case basis. There may well be situations in which paramountcy is invoked and the record satisfies the CCAA judge that application of the provincial legislation would frustrate the company's ability to restructure and avoid bankruptcy.

[52] The Timminco Entities seek approval to suspend Special Payments in order to maintain sufficient liquidity to continue operations for the benefit of all stakeholders, including employees and pensioners. It is clear that based on the January 2 forecast, as modified by the Second Report, the Timminco Entities have insufficient liquidity to make the Special Payments at this time.

[53] Counsel to the Timminco Entities submits that where it is necessary to achieve the objective of the CCAA, the court has the jurisdiction to make an order under the CCAA granting, in the present case, super priority over the Encumbrances for the Administration Charge and the D&O Charge, even if such an order conflicts with, or overrides, the QSPPA or the PBA.

[54] Further, the Timminco Entities submit that the doctrine of paramountcy is properly invoked in this case and that the court should order that the Administration Charge and the D&O Charge have super priority over the Encumbrances in order to ensure the continued participation of the beneficiaries of these charges in the Timminco Entities' CCAA proceedings.

[55] The Timminco Entities also submit that payment of the pension contributions should be suspended. These special (or amortization) payments are required to be made to liquidate a going concern or solvency deficiency in a pension plan as identified in the most recent funding valuation report for the plan that is filed with the applicable pension regulatory authority. The requirement for the employer to make such payments is provided for under applicable provincial pension minimum standards legislation.

[56] The courts have characterized special (or amortization) payments as pre-filing obligations which are stayed upon an initial order being granted under the CCAA. (See *AbitibiBowater Inc.*, (Re) (2009) 57 C.B.R. (5th) 285 (Q.S.C.); *Collins & Aikman Automotive Canada Inc.* (2007), 37 C.B.R. (5th) 282 (Ont. S.C.J.) and *Fraser Papers Inc. (Re)* (2009), 55 C.B.R. (5th) 217 (Ont. S.C.J.).

[57] I accept the submission of counsel to the Applicants to the effect that courts in Ontario and Quebec have addressed the issue of suspending special (or amortization) payments in the context of a CCAA restructuring and have ordered the suspension of such payments where the failure to stay the obligation would jeopardize the business of the debtor company and the company's ability to restructure.

[58] The Timminco Entities also submit that there should be no director or officer liability incurred as a result of a court-ordered suspension of payment of pension contributions. Counsel references *Fraser Papers*, where Pepall J. stated:

Given that I am ordering that the special payments need not be made during the stay period pending further order of the Court, the Applicants and the officers and directors should not have any liability for failure to pay them in that same period. The latter should be encouraged to remain during the CCAA process so as to govern and assist with the restructuring effort and should be provided with protection without the need to have recourse to the Director's Charge.

[59] Importantly, *Fraser Papers* also notes that there is no priority for special payments in bankruptcy. In my view, it follows that the employees and former employees are not prejudiced by the relief requested since the likely outcome should these proceedings fail is bankruptcy, which would not produce a better result for them. Thus, the "two hats" doctrine from *Indalex (Re)*, *supra*, discussed earlier in these reasons at [20], would not be infringed by the relief requested. Because it would avoid bankruptcy, to the benefit of both the Timminco Entities and beneficiaries of the pension plans, the relief requested would not favour the interests of the corporate entity over its obligations to its fiduciaries.

[60] Counsel to the Timminco Entities submits that where it is necessary to achieve the objective of the CCAA, the court has the jurisdiction to make an order under the CCAA

suspending the payment of the pension contributions, even if such order conflicts with, or overrides, the QSPPA or the PBA.

[61] The evidence has established that the Timminco Entities are in a severe liquidity crisis and, if required to make the pension contributions, will not have sufficient funds to continue operating. The Timminco Entities would then be forced to cease operations to the detriment of their stakeholders, including their employees and pensioners.

[62] On the facts before me, I am satisfied that the application of the QSPPA and the PBA would frustrate the Timminco Entities ability to restructure and avoid bankruptcy. Indeed, while the Timminco Entities continue to make Normal Cost Contributions to the pension plans, requiring them to pay what they owe in respect of special and amortization payments for those plans would deprive them of sufficient funds to continue operating, forcing them to cease operations to the detriment of their stakeholders, including their employees and pensioners.

[63] In my view, this is exactly the kind of result the CCAA is intended to avoid. Where the facts demonstrate that ordering a company to make special payments in accordance with provincial legislation would have the effect of forcing the company into bankruptcy, it seems to me that to make such an order would frustrate the rehabilitative purpose of the CCAA. In such circumstances, therefore, the doctrine of paramountcy is properly invoked, and an order suspending the requirement to make special payments is appropriate (see *ATB Financial and Nortel Networks Corporation (Re)*).

[64] In my view, the circumstances are such that the position put forth by the Timminco Entities must prevail. I am satisfied that bankruptcy is not the answer and that, in order to ensure that the purpose and objective of the CCAA can be fulfilled, it is necessary to invoke the doctrine of paramountcy such that the provisions of the CCAA override those of QSPPA and the PBA.

[65] There is a clear inter-relationship between the granting of the Administration Charge, the granting of the D&O Charge and extension of protection for the directors and officers for the company's failure to pay the pension contributions.

[66] In my view, in the absence of the court granting the requested super priority and protection, the objectives of the CCAA would be frustrated. It is not reasonable to expect that professionals will take the risk of not being paid for their services, and that directors and officers will remain if placed in a compromised position should the Timminco Entities continue CCAA proceedings without the requested protection. The outcome of the failure to provide these respective groups with the requested protection would, in my view, result in the overwhelming likelihood that the CCAA proceedings would come to an abrupt halt, followed, in all likelihood, by bankruptcy proceedings.

[67] If bankruptcy results, the outcome for employees and pensioners is certain. This alternative will not provide a better result for the employees and pensioners. The lack of a desirable alternative to the relief requested only serves to strengthen my view that the objectives of the CCAA would be frustrated if the relief requested was not granted.

[68] For these reasons, I have determined that it is both necessary and appropriate to grant super priority to both the Administrative Charge and D&O Charge.

[69] I have also concluded that it is both necessary and appropriate to suspend the Timminco Entities' obligations to make pension contributions with respect to the Pension Plans. In my view, this determination is necessary to allow the Timminco Entities to restructure or sell the business as a going concern for the benefit of all stakeholders.

[70] I am also satisfied that, in order to encourage the officers and directors to remain during the CCAA proceedings, an order should be granted relieving them from any liability for the Timminco Entities' failure to make pension contributions during the CCAA proceedings. At this point in the restructuring, the participation of its officers and directors is of vital importance to the Timminco Entities.

(ii) The KERPs

[71] Turning now to the issue of the employee retention plans (KERPs), the Timminco Entities seek an order approving the KERPs offered to certain employees who are considered critical to successful proceedings under the CCAA.

[72] In this case, the KERPs have been approved by the board of directors of Timminco. The record indicates that in the opinion of the Chief Executive Officer and the Special Committee of the Board, all of the KERPs participants are critical to the Timminco Entities' CCAA proceedings as they are experienced employees who have played central roles in the restructuring initiatives taken to date and will play critical roles in the steps taken in the future. The total amount of the KERPs in question is \$269,000. KERPs have been approved in numerous CCAA proceedings where the retention of certain employees has been deemed critical to a successful restructuring. See *Nortel Networks Corporation (Re)*, (2009) O.J. No. 1044 (S.C.J.), *Grant Forest Products Inc. (Re)*, (2009) 57 C.B.R. (5th) 128 (Ont. S.C.J.) [Commercial List], and *Canwest Global Communications Corp. (Re)*, (2009) 59 C.B.R. (5th) 72 (Ont. S.C.J.).

[73] In *Grant Forest Products*, Newbould J. noted that the business judgment of the board of directors of the debtor company and the monitor should rarely be ignored when it comes to approving a KERP charge.

[74] The Monitor also supports the approval of the KERPs and, following review of several court-approved retention plans in CCAA proceedings, is satisfied that the KERPs are consistent with the current practice for retention plans in the context of a CCAA proceeding and that the quantum of the proposed payments under the KERPs are reasonable in the circumstances.

[75] I accept the submissions of counsel to the Timminco Entities. I am satisfied that it is necessary, in these circumstances, that the KERPs participants be incentivized to remain in their current positions during the CCAA process. In my view, the continued participation of these experienced and necessary employees will assist the company in its objectives during its restructuring process. If these employees were not to remain with the company, it would be

necessary to replace them. It is reasonable to conclude that the replacement of such employees would not provide any substantial economic benefits to the company. The KERPs are approved.

[76] The Timminco Entities have also requested that the court seal the Confidential Supplement which contains copies of the unredacted KERPs, taking the position that the KERPs contain sensitive personal compensation information and that the disclosure of such information would compromise the commercial interests of the Timminco Entities and harm the KERPs participants. Further, the KERPs participants have a reasonable expectation that their names and salary information will be kept confidential. Counsel relies on *Sierra Club of Canada v. Canada (Minister of Finance)* [2002] 2 S.C.R. 522 at para. 53 where Iacobucci J. adopted the following test to determine when a sealing order should be made:

A confidentiality order under Rule 151 should only be granted when:

- (a) such an order is necessary in order to prevent serious risk to an important interest, including a commercial interest, in the context of litigation because reasonable alternative measures will not prevent the risk; and
- (b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh the deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.

[77] CEP argues that the CCAA process should be open and transparent to the greatest extent possible and that the KERPs should not be sealed but rather should be treated in the same manner as other CCAA documents through the Monitor. In the alternative, counsel to the CEP submits that a copy of the KERPs should be provided to the Respondent, CEP.

[78] In my view, at this point in time in the restructuring process, the disclosure of this personal information could compromise the commercial interests of the Timminco Entities and cause harm to the KERP participants. It is both necessary and important for the parties to focus on the restructuring efforts at hand rather than to get, in my view, potentially side-tracked on this issue. In my view, the Confidential Supplement should be and is ordered sealed with the proviso that this issue can be revisited in 45 days.

Disposition

[79] In the result, the motion is granted. An order shall issue:

- (a) suspending the Timminco Entities' obligation to make special payments with respect to the pension plans (as defined in the Notice of Motion);
- (b) granting super priority to the Administrative Charge and the D&O Charge;
- (c) approving the KERPs and the grant of the KERP Charge;

(d) authorizing the sealing of the Confidential Supplement to the First Report of the Monitor.

MORAWETZ J.

Date: February 2, 2012

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CITATION: Canwest Publishing Inc., 2010 ONSC 222
COURT FILE NO.: CV-10-8533-00CL
DATE: 20100118

ONTARIO

**SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

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

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR
ARRANGEMENT OF CANWEST PUBLISHING INC./PUBLICATIONS CANWEST
INC., CANWEST BOOKS INC. AND CANWEST (CANADA) INC.

COUNSEL: *Lyndon Barnes, Alex Cobb and Duncan Ault* for the Applicant LP Entities
Mario Forte for the Special Committee of the Board of Directors
Andrew Kent and Hilary Clarke for the Administrative Agent of the Senior
Secured Lenders' Syndicate
Peter Griffin for the Management Directors
Robin B. Schwill and Natalie Renner for the Ad Hoc Committee of 9.25% Senior
Subordinated Noteholders
David Byers and Maria Konyukhova for the proposed Monitor, FTI Consulting
Canada Inc.

PEPALL J.

REASONS FOR DECISION

Introduction

[1] Canwest Global Communications Corp. ("Canwest Global") is a leading Canadian media company with interests in (i) newspaper publishing and digital media; and (ii) free-to-air television stations and subscription based specialty television channels. Canwest Global, the entities in its Canadian television business (excluding CW Investments Co. and its subsidiaries) and the National Post Company (which prior to October 30, 2009 owned and published the National Post) (collectively, the "CMI Entities"), obtained protection from their creditors in a

*Companies' Creditors Arrangement Act*¹ ("CCAA") proceeding on October 6, 2009.² Now, the Canwest Global Canadian newspaper entities with the exception of National Post Inc. seek similar protection. Specifically, Canwest Publishing Inc./Publications Canwest Inc. ("CPI"), Canwest Books Inc. ("CBI"), and Canwest (Canada) Inc. ("CCI") apply for an order pursuant to the CCAA. They also seek to have the stay of proceedings and the other benefits of the order extend to Canwest Limited Partnership/Canwest Société en Commandite (the "Limited Partnership"). The Applicants and the Limited Partnership are referred to as the "LP Entities" throughout these reasons. The term "Canwest" will be used to refer to the Canwest enterprise as a whole. It includes the LP Entities and Canwest Global's other subsidiaries which are not applicants in this proceeding.

[2] All appearing on this application supported the relief requested with the exception of the Ad Hoc Committee of 9.25% Senior Subordinated Noteholders. That Committee represents certain unsecured creditors whom I will discuss more fully later.

[3] I granted the order requested with reasons to follow. These are my reasons.

[4] I start with three observations. Firstly, Canwest Global, through its ownership interests in the LP Entities, is the largest publisher of daily English language newspapers in Canada. The LP Entities own and operate 12 daily newspapers across Canada. These newspapers are part of the Canadian heritage and landscape. The oldest, The Gazette, was established in Montreal in 1778. The others are the Vancouver Sun, The Province, the Ottawa Citizen, the Edmonton Journal, the Calgary Herald, The Windsor Star, the Times Colonist, The Star Phoenix, the Leader-Post, the Nanaimo Daily News and the Alberni Valley Times. These newspapers have an estimated average weekly readership that exceeds 4 million. The LP Entities also publish 23 non-daily

¹ R.S.C. 1985, c. C. 36, as amended.

² On October 30, 2009, substantially all of the assets and business of the National Post Company were transferred to the company now known as National Post Inc.

newspapers and own and operate a number of digital media and online operations. The community served by the LP Entities is huge. In addition, based on August 31, 2009 figures, the LP Entities employ approximately 5,300 employees in Canada with approximately 1,300 of those employees working in Ontario. The granting of the order requested is premised on an anticipated going concern sale of the newspaper business of the LP Entities. This serves not just the interests of the LP Entities and their stakeholders but the Canadian community at large.

[5] Secondly, the order requested may contain some shortcomings; it may not be perfect. That said, insolvency proceedings typically involve what is feasible, not what is flawless.

[6] Lastly, although the builders of this insolvent business are no doubt unhappy with its fate, gratitude is not misplaced by acknowledging their role in its construction.

Background Facts

(i) Financial Difficulties

[7] The LP Entities generate the majority of their revenues through the sale of advertising. In the fiscal year ended August 31, 2009, approximately 72% of the LP Entities' consolidated revenue derived from advertising. The LP Entities have been seriously affected by the economic downturn in Canada and their consolidated advertising revenues declined substantially in the latter half of 2008 and in 2009. In addition, they experienced increases in certain of their operating costs.

[8] On May 29, 2009 the Limited Partnership failed, for the first time, to make certain interest and principal reduction payments and related interest and cross currency swap payments totaling approximately \$10 million in respect of its senior secured credit facilities. On the same day, the Limited Partnership announced that, as of May 31, 2009, it would be in breach of certain financial covenants set out in the credit agreement dated as of July 10, 2007 between its predecessor, Canwest Media Works Limited Partnership, The Bank of Nova Scotia as administrative agent, a syndicate of secured lenders ("the LP Secured Lenders"), and the predecessors of CCI, CPI and CBI as guarantors. The Limited Partnership also failed to make

principal, interest and fee payments due pursuant to this credit agreement on June 21, June 22, July 21, July 22 and August 21, 2009.

[9] The May 29, 2009, defaults under the senior secured credit facilities triggered defaults in respect of related foreign currency and interest rate swaps. The swap counterparties (the “Hedging Secured Creditors”) demanded payment of \$68.9 million. These unpaid amounts rank pari passu with amounts owing under the LP Secured Lenders’ credit facilities.

[10] On or around August 31, 2009, the Limited Partnership and certain of the LP Secured Lenders entered into a forbearance agreement in order to allow the LP Entities and the LP Secured Lenders the opportunity to negotiate a pre-packaged restructuring or reorganization of the affairs of the LP Entities. On November 9, 2009, the forbearance agreement expired and since then, the LP Secured Lenders have been in a position to demand payment of approximately \$953.4 million, the amount outstanding as at August 31, 2009. Nonetheless, they continued negotiations with the LP Entities. The culmination of this process is that the LP Entities are now seeking a stay of proceedings under the CCAA in order to provide them with the necessary “breathing space” to restructure and reorganize their businesses and to preserve their enterprise value for the ultimate benefit of their broader stakeholder community.

[11] The Limited Partnership released its annual consolidated financial statements for the twelve months ended August 31, 2009 and 2008 on November 26, 2009. As at August 31, 2009, the Limited Partnership had total consolidated assets with a net book value of approximately \$644.9 million. This included consolidated current assets of \$182.7 million and consolidated non-current assets of approximately \$462.2 million. As at that date, the Limited Partnership had total consolidated liabilities of approximately \$1.719 billion (increased from \$1.656 billion as at August 31, 2008). These liabilities consisted of consolidated current liabilities of \$1.612 billion and consolidated non-current liabilities of \$107 million.

[12] The Limited Partnership had been experiencing deteriorating financial results over the past year. For the year ended August 31, 2009, the Limited Partnership’s consolidated revenues decreased by \$181.7 million or 15% to \$1.021 billion as compared to \$1.203 billion for the year

ended August 31, 2008. For the year ended August 31, 2009, the Limited Partnership reported a consolidated net loss of \$66 million compared to consolidated net earnings of \$143.5 million for fiscal 2008.

(ii) Indebtedness under the Credit Facilities

[13] The indebtedness under the credit facilities of the LP Entities consists of the following.

- (a) The LP senior secured credit facilities are the subject matter of the July 10, 2007 credit agreement already mentioned. They are guaranteed by CCI, CPI and CBI. The security held by the LP Secured Lenders has been reviewed by the solicitors for the proposed Monitor, FTI Consulting Canada Inc. and considered to be valid and enforceable.³ As at August 31, 2009, the amounts owing by the LP Entities totaled \$953.4 million exclusive of interest.⁴
- (b) The Limited Partnership is a party to the aforementioned foreign currency and interest rate swaps with the Hedging Secured Creditors. Defaults under the LP senior secured credit facilities have triggered defaults in respect of these swap arrangements. Demand for repayment of amounts totaling \$68.9 million (exclusive of unpaid interest) has been made. These obligations are secured.
- (c) Pursuant to a senior subordinated credit agreement dated as of July 10, 2007, between the Limited Partnership, The Bank of Nova Scotia as administrative agent for a syndicate of lenders, and others, certain subordinated lenders agreed to provide the Limited Partnership with access to a term credit facility of up to \$75

³ Subject to certain assumptions and qualifications.

⁴ Although not formally in evidence before the court, counsel for the LP Secured Lenders advised the court that currently \$382,889,000 in principal in Canadian dollars is outstanding along with \$458,042,000 in principal in American dollars.

million. CCI, CPI, and CBI are guarantors. This facility is unsecured, guaranteed on an unsecured basis and currently fully drawn. On June 20, 2009, the Limited Partnership failed to make an interest payment resulting in an event of default under the credit agreement. In addition, the defaults under the senior secured credit facilities resulted in a default under this facility. The senior subordinated lenders are in a position to take steps to demand payment.

- (d) Pursuant to a note indenture between the Limited Partnership, The Bank of New York Trust Company of Canada as trustee, and others, the Limited Partnership issued 9.5% per annum senior subordinated unsecured notes due 2015 in the aggregate principal amount of US \$400 million. CPI and CBI are guarantors. The notes are unsecured and guaranteed on an unsecured basis. The noteholders are in a position to take steps to demand immediate payment of all amounts outstanding under the notes as a result of events of default.

[14] The LP Entities use a centralized cash management system at the Bank of Nova Scotia which they propose to continue. Obligations owed pursuant to the existing cash management arrangements are secured (the “Cash Management Creditor”).

(iii) LP Entities’ Response to Financial Difficulties

[15] The LP Entities took a number of steps to address their circumstances with a view to improving cash flow and strengthening their balance sheet. Nonetheless, they began to experience significant tightening of credit from critical suppliers and other trade creditors. The LP Entities’ debt totals approximately \$1.45 billion and they do not have the liquidity required to make payment in respect of this indebtedness. They are clearly insolvent.

[16] The board of directors of Canwest Global struck a special committee of directors (the “Special Committee”) with a mandate to explore and consider strategic alternatives. The Special Committee has appointed Thomas Strike, the President, Corporate Development & Strategy Implementation, as Recapitalization Officer and has retained Gary Colter of CRS Inc. as

Restructuring Advisor for the LP Entities (the “CRA”). The President of CPI, Dennis Skulsky, will report directly to the Special Committee.

[17] Given their problems, throughout the summer and fall of 2009, the LP Entities have participated in difficult and complex negotiations with their lenders and other stakeholders to obtain forbearance and to work towards a consensual restructuring or recapitalization.

[18] An ad hoc committee of the holders of the senior subordinated unsecured notes (the “Ad Hoc Committee”) was formed in July, 2009 and retained Davies Ward Phillips & Vineberg as counsel. Among other things, the Limited Partnership agreed to pay the Committee’s legal fees up to a maximum of \$250,000. Representatives of the Limited Partnership and their advisors have had ongoing discussions with representatives of the Ad Hoc Committee and their counsel was granted access to certain confidential information following execution of a confidentiality agreement. The Ad Hoc Committee has also engaged a financial advisor who has been granted access to the LP Entities’ virtual data room which contains confidential information regarding the business and affairs of the LP Entities. There is no evidence of any satisfactory proposal having been made by the noteholders. They have been in a position to demand payment since August, 2009, but they have not done so.

[19] In the meantime and in order to permit the businesses of the LP Entities to continue to operate as going concerns and in an effort to preserve the greatest number of jobs and maximize value for the stakeholders of the LP Entities, the LP Entities have been engaged in negotiations with the LP Senior Lenders, the result of which is this CCAA application.

(iv) The Support Agreement, the Secured Creditors’ Plan and the Solicitation Process

[20] Since August 31, 2009, the LP Entities and the LP administrative agent for the LP Secured Lenders have worked together to negotiate terms for a consensual, prearranged restructuring, recapitalization or reorganization of the business and affairs of the LP Entities as a going concern. This is referred to by the parties as the Support Transaction.

[21] As part of this Support Transaction, the LP Entities are seeking approval of a Support Agreement entered into by them and the administrative agent for the LP Secured Lenders. 48% of the LP Secured Lenders, the Hedging Secured Creditors, and the Cash Management Creditor (the “Secured Creditors”) are party to the Support Agreement.

[22] Three interrelated elements are contemplated by the Support Agreement and the Support Transaction: the credit acquisition, the Secured Creditors’ plan (the “Plan”), and the sale and investor solicitation process which the parties refer to as SISP.

[23] The Support Agreement contains various milestones with which the LP Entities are to comply and, subject to a successful bid arising from the solicitation process (an important caveat in my view), commits them to support a credit acquisition. The credit acquisition involves an acquisition by an entity capitalized by the Secured Creditors and described as AcquireCo. AcquireCo. would acquire substantially all of the assets of the LP Entities (including the shares in National Post Inc.) and assume certain of the liabilities of the LP Entities. It is contemplated that AcquireCo. would offer employment to all or substantially all of the employees of the LP Entities and would assume all of the LP Entities’ existing pension plans and existing post-retirement and post-employment benefit plans subject to a right by AcquireCo., acting commercially reasonably and after consultation with the operational management of the LP Entities, to exclude certain specified liabilities. The credit acquisition would be the subject matter of a Plan to be voted on by the Secured Creditors on or before January 31, 2010. There would only be one class. The Plan would only compromise the LP Entities’ secured claims and would not affect or compromise any other claims against any of the LP Entities (“unaffected claims”). No holders of the unaffected claims would be entitled to vote on or receive any distributions of their claims. The Secured Creditors would exchange their outstanding secured claims against the LP Entities under the LP credit agreement and the swap obligations respectively for their *pro rata* shares of the debt and equity to be issued by AcquireCo. All of the LP Entities’ obligations under the LP secured claims calculated as of the date of closing less \$25 million would be deemed to be satisfied following the closing of the Acquisition Agreement.

LP secured claims in the amount of \$25 million would continue to be held by AcquireCo. and constitute an outstanding unsecured claim against the LP Entities.

[24] The Support Agreement contemplates that the Financial Advisor, namely RBC Dominion Securities Inc., under the supervision of the Monitor, will conduct the solicitation process. Completion of the credit acquisition process is subject to a successful bid arising from the solicitation process. In general terms, the objective of the solicitation process is to obtain a better offer (with some limitations described below) than that reflected in the credit acquisition. If none is obtained in that process, the LP Entities intend for the credit acquisition to proceed assuming approval of the Plan. Court sanction would also be required.

[25] In more detailed terms, Phase I of the solicitation process is expected to last approximately 7 weeks and qualified interested parties may submit non-binding proposals to the Financial Advisor on or before February 26, 2010. Thereafter, the Monitor will assess the proposals to determine whether there is a reasonable prospect of obtaining a Superior Offer. This is in essence a cash offer that is equal to or higher than that represented by the credit acquisition. If there is such a prospect, the Monitor will recommend that the process continue into Phase II. If there is no such prospect, the Monitor will then determine whether there is a Superior Alternative Offer, that is, an offer that is not a Superior Offer but which might nonetheless receive approval from the Secured Creditors. If so, to proceed into Phase II, the Superior Alternative Offer must be supported by Secured Creditors holding more than at least 33.3% of the secured claims. If it is not so supported, the process would be terminated and the LP Entities would then apply for court sanction of the Plan.

[26] Phase II is expected to last approximately 7 weeks as well. This period allows for due diligence and the submission of final binding proposals. The Monitor will then conduct an assessment akin to the Phase 1 process with somewhat similar attendant outcomes if there are no Superior Offers and no acceptable Alternative Superior Offers. If there were a Superior Offer or an acceptable Alternative Superior Offer, an agreement would be negotiated and the requisite approvals sought.

[27] The solicitation process is designed to allow the LP Entities to test the market. One concern is that a Superior Offer that benefits the secured lenders might operate to preclude a Superior Alternative Offer that could provide a better result for the unsecured creditors. That said, the LP Entities are of the view that the solicitation process and the support transaction present the best opportunity for the businesses of the LP Entities to continue as going concerns, thereby preserving jobs as well as the economic and social benefits of their continued operation. At this stage, the alternative is a bankruptcy or liquidation which would result in significant detriment not only to the creditors and employees of the LP Entities but to the broader community that benefits from the continued operation of the LP Entities' business. I also take some comfort from the position of the Monitor which is best captured in an excerpt from its preliminary Report:

The terms of the Support Agreement and SISP were the subject of lengthy and intense arm's length negotiations between the LP Entities and the LP Administrative Agent. The Proposed Monitor supports approval of the process contemplated therein and of the approval of those documents, but without in any way fettering the various powers and discretions of the Monitor.

[28] It goes without saying that the Monitor, being a court appointed officer, may apply to the court for advice and directions and also owes reporting obligations to the court.

[29] As to the objection of the Ad Hoc Committee, I make the following observations. Firstly, they represent unsecured subordinated debt. They have been in a position to take action since August, 2009. Furthermore, the LP Entities have provided up to \$250,000 for them to retain legal counsel. Meanwhile, the LP Secured Lenders have been in a position to enforce their rights through a non-consensual court proceeding and have advised the LP Entities of their abilities in that regard in the event that the LP Entities did not move forward as contemplated by the Support Agreement. With the Support Agreement and the solicitation process, there is an enhanced likelihood of the continuation of going concern operations, the preservation of jobs and the maximization of value for stakeholders of the LP Entities. It seemed to me that in the face of these facts and given that the Support Agreement expired on January 8, 2010, adjourning the

proceeding was not merited in the circumstances. The Committee did receive very short notice. Without being taken as encouraging or discouraging the use of the comeback clause in the order, I disagree with the submission of counsel to the Ad Hoc Committee to the effect that it is very difficult if not impossible to stop a process relying on that provision. That provision in the order is a meaningful one as is clear from the decision in *Muscletech Research & Development Inc.*⁵. On a come back motion, although the positions of parties who have relied bona fide on an Initial Order should not be prejudiced, the onus is on the applicants for an Initial Order to satisfy the court that the existing terms should be upheld.

Proposed Monitor

[30] The Applicants propose that FTI Consulting Canada Inc. serve as the Monitor. It currently serves as the Monitor in the CMI Entities' CCAA proceeding. It is desirable for FTI to act; it is qualified to act; and it has consented to act. It has not served in any of the incompatible capacities described in section 11.7(2) of the CCAA. The proposed Monitor has an enhanced role that is reflected in the order and which is acceptable.

Proposed Order

[31] As mentioned, I granted the order requested. It is clear that the LP Entities need protection under the CCAA. The order requested will provide stability and enable the LP Entities to pursue their restructuring and preserve enterprise value for their stakeholders. Without the benefit of a stay, the LP Entities would be required to pay approximately \$1.45 billion and would be unable to continue operating their businesses.

⁵ 2006 CarswellOnt 264 (S.C.J.).

(a) Threshold Issues

[32] The chief place of business of the Applicants is Ontario. They qualify as debtor companies under the CCAA. They are affiliated companies with total claims against them that far exceed \$5 million. Demand for payment of the swap indebtedness has been made and the Applicants are in default under all of the other facilities outlined in these reasons. They do not have sufficient liquidity to satisfy their obligations. They are clearly insolvent.

(b) Limited Partnership

[33] The Applicants seek to extend the stay of proceedings and the other relief requested to the Limited Partnership. The CCAA definition of a company does not include a partnership or a limited partnership but courts have exercised their inherent jurisdiction to extend the protections of an Initial CCAA Order to partnerships when it was just and convenient to do so. The relief has been held to be appropriate where the operations of the partnership are so intertwined with those of the debtor companies that irreparable harm would ensue if the requested stay were not granted: *Re Canwest Global Communications Corp*⁶ and *Re Lehndorff General Partners Ltd*⁷.

[34] In this case, the Limited Partnership is the administrative backbone of the LP Entities and is integral to and intertwined with the Applicants' ongoing operations. It owns all shared information technology assets; it provides hosting services for all Canwest properties; it holds all software licences used by the LP Entities; it is party to many of the shared services agreements involving other Canwest entities; and employs approximately 390 full-time equivalent employees who work in Canwest's shared services area. The Applicants state that failure to extend the stay to the Limited Partnership would have a profoundly negative impact on the value of the Applicants, the Limited Partnership and the Canwest Global enterprise as a whole. In

⁶ 2009 CarswellOnt 6184 at para. 29 (S.C.J.).

⁷ (1993), 9 B.L.R. (2d) 275 (Ont. Gen. Div.).

addition, exposing the assets of the Limited Partnership to the demands of creditors would make it impossible for the LP Entities to successfully restructure. I am persuaded that under these circumstances it is just and convenient to grant the request.

(c) Filing of the Secured Creditors' Plan

[35] The LP Entities propose to present the Plan only to the Secured Creditors. Claims of unsecured creditors will not be addressed.

[36] The CCAA seems to contemplate a single creditor-class plan. Sections 4 and 5 state:

s.4 Where a compromise or an arrangement is proposed between a debtor company and its unsecured creditors or any class of them, the court may, on the application in a summary way of the company or of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors and, if the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.

s.5 Where a compromise or an arrangement is proposed between a debtor company and its secured creditors or any class of them, the court may, on the application in a summary way of the company or of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors and, if the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.

[37] Case law has interpreted these provisions as authorizing a single creditor-class plan. For instance, Blair J. (as he then was) stated in *Re Philip Services Corp.*⁸ : " There is no doubt that a debtor is at liberty, under the terms of sections 4 and 5 of the CCAA, to make a proposal to

⁸ 1999 CarswellOnt 4673 (S.C.J.).

secured creditors or to unsecured creditors or to both groups."⁹ Similarly, in *Re Anvil Range Mining Corp.*¹⁰, the Court of Appeal stated: "It may also be noted that s. 5 of the CCAA contemplates a plan which is a compromise between a debtor company and its secured creditors and that by the terms of s. 6 of the Act, applied to the facts of this case, the plan is binding only on the secured creditors and the company and not on the unsecured creditors."¹¹

[38] Based on the foregoing, it is clear that a debtor has the statutory authority to present a plan to a single class of creditors. In *Re Anvil Range Mining Corp.*, the issue was raised in the context of the plan's sanction by the court and a consideration of whether the plan was fair and reasonable as it eliminated the opportunity for unsecured creditors to realize anything. The basis of the argument was that the motions judge had erred in not requiring a more complete and in depth valuation of the company's assets relative to the claims of the secured creditors.

[39] In this case, I am not being asked to sanction the Plan at this stage. Furthermore, the Monitor will supervise a vigorous and lengthy solicitation process to thoroughly canvass the market for alternative transactions. The solicitation should provide a good indication of market value. In addition, as counsel for the LP Entities observed, the noteholders and the LP Entities never had any forbearance agreement. The noteholders have been in a position to take action since last summer but chose not to do so. One would expect some action on their part if they themselves believed that they "were in the money". While the process is not perfect, it is subject to the supervision of the court and the Monitor is obliged to report on its results to the court.

[40] In my view it is appropriate in the circumstances to authorize the LP Entities to file and present a Plan only to the Secured Creditors.

⁹ Ibid at para. 16.

¹⁰ (2002), 34 C.B.R. (4th) 157 (Ont. C.A.), leave to appeal to S.C.C. refused (March 6, 2003).

¹¹ Ibid at para. 34.

(d) DIP Financing

[41] The Applicants seek approval of a DIP facility in the amount of \$25 million which would be secured by a charge over all of the assets of the LP Entities and rank ahead of all other charges except the Administration Charge, and ahead of all other existing security interests except validly perfected purchase money security interests and certain specific statutory encumbrances.

[42] Section 11.2 of the CCAA provides the statutory jurisdiction to grant a DIP charge. In *Re Canwest*¹², I addressed this provision. Firstly, an applicant should address the requirements contained in section 11.2 (1) and then address the enumerated factors found in section 11.2(4) of the CCAA. As that list is not exhaustive, it may be appropriate to consider other factors as well.

[43] Applying these principles to this case and dealing firstly with section 11.2(1) of the CCAA, notice either has been given to secured creditors likely to be affected by the security or charge or alternatively they are not affected by the DIP charge. While funds are not anticipated to be immediately necessary, the cash flow statements project a good likelihood that the LP Entities will require the additional liquidity afforded by the \$25 million. The ability to borrow funds that are secured by a charge will help retain the confidence of the LP Entities' trade creditors, employees and suppliers. It is expected that the DIP facility will permit the LP Entities to conduct the solicitation process and consummate a recapitalization transaction of a sale of all or some of its assets. The charge does not secure any amounts that were owing prior to the filing. As such, there has been compliance with the provisions of section 11.2 (1).

[44] Turning then to a consideration of the factors found in section 11.2(4) of the Act, the LP Entities are expected to be subject to these CCAA proceedings until July 31, 2010. Their business and financial affairs will be amply managed during the proceedings. This is a

¹² Supra, note 7 at paras. 31-35.

consensual filing which is reflective of the confidence of the major creditors in the current management configuration. All of these factors favour the granting of the charge. The DIP loan would enhance the prospects of a viable compromise or arrangement and would ensure the necessary stability during the CCAA process. I have already touched upon the issue of value. That said, in relative terms, the quantum of the DIP financing is not large and there is no readily apparent material prejudice to any creditor arising from the granting of the charge and approval of the financing. I also note that it is endorsed by the proposed Monitor in its report.

[45] Other factors to consider in assessing whether to approve a DIP charge include the reasonableness of the financing terms and more particularly the associated fees. Ideally there should be some evidence on this issue. Prior to entering into the forbearance agreement, the LP Entities sought proposals from other third party lenders for a DIP facility. In this case, some but not all of the Secured Creditors are participating in the financing of the DIP loan. Therefore, only some would benefit from the DIP while others could bear the burden of it. While they may have opted not to participate in the DIP financing for various reasons, the concurrence of the non participating Secured Creditors is some market indicator of the appropriateness of the terms of the DIP financing.

[46] Lastly, I note that the DIP lenders have indicated that they would not provide a DIP facility if the charge was not approved. In all of these circumstances, I was prepared to approve the DIP facility and grant the DIP charge.

(e) Critical Suppliers

[47] The LP Entities ask that they be authorized but not required to pay pre-filing amounts owing in arrears to certain suppliers if the supplier is critical to the business and ongoing operations of the LP Entities or the potential future benefit of the payments is considerable and of value to the LP Entities as a whole. Such payments could only be made with the consent of the proposed Monitor. At present, it is contemplated that such suppliers would consist of certain newspaper suppliers, newspaper distributors, logistic suppliers and the Amex Bank of Canada. The LP Entities do not seek a charge to secure payments to any of its critical suppliers.

[48] Section 11.4 of the CCAA addresses critical suppliers. It states:

11.4(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, the court may make an order declaring a person to be a critical supplier to the company if the court is satisfied that the person is a supplier of goods and services to the company and that the goods or services that are supplied are critical to the company's continued operation.

(2) If the court declares the person to be a critical supplier, the court may make an order requiring the person to supply any goods or services specified by the court to the company on any terms and conditions that are consistent with the supply relationship or that the court considers appropriate.

(3) If the court makes an order under subsection (2), the court shall, in the order, declare that all or part of the property of the company is subject to a security or charge in favour of the person declared to be a critical supplier, in an amount equal to the value of the goods or services supplied upon the terms of the order.

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

[49] Mr. Byers, who is counsel for the Monitor, submits that the court has always had discretion to authorize the payment of critical suppliers and that section 11.4 is not intended to address that issue. Rather, it is intended to respond to a post-filing situation where a debtor company wishes to compel a supplier to supply. In those circumstances, the court may declare a person to be a critical supplier and require the person to supply. If the court chooses to compel a person to supply, it must authorize a charge as security for the supplier. Mr. Barnes, who is counsel for the LP Entities, submits that section 11.4 is not so limited. Section 11.4 (1) gives the court general jurisdiction to declare a supplier to be a "critical supplier" where the supplier provides goods or services that are essential to the ongoing business of the debtor company. The permissive as opposed to mandatory language of section 11.4 (2) supports this interpretation.

[50] Section 11.4 is not very clear. As a matter of principle, one would expect the purpose of section 11.4 to be twofold: (i) to codify the authority to permit suppliers who are critical to the continued operation of the company to be paid and (ii) to require the granting of a charge in circumstances where the court is compelling a person to supply. If no charge is proposed to be granted, there is no need to give notice to the secured creditors. I am not certain that the distinction between Mr. Byers and Mr. Barnes' interpretation is of any real significance for the purposes of this case. Either section 11.4(1) does not oust the court's inherent jurisdiction to make provision for the payment of critical suppliers where no charge is requested or it provides authority to the court to declare persons to be critical suppliers. Section 11.4(1) requires the person to be a supplier of goods and services that are critical to the companies' operation but does not impose any additional conditions or limitations.

[51] The LP Entities do not seek a charge but ask that they be authorized but not required to make payments for the pre-filing provision of goods and services to certain third parties who are critical and integral to their businesses. This includes newsprint and ink suppliers. The LP Entities are dependent upon a continuous and uninterrupted supply of newsprint and ink and they have insufficient inventory on hand to meet their needs. It also includes newspaper distributors who are required to distribute the newspapers of the LP Entities; American Express whose corporate card programme and accounts are used by LP Entities employees for business related expenses; and royalty fees accrued and owing to content providers for the subscription-based on-line service provided by FPinfomart.ca, one of the businesses of the LP Entities. The LP Entities believe that it would be damaging to both their ongoing operations and their ability to restructure if they are unable to pay their critical suppliers. I am satisfied that the LP Entities may treat these parties and those described in Mr. Strike's affidavit as critical suppliers but none will be paid without the consent of the Monitor.

(f) Administration Charge and Financial Advisor Charge

[52] The Applicants also seek a charge in the amount of \$3 million to secure the fees of the Monitor, its counsel, the LP Entities' counsel, the Special Committee's financial advisor and

counsel to the Special Committee, the CRA and counsel to the CRA. These are professionals whose services are critical to the successful restructuring of the LP Entities' business. This charge is to rank in priority to all other security interests in the LP Entities' assets, with the exception of purchase money security interests and specific statutory encumbrances as provided for in the proposed order.¹³ The LP Entities also request a \$10 million charge in favour of the Financial Advisor, RBC Dominion Securities Inc. The Financial Advisor is providing investment banking services to the LP Entities and is essential to the solicitation process. This charge would rank in third place, subsequent to the administration charge and the DIP charge.

[53] In the past, an administration charge was granted pursuant to the inherent jurisdiction of the court. Section 11.52 of the amended CCAA now provides statutory jurisdiction to grant an administration charge. Section 11.52 states:

On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of the debtor company is subject to a security or charge – in an amount that the court considers appropriate – in respect of the fees and expenses of

- (a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;
- (b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and
- (c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.

¹³ This exception also applies to the other charges granted.

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

[54] I am satisfied that the issue of notice has been appropriately addressed by the LP Entities. As to whether the amounts are appropriate and whether the charges should extend to the proposed beneficiaries, the section does not contain any specific criteria for a court to consider in its assessment. It seems to me that factors that might be considered would include:

- (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.

This is not an exhaustive list and no doubt other relevant factors will be developed in the jurisprudence.

[55] There is no question that the restructuring of the LP Entities is large and highly complex and it is reasonable to expect extensive involvement by professional advisors. Each of the professionals whose fees are to be secured has played a critical role in the LP Entities restructuring activities to date and each will continue to be integral to the solicitation and restructuring process. Furthermore, there is no unwarranted duplication of roles. As to quantum of both proposed charges, I accept the Applicants' submissions that the business of the LP Entities and the tasks associated with their restructuring are of a magnitude and complexity that justify the amounts. I also take some comfort from the fact that the administrative agent for the LP Secured Lenders has agreed to them. In addition, the Monitor supports the charges requested. The quantum of the administration charge appears to be fair and reasonable. As to the quantum

of the charge in favour of the Financial Advisor, it is more unusual as it involves an incentive payment but I note that the Monitor conducted its own due diligence and, as mentioned, is supportive of the request. The quantum reflects an appropriate incentive to secure a desirable alternative offer. Based on all of these factors, I concluded that the two charges should be approved.

(g) Directors and Officers

[56] The Applicants also seek a directors and officers charge (“D & O charge”) in the amount of \$35 million as security for their indemnification obligations for liabilities imposed upon the Applicants’ directors and officers. The D & O charge will rank after the Financial Advisor charge and will rank *pari passu* with the MIP charge discussed subsequently. Section 11.51 of the CCAA addresses a D & O charge. I have already discussed section 11.51 in *Re Canwest*¹⁴ as it related to the request by the CMI Entities for a D & O charge. Firstly, the charge is essential to the successful restructuring of the LP Entities. The continued participation of the experienced Boards of Directors, management and employees of the LP Entities is critical to the restructuring. Retaining the current officers and directors will also avoid destabilization. Furthermore, a CCAA restructuring creates new risks and potential liabilities for the directors and officers. The amount of the charge appears to be appropriate in light of the obligations and liabilities that may be incurred by the directors and officers. The charge will not cover all of the directors’ and officers’ liabilities in a worse case scenario. While Canwest Global maintains D & O liability insurance, it has only been extended to February 28, 2009 and further extensions are unavailable. As of the date of the Initial Order, Canwest Global had been unable to obtain additional or replacement insurance coverage.

[57] Understandably in my view, the directors have indicated that due to the potential for significant personal liability, they cannot continue their service and involvement in the

¹⁴ Supra note 7 at paras. 44-48.

restructuring absent a D & O charge. The charge also provides assurances to the employees of the LP Entities that obligations for accrued wages and termination and severance pay will be satisfied. All secured creditors have either been given notice or are unaffected by the D & O charge. Lastly, the Monitor supports the charge and I was satisfied that the charge should be granted as requested.

(h) Management Incentive Plan and Special Arrangements

[58] The LP Entities have made amendments to employment agreements with 2 key employees and have developed certain Management Incentive Plans for 24 participants (collectively the “MIPs”). They seek a charge in the amount of \$3 million to secure these obligations. It would be subsequent to the D & O charge.

[59] The CCAA is silent on charges in support of Key Employee Retention Plans (“KERPs”) but they have been approved in numerous CCAA proceedings. Most recently, in *Re Canwest*¹⁵, I approved the KERP requested on the basis of the factors enumerated in *Re Grant Forrest*¹⁶ and given that the Monitor had carefully reviewed the charge and was supportive of the request as were the Board of Directors, the Special Committee of the Board of Directors, the Human Resources Committee of Canwest Global and the Adhoc Committee of Noteholders.

[60] The MIPs in this case are designed to facilitate and encourage the continued participation of certain senior executives and other key employees who are required to guide the LP Entities through a successful restructuring. The participants are critical to the successful restructuring of the LP Entities. They are experienced executives and have played critical roles in the restructuring initiatives to date. They are integral to the continued operation of the business

¹⁵ Supra note 7.

¹⁶ [2009] O.J. No. 3344 (S.C.J.).

during the restructuring and the successful completion of a plan of restructuring, reorganization, compromise or arrangement.

[61] In addition, it is probable that they would consider other employment opportunities in the absence of a charge securing their payments. The departure of senior management would distract from and undermine the restructuring process that is underway and it would be extremely difficult to find replacements for these employees. The MIPs provide appropriate incentives for the participants to remain in their current positions and ensures that they are properly compensated for their assistance in the reorganization process.

[62] In this case, the MIPs and the MIP charge have been approved in form and substance by the Board of Directors and the Special Committee of Canwest Global. The proposed Monitor has also expressed its support for the MIPs and the MIP charge in its pre-filing report. In my view, the charge should be granted as requested.

(i) Confidential Information

[63] The LP Entities request that the court seal the confidential supplement which contains individually identifiable information and compensation information including sensitive salary information about the individuals who are covered by the MIPs. It also contains an unredacted copy of the Financial Advisor's agreement. I have discretion pursuant to Section 137(2) of the *Courts of Justice Act*¹⁷ to order that any document filed in a civil proceeding be treated as confidential, sealed and not form part of the public record. That said, public access in an important tenet of our system of justice.

[64] The threshold test for sealing orders is found in the Supreme Court of Canada decision of *Sierra Club of Canada v Canada (Minister of Finance)*¹⁸. In that case, Iacobucci J. stated that an

¹⁷ R.S.O. 1990, c. C.43, as amended.

¹⁸ [2002] 2 S.C.R. 522.

order should only be granted when: (i) it is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonable alternative measures will not prevent the risk; and (ii) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.

[65] In *Re Canwest*¹⁹ I applied the *Sierra Club* test and approved a similar request by the Applicants for the sealing of a confidential supplement containing unredacted copies of KERPs for the employees of the CMI Entities. Here, with respect to the first branch of the *Sierra Club* test, the confidential supplement contains unredacted copies of the MIPs. Protecting the disclosure of sensitive personal and compensation information of this nature, the disclosure of which would cause harm to both the LP Entities and the MIP participants, is an important commercial interest that should be protected. The information would be of obvious strategic advantage to competitors. Moreover, there are legitimate personal privacy concerns in issue. The MIP participants have a reasonable expectation that their names and their salary information will be kept confidential. With respect to the second branch of the *Sierra Club* test, keeping the information confidential will not have any deleterious effects. As in the *Re Canwest* case, the aggregate amount of the MIP charge has been disclosed and the individual personal information adds nothing. The salutary effects of sealing the confidential supplement outweigh any conceivable deleterious effects. In the normal course, outside of the context of a CCAA proceeding, confidential personal and salary information would be kept confidential by an employer and would not find its way into the public domain. With respect to the unredacted Financial Advisor agreement, it contains commercially sensitive information the disclosure of which could be harmful to the solicitation process and the salutary effects of sealing it outweigh

¹⁹ Supra, note 7 at para. 52.

any deleterious effects. The confidential supplements should be sealed and not form part of the public record at least at this stage of the proceedings.

Conclusion

[66] For all of these reasons, I was prepared to grant the order requested.

Pepall J.

Released: January 18, 2010

CITATION: CanWest Global Communications Corp., 2010 ONSC 222
COURT FILE NO.: CV-10-8533-00CL
DATE: 20100118

ONTARIO

**SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

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

AND IN THE MATTER OF A PROPOSED PLAN
OF COMPROMISE OR
ARRANGEMENT OF CANWEST GLOBAL
COMMUNICATIONS CORP. AND THE OTHER
APPLICANTS LISTED ON SCHEDULE "A"

REASONS FOR DECISION

Pepall J.

Released: January 18, 2010

19

Ville de Montréal *Appellant*

v.

Deloitte Restructuring Inc. *Respondent*

and

**Alaris Royalty Corp.,
Integrated Private Debt Fund V LP,
Thornhill Investments Inc.,
Ville de Laval and
Union des municipalités du Québec**
Intervenors

**INDEXED AS: MONTREAL (CITY) v. DELOITTE
RESTRUCTURING INC.**

2021 SCC 53

File No.: 39186.

2021: May 20; 2021: December 10.

Present: Wagner C.J. and Moldaver, Karakatsanis, Côté,
Brown, Rowe and Martin JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR
QUEBEC

Bankruptcy and insolvency — Stay of creditors' rights and remedies — Claims that may be dealt with by compromise or arrangement — Compensation between debt arising before and debt arising after initial order — Quebec Voluntary Reimbursement Program — Whether claim arising from agreement entered into under Quebec Voluntary Reimbursement Program is necessarily claim that relates to debt or liability resulting from obtaining property or services by false pretences or fraudulent misrepresentation pursuant to s. 19(2)(d) of Companies' Creditors Arrangement Act — Whether supervising judge's discretion in restructuring context allows judge to stay right invoked by creditor to effect compensation between debt arising before and debt arising after initial order — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, ss. 11, 11.02, 19(2)(d), 21 — Act to ensure mainly the recovery of amounts improperly paid as a result of fraud or fraudulent tactics in connection with public contracts, CQLR,

Ville de Montréal *Appelante*

c.

Restructuration Deloitte Inc. *Intimée*

et

**Alaris Royalty Corp.,
Integrated Private Debt Fund V LP,
Thornhill Investments Inc.,
Ville de Laval et
Union des municipalités du Québec**
Intervenantes

**RÉPERTORIÉ : MONTREAL (VILLE) c.
RESTRUCTURATION DELOITTE INC.**

2021 CSC 53

N° du greffe : 39186.

2021 : 20 mai; 2021 : 10 décembre.

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

EN APPEL DE LA COUR D'APPEL DU QUÉBEC

Faillite et insolvabilité — Suspension des droits et recours des créanciers — Réclamations considérées dans le cadre des transactions ou arrangements — Compensation entre une dette née avant et une dette née après l'ordonnance initiale — Programme québécois de remboursement volontaire — Une créance découlant d'une entente conclue dans le cadre du Programme québécois de remboursement volontaire constitue-t-elle nécessairement une réclamation se rapportant à une dette ou obligation résultant de l'obtention de biens ou de services par des faux-semblants ou la présentation erronée et frauduleuse des faits aux termes de l'al. 19(2)d) de la Loi sur les arrangements avec les créanciers des compagnies? — Le pouvoir discrétionnaire dont dispose le juge surveillant dans le contexte d'une restructuration lui permet-il de suspendre le droit d'opérer compensation entre une dette née avant et une dette née après l'émission d'une ordonnance initiale qu'invoque un créancier? — Loi sur les arrangements avec les créanciers des compagnies, L.R.C. 1985, c. C-36, art. 11, 11.02,

c. R-2.2.0.0.3 — Voluntary Reimbursement Program, CQLR, c. R-2.2.0.0.3, r. 1.

In August 2018, the Superior Court made an initial order by which SM Group, a consulting engineering firm, became subject to proceedings under the *Companies' Creditors Arrangement Act* ("CCAA"). The order stayed the rights and remedies of creditors, among other things, and appointed a monitor. Following that order, SM Group continued to perform work for Ville de Montréal ("City"). However, the City refused to pay for that work and invoked its right to effect compensation between what it owed SM Group and two claims it allegedly had against SM Group that arose before the initial order. Those claims are related to the application of the *Act to ensure mainly the recovery of amounts improperly paid as a result of fraud or fraudulent tactics in connection with public contracts* ("Bill 26") and, according to the City, result from fraud on SM Group's part. The first claim arises from a settlement agreement entered into under the Voluntary Reimbursement Program ("VRP") that resulted from Bill 26 ("VRP claim"). The second claim is based on a proceeding brought by the City against SM Group, in which it claimed money from SM Group for allegedly having participated in collusion in relation to a call for tenders for a water meter contract.

In response to the City's refusal to pay for the work done by SM Group after the initial order, the monitor applied for a declaratory judgment stating that compensation could not be effected with respect to the amounts owed by the City to SM Group. The supervising judge granted the application. The Court of Appeal reached the same conclusion as the supervising judge: that the compensation invoked by the City could not be effected. It found that a claim relating to fraud falling within s. 19(2)(d) of the CCAA is not an exception to the rule stated in *Quebec (Agence du revenu) v. Kitco Metals Inc.*, 2017 QCCA 268, whereby compensation between debts arising before and after an initial order ("pre-post compensation") is prohibited. It was also of the view that the City had not proved that s. 19(2)(d) applied to its claims. Finally, with regard to the water meter contract claim, the Court of Appeal agreed with the supervising judge that the conditions for judicial compensation were not met, since the certainty, liquidity and exigibility of that claim had to be determined later in a proceeding other than that of the restructuring case.

19(2)d), 21 — *Loi visant principalement la récupération de sommes payées injustement à la suite de fraudes ou de manœuvres dolosives dans le cadre de contrats publics*, RLRQ, c. R-2.2.0.0.3 — *Programme de remboursement volontaire*, RLRQ, c. R-2.2.0.0.3, r. 1.

En août 2018, la Cour supérieure rend une ordonnance initiale assujettissant Groupe SM, une firme de génie-conseil, à des procédures déposées en vertu de la *Loi sur les arrangements avec les créanciers des compagnies* (« LACC »). L'ordonnance suspend notamment les droits et recours des créanciers et nomme un contrôleur. Postérieurement à cette ordonnance, Groupe SM continue à effectuer des travaux dont bénéficie la Ville de Montréal. La Ville refuse toutefois de payer ces travaux et invoque son droit d'opérer compensation entre ce qu'elle doit à Groupe SM et deux créances, nées avant l'ordonnance initiale, qu'elle prétend détenir contre celui-ci. Ces créances sont liées à l'application de la *Loi visant principalement la récupération de sommes payées injustement à la suite de fraudes ou de manœuvres dolosives dans le cadre de contrats publics* (« Loi 26 ») et, selon la Ville, résulteraient de fraude de Groupe SM. La première créance découle d'une entente de règlement intervenue dans le cadre du Programme de remboursement volontaire (« PRV ») issu de la Loi 26 (« créance PRV »). La seconde créance est fondée sur un recours intenté par la Ville contre Groupe SM dans lequel elle lui réclame de l'argent au motif qu'il aurait participé à une collusion relativement à l'appel d'offres du contrat des compteurs d'eau.

En réponse au refus de la Ville de payer les travaux effectués par Groupe SM après l'émission de l'ordonnance initiale, le contrôleur demande un jugement déclaratoire portant que les sommes dues à Groupe SM par la Ville ne peuvent faire l'objet de compensation. La juge surveillante accueille la demande. À l'instar de cette dernière, la Cour d'appel conclut que la compensation invoquée par la Ville ne peut s'opérer. Elle estime qu'une créance relative à la fraude visée par l'al. 19(2)d) de la LACC ne constitue pas une exception à la règle énoncée dans l'arrêt *Québec (Agence du revenu) c. Métaux Kitco inc.*, 2017 QCCA 268, 46 C.B.R. (6th) 173, selon laquelle la compensation entre des dettes nées avant et après l'émission d'une ordonnance initiale (« compensation pré-post ») est interdite. Elle est également d'avis que la Ville n'a pas prouvé que ses créances sont visées par l'al. 19(2)d). Enfin, en ce qui concerne la créance relative au contrat des compteurs d'eau, la Cour d'appel, tout comme la juge surveillante, estime que les conditions de la compensation judiciaire ne sont pas réunies, le caractère certain, liquide et exigible de cette créance devant être déterminé postérieurement dans une autre instance que celle du dossier de restructuration.

Held (Brown J. dissenting): The appeal should be dismissed.

Per Wagner C.J. and Moldaver, Karakatsanis, Côté, Rowe and Martin JJ.: First, a claim arising from an agreement entered into under the VRP is not necessarily a claim that relates to a debt resulting from fraud pursuant to s. 19(2)(d) of the *CCAA*. In this case, the City has not shown that the VRP claim relates to a debt resulting from fraud within the meaning of that provision. Second, with regard to pre-post compensation, a supervising judge has the discretion to stay the exercise of a right to pre-post compensation, or set-off, invoked by a creditor under the civil law or the common law. However, the supervising judge may refuse to stay this right, or may lift such a stay, only in exceptional circumstances, given the high disruptive potential of this form of compensation. In the case at bar, the initial order stayed the City's right to pre-post compensation, and it would not be appropriate to lift the stay in relation to the claims in issue.

To answer the question with respect to compensation in the context of this appeal, the Court must first determine whether a claim arising from an agreement entered into under the VRP is necessarily a "claim that relates to" a "debt or liability resulting from obtaining property or services by false pretences or fraudulent misrepresentation" pursuant to s. 19(2)(d) of the *CCAA*.

The first step in characterizing the VRP claim is to distinguish, for the purposes of the *CCAA*, claims that are subject to a compromise or arrangement from those that are not. Section 19(2) provides, by way of exception, that certain claims may not be dealt with by a compromise or arrangement, including those that result from fraud. To prove that its claim relates to a debt resulting from obtaining property or services by false pretences or fraudulent misrepresentation pursuant to s. 19(2)(d), a creditor has the burden of establishing, on a balance of probabilities, the following four elements: (i) the debtor made a representation to the creditor; (ii) the representation was false; (iii) the debtor knew that the representation was false; (iv) the false representation was made to obtain property or a service.

In this case, the City did not try to prove or even allege any of these elements. The content of the VRP agreement, Bill 26 and the regulation made under it ("VRP

Arrêt (le juge Brown est dissident) : Le pourvoi est rejeté.

Le juge en chef Wagner et les juges Moldaver, Karakatsanis, Côté, Rowe et Martin : Premièrement, une créance découlant d'une entente conclue dans le cadre du PRV n'est pas nécessairement une réclamation se rapportant à une dette qui résulte de fraude aux termes de l'al. 19(2)d) de la *LACC*. En l'occurrence, la Ville n'a pas démontré que la créance PRV se rapporte à une dette qui résulte de fraude au sens de cette disposition. Deuxièmement, en ce qui concerne la compensation pré-post, le juge surveillant possède le pouvoir discrétionnaire de suspendre l'exercice du droit à la compensation pré-post invoqué par un créancier en vertu du droit civil ou de la common law. Toutefois, le juge surveillant peut refuser de suspendre ou lever la suspension du droit à la compensation pré-post dans des circonstances exceptionnelles seulement, considérant le fort potentiel perturbateur de cette forme de compensation. En l'espèce, l'ordonnance initiale a suspendu le droit de la Ville à la compensation pré-post, et il n'est pas indiqué de lever cette suspension pour ce qui est des créances en litige.

Pour trancher la question relative à la compensation dans le contexte du présent pourvoi, la Cour doit d'abord déterminer si une créance découlant d'une entente conclue dans le cadre du PRV constitue nécessairement une « réclamation se rapportant à » une « dette ou obligation résultant de l'obtention de biens ou de services par des faux-semblants ou la présentation erronée et frauduleuse des faits » aux termes de l'al. 19(2)d) de la *LACC*.

Pour qualifier la créance PRV, il faut d'abord distinguer, au sens de la *LACC*, les réclamations compromises par la transaction ou l'arrangement de celles qui ne le sont pas. Le paragraphe 19(2) prévoit exceptionnellement que certaines réclamations ne peuvent être compromises dans le cadre d'une transaction ou d'un arrangement, notamment celles découlant de fraude. Afin de démontrer que sa créance est une réclamation qui se rapporte à une dette résultant de l'obtention de biens ou de services par des faux-semblants ou la présentation erronée et frauduleuse des faits aux termes de l'al. 19(2)d), le créancier intéressé a le fardeau d'établir, par prépondérance des probabilités, les quatre éléments suivants : (i) le débiteur lui a fait une représentation; (ii) cette représentation était fautive; (iii) le débiteur savait que la représentation était fautive; (iv) cette fautive représentation a été faite dans le but d'obtenir un bien ou un service.

En l'espèce, la Ville n'a pas cherché à prouver ni même à alléguer l'un ou l'autre de ces éléments. Il est donc nécessaire d'interpréter le contenu de l'entente PRV, la

Regulation”) must therefore be interpreted to determine whether the VRP claim may be dealt with by a compromise or arrangement. This interpretation exercise confirms that s. 19(2)(d) of the *CCAA* does not apply to the VRP claim.

First, it is clearly stipulated in the VRP agreement entered into by the parties that the amount fixed in the agreement can in no way be considered to constitute an admission of liability. As a result, it cannot be presumed that the VRP claim is a claim that falls within s. 19(2)(d) of the *CCAA*.

Second, Bill 26 and the VRP Regulation do not create a statutory presumption or a presumption of fact that a debtor made fraudulent representations to a public body. The use of the words “may have been” in s. 3 of Bill 26 and in s. 1 of the VRP Regulation to describe the purpose of the VRP indicates that fraud is a possibility rather than a certainty. Section 7 of the VRP Regulation supports this point, since it states that the fact that a natural person or an enterprise participates in the VRP does not constitute an admission of liability or of a fault committed by the natural person or enterprise. The fault in question in s. 7 is a matter of civil liability and is limited to the public contract to which a VRP agreement pertains. Where the legislature intends to refer to penal or criminal proceedings, or to civil proceedings outside the scope of a VRP agreement, it does so expressly. This interpretation is confirmed when s. 7 of the VRP Regulation is read in conjunction with s. 8.

The City is wrong to say that reading ss. 1, 3 and 10 of Bill 26 together leads to the conclusion that a natural person or enterprise that participated in the VRP necessarily defrauded a public body. Although s. 1 of Bill 26 does not refer to fraud as being hypothetical, s. 3 of Bill 26 and s. 1 of the VRP Regulation are clear: the substantive provisions of Bill 26 and the VRP Regulation contemplate fraud only hypothetically. Finally, the two schemes created by Bill 26 must not be confused. Section 10 states that fraud was committed, but this section is part of the scheme introduced by Chapter III (ss. 10 to 17), which applies to judicial proceedings brought against a natural person or enterprise that allegedly participated in fraud in relation to a public contract, and not part of the VRP scheme introduced by Chapter II (ss. 3 to 9). It is up to the courts to conclude that fraud has been committed, and the existence of fraud will be recognized by a court only under the Chapter III scheme, which did not take effect until the VRP scheme introduced by Chapter II ended. The reference to s. 10 in s. 3 merely serves to specify the natural persons

Loi 26 ainsi que son règlement d’application (« règlement PRV ») pour déterminer si la créance PRV peut être considérée dans le cadre d’une transaction ou d’un arrangement. Cet exercice d’interprétation confirme que la créance PRV n’est pas visée par l’al. 19(2)d) de la *LACC*.

En premier lieu, il est clairement stipulé dans l’entente PRV intervenue entre les parties que la somme convenue dans celle-ci ne peut en aucun cas être assimilée à une admission de responsabilité. On ne saurait donc présumer que la créance PRV constitue une réclamation visée à l’al. 19(2)d) de la *LACC*.

En deuxième lieu, la Loi 26, tout comme le règlement PRV, ne créent pas une présomption légale ou factuelle de l’existence de représentations frauduleuses de la part d’un débiteur à l’endroit d’un organisme public. L’emploi du conditionnel à l’art. 3 de la Loi 26 et à l’art. 1 du règlement PRV pour décrire l’objet du PRV signale que la fraude est une éventualité, par opposition à quelque chose de certain. L’article 7 du règlement PRV appuie ce constat puisqu’il précise que le fait pour une personne physique ou une entreprise de se prévaloir du PRV ne constitue pas une reconnaissance de responsabilité ni une admission qu’elle a commis une faute. La faute dont il est question à l’art. 7 relève de la responsabilité civile et se limite au contrat public visé par l’entente PRV. Lorsque le législateur entend faire référence à des procédures de nature pénale ou criminelle, ou encore à des recours civils se situant hors du champ de l’entente PRV, il le fait expressément. L’article 7 du règlement PRV, lu conjointement avec l’art. 8, confirme cette interprétation.

La Ville a tort de dire qu’une lecture conjointe des art. 1, 3 et 10 de la Loi 26 mène à une conclusion que la personne physique ou l’entreprise qui participe au PRV a nécessairement fraudé un organisme public. Bien que l’art. 1 de la Loi 26 ne traite pas de la fraude à titre hypothétique, l’art. 3 de la Loi 26 et l’art. 1 du règlement PRV sont clairs : les dispositions substantielles de la Loi 26 et du règlement PRV ne considèrent la fraude que de façon hypothétique. Enfin, il ne faut pas confondre les deux régimes créés par la Loi 26. L’article 10 énonce qu’une fraude a été commise, mais celui-ci fait partie du régime introduit par le chapitre III (art. 10 à 17) qui est applicable aux recours judiciaires intentés contre une personne physique ou une entreprise qui aurait participé à une fraude visant un contrat public, et non du régime du PRV, introduit par le chapitre II (art. 3 à 9). Il appartient aux tribunaux de conclure qu’une fraude a été commise, et la reconnaissance judiciaire de l’existence d’une fraude n’intervient que dans le régime propre au chapitre III, lequel entre en vigueur seulement lorsque le régime du

to whom the VRP applies. Accordingly, the City has not shown that the VRP claim falls within s. 19(2)(d) of the CCAA. Neither the content of the VRP agreement nor its legal framework supports a presumption that SM Group admitted to having committed a fraudulent act.

Furthermore, a right to pre-post compensation, or set-off, invoked by a creditor under the civil law or the common law can be stayed by a court under ss. 11 and 11.02 of the CCAA. Under s. 11.02 of the CCAA, a court may stay any action, suit or other proceeding that might be brought against the debtor company. While at first glance the language of this provision limits the power to order a stay to judicial proceedings, the courts have taken a large and liberal approach in interpreting the scope of the rights and remedies that can be included in a stay order. A court has the power to stay rights held by creditors if the exercise of those rights could jeopardize the restructuring process. This includes a creditor's right to effect pre-post compensation. Such an interpretation advances the CCAA's remedial objectives and is consistent with its scheme.

In the vast majority of cases, an initial order will, and should, stay a creditor's right to set up pre-post compensation against the debtor. However, a court may in its discretion refuse to impose such a prohibition or, if pre-post compensation was stayed by the order, lift the stay at a later date to allow an interested creditor to assert its rights. The absolute prohibition against pre-post compensation imposed by the Quebec Court of Appeal in *Kitco* must therefore be tempered. However, a court must be cautious before allowing such a form of compensation, given its high disruptive potential.

Moreover, s. 21 of the CCAA does not grant creditors a right to pre-post compensation that would be shielded from a supervising judge's power to order a stay under ss. 11 and 11.02 of the CCAA. Read in light of its context, its purpose and the scheme of the CCAA, s. 21 is limited to authorizing compensation between debts that arise before an initial order is made ("pre-pre compensation") for the purpose of quantifying creditors' claims on the date of commencement of proceedings. This provision does not have the effect of authorizing pre-post compensation. That being said, s. 21 of the CCAA does not prohibit this form of compensation either. It follows that a supervising judge

PRV, introduit par le chapitre II, prend fin. Le renvoi à l'art. 10 dans l'art. 3 ne sert qu'à préciser quelles sont les personnes physiques visées par le PRV. En conséquence, la Ville n'a pas démontré que la créance PRV relevait de l'al. 19(2)d) de la LACC. Ni le contenu de l'entente PRV ni le cadre juridique qui lui est propre ne permettent de présumer que Groupe SM a admis avoir commis un acte frauduleux.

Par ailleurs, le droit à la compensation pré-post invoqué par un créancier en vertu du droit civil ou de la common law peut être suspendu par un tribunal en application des art. 11 et 11.02 de la LACC. L'article 11.02 de la LACC permet de suspendre toute action, poursuite ou autre procédure pouvant être intentée contre la compagnie débitrice. Bien que le texte de cette disposition limite à première vue aux procédures judiciaires l'application du pouvoir de suspension, la jurisprudence interprète de manière large et libérale l'étendue des droits et recours susceptibles d'être inclus dans une ordonnance de suspension. Le tribunal est habilité à suspendre des droits reconnus aux créanciers mais dont l'exercice serait susceptible de mettre en péril la restructuration, y compris le droit d'opérer compensation pré-post. Une telle interprétation favorise les objectifs réparateurs de la LACC, en plus d'être cohérente avec l'économie de cette loi.

Dans la très vaste majorité des cas, l'ordonnance initiale suspendra, et devrait suspendre, le droit d'un créancier d'opposer à la débitrice la compensation pré-post. En revanche, le tribunal peut à sa discrétion refuser d'imposer une telle interdiction ou, si la compensation pré-post a été suspendue par l'ordonnance, lever cette suspension par la suite pour permettre à un créancier intéressé de faire valoir ses droits. L'interdiction absolue énoncée par la Cour d'appel du Québec dans l'arrêt *Kitco* à l'égard de la compensation pré-post doit donc être tempérée. Cependant, le tribunal doit faire preuve de prudence avant de permettre une telle forme de compensation, considérant son fort potentiel perturbateur.

En outre, l'art. 21 de la LACC ne confère pas aux créanciers un droit à la compensation pré-post qui serait à l'abri du pouvoir de suspension dont dispose le juge surveillant en vertu des art. 11 et 11.02 de la LACC. Lu à la lumière de son contexte, de son objet et de l'esprit de la LACC, l'art. 21 se limite à autoriser la compensation entre des dettes nées avant le prononcé de l'ordonnance initiale (« compensation pré-pré ») aux fins de quantification des réclamations des créanciers au jour de l'ouverture. Cette disposition n'a pas pour effet d'autoriser la compensation pré-post. Cela dit, l'art. 21 de la LACC n'a pas non plus pour effet d'interdire cette forme de compensation. Il

retains the discretion to stay or to authorize the exercise of a right to pre-post compensation, or set-off, invoked by a creditor under the civil law or the common law.

In exercising its discretion under the *CCAA*, a court must keep three baseline considerations in mind: (1) the appropriateness of the order being sought, (2) due diligence and (3) good faith on the applicant's part. The first consideration relates both to the order itself and to the means that are employed. It is assessed in light of the *CCAA*'s remedial objectives, which include protecting the public interest. In very specific circumstances, a court could conclude that protection of the public interest and the *CCAA*'s other remedial objectives justify authorizing pre-post compensation in favour of a creditor that has proved that it was a victim of fraud within the meaning of s. 19(2)(d) of the *CCAA*. However, the court should take care not to reduce the public interest to the interests of a particular creditor or group of creditors. The second consideration is also important because it discourages parties from sitting on their rights and ensures that creditors do not strategically manoeuvre or position themselves to gain an advantage.

In the case at bar, the words of the stay order made by the Superior Court are broad enough to stay pre-post compensation, and it would not be appropriate to lift the stay in relation to the VRP claim. Because the City has not proved the alleged fraud and has not relied, in support of its position, on any of the *CCAA*'s remedial objectives other than protecting the public interest, it has not discharged its burden of proving that the order being sought is appropriate. In addition, the City did not act with the diligence expected in *CCAA* proceedings.

With regard to the water meter contract claim, the Superior Court agreed to lift the stay of proceedings to allow the City to establish the existence and amount of its claim in that case. That order did not authorize the City to withhold the amounts owed to SM Group for the work subsequent to the initial order with a view to effecting compensation if the City was successful in the case relating to the water meter contract. In the circumstances, an order allowing the City to withhold the amounts owed to SM Group pending the outcome of that case would not be appropriate for the same reasons as those relating to the VRP claim.

s'ensuit que le juge surveillant conserve le pouvoir discrétionnaire de suspendre ou d'autoriser l'exercice du droit à la compensation pré-post invoqué par un créancier en vertu du droit civil ou de la common law.

Dans l'exercice du pouvoir discrétionnaire que lui confère la *LACC*, le tribunal doit garder à l'esprit trois considérations de base : (1) l'opportunité de l'ordonnance sollicitée, (2) la diligence et (3) la bonne foi du demandeur. La première considération vise tout autant l'ordonnance elle-même que les moyens utilisés et s'évalue au regard des objectifs réparateurs de la *LACC*, dont la protection de l'intérêt public. Dans des circonstances bien particulières, le tribunal pourrait conclure que la protection de l'intérêt public, de même que les autres objectifs réparateurs de la *LACC*, justifient d'autoriser la compensation pré-post en faveur d'un créancier qui a démontré avoir été victime de fraude au sens de l'al. 19(2)d) de la *LACC*. Par contre, le tribunal doit se garder de réduire l'intérêt public à l'intérêt d'un créancier ou d'un groupe de créanciers en particulier. La deuxième considération est également importante étant donné qu'elle 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.

Dans la présente affaire, les termes de l'ordonnance de suspension rendue par la Cour supérieure sont suffisamment larges pour suspendre la compensation pré-post et il n'est pas indiqué de lever cette suspension en ce qui concerne la créance PRV. Puisque la Ville n'a pas apporté la preuve de la fraude alléguée et n'a pas invoqué un objectif réparateur de la *LACC* autre que la protection de l'intérêt public au soutien de sa position, elle ne s'est pas déchargée du fardeau qui lui incombait d'établir le caractère indiqué de l'ordonnance sollicitée. Au surplus, la Ville n'a pas fait montre de la diligence attendue dans le cadre d'une procédure fondée sur la *LACC*.

Pour ce qui est de la créance relative au contrat des compteurs d'eau, la Cour supérieure a accepté de lever la suspension des procédures pour permettre à la Ville d'établir l'existence et le montant de sa créance dans ce dossier. Cette ordonnance n'a pas autorisé la Ville à retenir les sommes dues à Groupe SM pour les travaux postérieurs à l'ordonnance initiale en vue d'opérer compensation dans l'éventualité où elle aurait gain de cause dans le dossier relatif au contrat des compteurs d'eau. Dans les circonstances, une ordonnance permettant à la Ville de retenir les sommes dues à Groupe SM jusqu'au dénouement du litige relatif au contrat des compteurs d'eau ne serait pas indiquée pour les mêmes motifs que ceux relatifs à la créance PRV.

Per Brown J. (dissenting): The appeal should be allowed solely for the purpose of remanding the case to the Superior Court so it can decide whether the City may effect pre-post compensation for the VRP claim and whether compensation is available in respect of the water meter claim. There is agreement with the majority that a supervising judge has a discretion under s. 11 of the CCAA as to whether to allow a creditor to effect pre-post compensation, or set-off. However, this discretion is not limited solely to the exceptional circumstances the majority describes. The scope of s. 21 of the CCAA is not limited to pre-pre compensation; pre-post compensation is permitted, but must be subject to the exercise of a supervising judge's discretion. Moreover, nothing in s. 21 of the CCAA prohibits judicial compensation.

The approach taken by the Quebec Court of Appeal in *Kitco*, according to which pre-post compensation will never be authorized under the CCAA, involves several errors and must be rejected. To begin with, the Court of Appeal erred in relying on a judgment rendered by the Court in the context of a bankruptcy under the *Bankruptcy and Insolvency Act* (“BIA”). Although the scheme established by the CCAA and the one established by the BIA must be viewed as an integrated body of insolvency law, there remain many differences between them, including two that are fundamental. First, when an insolvent company has recourse to the CCAA, it continues its business activities and is not divested of its property in favour of a third party, unlike with the measures put in place under the BIA that vest the bankrupt's property in a trustee. There is thus no loss of mutuality under the CCAA. This mutuality, which survives the initial order, is what makes compensation possible under the CCAA, unlike under the BIA. Secondly, the scheme established by the CCAA is flexible and allows creative solutions to be put forward to achieve the objective of restructuring a financially distressed company, in contrast to the BIA, which provides a set of pre-established rules. The CCAA's provisions must be interpreted expansively to enable its remedial objectives to be achieved. Because of these objectives, a broad discretion is also conferred on supervising judges by s. 11 of the CCAA. This discretion has no equivalent in the BIA.

Next, the state of the law elsewhere in Canada is clear: pre-post set-off is possible under the CCAA, subject to a supervising judge's discretion to stay such set-off having

Le juge Brown (dissident) : L'appel devrait être accueilli à seule fin de retourner le dossier devant la Cour supérieure pour qu'il soit décidé, d'une part, si la Ville peut opérer compensation pré-post à l'égard de la créance PRV et, d'autre part, si la réclamation à l'égard des compteurs d'eau donne ouverture à compensation. Il y a accord avec l'avis de la majorité portant que le juge surveillant possède, en vertu de l'art. 11 de la LACC, le pouvoir discrétionnaire d'autoriser ou non un créancier à opérer compensation pré-post. Cependant, ce pouvoir n'est pas limité aux seules circonstances exceptionnelles décrites par la majorité. Le champ d'application de l'art. 21 de la LACC n'est pas restreint à la compensation pré-pré; la compensation pré-post est permise, mais doit être assujettie à l'exercice du pouvoir discrétionnaire du juge surveillant. De plus, rien dans l'art. 21 de la LACC n'interdit la compensation judiciaire.

L'approche établie par la Cour d'appel du Québec dans l'arrêt *Kitco*, selon laquelle la compensation pré-post ne sera jamais autorisée en vertu de la LACC, contient plusieurs erreurs et doit être rejetée. Tout d'abord, la Cour d'appel s'appuie erronément sur un arrêt de la Cour rendu dans un contexte de faillite sous le régime de la *Loi sur la faillite et l'insolvabilité* (« LFI »). Or, bien que le régime établi par la LACC et celui établi par la LFI doivent être perçus comme un ensemble intégré de règles du droit de l'insolvabilité, de nombreuses différences persistent entre ceux-ci, dont deux distinctions fondamentales. Premièrement, lorsque l'entreprise insolvable a recours à la LACC, elle continue ses opérations commerciales et n'est pas dessaisie de ses biens au profit d'un tiers, contrairement aux mesures mises en place en vertu de la LFI, suivant lesquelles le syndic obtient la saisine des biens du failli. Il n'y a donc pas de perte de réciprocité sous le régime de la LACC. Cette réciprocité, qui subsiste au-delà de l'ordonnance initiale, est ce qui rend possible la compensation en vertu de la LACC, par opposition à la LFI. Deuxièmement, le régime établi par la LACC est flexible et permet de mettre de l'avant des solutions créatives afin d'atteindre l'objectif de restructuration d'une entreprise en difficultés financières, par contraste avec la LFI, qui prévoit un ensemble de règles préétablies. Les dispositions de la LACC doivent être interprétées largement afin de permettre la réalisation de ses objectifs réparateurs, en raison desquels un vaste pouvoir discrétionnaire est également conféré au juge surveillant par l'art. 11 de la LACC. Ce pouvoir n'a pas d'équivalent dans la LFI.

Ensuite, l'état du droit ailleurs au Canada est clair : la compensation pré-post est possible sous le régime de la LACC, sous réserve du pouvoir discrétionnaire du juge

regard to its effects on the status quo period, the underlying objectives of this period, the advancement of efforts to reach an arrangement, and the remedial objectives of the CCAA. The approach proposed in *Kitco* has created an asymmetry between the interpretation given to s. 21 of the CCAA by the Quebec courts and the interpretation given to it by the courts of other Canadian provinces, which is contrary to the principle of homogenous interpretation of federal statutes.

Lastly, staying the remedies of an insolvent company's creditors under the CCAA to allow the company to develop a plan of arrangement is of critical importance. However, where a plan of arrangement cannot be contemplated and the insolvent company will be liquidated or sold in any event, to conclude that pre-post compensation is never allowed could be unfair to the company's creditors with claims that are certain, liquid and exigible. In such cases, the creditors' remedies will be stayed indefinitely and they will never be able to effect pre-post compensation, since the insolvent company will become an "empty shell" after the sale. Moreover, allowing pre-post compensation will not have the effect of derailing the company's restructuring process, as there is no such process in this situation.

In the instant case, there is no need to decide whether the VRP claim must be characterized as a claim based on "false pretences or fraudulent misrepresentation" within the meaning of s. 19(2)(d) of the CCAA. Section 21 of the CCAA must be interpreted as allowing pre-post compensation regardless of whether a claim results from fraud for the purposes of s. 19(2)(d). It is true that proof that the debt underlying a claim is fraudulent is a relevant factor in the exercise of a supervising judge's discretion to permit pre-post compensation; however, whether the City's VRP claim results from fraud is a question to be decided by the supervising judge, not by the Court.

Given that the supervising judge did not exercise her discretion under s. 11 of the CCAA, believing herself to be bound by the conclusions of the Quebec Court of Appeal in *Kitco*, it is not for the Court to exercise that discretion in order to determine whether to permit pre-post compensation. Supervising judges are in the best position to decide whether to exercise their discretion in a particular case. In cases involving an exercise of discretion by a court of first

surveillant d'en suspendre l'application pour tenir compte des incidences de la compensation pré-post sur la période de statu quo et de ses objectifs sous-jacents, du bon déroulement des efforts déployés pour réaliser un arrangement et des objectifs réparateurs de la LACC. L'approche avancée dans l'arrêt *Kitco* crée une asymétrie entre l'interprétation de l'art. 21 de la LACC par les tribunaux du Québec et par les tribunaux d'autres provinces canadiennes, qui va à l'encontre du principe de l'interprétation uniforme des lois fédérales.

Enfin, la suspension, en vertu de la LACC, des recours des créanciers d'une entreprise insolvable afin de permettre à celle-ci d'élaborer un plan d'arrangement revêt une importance cruciale. Par contre, lorsqu'un plan d'arrangement n'est pas envisageable et que l'entreprise insolvable sera de toute manière liquidée ou vendue, conclure que la compensation pré-post n'est jamais permise pourrait être injuste pour les créanciers de cette entreprise ayant une créance certaine, liquide et exigible. En effet, dans ces cas, les recours des créanciers seront suspendus indéfiniment et ils ne pourront jamais exercer compensation pré-post, l'entreprise insolvable étant devenue après la vente une « coquille vide ». Par ailleurs, permettre la compensation pré-post n'aura pas comme effet de faire dérailler le processus de restructuration de l'entreprise, ce processus étant alors inexistant.

En l'espèce, il n'est pas nécessaire de trancher la question de savoir si la créance PRV doit être qualifiée de réclamation fondée sur des « faux-semblants ou la présentation erronée et frauduleuse des faits » au sens de l'al. 19(2)d) de la LACC. L'article 21 de la LACC doit être interprété comme permettant d'opérer compensation pré-post, peu importe qu'il s'agisse ou non d'une réclamation qui découle d'une fraude au sens de l'al. 19(2)d). Certes, la démonstration du caractère frauduleux de la dette à l'origine d'une créance constitue un facteur pertinent dans l'exercice par le juge surveillant de son pouvoir discrétionnaire de permettre la compensation pré-post; cependant, la question de savoir si la créance PRV de la Ville résulte d'une fraude est une question à laquelle il appartient à la juge surveillante de répondre, et non à la Cour.

Étant donné que, s'estimant liée par les conclusions de la Cour d'appel du Québec dans l'arrêt *Kitco*, la juge surveillante n'a pas exercé le pouvoir discrétionnaire que lui confère l'art. 11 de la LACC, il ne revient pas à la Cour de l'exercer afin de décider s'il y a lieu d'autoriser ou non la compensation pré-post. Les juges surveillants sont les mieux placés pour décider s'ils doivent exercer leur pouvoir discrétionnaire dans une situation donnée.

instance, it is not in the interests of justice for the Court to step into that court's shoes and decide these matters.

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Dans les affaires qui reposent sur l'exercice d'un pouvoir discrétionnaire par un tribunal de première instance, il n'est pas dans l'intérêt de la justice que la Cour se mette à la place de ce tribunal et tranche ces questions.

Jurisprudence

Citée par le juge en chef Wagner et la juge Côté

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APPEAL from a judgment of the Quebec Court of Appeal (Rochette, Healy and Ruel JJ.A.), 2020 QCCA 438, [2020] J.Q. n° 1852 (QL), 2020 CarswellQue 1987 (WL Can.), affirming a decision of Coriveau J., 2019 QCCS 2316, [2019] J.Q. n° 4840 (QL), 2019 CarswellQue 5032 (WL Can.). Appeal dismissed, Brown J. dissenting.

Raphaël Lescop and Eleni Yiannakis, for the appellant.

Guy P. Martel and Danny Duy Vu, for the respondent.

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POURVOI contre un arrêt de la Cour d'appel du Québec (les juges Rochette, Healy et Ruel), 2020 QCCA 438, [2020] J.Q. n° 1852 (QL), 2020 CarswellQue 1987 (WL Can.), qui a confirmé une décision de la juge Coriveau, 2019 QCCS 2316, [2019] J.Q. n° 4840 (QL), 2019 CarswellQue 5032 (WL Can.). Pourvoi rejeté, le juge Brown est dissident.

Raphaël Lescop et Eleni Yiannakis, pour l'appelante.

Guy P. Martel et Danny Duy Vu, pour l'intimée.

Alain Tardif, for the interveners the Alaris Royalty Corp. and the Integrated Private Debt Fund V LP.

Luc Béliveau, for the intervenor Thornhill Investments Inc.

Elizabeth Ferland, for the intervenor Ville de Laval.

Marc Duchesne, for the intervenor Union des municipalités du Québec.

English version of the judgment of Wagner C.J. and Moldaver, Karakatsanis, Côté, Rowe and Martin JJ. delivered by

THE CHIEF JUSTICE AND CÔTÉ J. —

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Alain Tardif, pour les intervenantes Alaris Royalty Corp. et Integrated Private Debt Fund V LP.

Luc Béliveau, pour l'intervenante Thornhill Investments Inc.

Elizabeth Ferland, pour l'intervenante la Ville de Laval.

Marc Duchesne, pour l'intervenante l'Union des municipalités du Québec.

Le jugement du juge en chef Wagner et des juges Moldaver, Karakatsanis, Côté, Rowe et Martin a été rendu par

LE JUGE EN CHEF ET LA JUGE CÔTÉ —

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[1] This appeal raises an issue relating to compensation, or set-off in a common law setting, between two debts in the context of proceedings under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA"). The question is whether compensation is permitted for debts between the same parties: on the one hand, a debt resulting from the *Act to ensure mainly the recovery of amounts improperly paid as a result of fraud or fraudulent tactics in connection with public contracts*, CQLR, c. R-2.2.0.0.3 ("Bill 26"), that predates an initial order made under the CCAA and, on the other hand, a debt between the same parties that postdates that order. In these reasons, we will use the expression "pre-post compensation" to refer generally to compensation between debts arising before and after an initial order.

[2] This question thus affords the Court an occasion to interpret, for the first time, certain provisions of Bill 26 as well as the regulation made under it, the *Voluntary Reimbursement Program*, CQLR, c. R-2.2.0.0.3, r. 1 ("VRP Regulation"). In doing so, we will clarify for public bodies the burden of proof that rests on them in seeking to establish that a claim arising from an agreement entered into under the Voluntary Reimbursement Program ("VRP") is fraudulent.

[3] Bill 26 was passed by the Quebec National Assembly in March 2015 in response to a commission

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[1] Le présent pourvoi soulève un problème de compensation entre deux dettes dans le contexte de procédures engagées sous le régime de la *Loi sur les arrangements avec les créanciers des compagnies*, L.R.C. 1985, c. C-36 (« LACC »). Il s'agit de savoir si la compensation est permise entre des dettes entre les mêmes parties, d'une part, une dette résultant de la *Loi visant principalement la récupération de sommes payées injustement à la suite de fraudes ou de manœuvres dolosives dans le cadre de contrats publics*, RLRQ, c. R-2.2.0.0.3 (« Loi 26 »), antérieure à une ordonnance initiale émise en vertu de la LACC, et, d'autre part, une dette postérieure à cette ordonnance encourue entre les mêmes parties. Dans les présents motifs, nous utiliserons l'expression « compensation pré-post » pour désigner de manière générale la compensation entre des dettes nées avant et après l'émission d'une ordonnance initiale.

[2] Cette question fournit ainsi à notre Cour l'occasion d'interpréter pour la première fois certaines dispositions de la Loi 26, ainsi que son règlement d'application, le *Programme de remboursement volontaire*, RLRQ, c. R-2.2.0.0.3, r. 1 (« règlement PRV »). Ce faisant, nous clarifions, à l'intention des organismes publics, le fardeau de preuve qui leur incombe lorsqu'ils tentent d'établir le caractère frauduleux d'une créance résultant d'une entente conclue en vertu du Programme de remboursement volontaire (« PRV »).

[3] La Loi 26 a été adoptée par l'Assemblée nationale du Québec en mars 2015 à la suite d'une

of inquiry that had brought to light the existence of schemes involving collusion and corruption in the awarding and management of public contracts in the construction industry (“Charbonneau Commission”), and the VRP Regulation was made a few months later. The program resulting from this legislation, which was in effect for two years, allowed enterprises to “reimburse certain amounts improperly paid in the course of the tendering, awarding or management of a public contract in relation to which there may have been fraud or fraudulent tactics” (s. 3 of Bill 26).

[4] To answer the question with respect to compensation in the context of this appeal, the Court must first determine whether a claim arising from an agreement entered into under the VRP is necessarily a “claim that relates to” a “debt or liability resulting from obtaining property or services by false pretences or fraudulent misrepresentation” pursuant to s. 19(2)(d) of the CCAA. We would answer this question in the negative. It cannot be presumed that a claim arising from the VRP falls within that provision where no evidence to this effect has been tendered. We also conclude that a court should generally exercise its discretion to stay pre-post compensation, although it may, in rare cases, refuse such a stay. As well, the court may later lift the stay of the right to pre-post compensation in appropriate cases. In the case at bar, however, we conclude that the initial order stayed the right of the appellant, Ville de Montréal (“City”), to pre-post compensation and that it would not be appropriate to lift the stay in relation to the claims in issue.

[5] The appeal should therefore be dismissed.

II. Facts

[6] SM Group, which at the relevant time was a consulting engineering firm, performed a variety of contracts for the City over a period of several years. The Charbonneau Commission’s work uncovered a

commission d’enquête qui a mis en lumière l’existence de stratagèmes de collusion et de corruption dans l’octroi et la gestion de contrats publics dans l’industrie de la construction (« Commission Charbonneau »), et le règlement PRV a été pris quelques mois plus tard. Mis en vigueur pour une période de deux ans, le programme issu de cette loi a permis à des entreprises de « rembourser certaines sommes payées injustement dans le cadre de l’adjudication, de l’attribution ou de la gestion d’un contrat public et pour lequel il aurait pu y avoir fraude ou manœuvre dolosive » (art. 3 de la Loi 26).

[4] Pour trancher la question relative à la compensation dans le contexte du présent pourvoi, notre Cour doit d’abord déterminer si une créance découlant d’une entente conclue dans le cadre du PRV constitue nécessairement une « réclamation se rapportant à » une « dette ou obligation résultant de l’obtention de biens ou de services par des faux-semblants ou la présentation erronée et frauduleuse des faits » aux termes de l’al. 19(2)d) de la LACC. Nous sommes d’avis de répondre à cette question par la négative. On ne peut présumer qu’une créance issue du PRV est visée par cette disposition lorsqu’aucune preuve n’a été administrée à cet effet. Nous concluons par ailleurs que le tribunal devrait généralement exercer son pouvoir discrétionnaire afin de suspendre la compensation pré-post, bien qu’il puisse, dans de rares cas, refuser de la suspendre. De même, le tribunal peut, par la suite, lever la suspension du droit à la compensation pré-post dans les cas qui s’y prêtent. En l’espèce, toutefois, nous concluons que l’ordonnance initiale a suspendu le droit de l’appelante Ville de Montréal (« Ville ») à la compensation pré-post et qu’il n’est pas indiqué de lever cette suspension pour ce qui est des créances en litige.

[5] En conséquence, l’appel doit être rejeté.

II. Faits

[6] Groupe SM, qui était au moment des faits une firme de génie-conseil, a exécuté divers contrats pour la Ville sur une période de plusieurs années. Les travaux de la Commission Charbonneau ont

link between SM Group and certain central players in the collusion schemes. Two of its former officers were in fact charged with criminal offences. SM Group subsequently became insolvent.

révélé l’existence d’un lien entre Groupe SM et des acteurs au cœur des stratagèmes de collusion. Deux de ses anciens dirigeants ont d’ailleurs fait l’objet d’accusations criminelles. Par la suite, Groupe SM est devenu insolvable.

[7] On August 24, 2018, the Quebec Superior Court made an initial order by which SM Group became subject to proceedings under the CCAA and the rights and remedies of creditors were stayed. The respondent, Deloitte Restructuring Inc. (“Deloitte”), was appointed as monitor. Following that order, SM Group continued to perform work for the City, including the construction of the Samuel De Champlain Bridge and the rebuilding of the Turcot Interchange.

[7] Le 24 août 2018, la Cour supérieure du Québec (« Tribunal ») rend une ordonnance initiale assujettissant Groupe SM à des procédures déposées en vertu de la LACC et suspendant les droits et recours des créanciers. L’intimée Restructuration Deloitte Inc. (« Deloitte ») est nommée à titre de contrôleur. Postérieurement à cette ordonnance, Groupe SM continue à effectuer des travaux dont bénéficie la Ville, notamment la construction du pont Samuel-De Champlain et la réfection de l’échangeur Turcot.

[8] The City refused to pay for that work. On November 7, 2018, it invoked its right to effect compensation between its debt to SM Group for the work done after the initial order and two claims against SM Group that, according to the City, arose before the order and resulted from fraud on SM Group’s part.

[8] La Ville refuse de payer ces travaux. Le 7 novembre 2018, elle invoque son droit d’opérer compensation entre sa dette envers Groupe SM résultant des travaux effectués postérieurement à l’ordonnance initiale, et deux créances de Groupe SM qui, soutient-elle, sont nées avant l’ordonnance et résulteraient de fraude de ce dernier.

[9] On November 12, 2018, the Superior Court approved the sale of some of SM Group’s assets to Thornhill Investments Inc. (“Thornhill”). One week later, SM Group’s contracts were assigned to Thornhill.

[9] Le 12 novembre 2018, le Tribunal approuve la vente partielle des actifs de Groupe SM à Thornhill Investments Inc. (« Thornhill »). Une semaine plus tard, les contrats de Groupe SM sont cédés à Thornhill.

[10] The two claims raised by the City are related to the application of Bill 26. The purpose of that statute, read in conjunction with the *Integrity in Public Contracts Act*, S.Q. 2012, c. 25, enacted in 2012, and the *Act to give effect to the Charbonneau Commission recommendations on political financing*, S.Q. 2016, c. 18, enacted in 2016, is to strengthen public confidence in government institutions by addressing the revelations made by the Charbonneau Commission. Bill 26 has been described as [TRANSLATION] “a statutory benchmark for establishing a lack of ethics and lax (if not criminal) morals in a number of enterprises in relation to the awarding of public contracts in Quebec” (*R. v. Fedele*, 2018 QCCA 1901, at para. 44 (CanLII)).

[10] Les deux créances invoquées par la Ville sont liées à l’application de la Loi 26. Lue avec la *Loi sur l’intégrité en matière de contrats publics*, L.Q. 2012, c. 25, adoptée en 2012, et la *Loi donnant suite aux recommandations de la Commission Charbonneau en matière de financement politique*, L.Q. 2016, c. 18, adoptée en 2016, la Loi 26 a pour objectif de renforcer la confiance du public dans les institutions publiques en donnant suite aux révélations émanant de la Commission Charbonneau. Elle a été décrite comme « un repère législatif permettant de conclure au manque d’éthique et à la morale laxiste (sinon criminelle) dans plusieurs entreprises en lien avec l’octroi de contrats publics au Québec » (*R. c. Fedele*, 2018 QCCA 1901, par. 44 (CanLII)).

[11] The first claim the City alleges it has against SM Group arises from a settlement agreement entered into in November 2017 by SM Group and the Minister of Justice, acting on the City's behalf, under the VRP ("VRP claim"). The second is based on a proceeding brought by the City against SM Group in September 2018, in which it claimed more than \$14 million from SM Group for allegedly having participated in collusion in relation to a call for tenders for a water meter contract ("water meter contract claim").

[12] Because SM Group had failed to repay the VRP claim and because the sale of certain assets to Thornhill was imminent, the City advised SM Group that it intended to effect compensation between what it owed SM Group and the above-mentioned claims, noting that those claims could not be discharged or dealt with by a compromise or arrangement in the planned restructuring process given that they resulted from fraud and from a misappropriation of public funds.

[13] In response, Deloitte applied for a declaratory judgment stating that compensation could not be effected with respect to the amounts owed by the City to SM Group for work performed for the City.

III. Judicial History

A. *Quebec Superior Court, 2019 QCCS 2316 (Corriveau J.)*

[14] The supervising judge granted Deloitte's application for a declaratory judgment and held that pre-post compensation could not be effected in favour of the City. Even though, in her view, the VRP claim was linked to an allegation of fraud that had not been refuted by SM Group, she concluded that, according to the principles laid down in *Quebec (Agence du revenu) v. Kitco Metals Inc.*, 2017 QCCA 268, pre-post compensation was not possible. She also concluded that the water meter contract claim was neither liquid nor exigible, which precluded compensation.

[11] La première créance que la Ville prétend détenir contre Groupe SM résulte d'une entente de règlement intervenue en novembre 2017 entre Groupe SM et la ministre de la Justice, agissant pour le compte de la Ville, dans le cadre du PRV (« créance PRV »). La seconde créance est fondée sur un recours intenté par la Ville contre Groupe SM, en septembre 2018, dans lequel elle lui réclame plus de 14 millions de dollars au motif qu'il aurait participé à une collusion relativement à l'appel d'offres du contrat des compteurs d'eau (« créance relative au contrat des compteurs d'eau »).

[12] Vu le défaut de Groupe SM de rembourser la créance PRV et l'imminence de la vente de certains actifs à Thornhill, la Ville informe Groupe SM de son intention d'opérer compensation entre ce qu'elle lui doit et les créances ci-haut mentionnées, tout en précisant que ces créances ne peuvent être purgées ou compromises par la restructuration envisagée puisqu'elles découlent de la fraude et d'un détournement de fonds du Trésor public.

[13] En réponse, Deloitte demande un jugement déclaratoire portant que les sommes dues à Groupe SM par la Ville pour des travaux exécutés pour son bénéfice ne peuvent faire l'objet de compensation.

III. Historique judiciaire

A. *Cour supérieure du Québec, 2019 QCCS 2316 (la juge Corriveau)*

[14] La juge surveillante accueille la demande en jugement déclaratoire de Deloitte et décide que la compensation pré-post ne peut s'opérer en faveur de la Ville. Même si, selon elle, la créance PRV est liée à une allégation de fraude non réfutée par Groupe SM, la juge surveillante conclut que, selon les enseignements de l'arrêt *Québec (Agence du revenu) c. Métaux Kitco inc.*, 2017 QCCA 268, 46 C.B.R. (6th) 173, la compensation pré-post n'est pas possible. Elle statue par ailleurs que la créance relative au contrat des compteurs d'eau n'est ni liquide ni exigible, de sorte que la compensation ne peut être opérée.

B. *Quebec Court of Appeal, 2020 QCCA 438 (Rochette and Healy J.J.A., Ruel J.A. Dissenting in Part)*

[15] Rochette J.A., writing for the majority, rejected the City’s argument regarding the VRP claim. Relying on *Kitco*, he reached the same conclusion as the supervising judge: that pre-post compensation could not be effected in this case. He also rejected the City’s argument that a claim relating to fraud falling within s. 19(2)(d) of the CCAA is an exception to the rule stated in that case. In any event, he expressed the view that the City had not proved that s. 19(2)(d) applied to its claims. Finally, with regard to the water meter contract claim, Rochette J.A. added that the conditions for judicial compensation were not met, since the certainty, liquidity and exigibility of that claim had to be determined later in a proceeding other than that of the restructuring case.

[16] Ruel J.A., dissenting in part, agreed with his colleagues on the nature of the water meter contract claim. However, he was of the view that the VRP claim had to be presumed to fall within s. 19(2)(d) of the CCAA and that *Kitco* had to be distinguished on the basis that it had been rendered in a different context. In the final analysis, Ruel J.A. found that s. 19(2)(d) of the CCAA represents an exception to the principle established in that case and that it therefore allowed pre-post compensation between the two parties’ respective debts.

IV. Issues

[17] This appeal raises the following three questions:

1. Is the VRP claim a claim that relates to a debt resulting from fraud pursuant to s. 19(2)(d) of the CCAA?
2. Does the CCAA permit compensation between a debt that arises before an initial order and one that arises after that order?
3. If compensation is permitted, should the City be authorized to withhold the payments owed

B. *Cour d’appel du Québec, 2020 QCCA 438 (les juges Rochette et Healy, le juge Ruel, dissident en partie)*

[15] Rédigeant pour la majorité, le juge Rochette rejette la prétention de la Ville relativement à la créance PRV. S’appuyant sur l’arrêt *Kitco*, il conclut, à l’instar de la juge surveillante, que la compensation pré-post ne peut s’opérer en l’espèce. En outre, il rejette l’argument de la Ville selon lequel une créance relative à la fraude visée par l’al. 19(2)d) de la LACC constitue une exception à la règle énoncée dans cet arrêt. Quoiqu’il en soit, il se dit d’avis que la Ville n’a pas prouvé que ses créances sont visées par cette disposition. Enfin, en ce qui concerne la créance relative au contrat des compteurs d’eau, le juge Rochette ajoute que les conditions de la compensation judiciaire ne sont pas réunies, le caractère certain, liquide et exigible de cette créance devant être déterminé postérieurement dans une autre instance que celle du dossier de restructuration.

[16] Dissident en partie, le juge Ruel partage l’avis de ses collègues sur la nature de la créance relative au contrat des compteurs d’eau. Cependant, il est plutôt d’avis qu’il faut présumer que la créance PRV est visée par l’al. 19(2)d) de la LACC et que l’arrêt *Kitco* doit être distingué étant donné qu’il a été rendu dans un contexte différent. En dernière analyse, le juge Ruel estime que l’al. 19(2)d) de la LACC fait exception au principe établi dans cet arrêt et permet donc la compensation pré-post entre les dettes respectives des deux parties.

IV. Questions en litige

[17] Le présent pourvoi soulève les trois questions suivantes :

1. La créance PRV est-elle une réclamation se rapportant à une dette qui résulte de fraude aux termes de l’al. 19(2)d) de la LACC?
2. La LACC autorise-t-elle la compensation entre une dette née avant une ordonnance initiale et une dette née après cette ordonnance?
3. Si la compensation est permise, la Ville devrait-elle être autorisée à retenir les paiements dus

to SM Group until judgment is rendered in the case relating to the water meter contract?

[18] We will deal with these questions by considering each of the City's claims separately.

V. Analysis

[19] In essence, the City argues that the VRP claim cannot be dealt with by a compromise or arrangement because it relates to a debt resulting from fraud pursuant to s. 19(2)(d) of the CCAA. According to the City, such a claim falls outside the absolute prohibition against pre-post compensation imposed by *Kitco*. The City also argues that the absolute nature of the *Kitco* rule is inconsistent with the broad discretion conferred on supervising judges by the CCAA. It submits that supervising judges can, in exercising their discretion, authorize pre-post compensation in appropriate circumstances. The exercise of this discretion is particularly appropriate where fraud is involved.

[20] For the reasons that follow, we are of the view that the VRP claim in this case is not a claim that relates to a debt resulting from fraud pursuant to s. 19(2)(d) of the CCAA. We also conclude that a right to pre-post compensation, or set-off, invoked under the civil law or the common law can be stayed under ss. 11 and 11.02 of the CCAA. In our opinion, however, a supervising judge has the discretion to authorize pre-post compensation only in exceptional circumstances, given the high disruptive potential of this form of compensation. In this regard, the fact that the debt underlying a VRP claim is fraudulent, where this is shown, is a relevant factor in the exercise of the supervising judge's discretion. In this case, we find that it would not be appropriate to allow the City to effect compensation with respect to the VRP claim. Nor would it be appropriate to authorize the City to withhold the payments owed to SM Group pending the outcome of the case relating to the water meter contract.

à Groupe SM en attendant que jugement soit rendu dans le dossier relatif au contrat des compteurs d'eau?

[18] Nous traiterons de ces questions en abordant séparément chacune des créances invoquées par la Ville.

V. Analyse

[19] Essentiellement, la Ville soutient que la créance PRV est une réclamation qui ne peut être considérée dans le cadre d'une transaction ou d'un arrangement, puisqu'elle se rapporte à une dette qui résulte de fraude aux termes de l'al. 19(2)d) de la LACC. Selon la Ville, une telle réclamation échappe à l'interdiction absolue énoncée dans l'arrêt *Kitco* à l'égard de la compensation pré-post. La Ville plaide également que le caractère absolu de la règle de l'arrêt *Kitco* est incompatible avec le large pouvoir discrétionnaire conféré au juge surveillant par la LACC. La Ville estime que le juge surveillant peut, dans l'exercice de son pouvoir discrétionnaire, autoriser la compensation pré-post dans des circonstances appropriées. L'exercice de ce pouvoir est d'autant plus indiqué en présence de fraude.

[20] Pour les motifs qui suivent, nous sommes d'avis que la créance PRV visée en l'espèce n'est pas une réclamation se rapportant à une dette qui résulte de fraude aux termes de l'al. 19(2)d) de la LACC. Nous concluons par ailleurs que le droit à la compensation pré-post invoqué en vertu du droit civil ou de la common law peut être suspendu en application des art. 11 et 11.02 de la LACC. Toutefois, nous sommes d'avis que le juge surveillant possède le pouvoir discrétionnaire d'autoriser la compensation pré-post dans des circonstances exceptionnelles seulement, considérant le fort potentiel perturbateur de cette forme de compensation. À cet égard, le caractère frauduleux de la dette à l'origine d'une créance PRV, lorsque démontré, constitue un facteur pertinent dans l'exercice de la discrétion du juge surveillant. En l'espèce, nous estimons qu'il ne serait pas indiqué de permettre à la Ville d'opérer compensation en ce qui concerne la créance PRV. Il ne serait pas non plus approprié d'autoriser la Ville à retenir les paiements dus à Groupe SM jusqu'au dénouement du litige relatif au contrat des compteurs d'eau.

A. *Voluntary Reimbursement Program Claim*

(1) Characterization of the Voluntary Reimbursement Program Claim

[21] We must begin by determining whether the VRP claim is a claim that relates to a fraudulent debt, because this is the premise behind the City's reasoning. For the reasons that follow, we conclude that this basic premise is not correct: the VRP claim is not a claim that relates to a debt resulting from fraud pursuant to s. 19(2)(d) of the *CCAA*. The mere fact that a debtor company participated in the VRP is not sufficient to infer that the company defrauded a public body. In light of this conclusion, it is not necessary for us to deal with Deloitte's alternative argument that s. 19 of the *CCAA* is inapplicable in this case because there is no plan providing for a compromise or arrangement.

[22] The first step in characterizing the VRP claim is to distinguish, for the purposes of the *CCAA*, claims that are subject to a compromise or arrangement from those that are not. Section 19(1) of the *CCAA* sets out the general scheme governing claims that may be dealt with by a compromise or arrangement:

19 (1) Subject to subsection (2), the only claims that may be dealt with by a compromise or arrangement in respect of a debtor company are

(a) claims that relate to debts or liabilities, present or future, to which the company is subject on the earlier of

(i) the day on which proceedings commenced under this Act, and

(ii) if the company filed a notice of intention under section 50.4 of the *Bankruptcy and Insolvency Act* or commenced proceedings under this Act with the consent of inspectors referred to in section 116 of the *Bankruptcy and Insolvency Act*, the date of

A. *Créance du Programme de remboursement volontaire*

(1) Qualification de la créance du Programme de remboursement volontaire

[21] Il nous incombe de déterminer, d'entrée de jeu, si la créance PRV est une réclamation se rapportant à une dette frauduleuse, puisque cette prémisse explique le raisonnement de la Ville. Pour les motifs qui suivent, nous concluons que cette prémisse fondamentale n'est pas fondée : la créance PRV n'est pas une réclamation se rapportant à une dette qui résulte de fraude aux termes de l'al. 19(2)d) de la *LACC*. En effet, la seule participation au PRV par une société débitrice n'est pas suffisante pour inférer la commission d'une fraude par cette dernière à l'endroit d'un organisme public. Considérant cette conclusion, il n'est pas nécessaire de nous prononcer sur l'argument subsidiaire de Deloitte selon lequel l'art. 19 de la *LACC* serait inapplicable en l'espèce, en raison de l'absence de plan prévoyant une transaction ou un arrangement.

[22] Pour qualifier la créance PRV, il faut d'abord distinguer, au sens de la *LACC*, les réclamations compromises par la transaction ou l'arrangement de celles qui ne le sont pas. Le paragraphe 19(1) de cette loi énonce le régime général encadrant les réclamations qui peuvent être considérées dans le cadre d'une transaction ou d'un arrangement :

19 (1) Les seules réclamations qui peuvent être considérées dans le cadre d'une transaction ou d'un arrangement visant une compagnie débitrice sont :

a) celles se rapportant aux dettes et obligations, présentes ou futures, auxquelles la compagnie est assujettie à celle des dates ci-après qui est antérieure à l'autre :

(i) la date à laquelle une procédure a été intentée sous le régime de la présente loi à l'égard de la compagnie,

(ii) la date d'ouverture de la faillite, au sens de l'article 2 de la *Loi sur la faillite et l'insolvabilité*, si elle a déposé un avis d'intention sous le régime de l'article 50.4 de cette loi ou qu'elle a intenté une procédure sous le régime de la présente loi avec le

the initial bankruptcy event within the meaning of section 2 of that Act; and

(b) claims that relate to debts or liabilities, present or future, to which the company may become subject before the compromise or arrangement is sanctioned by reason of any obligation incurred by the company before the earlier of the days referred to in subparagraphs (a)(i) and (ii).

[23] As an exception to this scheme, s. 19(2) of the CCAA provides that certain claims may not be dealt with by a compromise or arrangement, including those that result from fraud:

(2) A compromise or arrangement in respect of a debtor company may not deal with any claim that relates to any of the following debts or liabilities unless the compromise or arrangement explicitly provides for the claim's compromise and the creditor in relation to that debt has voted for the acceptance of the compromise or arrangement:

...

(d) any debt or liability resulting from obtaining property or services by false pretences or fraudulent misrepresentation, other than a debt or liability of the company that arises from an equity claim; . . .

[24] The burden of proof applicable to this scheme can be determined by referring to the case law and academic commentary on s. 178(1)(e) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (“BIA”), which is analogous in every respect to s. 19(2)(d) of the CCAA. As this Court noted in *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379, these two statutes “for[m] part of an integrated body of insolvency law” (para. 78; see also 9354-9186 *Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10, [2020] 1 S.C.R. 522, at para. 74).

[25] To discharge its burden of proving that its claim relates to a debt “resulting from obtaining property or services by false pretences or fraudulent misrepresentation”, a creditor must establish, on a balance of probabilities, the following four elements: (i) the debtor made a representation to the

consentement des inspecteurs visés à l’article 116 de la *Loi sur la faillite et l’insolvabilité*;

b) celles se rapportant aux dettes et obligations, présentes ou futures, auxquelles elle peut devenir assujettie avant l’acceptation de la transaction ou de l’arrangement, en raison d’une obligation contractée antérieurement à celle des dates mentionnées aux sous-alinéas a)(i) et (ii) qui est antérieure à l’autre.

[23] À titre d’exception à ce régime, le par. 19(2) de la LACC prévoit que certaines réclamations ne peuvent être compromises, notamment celles découlant de fraude :

(2) La réclamation se rapportant à l’une ou l’autre des dettes ou obligations ci-après ne peut toutefois être ainsi considérée, à moins que la transaction ou l’arrangement ne prévoie expressément la possibilité de transiger sur cette réclamation et que le créancier intéressé n’ait voté en faveur de la transaction ou de l’arrangement proposé :

...

d) toute dette ou obligation résultant de l’obtention de biens ou de services par des faux-semblants ou la présentation erronée et frauduleuse des faits, autre qu’une dette ou obligation de la compagnie qui découle d’une réclamation relative à des capitaux propres;

[24] Pour déterminer le fardeau de preuve applicable à ce régime, il convient de se référer à la jurisprudence et à la doctrine portant sur l’al. 178(1)(e) de la *Loi sur la faillite et l’insolvabilité*, L.R.C. 1985, c. B-3 (« LFI »), lequel s’apparente en tous points à l’al. 19(2)(d) de la LACC. Comme notre Cour l’a souligné dans l’arrêt *Century Services Inc. c. Canada (Procureur général)*, 2010 CSC 60, [2010] 3 R.C.S. 379, ces deux lois « [font] partie d’un ensemble intégré de règles du droit de l’insolvabilité » (par. 78; voir aussi 9354-9186 *Québec inc. c. Callidus Capital Corp.*, 2020 CSC 10, [2020] 1 R.C.S. 522, par. 74).

[25] Afin de satisfaire au fardeau qui lui incombe, c’est-à-dire démontrer que sa créance est une réclamation qui se rapporte à une dette « résultant de l’obtention de biens ou de services par des faux-semblants ou la présentation erronée et frauduleuse des faits », le créancier intéressé devra établir, par

creditor; (ii) the representation was false; (iii) the debtor knew that the representation was false; (iv) the false representation was made to obtain property or a service (*Léger v. Ouellet*, 2011 QCCA 1858, at para. 30 (CanLII); *Dupuis v. Cernato Holdings Inc.*, 2019 QCCA 376, at para. 37 (CanLII); see also L. W. Houlden, G. B. Morawetz and J. Sarra, *Bankruptcy and Insolvency Law of Canada* (4th ed. rev. (loose-leaf)), vol. 3, at H§63; *Berger, Re*, 2010 ONSC 4376, 70 C.B.R. (5th) 225, at para. 28; J. P. Sarra, G. B. Morawetz and L. W. Houlden, *The 2020-2021 Annotated Bankruptcy And Insolvency Act* (2020), at pp. 1001 and 1006; D. Brochu, *Précis de la faillite et de l'insolvabilité* (5th ed. 2016), at pp. 502-3). Once these elements have been proved, the creditor of a claim to which s. 19(2)(d) of the CCAA applies is in a better position than other ordinary creditors, insofar as such a claim, while not conferring secured creditor status, cannot be dealt with by a compromise or arrangement (see Houlden, Morawetz and Sarra, at H§63). This exception to the general scheme established by s. 19(1) of the CCAA must be interpreted narrowly (see, e.g., by analogy, *Lambert v. Macara*, [2004] R.J.Q. 2637 (C.A.), at para. 96; *Canada Mortgage and Housing Corp. v. Gray*, 2014 ONCA 236, 119 O.R. (3d) 710, at para. 24).

[26] The City's burden was certainly not negligible: it had to prove that SM Group had knowingly made a false representation that led to the VRP claim. However, the City considered it sufficient for that purpose to mention that the claim existed, and did not try to prove or even allege any of these elements, presuming or assuming that the VRP claim resulted from fraudulent representations.

[27] As a result, the content of the VRP agreement, Bill 26 and the VRP Regulation must be interpreted to determine whether the VRP claim may be dealt with by a compromise or arrangement. In this regard, and for the reasons that follow, we agree with the

prépondérance des probabilités, les quatre éléments suivants : (i) le débiteur lui a fait une représentation; (ii) cette représentation était fausse; (iii) le débiteur savait que la représentation était fausse; (iv) cette fausse représentation a été faite dans le but d'obtenir un bien ou un service (*Léger c. Ouellet*, 2011 QCCA 1858, par. 30 (CanLII); *Dupuis c. Cernato Holdings Inc.*, 2019 QCCA 376, par. 37 (CanLII); voir aussi L. W. Houlden, G. B. Morawetz et J. Sarra, *Bankruptcy and Insolvency Law of Canada* (4^e éd. rév. (feuilles mobiles)), vol. 3, H§63; *Berger, Re*, 2010 ONSC 4376, 70 C.B.R. (5th) 225, par. 28; J. P. Sarra, G. B. Morawetz et L. W. Houlden, *The 2020-2021 Annotated Bankruptcy And Insolvency Act* (2020), p. 1001 et 1006; D. Brochu, *Précis de la faillite et de l'insolvabilité* (5^e éd. 2016), p. 502-503). Une fois ces éléments prouvés, le créancier d'une réclamation visée par l'al. 19(2)d) de la LACC bénéficie d'une position plus avantageuse que les autres créanciers ordinaires, dans la mesure où cette réclamation ne peut être compromise dans le cadre d'une transaction ou d'un arrangement, quoiqu'elle ne confère pas le statut de créancier garanti (voir Houlden, Morawetz et Sarra, H§63). Cette exception au régime général institué par le par. 19(1) de la LACC doit être interprétée restrictivement (voir notamment, par analogie, *Lambert c. Macara*, [2004] R.J.Q. 2637 (C.A.), par. 96; *Canada Mortgage and Housing Corp. c. Gray*, 2014 ONCA 236, 119 O.R. (3d) 710, par. 24).

[26] Le fardeau qui incombait à la Ville n'était certes pas négligeable. En effet, elle devait prouver que Groupe SM avait sciemment fait une fausse représentation ayant mené à la créance PRV. Toutefois, la Ville a estimé, aux fins de cette démonstration, qu'il suffisait de mentionner l'existence de cette créance, et n'a pas cherché à prouver ni même à alléguer l'un ou l'autre de ces éléments, présumant ou tenant pour acquis que la créance PRV découlait de représentations frauduleuses.

[27] En conséquence, pour déterminer si la créance PRV peut être considérée dans le cadre d'une transaction ou d'un arrangement, il est nécessaire d'interpréter le contenu de l'entente PRV, la Loi 26 ainsi que le règlement PRV. À cet égard, et pour les raisons

majority of the Court of Appeal that s. 19(2)(d) of the CCAA does not apply to the VRP claim.

[28] First, the content of the VRP agreement itself is a complete bar to the City's argument that participation in the program in itself justifies a finding that the City's claim results from SM Group's fraudulent activities. Because this confidential agreement entered into by the parties clearly stipulates that the amount fixed in the agreement can in no way be considered to constitute an admission of liability, it cannot be presumed that the VRP claim is a claim that falls within s. 19(2)(d) of the CCAA. The onus was therefore on the City to prove, in accordance with the provisions of that statute, that SM Group had knowingly made a false representation to it in order to obtain property or a service.

[29] In this regard, there is, moreover, a well-established principle in the case law that a court must generally make its own findings of fact in applying s. 19(2)(d) (see Houlden, Morawetz and Sarra, at H§63). This is true, for example, even where findings possibly linked to fraud have been made in a previous trial or where a default judgment or a consent to judgment might have contained such findings. It can be inferred by analogy from the case law on s. 178(1)(e) of the BIA that the courts have been particularly consistent and rigorous in assessing the evidence presented to them in this regard (see, e.g., *Terrain DEV Immobilier inc. v. Charron*, 2021 QCCA 417, at para. 2 (CanLII); *Dupuis*, at paras. 36-40; *Pelletier v. CAE Rive-Nord*, 2019 QCCA 2164, at paras. 13-19 (CanLII); *Tavan v. Rostami*, 2014 QCCA 304, at paras. 3-6 (CanLII); *Léger*, at paras. 30-40; *Guilbert v. Economical Mutual Insurance Co.*, 2020 MBQB 179, [2021] I.L.R. ¶I-6280, at paras. 20-25; *Sharma v. Sandhu*, 2019 MBQB 160, at paras. 38-45 (CanLII); *Royal Bank of Canada v. Hejna*, 2013 ONSC 1719, at paras. 90-92 (CanLII); *Berger*, at paras. 28-35; *Re Horwitz* (1984), 52 C.B.R. (N.S.) 102 (Ont. H.C.J.), at pp. 106-7, aff'd (1985), 53 C.B.R. (N.S.) 275 (C.A.); *Agriculture Financial Services Corp. v. Zaborski*, 2009 ABQB

que nous expliquons ci-dessous, nous partageons les conclusions des juges majoritaires de la Cour d'appel : la créance PRV n'est pas visée par l'al. 19(2)d) de la LACC.

[28] En premier lieu, le contenu même de l'entente PRV constitue un obstacle dirimant à la prétention de la Ville selon laquelle le seul fait de la participation à ce programme suffit pour conclure que sa créance résulte des activités frauduleuses de Groupe SM. En effet, comme il est clairement stipulé dans cette entente confidentielle intervenue entre les parties que la somme convenue dans celle-ci ne peut en aucun cas être assimilée à une admission de responsabilité, on ne saurait présumer que la créance PRV constitue une réclamation visée à l'al. 19(2)d) de la LACC. En conséquence, il incombait à la Ville de prouver, conformément aux dispositions de cette loi, que Groupe SM lui avait faussement et sciemment fait une représentation afin d'obtenir un bien ou un service.

[29] D'ailleurs, en cette matière, une règle jurisprudentielle bien établie veut qu'un tribunal tire généralement ses propres conclusions factuelles aux fins d'application de l'al. 19(2)d) (voir Houlden, Morawetz et Sarra, H§63). Il en est ainsi, notamment, malgré la présence de conclusions liées possiblement à la fraude prononcées dans le cadre d'un procès antérieur, ou encore lorsqu'un jugement par défaut ou un acquiescement à jugement contiendrait de telles conclusions. La jurisprudence portant sur l'al. 178(1)e) de la LFI permet d'inférer, par analogie, que les tribunaux se montrent particulièrement constants et rigoureux dans l'appréciation de la preuve qui leur est présentée à cet égard (voir notamment *Terrain DEV Immobilier inc. c. Charron*, 2021 QCCA 417, par. 2 (CanLII); *Dupuis*, par. 36-40; *Pelletier c. CAE Rive-Nord*, 2019 QCCA 2164, par. 13-19 (CanLII); *Tavan c. Rostami*, 2014 QCCA 304, par. 3-6 (CanLII); *Léger*, par. 30-40; *Guilbert c. Economical Mutual Insurance Co.*, 2020 MBQB 179, [2021] I.L.R. ¶I-6280, par. 20-25; *Sharma c. Sandhu*, 2019 MBQB 160, par. 38-45 (CanLII); *Royal Bank of Canada c. Hejna*, 2013 ONSC 1719, par. 90-92 (CanLII); *Berger*, par. 28-35; *Re Horwitz* (1984), 52 C.B.R. (N.S.) 102 (H.C.J. Ont.), p. 106-107, conf. par (1985), 53 C.B.R. (N.S.) 275 (C.A.);

183, 58 C.B.R. (5th) 301, at paras. 12-18; *Szeto, Re*, 2014 BCSC 1563, 15 C.B.R. (6th) 255, at paras. 37-63; *The Toronto-Dominion Bank v. Merenick*, 2007 BCSC 1261, at paras. 30-48 (CanLII); *Johnson v. Erdman*, 2007 SKQB 223, 34 C.B.R. (5th) 108, at paras. 10-12; *Coyle (Bankrupt), Re*, 2011 NSSC 238, 304 N.S.R. (2d) 369, at paras. 53-58).

[30] Second, Bill 26 and the VRP Regulation published in the *Gazette officielle du Québec* pursuant to ss. 3 and 4 of that statute do not provide any greater support for the City’s position. We agree with the majority of the Court of Appeal, who rejected the idea of a statutory presumption or a presumption of fact that a debtor made fraudulent representations based solely on the fact that it participated in the VRP. That scheme, which was in effect from November 2015 to December 2017, created no such presumption.

[31] The purpose of the VRP as defined in s. 3 of Bill 26 — in Chapter II, entitled “Reimbursement Program” — supports this conclusion:

3. The Minister publishes in the *Gazette officielle du Québec* a voluntary, fixed-term reimbursement program to make it possible for an enterprise or a natural person mentioned in section 10 to reimburse certain amounts improperly paid in the course of the tendering, awarding or management of a public contract in relation to which there may have been fraud or fraudulent tactics.

[32] The use of the words “may have been” in the phrase “there may have been fraud or fraudulent tactics” clearly contradicts the City’s argument. Moreover, the same words are also used in s. 1 of the VRP Regulation in describing the purpose of that program:

1. The Voluntary Reimbursement Program makes it possible for every natural person and every enterprise to reimburse certain amounts improperly paid by a public body in the course of the tendering, awarding or management of a public contract entered into after 1 October 1996 in relation to which there may have been fraud or fraudulent tactics.

Agriculture Financial Services Corp. c. Zaborski, 2009 ABQB 183, 58 C.B.R. (5th) 301, par. 12-18; *Szeto, Re*, 2014 BCSC 1563, 15 C.B.R. (6th) 255, par. 37-63; *The Toronto-Dominion Bank c. Merenick*, 2007 BCSC 1261, par. 30-48 (CanLII); *Johnson c. Erdman*, 2007 SKQB 223, 34 C.B.R. (5th) 108, par. 10-12; *Coyle (Bankrupt), Re*, 2011 NSSC 238, 304 N.S.R. (2d) 369, par. 53-58).

[30] En deuxième lieu, la Loi 26, tout comme le règlement PRV publié dans la *Gazette officielle du Québec* en vertu des art. 3 et 4 de cette loi, n’appuient pas davantage la thèse de la Ville. Nous partageons l’avis des juges majoritaires de la Cour d’appel, qui rejettent l’idée d’une présomption légale ou factuelle de l’existence de représentations frauduleuses de la part d’un débiteur du seul fait de sa participation au PRV. Ce régime, qui a été en vigueur de novembre 2015 à décembre 2017, n’a pas créé une telle présomption.

[31] En effet, l’objet du PRV tel qu’il est défini à l’art. 3 de la Loi 26, au chapitre II intitulé « Programme de remboursement », étaye cette conclusion :

3. Le ministre publie à la *Gazette officielle du Québec* un programme de remboursement volontaire à durée déterminée afin qu’une entreprise ou une personne physique mentionnée à l’article 10 puisse rembourser certaines sommes payées injustement dans le cadre de l’adjudication, de l’attribution ou de la gestion d’un contrat public et pour lequel il aurait pu y avoir fraude ou manœuvre dolosive.

[32] L’emploi du conditionnel dans l’expression « il aurait pu y avoir fraude ou manœuvre dolosive » contredit clairement la thèse avancée par la Ville. De plus, le conditionnel est également utilisé à l’art. 1 du règlement PRV pour décrire l’objet de ce programme :

1. Le Programme de remboursement volontaire permet à toute personne physique et à toute entreprise de rembourser certaines sommes payées injustement par un organisme public dans le cadre de l’adjudication, de l’attribution ou de la gestion d’un contrat public, conclu après le 1^{er} octobre 1996, et pour lequel il aurait pu y avoir fraude ou ma[n]œuvre dolosive.

[33] The fact that fraud is characterized as a possibility rather than a certainty is by no means surprising. Given the VRP's purpose of recovering amounts paid improperly by public bodies, it stands to reason that Bill 26 does not provide for any mechanism to determine whether amounts agreed to under the VRP are in fact related, in whole or in part, to fraud. Section 7 of the VRP Regulation supports this point, since it states the following:

7. The fact that a natural person or an enterprise participates in the Program does not constitute an admission of liability or of a fault committed by the natural person or enterprise.

[34] The fault in question in s. 7 is a matter of civil liability and is limited to the public contract to which a VRP agreement pertains. Where the legislature intends to refer to penal or criminal proceedings, or to civil proceedings outside the scope of a VRP agreement, it does so expressly. This interpretation is confirmed when s. 7 of the VRP Regulation is read in conjunction with s. 8:

8. Every natural person or enterprise participating in the Program acknowledges that revealing information or sending documents within the Program framework does not restrict in any manner whatever a public body's capacity to bring civil proceedings against the natural person or enterprise in relation to public contracts for which a settlement has not been reached under the Program or to which the Act does not apply.

Every natural person or enterprise acknowledges that participation in the Program and the conclusion of an agreement under it in no manner protects the natural person or enterprise, or its officers, against any penal or criminal proceedings that have been or may be brought in connection with public contracts entered into by the natural person or enterprise.

[35] Evidence that a natural person or enterprise participated in the VRP therefore cannot on its own justify characterizing a claim as being related to a debt resulting from fraud pursuant to s. 19(2)(d) of the CCAA.

[33] Que la fraude soit caractérisée comme une éventualité, par opposition à quelque chose de certain, n'a rien de surprenant. En effet, comme l'objectif du PRV consiste à récupérer des sommes payées injustement par des organismes publics, il va de soi que la Loi 26 ne prévoit aucun mécanisme pour déterminer si, dans les faits, les sommes convenues dans le cadre du PRV sont reliées, en partie ou en totalité, à une fraude. L'article 7 du règlement PRV appuie ce constat, puisqu'il précise ce qui suit :

7. Le fait pour une personne physique ou une entreprise de se prévaloir du Programme ne constitue pas une reconnaissance de responsabilité ni une admission qu'elle a commis une faute.

[34] La faute dont il est question à l'art. 7 relève de la responsabilité civile et se limite au contrat public visé par l'entente PRV. Lorsque le législateur entend faire référence à des procédures de nature pénale ou criminelle, ou encore à des recours civils se situant hors du champ de l'entente PRV, il le fait expressément. L'article 7 du règlement PRV, lu conjointement avec l'art. 8, confirme cette interprétation :

8. Toute personne physique ou entreprise qui se prévaut du Programme reconnaît que le fait qu'elle révèle des informations ou transmette des documents dans ce cadre n'a pas pour effet de limiter, de quelque façon que ce soit, la capacité d'un organisme public d'entreprendre contre elle tout recours civil concernant des contrats publics qui n'auront pas fait l'objet d'un règlement dans le cadre du Programme ou qui ne sont pas visés par la Loi.

De plus, toute personne physique ou entreprise reconnaît que sa participation au Programme, et la conclusion d'une entente en vertu de celui-ci, ne la protège, ni ses dirigeants, d'aucune façon de poursuites pénales et/ou criminelles qui ont été ou pourraient être intentées contre elle à l'égard de contrats publics qu'elle a conclus.

[35] En conséquence, la seule preuve qu'une personne physique ou une entreprise a participé au PRV ne saurait à elle seule permettre de qualifier une créance de réclamation se rapportant à une dette qui résulte de fraude aux termes de l'al. 19(2)d) de la LACC.

[36] However, the City submits that reading ss. 1, 3 and 10 of Bill 26 together leads to an entirely different conclusion, namely that a natural person or enterprise that participated in the VRP necessarily defrauded a public body. In our view, the City is wrong.

[37] It is true that s. 1 of Bill 26 does not refer to fraud as being hypothetical:

1. This Act provides for exceptional measures for the reimbursement and recovery of amounts improperly paid as a result of fraud or fraudulent tactics in the course of the tendering, awarding or management of public contracts.

As we saw above, however, s. 3 of Bill 26 and s. 1 of the VRP Regulation are clear: there is no question that, unlike s. 1 of Bill 26, which sets out the purpose of that statute generally, the substantive provisions of Bill 26 and the VRP Regulation contemplate fraud only hypothetically. In addition, the City's interpretation cannot be reconciled with ss. 7 and 8 of the VRP Regulation, which are reproduced above.

[38] That being said, the City points out that s. 3 of Bill 26 refers to s. 10, which specifically states that fraud was committed:

10. Any enterprise or natural person who has, in any capacity, participated in fraud or fraudulent tactics in the course of the tendering, awarding or management of a public contract is presumed to have caused injury to the public body concerned.

In such a case, the officers of the enterprise in office at the time the fraud or fraudulent tactics occurred are held liable unless they prove that they acted with the care, diligence and skill that a prudent person would have exercised in similar circumstances.

The directors of the enterprise in office at the time the fraud or fraudulent tactics occurred are also held liable if it is established that they knew or ought to have known that fraud or fraudulent tactics were committed in relation to the contract concerned, unless they prove that they acted with the care, diligence and skill that a prudent person would have exercised in similar circumstances.

[36] Cependant, la Ville soutient qu'une lecture conjointe des art. 1, 3 et 10 de la Loi 26 mène à une toute autre conclusion, à savoir que la personne physique ou l'entreprise qui participe au PRV a nécessairement fraudé un organisme public. Nous sommes d'avis qu'elle a tort.

[37] Il est vrai que l'art. 1 de la Loi 26 ne traite pas de la fraude à titre hypothétique :

1. La présente loi prévoit des mesures exceptionnelles adaptées au remboursement et au recouvrement de sommes payées injustement à la suite de fraudes ou de manœuvres dolosives dans le cadre de l'adjudication, de l'attribution ou de la gestion de contrats publics.

Toutefois, comme nous l'avons vu précédemment, l'art. 3 de la Loi 26 et l'art. 1 du règlement PRV sont clairs : il est acquis que, contrairement à l'art. 1 de la Loi 26, qui énonce l'objet de cette loi de manière générale, les dispositions substantielles de la Loi 26 et du règlement PRV ne considèrent la fraude que de façon hypothétique. L'interprétation de la Ville est également inconciliable avec les art. 7 et 8 du règlement PRV, qui sont reproduits plus haut.

[38] Cela dit, la Ville fait remarquer que l'art. 3 de la Loi 26 renvoie à l'art. 10 lequel énonce explicitement qu'une fraude a été commise :

10. Toute entreprise ou toute personne physique qui, à quelque titre que ce soit, a participé à une fraude ou à une manœuvre dolosive dans le cadre de l'adjudication, de l'attribution ou de la gestion d'un contrat public est présumée avoir causé un préjudice à l'organisme public concerné.

Le cas échéant, la responsabilité de ses dirigeants en fonction au moment de la fraude ou de la manœuvre dolosive est engagée, à moins qu'ils ne démontrent avoir agi avec le soin, la diligence et la compétence dont ferait preuve, en pareilles circonstances, une personne prudente.

La responsabilité des administrateurs de l'entreprise en fonction au moment de la fraude ou de la manœuvre dolosive est également engagée s'il est établi qu'ils savaient ou qu'ils auraient dû savoir qu'une fraude ou une manœuvre dolosive a été commise relativement au contrat visé, à moins qu'ils ne démontrent avoir agi avec le soin, la diligence et la compétence dont ferait preuve, en pareilles circonstances, une personne prudente.

The enterprises and natural persons referred to in this section are solidarily liable for the injury caused, unless such liability is waived by the public body.

[39] We do not agree with the City’s interpretation on this point. It is up to the courts to conclude that fraud of this kind has been committed. More precisely, we are of the view that the City is confusing two schemes created by Bill 26: one — the VRP (ss. 3 to 9) — introduced by Chapter II and the other by Chapter III, which is entitled “Special Rules Applicable to Judicial Proceedings” (ss. 10 to 17). The first scheme was designed to encourage — for a two-year period — natural persons or enterprises fearing that a public body would bring civil proceedings against them to participate in the VRP with a view to entering into an agreement through a completely confidential process (s. 7 of Bill 26; s. 4 of the VRP Regulation). It was only once the first scheme ended that the second, one of an entirely different nature, took effect.

[40] The scheme provided for in ss. 10 to 17 of Bill 26 is one that deviates from the general law. It applies to judicial proceedings brought by a public body, or by the Minister of Justice on behalf of a public body, against a natural person or enterprise that allegedly participated in fraud in relation to a public contract. When a court allows such an action, not only can it assume that the defendant caused injury to the public body through its fraudulent act (s. 10 para. 1), but in addition, “[t]he injury is presumed to correspond to the amount claimed by the public body concerned for the contract concerned if the amount does not exceed 20% of the total amount paid for that contract” (s. 11 para. 1). The enterprises and natural persons contemplated by the statute are solidarily liable for such injury (s. 10 para. 4). An amount granted “bears interest from the date the work is accepted by the public body concerned for the contract concerned” (s. 11 para. 3). As well, the court “must add a lump sum equal to 20% of any amount granted for injury, to cover expenses incurred for the purposes of th[e] Act” (s. 14).

Les entreprises et les personnes physiques visées au présent article sont solidairement responsables du préjudice causé, à moins que l’organisme public n’y renonce.

[39] Nous ne partageons pas cette interprétation de la Ville. Il appartient aux tribunaux de conclure qu’une fraude de cette nature a été commise. Plus précisément, nous estimons que la Ville confond deux régimes créés par la Loi 26 : l’un introduit par le chapitre II — le PRV — (art. 3 à 9), l’autre par le chapitre III intitulé « Règles particulières applicables aux recours judiciaires » (art. 10 à 17). Le premier régime a été conçu afin d’inciter, pendant une période de deux ans, les personnes physiques ou les entreprises craignant qu’un organisme public introduise contre elles une poursuite civile à participer au PRV dans le but de conclure une entente en toute confidentialité (art. 7 de la Loi 26; art. 4 du règlement PRV). Or, ce n’est qu’une fois que le premier régime prend fin que le second entre en vigueur, lequel est d’une toute autre nature.

[40] Le régime prévu aux art. 10 à 17 de la Loi 26 est un régime exorbitant du droit commun, applicable aux recours judiciaires intentés par un organisme public ou le ministre de la Justice, pour le compte d’un organisme public, contre une personne physique ou une entreprise qui aurait participé à une fraude visant un contrat public. Lorsqu’un tel recours est accueilli, non seulement le tribunal peut-il tenir pour acquis que le défendeur a causé par son acte frauduleux un préjudice à l’organisme public (art. 10 al. 1), mais aussi que « [c]e préjudice est présumé correspondre à la somme réclamée par l’organisme public concerné pour le contrat visé lorsque cette somme ne représente pas plus de 20 % du montant total payé pour le contrat visé » (art. 11 al. 1), préjudice pour lequel les entreprises et les personnes physiques visées par la loi sont solidairement responsables (art. 10 al. 4). La somme accordée « porte intérêt à compter de la réception de l’ouvrage par l’organisme public concerné pour le contrat visé » (art. 11 al. 3). De même, le tribunal « doit ajouter à la somme qu’il accorde en réparation du préjudice un montant forfaitaire égal à 20 % de cette somme à titre de frais engagés pour l’application de la [. . .] loi » (art. 14).

[41] In other words, these provisions are designed to make it easier to prove causation and injury when such a proceeding is brought, but it should be noted that they are of no effect if a court finds that the evidence of fraud is insufficient; as well, and most importantly, they in no way make it easier to prove such a fault. Section 10 of Bill 26 is therefore of no assistance to the City, which in any event has not sought to show, on any basis other than the mere existence of the VRP agreement, that SM Group took part in fraud in connection with a contract the City awarded to it. The schemes created by Bill 26 suggest that a court will recognize the existence of fraud only under the Chapter III scheme. Moreover, it appears that the reference to s. 10 in s. 3 merely serves to specify the natural persons to whom the VRP applies, namely directors and officers of enterprises.

[42] Lastly, it should be mentioned that it can easily be imagined that an enterprise that entered into a potentially contentious public contract with a public body would make the strategic choice to participate in the VRP out of fear of bad publicity or to avoid exposing itself to the exceptional scheme of Chapter III of Bill 26, the result of which, if the proceeding were decided in the public body's favour, would likely be significant additional financial liability for the enterprise on top of the legal fees it would have to pay.

[43] In sum, neither the content of the VRP agreement nor its legal framework supports a presumption that SM Group admitted to having committed a fraudulent act; nor does the VRP agreement constitute a serious, precise and concordant presumption of fact (art. 2849 of the *Civil Code of Québec*). It follows that the City has not shown that the VRP claim falls within s. 19(2)(d) of the CCAA.

(2) Compensation Between Debts Arising Before and After an Initial Order (Pre-post Compensation)

[44] The bankruptcy of large companies often resulted in “the entire disruption of the corporation,

[41] Autrement dit, ces dispositions visent à faciliter la preuve du lien de causalité et du préjudice lorsqu'un tel recours est intenté, mais, faut-il le souligner, elles demeurent sans effet dans l'éventualité où un tribunal judiciaire conclut que la preuve relative à la fraude s'avère insuffisante; aussi, et surtout, elles ne facilitent en aucun cas la preuve d'une telle faute. Partant, l'art. 10 de la Loi 26 n'est d'aucun secours pour la Ville, qui, de toute manière, n'a pas cherché à démontrer, autrement qu'en invoquant la seule existence de l'entente PRV, que Groupe SM a participé à une fraude dans le cadre d'un contrat qu'elle lui a octroyé. À en juger par les régimes mis en œuvre par cette loi, la reconnaissance judiciaire de l'existence d'une fraude n'intervient que dans le régime propre au chapitre III de celle-ci. De plus, il appert que le renvoi à l'art. 10 dans l'art. 3 ne sert qu'à préciser quelles sont les personnes physiques visées par le PRV, en l'occurrence les administrateurs et dirigeants des entreprises.

[42] En dernier lieu, il convient de souligner qu'il est facile d'imaginer qu'une entreprise ayant conclu un contrat public possiblement litigieux avec un organisme public fasse le choix stratégique de participer au PRV par crainte de mauvaise publicité ou encore pour éviter de s'exposer au régime exorbitant prévu au chapitre III de la Loi 26, lequel serait susceptible d'emporter pour elle, si le recours était accueilli en faveur de l'organisme, une responsabilité financière additionnelle non négligeable, en sus des frais juridiques qu'elle aurait à déboursier.

[43] En somme, ni le contenu de l'entente PRV ni le cadre juridique qui lui est propre ne permettent de présumer que Groupe SM a admis avoir commis un acte frauduleux, pas plus que l'entente PRV ne constitue une présomption de fait grave, précise et concordante (art. 2849 du *Code civil du Québec*). Il s'ensuit que la Ville n'a pas démontré que la créance PRV relevait de l'al. 19(2)d) de la LACC.

(2) Compensation entre des dettes nées avant et après le prononcé de l'ordonnance initiale (compensation pré-post)

[44] La mise en faillite des grandes compagnies a fréquemment mené à [TRADUCTION] « la

loss of goodwill, and sale of assets on a discounted basis” (J. P. Sarra, *Rescue! The Companies’ Creditors Arrangement Act* (2nd ed. 2013), at pp. 22-23; see also *Century Services*, at para. 16). Parliament, wishing to protect the survivability of such companies, which are essential to economic prosperity and to a high rate of employment, therefore set up a restructuring process in the CCAA that was designed to prevent them from being dismantled and having their assets liquidated at a discount (*Century Services*, at paras. 17-18 and 70; *Callidus*, at paras. 41-42).

[45] Initially, restructuring under the CCAA was done through a plan of arrangement or compromise negotiated between the debtor company and its creditors that averted the company’s bankruptcy by allowing it to adjust its debts and reorganize its business (S. E. Edwards, “Reorganizations Under the Companies’ Creditors Arrangement Act” (1947), 25 *Can. Bar Rev.* 587, at pp. 588-90 and 592). Later, liquidation under the CCAA emerged as a practice. Liquidation can also serve as a tool for restructuring a struggling business “by allowing the business to survive, albeit under a different corporate form or ownership” (*Callidus*, at para. 45; see also Sarra, at p. 169; K. P. McElcheran, *Commercial Insolvency in Canada* (4th ed. 2019), at p. 311).

[46] The primary tool that allows the CCAA to achieve its restructuring objective is a stay of proceedings and of creditors’ rights (Sarra, at pp. 17 and 52; McElcheran, at p. 5). The direct effect of a stay is that it creates a status quo period that stabilizes the debtor company’s situation by shielding it from its creditors while the restructuring process is under way (*Century Services*, at para. 60; see also *Kitco*, at para. 43 (CanLII)). Without such a period, there would be a free-for-all in which individual creditors would fight it out to enforce their rights without regard for the company’s survival or the maximization of its liquidation value (*Century Services*, at para. 22).

[47] During the status quo period, the debtor company can therefore continue operating without fear of being driven into bankruptcy by its creditors. This

perturbation complète des activités de l’entreprise, à la perte de sa clientèle et à la vente à rabais de son actif » (J. P. Sarra, *Rescue! The Companies’ Creditors Arrangement Act* (2^e éd. 2013), p. 22-23; voir aussi *Century Services*, par. 16). Le législateur, soucieux de protéger la capacité de survie de ces compagnies essentielles à la prospérité économique et à un taux d’emploi élevé, a donc mis en place dans la LACC un processus de restructuration destiné à éviter leur démantèlement et la liquidation à rabais de leurs actifs (*Century Services*, par. 17-18 et 70; *Callidus*, par. 41-42).

[45] Initialement, la restructuration sous le régime de la LACC se faisait au moyen d’un plan d’arrangement ou de transaction négocié entre la compagnie débitrice et ses créanciers qui évitait sa mise en faillite en lui permettant de rajuster ses dettes et de réorganiser ses affaires (S. E. Edwards, « Reorganizations Under the Companies’ Creditors Arrangement Act » (1947), 25 *R. du B. can.* 587, p. 588-590 et 592). Puis a émergé, en application de la LACC, une pratique de liquidation qui peut elle aussi constituer un outil de restructuration de l’entreprise en difficulté « en lui permettant de survivre, quoique sous une forme corporative différente ou sous la gouverne de propriétaires différents » (*Callidus*, par. 45; voir aussi Sarra, p. 169; K. P. McElcheran, *Commercial Insolvency in Canada* (4^e éd. 2019), p. 311).

[46] L’instrument principal qui permet à la LACC de réaliser son objectif de restructuration est la suspension des procédures et des droits des créanciers (Sarra, p. 17 et 52; McElcheran, p. 5). L’effet direct de la suspension est qu’elle instaure une période de statu quo qui stabilise la situation de la compagnie débitrice en la mettant à l’abri de ses créanciers pendant que la restructuration suit son cours (*Century Services*, par. 60; voir aussi *Kitco*, par. 43). L’absence d’une telle période entraînerait une situation anarchique où chaque créancier se battraient pour faire valoir ses droits, sans égard à la survie de l’entreprise ou à la maximisation de sa valeur de liquidation (*Century Services*, par. 22).

[47] Durant cette période, la compagnie débitrice peut donc poursuivre ses activités sans craindre d’être poussée à la faillite par ses créanciers. Ce

temporary respite creates an environment conducive to fair negotiations between the various stakeholders and gives the debtor the necessary time to prepare a plan of compromise or arrangement ensuring its survival, or to take steps to maximize the value of the business it operates with a view to its liquidation under the CCAA (*Meridian Developments Inc. v. Toronto Dominion Bank* (1984), 32 Alta. L.R. (2d) 150 (Q.B.), at para. 15; *Kitco*, at para. 43; *Callidus*, at paras. 40 and 46).

[48] The fundamental feature of the CCAA is a grant to the courts that apply it of a broad discretion to make any orders needed to ensure that restructuring is successful and that the CCAA's objectives are achieved (*Century Services*, at para. 19). The true “engine” driving the statutory scheme (*Callidus*, at para. 48, citing *Stelco Inc. (Re)* (2005), 253 D.L.R. (4th) 109 (Ont. C.A.), at para. 36), this judicial discretion also plays a prominent part in stays of proceedings.

[49] In principle, a court may deny a stay application. Such applications are rarely denied, however, to the point where the terms “initial order” and “stay order” have, in practice, become interchangeable (*Sarra*, at p. 51). Stays are in fact requested and granted systematically, other than in certain exceptional cases (p. 51).

[50] A stay is a temporary measure, however; once it has been lifted, creditors regain their ability to fully exercise their rights and remedies (*Quinsam Coal Corp., Re*, 2000 BCCA 386, 20 C.B.R. (4th) 145, at paras. 9 and 14). On an initial application in respect of a debtor company, a court may include in its initial order a first stay period of no more than 10 days (s. 11.02(1) of the CCAA). After that, the court may renew the stay for any period it considers necessary (s. 11.02(2) of the CCAA). When a stay is renewed, or at any other time in the course of the proceedings, an interested creditor may, in accordance with the procedure set out in the initial order, apply to the court to lift a stay affecting any of its rights or remedies (*Sarra*, at pp. 58-60 and 88; see also *Muscletech Research & Development Inc., Re*

moment de répit crée un environnement propice à une négociation équitable entre les différentes parties prenantes, en plus d’offrir à la débitrice le temps nécessaire pour préparer un plan de transaction ou d’arrangement assurant sa survie ou pour prendre des mesures maximisant la valeur de l’entreprise qu’elle exploite en vue de sa liquidation en vertu de la LACC (*Meridian Developments Inc. c. Toronto Dominion Bank* (1984), 32 Alta. L.R. (2d) 150 (B.R.), par. 15; *Kitco*, par. 43; *Callidus*, par. 40 et 46).

[48] La caractéristique fondamentale de la LACC est l’attribution au tribunal chargé de son application d’un vaste pouvoir discrétionnaire lui permettant de rendre les ordonnances nécessaires pour mener à bon port la restructuration et atteindre les objectifs de la LACC (*Century Services*, par. 19). Véritable « moteur » du régime législatif (*Callidus*, par. 48, citant *Stelco Inc. (Re)* (2005), 253 D.L.R. (4th) 109 (C.A. Ont.), par. 36), ce pouvoir discrétionnaire du tribunal joue également un rôle de premier plan dans le cadre de la suspension des procédures.

[49] En principe, le tribunal peut refuser une demande de suspension. Ces demandes sont toutefois rarement refusées, à tel point que les termes « ordonnance initiale » et « ordonnance de suspension » sont devenus, en pratique, interchangeables (*Sarra*, p. 51). La suspension est en effet demandée et accordée systématiquement, si ce n’est dans certains cas exceptionnels (p. 51).

[50] La suspension est cependant une mesure temporaire; une fois levée, les créanciers retrouvent la capacité d’exercer pleinement leurs droits et recours (*Quinsam Coal Corp., Re*, 2000 BCCA 386, 20 C.B.R. (4th) 145, par. 9 et 14). Dans le cas d’une demande initiale visant une compagnie débitrice, le tribunal peut assortir son ordonnance initiale d’une première période de suspension d’une durée maximale de 10 jours (par. 11.02(1) de la LACC). Par la suite, la suspension peut être renouvelée par le tribunal pour la période qu’il estime nécessaire (par. 11.02(2) de la LACC). Au moment du renouvellement de la suspension, ou à tout autre moment au cours des procédures, un créancier intéressé peut, conformément à la procédure prévue à cet effet dans l’ordonnance initiale, demander au tribunal de lever

(2006), 19 C.B.R. (5th) 54 (Ont. S.C.J.), at para. 5; *Parc industriel Laprade inc. v. Conporec inc.*, 2008 QCCA 2222, [2008] R.J.Q. 2590, at paras. 7-8 and 14-15).

[51] While it is true that the *BIA* and the *CCAA* form part of an integrated body of insolvency law, there are nonetheless some fundamental differences between the two schemes (*Century Services*, at para. 78). Unlike the *BIA*, the *CCAA* gives courts a broad discretion to decide whether a stay is appropriate, to determine how long it should last and to adjust its scope depending on what is needed to restructure the debtor company and to achieve the objectives of the *CCAA*. In this regard, the *CCAA* has been described as a “skeletal” statute that does not contain “a comprehensive code that lays out all that is permitted or barred” (*Century Services*, at para. 57, quoting *Metcalf & Mansfield Alternative Investments II Corp. (Re)*, 2008 ONCA 587, 92 O.R. (3d) 513, at para. 44).

[52] To fully understand the rights and restrictions applicable in a given case, it is therefore not enough to read the legislation; it is also important to consider the court’s exercise of its discretion, which is reflected in all of the many orders made throughout the proceedings.

[53] The question raised by this appeal is therefore whether a court’s discretion allows it to stay a right to pre-post compensation, or set-off, invoked by a creditor under the civil law or the common law and, by extension, to authorize pre-post compensation in appropriate cases.

(a) *Power to Grant and Lift a Stay of the Right to Pre-post Compensation*

[54] In our view, the broad discretion conferred on a court by ss. 11 and 11.02 of the *CCAA* allows it to stay rights held by creditors if the exercise of those rights could jeopardize the restructuring process.

la suspension affectant l’un de ses droits ou recours (Sarrazin, p. 58-60 et 88; voir aussi *Muscletech Research & Development Inc., Re* (2006), 19 C.B.R. (5th) 54 (C.S.J. Ont.), par. 5; *Parc industriel Laprade inc. c. Conporec inc.*, 2008 QCCA 2222, [2008] R.J.Q. 2590, par. 7-8 et 14-15).

[51] Bien que la *LFI* et la *LACC* fassent partie d’un ensemble intégré de règles du droit de l’insolvabilité, il existe tout de même des différences fondamentales entre les deux régimes (*Century Services*, par. 78). En effet, contrairement à ce qui prévaut sous la *LFI*, la *LACC* confère au tribunal un large pouvoir discrétionnaire lui permettant de décider de l’opportunité d’une suspension, de déterminer la durée de celle-ci et d’en ajuster la portée selon les besoins de la restructuration et selon ce qui est nécessaire pour réaliser les objectifs de la *LACC*. En ce sens, la *LACC* a été décrite comme une loi [TRADUCTION] « schématique » ne contenant « pas un code complet énonçant tout ce qui est permis et tout ce qui est interdit » (*Century Services*, par. 57, citant *Metcalf & Mansfield Alternative Investments II Corp. (Re)*, 2008 ONCA 587, 92 O.R. (3d) 513, par. 44).

[52] Pour bien saisir les droits et restrictions applicables dans un cas donné, il ne suffit donc pas de lire la loi; il faut également se pencher sur l’exercice par le tribunal de son pouvoir discrétionnaire, lequel se manifeste dans toute la multitude d’ordonnances rendues tout au long des procédures.

[53] La question que soulève le présent pourvoi consiste donc à déterminer si le pouvoir discrétionnaire dont dispose le tribunal lui permet de suspendre le droit d’opérer compensation pré-post qu’invoque un créancier en vertu du droit civil ou de la common law et, corollairement, d’autoriser la compensation pré-post dans les cas qui s’y prêtent.

a) *Pouvoir d’accorder et de lever une suspension du droit à la compensation pré-post*

[54] Nous sommes d’avis que le vaste pouvoir discrétionnaire conféré au tribunal par les art. 11 et 11.02 de la *LACC* permet à celui-ci de suspendre des droits reconnus aux créanciers mais dont l’exercice

This includes a creditor's right to effect pre-post compensation.

[55] Under s. 11.02 of the CCAA, a court may stay any action, suit or other proceeding that might be brought against the debtor company. Despite the language of s. 11.02, which at first glance limits the power to order a stay to judicial proceedings, the courts have taken a large and liberal approach in interpreting the scope of the rights and remedies that can be included in a stay order (see *Meridian*, at para. 26; *Quintette Coal Ltd. v. Nippon Steel Corp.* (1990), 51 B.C.L.R. (2d) 105 (C.A.), at pp. 113-14; *Smoky River Coal Ltd., Re*, 1999 ABCA 179, 71 Alta. L.R. (3d) 1, at paras. 31-33; McElcheran, at pp. 135 and 245-46; R. J. Wood, *Bankruptcy and Insolvency Law* (2nd ed. 2015), at p. 363). For example, in *Quintette Coal*, the British Columbia Court of Appeal concluded that a creditor's right to pre-post set-off can be stayed just like any other enforcement measure with a high disruptive potential (see also *Associated Investors of Canada Ltd. (Manager of) v. Principal Savings & Trust Co. (Liquidator of)* (1993), 13 Alta. L.R. (3d) 115 (C.A.), at paras. 23-24; *North American Tungsten Corp., Re*, 2015 BCCA 390, 377 B.C.A.C. 6, at paras. 13-16, aff'd 2015 BCCA 426, 378 B.C.A.C. 116, at paras. 28-30). In our view, this interpretation is the correct one, as it advances the CCAA's remedial objectives and is consistent with its scheme.

[56] It can also be seen from the various model initial orders adopted by the country's superior courts that prohibitions against setting off debts are standard practice, and in the vast majority of cases take effect as soon as an initial order is made (see Court of Queen's Bench of Alberta, *Alberta Template CCAA Initial Order*, January 2019 (online), at paras. 14 and 16; Supreme Court of British Columbia, *Model CCAA Initial Order*, August 1, 2015 (online), at paras. 16 and 18; Ontario Superior Court of Justice, Commercial List, *Initial Order*, January 21, 2014 (online), at paras. 15-16; Superior Court of Quebec, Commercial Division, *Initial Order*, May 2014 (online), at paras. 10 and 12; Court of Queen's Bench for

serait susceptible de mettre en péril la restructuration, y compris le droit d'opérer compensation pré-post.

[55] L'article 11.02 de la LACC permet de suspendre toute action, poursuite ou autre procédure pouvant être intentée contre la compagnie débitrice. Malgré le texte de l'art. 11.02, qui limite à première vue aux procédures judiciaires l'application du pouvoir de suspension, la jurisprudence interprète de manière large et libérale l'étendue des droits et recours susceptibles d'être inclus dans une ordonnance de suspension (voir *Meridian*, par. 26; *Quintette Coal Ltd. c. Nippon Steel Corp.* (1990), 51 B.C.L.R. (2d) 105 (C.A.), p. 113-114; *Smoky River Coal Ltd., Re*, 1999 ABCA 179, 71 Alta. L.R. (3d) 1, par. 31-33; McElcheran, p. 135 et 245-246; R. J. Wood, *Bankruptcy and Insolvency Law* (2^e éd. 2015), p. 363). À titre d'exemple, dans l'arrêt *Quintette Coal*, la Cour d'appel de la Colombie-Britannique a conclu que le droit d'un créancier d'opérer compensation pré-post pouvait être suspendu au même titre que toute autre mesure d'exécution possédant un fort potentiel perturbateur (voir aussi *Associated Investors of Canada Ltd. (Manager of) c. Principal Savings & Trust Co. (Liquidator of)* (1993), 13 Alta. L.R. (3d) 115 (C.A.), par. 23-24; *North American Tungsten Corp., Re*, 2015 BCCA 390, 377 B.C.A.C. 6, par. 13-16, conf. par 2015 BCCA 426, 378 B.C.A.C. 116, par. 28-30). Selon nous, cette interprétation est la bonne, puisqu'elle favorise les objectifs réparateurs de la LACC, en plus d'être cohérente avec l'économie de cette loi.

[56] À la lumière des divers modèles d'ordonnances initiales adoptés par les cours supérieures du pays, on constate d'ailleurs que l'interdiction d'opérer compensation entre des dettes est pratique courante et que, dans la très vaste majorité des cas, une telle interdiction entre en vigueur dès le prononcé de l'ordonnance initiale (voir Cour du Banc de la Reine de l'Alberta, *Alberta Template CCAA Initial Order*, janvier 2019 (en ligne), par. 14 et 16; Cour suprême de la Colombie-Britannique, *Model CCAA Initial Order*, 1^{er} août 2015 (en ligne), par. 16 et 18; Cour supérieure de justice de l'Ontario, rôle des affaires commerciales, *Ordonnance initiale*, 21 janvier 2014 (en ligne), par. 15-16; Cour supérieure du Québec,

Saskatchewan, *Saskatchewan Template CCAA Initial Order*, December 6, 2017 (online), at paras. 15-16).

[57] A court’s discretion is therefore broad enough to allow it to stay the right of creditors to effect pre-post compensation. In such a case, the prohibition against pre-post compensation flows directly from the stay order. Conversely, a court may in its discretion refuse to impose such a prohibition or, if pre-post compensation was stayed by the order, lift the stay at a later date to allow an interested creditor to assert its rights. On this point, we reject the absolute prohibition proposed by the Quebec Court of Appeal in *Kitco*, because we conclude that a court has the discretion to allow pre-post compensation in appropriate cases.

[58] The instances in which a court should not stay the right to effect pre-post compensation in an initial order will be rare, however. It must be borne in mind that a supervising judge’s discretion, although broad, is not boundless. It must be exercised in furtherance of the CCAA’s remedial objectives (*Callidus*, at para. 49).

[59] The status quo period could be rendered pointless if creditors were allowed to effect pre-post compensation without restraint (see *Kitco*, at paras. 20 and 43). *Tungsten*, in which the court stayed pre-post set-off, provides a good example of the disruptive potential of this form of set-off (*North American Tungsten Corp., Re*, 2015 BCSC 1382, 28 C.B.R. (6th) 147 (“*Tungsten* (S.C.)”), at para. 32, aff’d 2015 BCCA 390, 377 B.C.A.C. 6, at paras. 16, 20 and 25, and 2015 BCCA 426, 378 B.C.A.C. 116, at para. 29). If a creditor could rely on compensation to refuse to pay for goods or services supplied by the debtor during the status quo period, the restructuring could be torpedoed. The debtor would have a disincentive to provide its creditors with goods and services because it would fear not being paid for them; it would then be deprived of the funds needed to continue

Chambre commerciale, *Ordonnance initiale*, mai 2014 (en ligne), par. 10 et 12; Cour du Banc de la Reine de la Saskatchewan, *Saskatchewan Template CCAA Initial Order*, 6 décembre 2017 (en ligne), par. 15-16).

[57] Le pouvoir discrétionnaire dont dispose le tribunal est donc suffisamment large pour lui permettre de suspendre le droit des créanciers d’opérer compensation pré-post. Dans un tel cas, l’interdiction d’opérer compensation pré-post découle directement de l’ordonnance de suspension. En revanche, le tribunal peut à sa discrétion refuser d’imposer une telle interdiction ou, si la compensation pré-post a été suspendue par l’ordonnance, lever cette suspension par la suite pour permettre à un créancier intéressé de faire valoir ses droits. Sur ce point, nous écartons l’interdiction absolue proposée par la Cour d’appel du Québec dans l’arrêt *Kitco*, puisque nous concluons que le tribunal possède le pouvoir discrétionnaire de permettre la compensation pré-post dans les cas qui s’y prêtent.

[58] Rares seront toutefois les occasions où un tribunal ne devrait pas suspendre le droit d’opérer compensation pré-post dans l’ordonnance initiale. Faut-il le rappeler, le pouvoir discrétionnaire du juge surveillant, quoique vaste, n’est pas sans limites. Il doit tendre à la réalisation des objectifs réparateurs de la LACC (*Callidus*, par. 49).

[59] En effet, la période de statu quo pourrait devenir lettre morte si l’on permettait aux créanciers d’opérer sans retenue la compensation pré-post (voir *Kitco*, par. 20 et 43). L’affaire *Tungsten*, dans laquelle le tribunal avait suspendu l’exercice de la compensation pré-post constitue un bon exemple du potentiel perturbateur de cette forme de compensation (*North American Tungsten Corp., Re*, 2015 BCSC 1382, 28 C.B.R. (6th) 147 (« *Tungsten* (C.S.) »), par. 32, conf. par 2015 BCCA 390, 377 B.C.A.C. 6, par. 16, 20 et 25, et par 2015 BCCA 426, 378 B.C.A.C. 116, par. 29). Si le créancier pouvait, en invoquant la compensation, refuser de payer le prix pour les biens ou services fournis par la débitrice pendant la période de statu quo, la restructuration risquerait d’être torpillée. La débitrice serait incitée à ne fournir ni biens ni services à ses créanciers par

operating (see *Kitco*, at paras. 46-48). Section 32 of the CCAA in fact gives the debtor a right — subject to the limits and formal requirements provided for in that provision — to disclaim or resiliate any agreement to which it is a party on the day on which the restructuring proceedings commence. In addition, an interim lender would most likely refuse to continue to finance the debtor’s operations during this period if the loaned funds were destined to enrich another creditor at its expense. Lastly, the rampart set up by a stay to protect against attacks from all sides by creditors would also crumble, thereby increasing the risk of the debtor’s collapse and bankruptcy (see also A. R. Anderson, T. Gelbman and B. Pullen, “Recent Developments in the Law of Set-off”, in J. P. Sarra, ed., *Annual Review of Insolvency Law 2009* (2010), 1, at pp. 22 and 29).

[60] The inevitable interruption of the business relationship between the debtor and those who are at once creditors and customers could not come at a worse time. Without these contracts and without the payment of accounts receivable and interim financing to replenish the debtor’s working capital, the resale value of its business would melt away, thus setting up roadblocks for restructuring it by way of liquidation. And such a situation could also be unfavourable to creditors that wish to effect compensation. If the debtor terminates a contract and refuses to perform it, the creditor concerned will be deprived of the benefit of the contract and will have to find a new contracting party in place of the debtor, with no guarantee that the price will remain the same.

[61] Furthermore, where pre-post compensation has been stayed, the court retains the discretion to lift the stay based on the specific facts of each case. However, it must be cautious in doing so, given the high disruptive potential of such compensation.

[62] In conclusion, we are of the view that ss. 11 and 11.02 of the CCAA authorize a court to stay pre-post compensation. Although we would temper the rule from *Kitco*, which involves an absolute prohibition against pre-post compensation, it is our view

crainte de ne pas être payée en retour; elle serait alors privée des fonds nécessaires pour poursuivre ses opérations (voir *Kitco*, par. 46-48). L’article 32 de la LACC lui donne justement le droit de résilier tout contrat auquel elle est partie à la date à laquelle les procédures de restructuration ont été intentées, sous réserve des limites et formalités qui sont prévues par cette disposition. De plus, le prêteur intérimaire refuserait fort probablement de continuer à financer les opérations de la débitrice durant cette période, si les sommes prêtées sont destinées à enrichir un autre créancier à son détriment. Enfin, le rempart érigé par la suspension contre les attaques tous azimuts des créanciers s’effriterait lui aussi, augmentant ainsi les risques de déconfiture et de faillite de la débitrice (voir aussi A. R. Anderson, T. Gelbman et B. Pullen, « Recent Developments in the Law of Set-off », dans J. P. Sarra, dir., *Annual Review of Insolvency Law 2009* (2010), 1, p. 22 et 29).

[60] L’inévitable interruption de la relation d’affaires entre la débitrice et ceux qui sont à la fois créanciers et clients ne pourrait intervenir à un pire moment. Sans ces contrats et sans un fonds de roulement regarni par le paiement des comptes à recevoir et le financement intérimaire, la valeur de revente de l’entreprise exploitée par la débitrice s’atrophierait, dressant alors des écueils à sa restructuration par voie de liquidation. Par ailleurs, une telle situation peut également être défavorable pour le créancier qui désire opérer compensation. Si la débitrice met fin au contrat et refuse de s’exécuter, le créancier concerné sera privé du bénéfice du contrat et devra trouver un nouveau cocontractant à la place de la débitrice, sans garantie que le prix restera le même.

[61] En outre, lorsque la compensation pré-post a été suspendue, le tribunal conserve le pouvoir discrétionnaire de lever la suspension selon les faits particuliers de chaque affaire. Cependant, il doit faire preuve de prudence, considérant le fort potentiel perturbateur d’une telle compensation.

[62] Pour conclure, nous sommes d’avis que les art. 11 et 11.02 de la LACC autorisent le tribunal à suspendre l’exercice de la compensation pré-post. Tout en tempérant la règle énoncée dans l’arrêt *Kitco*, qui interdisait de manière absolue la compensation

that in the vast majority of cases an initial order will, and should, stay a creditor's right to set up pre-post compensation against the debtor. Finally, where an initial order has stayed the right of creditors to pre-post compensation, the court retains the discretion to lift the stay having regard to the circumstances.

(b) *Scope of Section 21 of the CCAA*

[63] In addition, we note that s. 21 of the CCAA does not grant creditors a right to pre-post compensation that would be shielded from a supervising judge's power to order a stay under ss. 11 and 11.02 of the CCAA. Although s. 21 of the CCAA indicates that there is a right to effect compensation in proceedings under that statute, we are of the opinion that it applies only to compensation between debts that arise *before an initial order is made* (in other words, "pre-pre compensation"). The modern approach to statutory interpretation dictates this conclusion (*Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21, citing E. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87). Our interpretation of s. 21 of the CCAA is not based on an inappropriate analogy with the provisions of the BIA.

[64] Section 21 does state that it is possible to effect compensation in insolvency proceedings under the CCAA, but it does not specifically deal with pre-post compensation. It reads as follows:

Law of set-off or compensation to apply

21 The law of set-off or compensation applies to all claims made against a debtor company and to all actions instituted by it for the recovery of debts due to the company in the same manner and to the same extent as if the company were plaintiff or defendant, as the case may be.

Read in light of its context, its purpose and the scheme of the CCAA, s. 21 is, in our view, limited to authorizing pre-pre compensation for the purpose

pre-post, nous estimons que, dans la très vaste majorité des cas, l'ordonnance initiale suspendra, et devrait suspendre, le droit d'un créancier d'opposer à la débitrice une telle forme de compensation. Finalement, lorsque l'ordonnance initiale a suspendu le droit des créanciers à la compensation pré-post, le tribunal conserve le pouvoir discrétionnaire de lever la suspension en fonction des circonstances.

(b) *La portée de l'art. 21 de la LACC*

[63] Nous soulignons par ailleurs que l'art. 21 de la LACC ne confère pas aux créanciers un droit à la compensation pré-post qui serait à l'abri du pouvoir de suspension dont dispose le juge surveillant en vertu des art. 11 et 11.02 de la LACC. Bien que l'art. 21 de la LACC atteste d'un droit d'opérer compensation dans le cadre des procédures prises sous cette loi, nous sommes d'avis qu'il ne vise que la compensation entre des dettes nées *avant le prononcé de l'ordonnance initiale* (autrement dit, la « compensation pré-pré »). Cette conclusion s'impose suivant la méthode moderne d'interprétation des lois (*Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 R.C.S. 27, par. 21, citant E. Driedger, *Construction of Statutes* (2^e éd. 1983), p. 87). Notre interprétation de l'art. 21 de la LACC ne repose pas sur une analogie inappropriée avec les dispositions de la LFI.

[64] En effet, cet article précise qu'il est possible d'opérer compensation dans le cadre de procédures en insolvabilité introduites sous le régime de la LACC, mais il ne traite pas expressément de la compensation pré-post. Cette disposition est rédigée ainsi :

Compensation

21 Les règles de compensation s'appliquent à toutes les réclamations produites contre la compagnie débitrice et à toutes les actions intentées par elle en vue du recouvrement de ses créances, comme si elle était demanderesse ou défenderesse, selon le cas.

Lu à la lumière de son contexte, de son objet et de l'esprit de la LACC, nous sommes d'avis que l'art. 21 se limite à autoriser la compensation pré-pré aux fins

of quantifying creditors' claims on the date of commencement of proceedings.

[65] With regard to the context, s. 21 is in a different part of the statute than the one that provides for a court's discretion to order a stay. The power to order a stay (ss. 11 and 11.02) and most of the exceptions to it (see, e.g., ss. 11.01, 11.08 and 11.1) appear in Part II, which is entitled "Jurisdiction of Courts". Section 21, meanwhile, is in the division of Part III entitled "Claims", which also includes ss. 19 and 20. This indicates that Parliament probably did not consider s. 21 to be an exception to the stay period. If Parliament had in fact intended s. 21 to be an exception, it would have included it in Part II or expressly stated that it was an exception.

[66] What is more, when s. 21 is considered in the broader context of the "Claims" division, it becomes clear that this provision is part of a set of rules governing the claims that may be dealt with by a compromise or arrangement and the quantification of the resulting amounts.

[67] Section 19 specifies which claims may be dealt with by a compromise or arrangement (s. 19(1)) and those which will remain intact despite the creditors' agreement to a compromise or arrangement and its sanction by a court (s. 19(2)). Only claims arising before the date of commencement of bankruptcy or insolvency proceedings are "claims" that fall under s. 19 and therefore give creditors a right to vote on a compromise or arrangement. As for s. 20, it contains rules for determining the amount of claims. Once that amount has been determined, it can then be used to define the relative weight of the voting rights of each creditor with a claim.¹

¹ A plan of compromise or arrangement must be approved by a special majority representing two thirds in value of the creditors or a class of creditors (s. 6(1) of the CCAA).

de quantification des réclamations des créanciers au jour de l'ouverture.

[65] En ce qui concerne le contexte, l'art. 21 fait partie d'une section différente de celle visant le pouvoir discrétionnaire de suspension conféré au tribunal. Le pouvoir de suspension (art. 11 et 11.02) ainsi que la plupart de ses exceptions (voir, p. ex., art. 11.01, 11.08 et 11.1) figurent dans la partie II, intitulée « Juridiction des tribunaux ». Pour sa part, l'art. 21 fait plutôt partie de la section « Réclamations » de la partie III, qui comprend également les art. 19 et 20. Ceci indique que le législateur ne considérerait vraisemblablement pas l'art. 21 comme une exception à la période de suspension. Si son intention avait été plutôt d'en faire une exception, il aurait inclus l'art. 21 dans la partie II ou affirmé expressément qu'il s'agit d'une exception.

[66] Au surplus, il ressort d'un examen de l'art. 21 dans le contexte plus large de la section « Réclamations » que cette disposition fait partie d'un ensemble de règles encadrant les réclamations qui peuvent être considérées dans le cadre d'une transaction ou d'un arrangement et la quantification des montants qui en découlent.

[67] L'article 19 précise quelles sont les réclamations qui peuvent être considérées dans le cadre d'une transaction ou d'un arrangement (par. (1)) et celles qui demeureront intactes malgré l'acceptation par les créanciers d'une transaction ou d'un arrangement et son homologation par le tribunal (par. (2)). Seules les créances ayant pris naissance avant la date d'ouverture des procédures en faillite ou insolvabilité constituent des « réclamations » visées par l'art. 19 et donnent ainsi aux créanciers le droit de voter sur une transaction ou un arrangement. Quant à l'art. 20, il contient des règles permettant de déterminer le montant des réclamations. Une fois déterminé, ce montant permet ensuite de définir le poids relatif du droit de vote de chaque créancier détenant une réclamation¹.

¹ Le plan de transaction ou d'arrangement doit être approuvé par une majorité qualifiée des deux tiers en valeur des créanciers ou d'une catégorie de créanciers (par. 6(1) de la LACC).

[68] Section 21 complements ss. 19 and 20; the compensation authorized by s. 21 is intended, among other things, to determine the value of the claim that a creditor may have against the debtor on the *date of commencement of proceedings*. In other words, the purpose of s. 21 is to provide an accurate picture of the pecuniary interest each creditor has in the restructuring on the date of commencement of proceedings, and of the number of votes each creditor should have (see *Kitco*, at para. 83). This provision is not concerned with what might happen to the debtor's business after that date, because the date of commencement of proceedings is when [TRANSLATION] “the claims must be established” and therefore when the mutuality of debts must be assessed (B. Boucher, “Procédures en vertu de la *Loi sur les arrangements avec les créanciers des compagnies*”, in *JurisClasseur Québec — Collection Droit des affaires — Faillite, insolvabilité et restructuration* (loose-leaf), by S. Rousseau, ed., fasc. 14, at No. 70; see also *Kitco*, at para. 34).

[69] With all due respect for our colleague, in light of the context of s. 21, it is evident that this provision is not meant to legitimize pre-post compensation.

[70] This contextual interpretation of s. 21, which limits its scope to pre-pre compensation, is also confirmed by the section's purpose. It was added to the CCAA to prevent the unfair situation that would result from a creditor being required to pay its debt to the debtor company in full but receiving almost nothing from the debtor in payment of its claim under an arrangement or compromise. The effect of s. 21 is that the creditor receives payment of its claim up to the value of the debt it owes to the debtor (Anderson, Gelbman and Pullen, at p. 27; Boucher, at No. 70; McElcheran, at p. 116).

[71] It is true that compensation “creat[es] a type of security interest in the [insolvent company's] estate” because it “[authorizes] the party claiming set-off [to] ‘reorde[r]’ . . . his priority” by reducing the value of that party's claim (*Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453, at paras. 59-60; see *Kitco*, at paras. 63-68). The

[68] L'article 21 complète les art. 19 et 20; la compensation autorisée par l'art. 21 vise, entre autres, à déterminer la valeur de la réclamation qu'un créancier peut avoir contre la débitrice au *jour de l'ouverture*. Autrement dit, l'art. 21 vise à donner l'heure juste sur l'intérêt pécuniaire que détient chaque créancier dans la restructuration au jour de l'ouverture et le nombre de votes dont il devrait disposer (voir *Kitco*, par. 83). Cette disposition s'intéresse peu à ce qui pourrait se passer postérieurement à cette date dans les affaires de la débitrice; en effet, c'est au jour de l'ouverture que « doivent être établies les réclamations » et donc que la réciprocité des dettes doit s'apprécier (B. Boucher, « Procédures en vertu de la *Loi sur les arrangements avec les créanciers des compagnies* », dans *JurisClasseur Québec — Collection Droit des affaires — Faillite, insolvabilité et restructuration* (feuilles mobiles), par S. Rousseau, dir., fasc. 14, n° 70; voir aussi *Kitco*, par. 34).

[69] Avec égards pour l'opinion de notre collègue, à la lumière du contexte de l'art. 21, il est apparent que cette disposition n'a pas pour vocation de légitimer la compensation pré-post.

[70] Cette interprétation contextuelle de l'art. 21, qui limite son champ d'application à la compensation pré-pré, est également confirmée par son objet. Cette disposition a été ajoutée à la LACC afin de prévenir l'injustice qui résulterait du fait qu'un créancier serait tenu de payer intégralement sa dette à la compagnie débitrice, mais ne recevrait presque rien de la débitrice en paiement de sa créance aux termes d'un arrangement ou d'une transaction. En raison de l'art. 21, le créancier reçoit paiement de sa créance jusqu'à concurrence de la valeur de la dette qu'il devait à la débitrice (Anderson, Gelbman et Pullen, p. 27; Boucher, n° 70; McElcheran, p. 116).

[71] Il est vrai que la compensation « crée une sorte de garantie sur l'actif de la [compagnie insolvable] », parce qu'elle « autorise la partie qui invoque la compensation à “modifier” l'ordre de priorité » en réduisant la valeur de sa créance (*Husky Oil Operations Ltd. c. Ministre du Revenu national*, [1995] 3 R.C.S. 453, par. 59-60; voir *Kitco*, par. 63-68). Le créancier

creditor uses its indebtedness to the debtor as a form of security for its claim, security that is equal in value to its debt to the insolvent company (*Stein v. Blake*, [1996] 1 A.C. 243 (H.L.), at p. 251). This portion of its claim is therefore sure to be paid in full (*Husky Oil*, at para. 58). The effect of compensation is thus to deviate from the principle of equality among ordinary creditors, a fundamental principle of insolvency law that applies with equal force in proceedings under the CCAA, one of the remedial objectives of which is to ensure the fair and equitable treatment of the claims made against a debtor (*Callidus*, at para. 40). The exception created by compensation must therefore be interpreted narrowly. As a general rule, “[o]nce a formal insolvency process commences, all unsecured creditor remedies are stayed and the creditor must stand in line behind secured and preferred creditors and share any remaining recoveries in the estate *pro rata* with all other unsecured creditors” (McElcheran, at p. 78).

[72] The prejudice suffered by a creditor wishing to effect pre-post compensation does not justify expanding the scope of s. 21. When the debt owed by the creditor arises after a stay order has been made, prejudice is merely illusory. The fact that the creditor contracted obligations toward the debtor company during the stay period does not place it in a worse situation than it would have been in had it contracted with a third party instead. If it had contracted with a third party, it would likewise have had to pay the full price of the goods or services it obtained (*Tungsten* (S.C.), at para. 27). A creditor that contracts with the debtor company during the status quo period knows or ought to know that it will probably receive only pennies on the dollar in payment of its pre-order claim and that payment of its post-order debt will benefit it and the other creditors.

[73] Because there is really prejudice only in the case of pre-pre compensation, this exception to the

se sert de sa dette envers la débitrice comme d’une forme de garantie à l’égard de sa créance, une garantie d’une valeur égale à sa dette envers la compagnie insolvable (*Stein c. Blake*, [1996] 1 A.C. 243 (H.L.), p. 251). Cette portion de sa créance est donc assurée d’être payée en totalité (*Husky Oil*, par. 58). Par ses effets, la compensation déroge ainsi au principe de l’égalité entre les créanciers ordinaires, un principe fondamental du droit de l’insolvabilité qui s’applique avec autant de force dans le cadre de procédures intentées sous le régime de la LACC, dont l’un des objectifs réparateurs vise à assurer un traitement juste et équitable des réclamations déposées contre un débiteur (*Callidus*, par. 40). L’exception créée par la compensation doit donc être interprétée de manière restrictive. En règle générale, [TRADUCTION] « [u]ne fois que s’amorce formellement une procédure en matière d’insolvabilité, tous les recours des créanciers non garantis sont suspendus et chaque créancier doit faire la queue derrière les créanciers garantis et les créanciers privilégiés, et partager avec tous les autres créanciers non garantis, au prorata, toute somme qui reste dans le patrimoine » (McElcheran, p. 78).

[72] Le préjudice subi par un créancier désirant opérer compensation pré-post ne justifie pas d’élargir la portée de l’art. 21. Lorsque la dette due par le créancier prend naissance après le prononcé de l’ordonnance de suspension, le préjudice n’est qu’illusoire. Le fait que le créancier ait contracté des obligations envers la compagnie débitrice durant la période de suspension ne le place pas dans une pire situation que celle dans laquelle il aurait été s’il avait plutôt contracté avec un tiers. S’il avait contracté avec un tiers, il aurait de la même façon été contraint de payer intégralement le prix des produits ou services qu’il a obtenus (*Tungsten* (C.S.), par. 27). Le créancier qui contracte avec la compagnie débitrice durant la période de statu quo sait ou devrait savoir qu’il ne recevra probablement que des sous pour chaque dollar de sa créance pré-ordonnance et que le paiement de sa dette post-ordonnance lui bénéficiera, ainsi qu’aux autres créanciers.

[73] Puisque le préjudice ne se manifeste réellement qu’en ce qui concerne la compensation pré-pré,

principle of equality should apply to only one of the debtor's assets on the date of commencement of insolvency proceedings, that is, the debt owed to it by the creditor (*Kitco*, at para. 68; *Husky Oil*, at para. 59). Otherwise, giving the green light to pre-post compensation would amount to granting certain creditors an additional "type of security interest" in respect of new assets acquired by the debtor after the commencement of proceedings (for example, amounts received as interim financing). Professor Wood aptly describes the injustice that would thus befall the other ordinary creditors whose rights and remedies have been stayed:

The ability to exercise a right of set-off in restructuring proceedings can operate to improve greatly the position of one creditor at the expense of the other creditors. This is illustrated in the following example. Suppose that the debtor company owes \$1,000 to a creditor. The debtor company then initiates restructuring proceedings. While the proceedings are under way, the debtor company sells and delivers goods to the creditor for \$1,000. By exercising its right of set-off, the creditor obtains full recovery of its claim at the expense of the other unsecured creditors whose claims will be compromised or otherwise affected by the plan. [p. 400]

[74] Yet the very purpose of the stay period is to ensure that no creditor gains an advantage over the others while the restructuring of the debtor company is under way (*Woodward's Ltd., Re* (1993), 79 B.C.L.R. (2d) 257 (S.C.), at para. 12; *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. C.J. (Gen. Div.)), at para. 6; *Hawkair Aviation Services Ltd., Re*, 2006 BCSC 669, 22 C.B.R. (5th) 11, at para. 17). Pre-post compensation should not allow a creditor to do indirectly what it cannot do directly. Parliament could not have intended to create such an additional security interest that can be realized during the stay period simply because the creditor and the debtor company have a continuing business relationship.

[75] To repeat, viewing s. 21 as allowing pre-post compensation would undermine the effectiveness of the status quo period, would jeopardize the survival

cette exception au principe de l'égalité ne devrait donc porter que sur un seul des éléments d'actifs de la débitrice au jour de l'ouverture des procédures en insolvabilité, c'est-à-dire la dette du créancier à son endroit (*Kitco*, par. 68; *Husky Oil*, par. 59). Autrement, donner le feu vert à la compensation pré-post équivaldrait à attribuer à certains créanciers une « sorte de garantie » additionnelle sur de nouveaux éléments d'actif acquis par la débitrice après l'ouverture des procédures (par exemple, les sommes reçues à titre de financement intérimaire). Le professeur Wood décrit bien l'injustice qui serait ainsi causée aux autres créanciers ordinaires dont les droits et recours sont suspendus :

[TRADUCTION] La capacité d'exercer un droit d'opérer compensation lors de procédures de restructuration peut avoir pour effet d'améliorer grandement la position d'un créancier au détriment des autres. Voici un exemple qui illustre cette affirmation. Supposons qu'une compagnie débitrice doit 1 000 \$ à un créancier. Cette compagnie entame des procédures de restructuration. Alors que les procédures sont en cours, la compagnie débitrice vend et livre au créancier des biens d'une valeur de 1 000 \$. Exerçant son droit d'opérer compensation, ce dernier recouvre entièrement le montant de sa réclamation, au détriment des autres créanciers non garantis, dont les réclamations seront compromises ou autrement affectées par le plan. [p. 400]

[74] Or, l'objectif de la période de suspension est justement d'empêcher un créancier d'être avantagé par rapport aux autres pendant la restructuration de la compagnie débitrice (*Woodward's Ltd., Re* (1993), 79 B.C.L.R. (2d) 257 (C.S.), par. 12; *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (C.J. Ont. (Div. gén.)), par. 6; *Hawkair Aviation Services Ltd., Re*, 2006 BCSC 669, 22 C.B.R. (5th) 11, par. 17). La compensation pré-post ne devrait pas permettre à un créancier de faire indirectement ce qu'il ne peut faire directement. Le législateur ne peut avoir souhaité créer une telle garantie additionnelle pouvant être réalisée pendant la période de suspension du seul fait que le créancier et la compagnie débitrice ont une relation d'affaires qui se poursuit.

[75] Faut-il le rappeler, considérer que l'art. 21 autorise la compensation pré-post minerait l'efficacité de la période de statu quo, mettrait en péril la survie

of the debtor company or the business it operates and could derail the restructuring process. It is clear that Parliament could not have intended that a struggling company, deprived of its only lifeline, be condemned to drown in its debts solely because a single creditor wanted to gain an advantage over the others. Such an outcome is contrary to the fundamental objectives of the CCAA.

[76] Before concluding, we will pause to briefly discuss *Kitco*. In that case, the Court of Appeal rejected a literal interpretation of s. 21 as allowing all forms of compensation, including pre-post compensation, without any restrictions. Our colleague is of the view that *Kitco*, which was applied by the majority of the Court of Appeal and by the supervising judge in the instant case, has created an asymmetry between the interpretation given to s. 21 of the CCAA by the Quebec courts and the interpretation given to it by the courts of other Canadian provinces. He cites *Air Canada, Re* (2003), 45 C.B.R. (4th) 13 (Ont. S.C.J.), and *Tungsten* in this regard.

[77] In our view, *Kitco* is not at odds with the jurisprudence of the rest of the country on the interpretation of s. 21. *Air Canada* and *Tungsten* did not determine whether pre-post compensation is consistent with the interpretation and objectives of the CCAA, let alone establish a framework for the exercise of this right by creditors.

[78] First of all, in *Air Canada*, the issues did not relate to the impact of pre-post compensation on the achievement of the CCAA's objectives. Rather, the case concerned the requirements for legal set-off at common law and the interpretation of a provision of the *Winding-up and Restructuring Act*, R.S.C. 1985, c. W-11, that was worded differently from s. 18.1 (now s. 21) of the CCAA. On the subject of legal set-off, *Air Canada* argued that the making of an initial order under the CCAA results in a loss of mutuality between debts, by analogy with the vesting of a bankrupt's property in a trustee under the *BIA*. This was the context in which the court found that an

de la compagnie débitrice ou de l'entreprise qu'elle exploite et pourrait faire dérailler la restructuration. Il ne fait aucun doute que le législateur ne peut avoir souhaité qu'une compagnie en difficulté, privée de sa seule bouée de sauvetage, soit condamnée à crouler sous le poids de ses dettes, uniquement parce qu'un seul créancier a souhaité s'avantager au détriment des autres. Un tel résultat va à l'encontre des objectifs fondamentaux de la LACC.

[76] Avant de conclure, nous ouvrons une parenthèse au sujet de l'arrêt *Kitco*. Dans cette affaire, la Cour d'appel a rejeté l'interprétation littérale de l'art. 21 selon laquelle cette disposition autoriserait sans réserve toute forme de compensation, y compris la compensation pré-post. Notre collègue est d'avis que cet arrêt, appliqué par la majorité de la Cour d'appel et la juge surveillante dans la présente affaire, crée une asymétrie entre l'interprétation par les tribunaux québécois de l'art. 21 de la LACC et celle des tribunaux des autres provinces canadiennes. Notre collègue cite à cet égard les affaires *Air Canada, Re* (2003), 45 C.B.R. (4th) 13 (C.S.J. Ont.), et *Tungsten*.

[77] À notre avis, l'arrêt *Kitco* ne s'inscrit pas en faux contre la jurisprudence du reste du pays en ce qui concerne l'interprétation de l'art. 21. En effet, les affaires *Air Canada* et *Tungsten* n'ont pas tranché la question de savoir si la compensation pré-post est conforme à l'interprétation et aux objectifs de la LACC, et encore moins établi les balises entourant l'exercice de ce droit par des créanciers.

[78] D'abord, dans l'affaire *Air Canada*, les questions en litige ne portaient pas sur les répercussions de la compensation pré-post sur la réalisation des objectifs de la LACC. Cette affaire portait plutôt sur les critères de la compensation légale en common law, ainsi que sur l'interprétation d'une disposition de la *Loi sur les liquidations et les restructurations*, L.R.C. 1985, c. W-11, dont le texte différerait de celui de l'art. 18.1 de la LACC (maintenant l'art. 21 de la LACC). Au chapitre de la compensation légale, *Air Canada* prétendait que le prononcé d'une ordonnance initiale en vertu de la LACC entraînait une perte de réciprocité entre

initial order under the CCAA does not alter the status of creditor and debtor of the insolvent company, unlike what happens in a bankruptcy proceeding.

[79] Moreover, in *Tungsten*, the dispute related primarily to the possibility of staying the right to pre-post set-off. The judge who ruled on the applications did not analyze the arguments concerning the effects of pre-post set-off on the status quo period and on the underlying objectives of this period, finding that it was not necessary to do so in the circumstances. Our colleague maintains that the question of whether pre-post set-off could be effected was never raised by the parties, which by implication showed that it was permitted by s. 21 of the CCAA. In our view, the fact that the possibility of effecting pre-post set-off was not argued tends more to weaken the authority of that decision than to strengthen it.

[80] Therefore, and with due respect for the contrary view, the state of the law on the interpretation of s. 21 had not been settled elsewhere in Canada. When ruling in *Kitco*, the Court of Appeal was not bound by *Air Canada* and *Tungsten*.

[81] In summary, we conclude, as the Court of Appeal did in *Kitco*, that s. 21 of the CCAA allows pre-pre compensation for the purpose of quantifying creditors' claims on the date of commencement of proceedings (*Kitco*, at para. 82). This provision does not have the effect of authorizing pre-post compensation. That being said, s. 21 of the CCAA does not prohibit this form of compensation either. A supervising judge therefore retains the discretion to stay or to authorize the exercise of a right to pre-post compensation, or set-off, invoked by a creditor under the civil law or the common law.

[82] We turn now to the situation in this case.

les dettes, par analogie avec la saisine des biens du failli par un syndic sous le régime de la *LFI*. C'est dans ce contexte que le tribunal a conclu que l'ordonnance initiale rendue en application de la *LACC* ne modifie pas les qualités de créancière et de débitrice de la société insolvable, contrairement à une procédure de faillite.

[79] De plus, dans l'affaire *Tungsten*, le litige portait principalement sur la possibilité de suspendre le droit à la compensation pré-post. En première instance, le juge n'a procédé à aucune analyse des arguments relatifs aux impacts de la compensation pré-post sur la période de statu quo et sur les objectifs sous-jacents de cette dernière, estimant qu'il n'était pas nécessaire de le faire dans les circonstances. Notre collègue soutient que la question de savoir si la compensation pré-post pouvait s'opérer n'a jamais été soulevée par les parties, ce qui démontrait implicitement que cette compensation était permise par l'art. 21 de la *LACC*. Selon nous, l'absence de débat sur la possibilité d'opérer compensation pré-post a davantage pour effet d'affaiblir l'autorité de cette décision que de la renforcer.

[80] En conséquence, et avec égards pour l'opinion contraire, l'état du droit n'était pas définitif ailleurs au Canada sur l'interprétation de l'art. 21. Lorsqu'elle s'est prononcée dans l'arrêt *Kitco*, la Cour d'appel n'était pas liée par les affaires *Air Canada* et *Tungsten*.

[81] En somme, à l'instar de la Cour d'appel dans l'arrêt *Kitco*, nous concluons que l'art. 21 de la *LACC* permet la compensation pré-pré aux fins de quantification des réclamations des créanciers au jour de l'ouverture (*Kitco*, par. 82). Cette disposition n'a pas pour effet d'autoriser la compensation pré-post. Cela dit, l'art. 21 de la *LACC* n'a pas non plus pour effet d'interdire cette forme de compensation. Ainsi, le juge surveillant conserve le pouvoir discrétionnaire de suspendre ou d'autoriser l'exercice du droit à la compensation pré-post invoqué par un créancier en vertu du droit civil ou de la common law.

[82] Voyons ce qu'il en est en l'espèce.

(c) *Application*

[83] In the case at bar, the words of the stay order made by the Superior Court are broad enough to prohibit pre-post compensation:

No Exercise of Rights or Remedies

ORDERS that during the Stay Period, and subject to, *inter alia*, subsection 11.1 CCAA, all rights and remedies, including, but not limited to modifications of existing rights and events deemed to occur pursuant to any agreement to which any of the Debtors is a party as a result of the insolvency of the foreign Debtors and/or these CCAA proceedings, any events of default or non-performance by the Debtors or any admissions or evidence in these CCAA proceedings, of any individual, natural person, firm, corporation, partnership, limited liability company, trust, joint venture, association, organization, governmental body or agency, or any other entity (all of the foregoing, collectively being “Persons” and each being a “Person”) against or in respect of the Debtors, or affecting the Business, the Property or any part thereof, are hereby stayed and suspended except with leave of this Court.

...

No Interference with Rights

ORDERS that during the Stay Period, no Person shall discontinue, fail to honour, alter, interfere with, repudiate, resiliate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of or held by the Debtors, except with the written consent of the Debtors, as applicable, and the Monitor, or with leave of this Court. [Emphasis added.]

(A.R., vol. I, at p. 75)

[84] Given that the order stayed compensation in respect of pre-post claims, what remains to be determined is whether the Superior Court should have

c) *Application*

[83] Dans la présente affaire, les termes de l’ordonnance de suspension rendue par le Tribunal sont suffisamment larges pour interdire la compensation pré-post :

[TRADUCTION]

Suspension des droits et recours

ORDONNE CE QUI SUIIT : Durant la Période de suspension, et sous réserve, entre autres, de l’article 11.1 de la LACC, tous les droits et recours, notamment les modifications aux droits existants et les événements réputés survenir suivant toute entente à laquelle l’un des Débiteurs est partie en raison de l’insolvabilité des Débiteurs étrangers et/ou des présentes procédures fondées sur la LACC, de quelque manquement ou inexécution par les Débiteurs ou de quelque admission ou témoignage dans le cadre de ces procédures fondées sur la LACC, de quelque personne physique, firme, personne morale, société de personnes, société à responsabilité limitée, fiducie, coentreprise, association, organisation, organisme ou agence du gouvernement, ou de toute autre entité (toutes les entités énumérées précédemment étant appelées collectivement « Personnes » et individuellement « Personne ») visant les Débiteurs ou s’y rapportant, ou touchant l’Entreprise, les Biens ou toute partie de ceux-ci, sont suspendus par les présentes, sauf sur autorisation de la Cour.

...

Interdiction de porter atteinte aux droits

ORDONNE CE QUI SUIIT : Durant la Période de suspension, il est interdit à toute Personne de supprimer, de refuser d’honorer, de modifier, de violer, de répudier, de résilier ou de cesser d’exécuter, selon le cas, quelque droit, droit de renouvellement, contrat, entente, licence ou permis en faveur des Débiteurs ou détenu par ceux-ci, sauf avec le consentement écrit des Débiteurs, le cas échéant, et du Contrôleur, ou sur autorisation de la Cour. [Nous soulignons.]

(d.a., vol. I, p. 75)

[84] L’ordonnance ayant suspendu la compensation à l’égard des créances pré-post, il reste à déterminer si le Tribunal aurait dû exercer son

exercised its discretion under s. 11 of the CCAA and allowed such compensation in respect of the VRP claim. Although we are of the view that the supervising judge erred in finding, in reliance on *Kitco*, that she had no discretion to authorize pre-post compensation, we feel that remanding the case to the court of original jurisdiction would be unhelpful and would not be in the interests of justice. What is more, the delays resulting from this case have prejudiced the rights of third persons in good faith involved in the restructuring of SM Group. In this regard, Thornhill was unable to reimburse, as stipulated, the transition financing granted by the interveners Alaris Royalty Corp. and Integrated Private Debt Fund V LP, which are also creditors of SM Group, largely because of the City's refusal to pay the cost of the work done by SM Group.

[85] In exercising its discretion under the CCAA, a court must keep three baseline considerations in mind: (1) the appropriateness of the order being sought, (2) due diligence and (3) good faith on the applicant's part (*Callidus*, at para. 49; *Century Services*, at para. 70).

[86] The first consideration, the appropriateness of the order being sought, relates both to the order itself and to the means that are employed (*Century Services*, at para. 70). It is assessed in light of the remedial objectives of the CCAA (*Callidus*, at para. 49; *Century Services*, at para. 70). These remedial objectives include the following: avoiding the social and economic losses resulting from the liquidation of an insolvent company; maximizing creditor recovery; ensuring fair and equitable treatment of the claims against the debtor company; preserving going-concern value where possible; protecting jobs and communities affected by the company's financial distress; and enhancing the credit system generally (*Callidus*, at paras. 40-42). In this regard, the context of restructuring by way of liquidation, and the impact of pre-post compensation on its progress, can be weighed by a court in exercising its discretion. In addition, protecting the public interest, although it overlaps a number of the remedial objectives to be considered by the courts, must also be included

pouvoir discrétionnaire en vertu de l'art. 11 de la LACC et permettre l'application de cette compensation à l'égard de la créance PRV. Bien que nous soyons d'avis que la juge surveillante a fait erreur en concluant qu'elle ne possédait aucun pouvoir discrétionnaire l'habilitant à autoriser la compensation pré-post en se basant sur l'arrêt *Kitco*, il nous apparaît que le renvoi du dossier en première instance serait inutile et contraire aux intérêts de la justice. Au surplus, les délais occasionnés par le présent dossier causent préjudice aux droits des tiers de bonne foi ayant participé à la restructuration de Groupe SM. À cet égard, Thornhill n'a pas été en mesure de rembourser, selon les termes stipulés, le financement de transition consenti par les intervenantes Alaris Royalty Corp. et Integrated Private Debt Fund V LP, également créancières de Groupe SM, notamment en raison du refus de la Ville d'acquitter le coût des travaux effectués par Groupe SM.

[85] Dans l'exercice du pouvoir discrétionnaire que lui confère la LACC, le tribunal doit garder à l'esprit trois considérations de base : (1) l'opportunité de l'ordonnance sollicitée, (2) la diligence et (3) la bonne foi du demandeur (*Callidus*, par. 49; *Century Services*, par. 70).

[86] La première considération, soit le caractère opportun de l'ordonnance sollicitée, vise tout autant l'ordonnance elle-même que les moyens utilisés (*Century Services*, par. 70). Elle s'évalue au regard des objectifs réparateurs de la LACC (*Callidus*, par. 49; *Century Services*, par. 70). Parmi ces objectifs réparateurs, mentionnons les suivants : éviter les pertes sociales et économiques résultant de la liquidation d'une compagnie insolvable; maximiser le recouvrement au profit des créanciers; assurer un traitement juste et équitable des réclamations déposées contre la compagnie débitrice; préserver la valeur d'exploitation dans la mesure du possible; protéger les emplois et les collectivités touchées par les difficultés financières de l'entreprise; améliorer le système de crédit de manière générale (*Callidus*, par. 40-42). À ce chapitre, le contexte d'une restructuration par voie de liquidation, ainsi que les répercussions de la compensation pré-post sur son bon déroulement, peuvent être soupesés par le tribunal dans l'exercice de son pouvoir discrétionnaire. De

in this list (*Callidus*, at para. 40; *Century Services*, at para. 60).

[87] Here, the City argues that protecting the public interest is a consideration that favours pre-post compensation. It submits that the majority of the Court of Appeal erred in not considering [TRANSLATION] “the public interest in ensuring the recovery of fraudulently misappropriated public funds” (A.F., at para. 2; see also para. 80). We cannot accept this argument, for the following reasons.

[88] In our view, the City is wrongly conflating the public interest with its own interest as a public body with a claim. The objective of protecting the public interest does not mean that public bodies should be placed in a better position than other creditors because their claims relate to public funds. That would be contrary to the principle of equality among creditors. In the context of the CCAA, protecting the public interest therefore cannot be reduced to protecting the interests of a particular creditor. It involves taking account of interests beyond those of the debtor company and its creditors, such as the interests of employees whose jobs are threatened or of the community in which the debtor company operates (*Ernst & Young Inc. v. Essar Global Fund Ltd.*, 2017 ONCA 1014, 139 O.R. (3d) 1, at para. 102; *Metcalfe*, at paras. 50-52; Sarra, at pp. 162 and 501; Wood, at p. 341; see also, for a clear illustration, *Canadian Red Cross Society/Société canadienne de la Croix-Rouge, Re* (1998), 5 C.B.R. (4th) 299 (Ont. C.J. (Gen. Div.)), at para. 50).

[89] Protecting the public interest can also encompass considerations of commercial morality that reflect societal norms, such as considerations related to the fact that no one should profit from fraudulent activities in which they have taken part (A. Keay, “Insolvency Law: A Matter of Public Interest?” (2000), 51 *N. Ir. Legal Q.* 509, at pp. 513 and 525). In very specific circumstances, a court could therefore conclude that protection of the public interest and the CCAA’s other remedial objectives justify authorizing

surcroît, bien qu’elle recoupe un certain nombre des objectifs réparateurs dont les tribunaux doivent tenir compte, la protection de l’intérêt public doit elle aussi figurer sur cette liste (*Callidus*, par. 40; *Century Services*, par. 60).

[87] En l’espèce, la Ville prétend que la protection de l’intérêt public milite en faveur de la compensation pré-post. Elle estime que les juges majoritaires de la Cour d’appel ont commis une erreur en ne considérant pas « l’intérêt public de voir à la récupération des deniers publics détournés frauduleusement » (m.a., par. 2; voir aussi par. 80). Nous ne pouvons retenir cette prétention. Voici pourquoi.

[88] Selon nous, la Ville amalgame à tort l’intérêt public avec son propre intérêt en tant qu’organisme public titulaire d’une créance. L’objectif de protection de l’intérêt public ne signifie pas que les entités publiques devraient être placées dans une position plus avantageuse que les autres créanciers parce que leurs créances concernent des deniers publics. Cela contredit le principe de l’égalité entre les créanciers. Dans le contexte de la LACC, la protection de l’intérêt public ne saurait donc être réduite à la protection de l’intérêt d’un créancier en particulier. Elle suppose la prise en compte d’intérêts qui dépassent ceux de la compagnie débitrice et de ses créanciers, comme celui des employés dont les emplois sont menacés ou celui de la communauté dans laquelle évolue la compagnie débitrice (*Ernst & Young Inc. c. Essar Global Fund Ltd.*, 2017 ONCA 1014, 139 O.R. (3d) 1, par. 102; *Metcalfe*, par. 50-52; Sarra, p. 162 et 501; Wood, p. 341; voir aussi, pour une illustration éloquent, *Canadian Red Cross Society/Société canadienne de la Croix-Rouge, Re* (1998), 5 C.B.R. (4th) 299 (C.J. Ont. (Div. gén.)), par. 50).

[89] La protection de l’intérêt public peut aussi s’étendre à des considérations de moralité commerciale qui reflètent les normes sociales, comme des considérations liées au fait que nul ne devrait bénéficier d’activités frauduleuses auxquelles il a pris part (A. Keay, « Insolvency Law : A Matter of Public Interest? » (2000), 51 *N. Ir. Legal Q.* 509, p. 513 et 525). Dans des circonstances bien particulières, le tribunal pourrait donc conclure que la protection de l’intérêt public, de même que les

pre-post compensation in favour of a creditor that has proved that it was a victim of fraud within the meaning of s. 19(2)(d) of the CCAA, which explains the relevance of determining whether the VRP claim is a claim resulting from fraud in this case. But while such a conclusion is possible in law, it should not be drawn automatically. In every case, a court should exercise its discretion as indicated in *Callidus* and *Century Services*, and if it so happens that predominant weight must be given to the objective of protecting the public interest, the court should take care not to reduce the public interest to the interests of a particular creditor or group of creditors.

[90] In the instant case, the City's VRP claim is an ordinary claim because, as we have indicated, the City has not proved the alleged fraud and such proof cannot be inferred solely from the fact that its claim is related to an agreement entered into under the VRP. Its argument that the objective of protecting the public interest favours pre-post compensation must therefore be rejected. The City has not relied on any of the CCAA's other remedial objectives in support of its position. It follows that it has not discharged its burden of proving that the order being sought is appropriate. Moreover, the work performed for the City by SM Group was in the public interest, as it involved continuing to carry out major projects, such as the construction of the Samuel De Champlain Bridge and the rebuilding of the Turcot Interchange.

[91] The second consideration, due diligence, clearly weighs against pre-post compensation by the City. Under the CCAA, this consideration is important because it "discourages parties from sitting on their rights and ensures that creditors do not strategically manoeuvre or position themselves to gain an advantage" (*Callidus*, at para. 51). The procedure set out in the CCAA involves negotiations as well as compromises between the debtor and stakeholders and is overseen by a court and a monitor; it follows that all those who participate must be on an equal footing and must have a clear understanding of their respective obligations and rights (para. 51). This

autres objectifs réparateurs de la LACC, justifient d'autoriser la compensation pré-post en faveur d'un créancier qui a démontré avoir été victime de fraude au sens de l'al. 19(2)d) de la LACC, d'où la pertinence de déterminer si la créance PRV est une réclamation qui découle de fraude dans le cas qui nous occupe. Mais si une telle conclusion est possible en droit, elle ne devrait pas relever de l'automatisme. Dans chaque cas, le tribunal doit exercer son pouvoir discrétionnaire de la façon indiquée dans les arrêts *Callidus* et *Century Services*, et si d'aventure il est appelé à accorder un poids prépondérant à l'objectif de protection de l'intérêt public, il doit se garder de réduire l'intérêt public à l'intérêt d'un créancier ou d'un groupe de créanciers en particulier.

[90] En l'espèce, la créance PRV de la Ville est une créance ordinaire, puisque, comme nous l'avons indiqué, la Ville n'a pas apporté la preuve de la fraude alléguée et cette preuve ne saurait s'inférer du seul fait que sa créance se rattache à une entente conclue en vertu du PRV. En conséquence, sa prétention selon laquelle l'objectif de protection de l'intérêt public milite en faveur de la compensation pré-post doit être rejetée. La Ville n'a pas invoqué d'autre objectif réparateur de la LACC au soutien de sa position. Il s'ensuit qu'elle ne s'est pas déchargée du fardeau qui lui incombait d'établir le caractère indiqué de l'ordonnance sollicitée. De plus, les travaux effectués par Groupe SM pour la Ville étaient dans l'intérêt public, puisqu'ils consistaient à poursuivre la réalisation de chantiers majeurs, tels que la construction du pont Samuel-De Champlain et la réfection de l'échangeur Turcot.

[91] La deuxième considération, soit celle de la diligence, milite clairement à l'encontre de l'exercice de la compensation pré-post par la Ville. Sous le régime de la LACC, cette considération est importante étant donné qu'elle « décourage les parties de rester sur leurs positions et fait en sorte que les créanciers n'utilisent pas stratégiquement de ruse ou ne se placent pas eux-mêmes dans une position pour obtenir un avantage » (*Callidus*, par. 51). La procédure prévue par la LACC implique des négociations ainsi que des transactions entre le débiteur et les intéressés et elle est supervisée par le tribunal et le contrôleur; il s'ensuit que tous les acteurs qui y participent doivent

Court accordingly reached the following conclusion in *Callidus*:

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). [para. 51]

[92] In this case, it is clear that the City did not act in accordance with the standard of diligence expected in CCAA proceedings. On this point, Deloitte submits that the City should have given notice of its intention to effect compensation in the days after the initial order was made on August 24, 2018. The record does not show that the City learned of the initial order on August 24, 2018, but, as indicated in an email to counsel for Deloitte, the City was aware of the existence of that order by at least September 10, 2018. Whatever the case may be, we are of the view that a diligent creditor, after learning of the debtor's insolvency when it is subject to proceedings under the CCAA, cannot wait 47 to 58 days to notify the debtor of its intention to effect compensation.

[93] The City justifies the lateness of its application by stating that it was waiting for one of the payments on the VRP claim, which was due on October 31, 2018, before taking any action. Yet the VRP agreement indicates that the payment in question was actually due on October 1, 2018. Furthermore, the City knew or ought to have known that the term had already expired several weeks earlier, as SM Group's insolvency had resulted in the loss of the benefit of the term of the VRP claim.

se trouver sur un pied d'égalité et avoir une compréhension sans équivoque de leurs obligations et droits respectifs (par. 51). En conséquence, dans l'arrêt *Callidus*, notre Cour a conclu :

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). [par. 51]

[92] Dans la présente affaire, il appert clairement que la Ville ne s'est pas comportée conformément à la norme de diligence attendue dans le cadre d'une procédure fondée sur la LACC. À ce propos, Deloitte soutient que la Ville aurait dû signifier son intention d'opérer compensation dans les jours qui ont suivi le prononcé de l'ordonnance initiale, le 24 août 2018. Le dossier ne révèle pas que la Ville a pris connaissance de l'ordonnance initiale dès le 24 août 2018, mais, tel qu'indiqué dans un courriel adressé au procureur de Deloitte, elle connaissait l'existence de cette ordonnance depuis le 10 septembre 2018 au moins. Quoi qu'il en soit, nous sommes d'avis qu'un créancier diligent, une fois qu'il a pris connaissance de l'insolvabilité du débiteur alors qu'il est l'objet d'une procédure intentée en vertu de la LACC, ne peut attendre de 47 à 58 jours pour lui signifier son intention d'opérer compensation.

[93] La Ville justifie la tardiveté de sa demande en affirmant qu'elle attendait un des paiements de la créance PRV dû le 31 octobre 2018, avant de prendre quelque action que ce soit. Or, l'entente PRV indique plutôt que ce paiement était dû le 1^{er} octobre 2018. De plus, la Ville savait ou aurait dû savoir que le terme était échu depuis plusieurs semaines déjà, puisque l'insolvabilité de Groupe SM a entraîné la perte du bénéfice du terme de la créance PRV.

[94] Whether intentional or not, this inaction on the City's part tended to place it in a better position than other ordinary creditors at what, we should point out, was a critical time in the restructuring process. By invoking compensation, the City could obtain services without paying for them. The City had to suspect that if it had indicated its intention to proceed in this manner right from the start, as due diligence requires, SM Group would likely have refused to undertake the work provided for in the contract, knowing that it would not be paid and that this would be a major stumbling block in the interim financing process. What is more, under s. 32 of the CCAA, SM Group could even have asked that the contract be resiliated.

[95] In summary, the considerations that guide the exercise of a court's discretion do not justify lifting the stay of the City's right to pre-post compensation. Given our conclusions on the first two considerations, it is not necessary for us to discuss the City's good faith. In our view, remanding the case to the court of original jurisdiction would lead inevitably to the same outcome.

B. *Water Meter Contract Claim*

[96] Here again, the words of the stay order made by the Superior Court are broad enough to prohibit pre-post compensation. However, the Superior Court agreed to lift the stay of proceedings to allow the City to establish the existence and amount of its claim in the case relating to the water meter contract. The relevant excerpts from its judgment are as follows:

[TRANSLATION]

THE COURT, seized of the Application of Ville de Montréal dated September 27, 2018 for authorization to lift the stay of proceedings in order to deal with and liquidate a claim in the Civil Division ("**Application**");

...

LIFTS, in favour of the Applicant, Ville de Montréal, the stay of proceedings ordered in this case with regard to S.M.

[94] Intentionnelle ou non, cette inaction de la Ville était de nature à la placer dans une position plus avantageuse que celle des autres créanciers ordinaires, et ce, faut-il le souligner, à un moment crucial des procédures de restructuration. En effet, en invoquant compensation, elle pouvait, ce faisant, obtenir des services sans les payer. La Ville devait se douter que si elle avait manifesté son intention de procéder ainsi dès le départ, en toute diligence, Groupe SM aurait vraisemblablement refusé d'entreprendre les travaux prévus au contrat, sachant qu'il ne serait pas payé et qu'il s'agirait là d'un obstacle majeur au processus de financement intérimaire. Qui plus est, suivant l'art. 32 de la LACC, Groupe SM aurait même pu demander la résiliation de ce contrat.

[95] En somme, les considérations guidant l'exercice du pouvoir discrétionnaire du tribunal ne justifient pas de lever la suspension du droit à la compensation pré-post de la Ville. Considérant nos conclusions relatives aux deux premières considérations, il n'est pas nécessaire de nous pencher sur la bonne foi de la Ville. Nous sommes d'avis que le renvoi du dossier en première instance mènerait inéluctablement au même résultat.

B. *Créance relative au contrat des compteurs d'eau*

[96] Ici encore, les termes de l'ordonnance de suspension prononcée par le Tribunal sont suffisamment larges pour interdire la compensation pré-post. Le Tribunal a cependant accepté de lever la suspension des procédures pour permettre à la Ville d'établir l'existence et le montant de sa créance dans le dossier relatif au contrat des compteurs d'eau. Voici les extraits pertinents de son jugement :

LE TRIBUNAL, saisi de la Demande de la Ville de Montréal datée du 27 septembre 2018 pour être autorisée à lever la suspension des procédures afin de traiter et liquider une réclamation en Chambre civile (la « **Demande** »);

...

LÈVE, en faveur de la Requérante Ville de Montréal, la suspension des procédures ordonnée dans ce dossier

Consultants Inc., The S.M. Group Inc., The SMI Group Inc. and The S.M. Group International L.P. (“**Debtors Concerned**”) . . . for the sole purpose of allowing the Applicant, Ville de Montréal, to establish its claim against the Debtors Concerned . . . in the proceedings instituted in the Superior Court of Quebec bearing number 500-17-104932-184; [Emphasis added.]

(A.R., vol. IV, at p. 129)

[97] This order did not authorize the City to withhold the amounts owed to SM Group for the work subsequent to the initial order with a view to effecting compensation if the City was successful in the case relating to the water meter contract. The City submits that it is entitled to withhold the payments owed to SM Group until judgment is rendered in that case.

[98] In the circumstances, an order allowing the City to withhold the amounts owed to SM Group pending the outcome of the case relating to the water meter contract would not be appropriate. Remanding the case to the court of original jurisdiction for a decision on this question would, once again, be unhelpful and contrary to the interests of justice.

[99] Not only would the order being sought by the City place Thornhill at the mercy of the outcome of lengthy and complex judicial proceedings — which, it must not be forgotten, concern a claim for several million dollars — but it would not be appropriate for the same reasons as those relating to the VRP claim. The City is conflating the public interest with its own interest as a public body with a claim that was never established. In addition, the City did not act diligently. Although its originating application in the case relating to the water meter contract was filed on September 26, 2018, it breached its obligation of diligence by waiting until November 7, 2018 before indicating its intention to effect compensation, even though it had been aware of the initial order since at least September 10, 2018.

à l’égard de Les Consultants S.M. inc., Le Groupe S.M. inc., le Groupe SMI inc. et Le Groupe S.M. International S.E.C. (les « **Débitrices visées** ») [. . .] afin uniquement de permettre à la Requérante, Ville de Montréal, d’établir sa réclamation contre les Débitrices visées [. . .] dans le cadre des procédures initiées devant la Cour supérieure du Québec portant le numéro 500-17-104932-184; [Nous soulignons.]

(d.a., vol. IV, p. 129)

[97] Cette ordonnance n’a pas autorisé la Ville à retenir les sommes dues à Groupe SM pour les travaux postérieurs à l’ordonnance initiale en vue d’opérer compensation dans l’éventualité où elle aurait gain de cause dans le dossier relatif au contrat des compteurs d’eau. La Ville affirme qu’elle est en droit de retenir les paiements dus à Groupe SM jusqu’à ce qu’un jugement soit rendu dans l’affaire relative au contrat des compteurs d’eau.

[98] Dans les circonstances, une ordonnance permettant à la Ville de retenir les sommes dues à Groupe SM jusqu’au dénouement du litige relatif au contrat des compteurs d’eau n’est pas indiquée. Le renvoi du dossier en première instance pour trancher cette question serait, encore une fois, inutile et contraire aux intérêts de la justice.

[99] En effet, non seulement l’ordonnance recherchée par la Ville placerait Thornhill à la merci du résultat de procédures judiciaires longues et complexes — qui, faut-il le rappeler, concernent une créance de plusieurs millions —, mais elle ne serait pas indiquée pour les mêmes motifs que ceux relatifs à la créance PRV. La Ville confond ici l’intérêt public et son propre intérêt en tant qu’organisme public titulaire d’une créance qui n’a jamais été établie. Ensuite, la Ville n’a pas fait montre de diligence. Même si sa demande introductive d’instance dans le dossier relatif au contrat des compteurs d’eau a été introduite le 26 septembre 2018, la Ville a manqué à son obligation de diligence en attendant au 7 novembre 2018 pour signaler son intention d’opérer compensation, alors qu’elle avait connaissance de l’ordonnance initiale au moins depuis le 10 septembre 2018.

VI. Conclusion

[100] For these reasons, we would dismiss this appeal with costs.

English version of the reasons delivered by

[101] BROWN J. (dissenting) — I agree with the majority that a supervising judge has a discretion under s. 11 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (“CCAA”), as to whether to allow a creditor to effect compensation, or set-off, between pre-initial order and post-initial order debts (“pre-post compensation”). I find, however, that this discretion is not limited solely to the exceptional circumstances the majority describes. While my colleagues in the majority recognize the broad discretion conferred on a supervising judge by the CCAA, in my view they fail to give full effect to it by concluding that pre-post compensation will never be authorized unless there are exceptional circumstances.

[102] Moreover, unlike my colleagues who limit the scope of s. 21 of the CCAA to compensation between debts arising before an initial order is made, I conclude that pre-post compensation is permitted under s. 21 of the CCAA but that it must be subject to the exercise of a supervising judge’s discretion. The majority at the Quebec Court of Appeal (2020 QCCA 438), like the supervising judge (2019 QCCS 2316), erred in relying on the Quebec Court of Appeal’s decision in *Quebec (Agence du revenu) v. Kitco Metals Inc.*, 2017 QCCA 268, to conclude that pre-post compensation will never be authorized. But, for the reasons set out below, this Court must in my view reject the approach taken in *Kitco*.

[103] Given that the supervising judge in this case did not exercise her discretion, believing herself to be bound by *Kitco*, it would be unwise for this Court to exercise that discretion for the first time in order to determine whether Ville de Montréal

VI. Conclusion

[100] Pour ces motifs, nous sommes d’avis de rejeter le présent pourvoi avec dépens.

Les motifs suivants ont été rendus par

[101] LE JUGE BROWN (dissident) — Je partage l’avis de la majorité selon lequel le juge surveillant possède, en vertu de l’art. 11 de la *Loi sur les arrangements avec les créanciers des compagnies*, L.R.C. 1985, c. C-36 (« LACC »), le pouvoir discrétionnaire d’autoriser ou non un créancier à opérer compensation entre des dettes pré-ordonnance initiale et post-ordonnance initiale (« compensation pré-post »). Cependant, j’estime que ce pouvoir n’est pas limité aux seules circonstances exceptionnelles décrites par la majorité. En effet, à mon avis, bien qu’ils reconnaissent le large pouvoir discrétionnaire conféré au juge surveillant par la LACC, mes collègues majoritaires échouent à lui donner plein effet en ce qu’ils concluent que la compensation pré-post ne sera jamais autorisée sauf circonstances exceptionnelles.

[102] En outre, contrairement à mes collègues, qui restreignent le champ d’application de l’art. 21 de la LACC à la compensation entre des dettes nées avant la délivrance de l’ordonnance initiale, je conclus que la compensation pré-post est permise en vertu de l’art. 21 de la LACC, mais doit être assujettie à l’exercice du pouvoir discrétionnaire du juge surveillant. Les juges majoritaires de la Cour d’appel du Québec (2020 QCCA 438), ainsi que la juge surveillante (2019 QCCS 2316), s’appuient erronément sur l’arrêt de la Cour d’appel du Québec dans *Québec (Agence du revenu) c. Métaux Kitco inc.*, 2017 QCCA 268, 46 C.B.R. (6th) 173, pour conclure que la compensation pré-post ne sera jamais autorisée. Mais, pour les raisons exprimées ci-dessous, l’approche établie dans l’arrêt *Kitco* doit à mon avis être rejetée par la Cour.

[103] Étant donné que la juge surveillante n’a pas exercé son pouvoir discrétionnaire dans la présente affaire, se croyant liée par l’arrêt *Kitco*, il serait mal avisé pour la Cour d’exercer pour la première fois ce pouvoir afin de déterminer si la Ville de Montréal peut

(the “City”) may effect compensation here. I would therefore allow the appeal solely for the purpose of remanding the case to the Superior Court so it can decide whether the City may effect compensation between the debts incurred by SM Group before the initial order and the amounts owed by the City to SM Group for work performed by the latter after the initial order. I would also allow the appeal so that it can be determined whether compensation is available in respect of the City’s water meter claim against SM Group, as nothing in s. 21 of the CCAA prohibits judicial compensation.

[104] Furthermore, and again unlike my colleagues, I find that there is no need in this appeal to decide whether the City’s claim against SM Group, which derives from the *Act to ensure mainly the recovery of amounts improperly paid as a result of fraud or fraudulent tactics in connection with public contracts*, CQLR, c. R-2.2.0.0.3, must be characterized as a claim based on “false pretences or fraudulent misrepresentation” within the meaning of s. 19(2)(d) of the CCAA. In my view, s. 21 of the CCAA must be interpreted as allowing pre-post compensation regardless of whether a claim results from fraud for the purposes of s. 19(2)(d). I nonetheless agree with my colleagues that proof by a creditor that it was a victim of fraud within the meaning of s. 19(2)(d) is a factor favouring pre-post compensation that must be weighed by a supervising judge along with the other relevant considerations.

[105] My colleagues consider it necessary to characterize the City’s claim arising from the Voluntary Reimbursement Program (“VRP”) because proof that the debt underlying a claim is fraudulent is a relevant factor in the exercise of a supervising judge’s discretion to permit or to deny pre-post compensation (para. 20). As they acknowledge, this is a relevant factor in the exercise of a *supervising judge’s* discretion. As I will explain in greater detail below, whether the City’s VRP claim results from fraud is a question to be decided *by the supervising judge* in

opérer compensation en l’espèce. Par conséquent, j’accueillerais l’appel à seule fin de retourner le dossier devant la Cour supérieure pour qu’il soit décidé si la Ville peut opérer compensation entre les dettes de Groupe SM antérieures à l’ordonnance initiale et les sommes dues par la Ville à Groupe SM pour des travaux réalisés par ce dernier après l’ordonnance initiale. J’accueillerais également l’appel afin qu’il soit décidé si la réclamation de la Ville à l’encontre de Groupe SM à l’égard des compteurs d’eau donne ouverture à compensation, puisque rien dans l’art. 21 de la LACC n’interdit la compensation judiciaire.

[104] Au surplus, et contrairement à mes collègues, j’estime qu’il n’est pas nécessaire dans le présent pourvoi de trancher la question de savoir si la réclamation de la Ville de Montréal à l’encontre de Groupe SM, laquelle s’appuie sur la *Loi visant principalement la récupération de sommes payées injustement à la suite de fraudes ou de manœuvres dolosives dans le cadre de contrats publics*, RLRQ, c. R-2.2.0.0.3, doit être qualifiée de réclamation fondée sur des « faux-semblants ou la présentation erronée et frauduleuse des faits » au sens de l’al. 19(2)d) de la LACC. À mon avis, l’art. 21 de la LACC doit être interprété comme permettant d’opérer compensation pré-post, peu importe qu’il s’agisse ou non d’une réclamation qui découle d’une fraude au sens de l’al. 19(2)d). Je conviens néanmoins avec mes collègues que le fait pour un créancier de démontrer qu’il a été victime d’une fraude au sens de l’al. 19(2)d) est un facteur favorable à la compensation pré-post qui doit être soupesé par le juge surveillant avec les autres considérations pertinentes.

[105] Mes collègues estiment qu’il est nécessaire de qualifier la créance de la Ville de Montréal issue du Programme de remboursement volontaire (« PRV »), parce que la démonstration du caractère frauduleux de la dette à l’origine d’une créance constitue un facteur pertinent dans l’exercice par le juge surveillant de son pouvoir discrétionnaire de permettre ou non la compensation pré-post (par. 20). Tel qu’ils le reconnaissent, il s’agit d’un facteur pertinent dans l’exercice du pouvoir discrétionnaire *du juge surveillant*. Comme je l’explique

the exercise of her discretion, not by *my colleagues* or this Court.

plus amplement ci-après, la question de savoir si la créance PRV de la Ville de Montréal résulte d'une fraude est une question à laquelle il appartient à *la juge surveillante* de répondre dans le cadre de l'exercice de son pouvoir discrétionnaire, et non à *mes collègues* ou à la Cour.

I. Decision of the Quebec Court of Appeal in *Kitco*

[106] Kitco Metals Inc. specialized in buying scrap gold and extracting fine gold from it for resale. It was subject to special tax rules: it paid the goods and services tax and the Quebec sales tax on the purchase of scrap gold (“inputs”), but the sale of fine gold was not subject to these taxes. Under these special rules, Kitco paid the taxes to its gold suppliers, which were required to remit them to the Agence du revenu du Québec (“Agency”). When the fine gold was sold, Kitco was then entitled to a refund of the taxes paid. The Agency, however, became aware of a fraudulent scheme by which the gold suppliers were not remitting to it the taxes they collected, even though it was refunding Kitco for them.

[107] The Agency, suspecting that Kitco was involved in this fraudulent scheme, sent it a notice of assessment for more than \$300 million (the pre-order debt). On June 7, 2011, the Agency proceeded with compulsory execution on that notice to recover the amounts it considered it was owed. The next day, Kitco filed a notice of intention to make a proposal under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (“BIA”), thereby staying its creditors’ remedies (s. 69). One month later, it instead obtained an initial order under the CCAA that continued the stay of remedies (stay still in effect at the time of judgment). Meanwhile, Kitco had been continuing its business activities since June 8, 2011: it was paying taxes on inputs and claiming tax refunds from the Agency in accordance with the applicable tax rules. The Agency owed it more than \$1.7 million in refunds (the post-order debt) but applied this amount as compensation against the tax assessments it was claiming from Kitco. Kitco successfully brought a

I. L’arrêt *Kitco* de la Cour d’appel du Québec

[106] Métaux Kitco inc. est une entreprise qui se spécialise dans l’achat de ferraille d’or, dont elle extrait l’or fin afin de pouvoir le revendre. En vertu des règles fiscales, elle est soumise à un régime spécial, c’est-à-dire qu’elle paie la taxe sur les produits et services et la taxe de vente du Québec à l’achat de ferraille d’or (« intrants »), mais la vente d’or fin n’est pas assujettie à ces taxes. Conformément à ce régime spécial, Kitco paie les taxes à ses fournisseurs d’or, lesquels doivent remettre ces taxes à l’Agence du revenu du Québec. Par la suite, lors de la vente d’or fin, Kitco a droit à un remboursement des taxes payées. Cependant, l’Agence constate l’existence d’un stratagème frauduleux suivant lequel les fournisseurs d’or ne lui versent pas les taxes perçues, alors qu’elle rembourse Kitco pour celles-ci.

[107] L’Agence suspecte Kitco d’être impliquée dans ce stratagème frauduleux et lui envoie un avis de cotisation de plus de 300 millions de dollars (soit la dette pré-ordonnance). Le 7 juin 2011, elle entreprend l’exécution forcée de cet avis pour récupérer les sommes qu’elle estime dues. Dès le lendemain, Kitco dépose un avis d’intention de faire une proposition sous le régime de la *Loi sur la faillite et l’insolvabilité*, L.R.C. 1985, c. B-3 (« LFI »), suspendant les recours de ses créanciers (art. 69). Un mois plus tard, elle obtient plutôt, en vertu de la LACC, une ordonnance initiale qui continue la suspension des recours (suspension toujours en vigueur au moment de l’arrêt). Parallèlement, Kitco continue ses activités commerciales depuis le 8 juin 2011 : elle paie des taxes sur les intrants et en réclame le remboursement à l’Agence, conformément au régime fiscal en place. L’Agence lui doit plus de 1,7 million de dollars en remboursement (soit la dette post-ordonnance), mais impute par compensation cette somme sur les

motion in the Superior Court to force the Agency to refund it \$1.7 million on the basis that this compensation was unlawful.

[108] Vézina J.A., writing for the Court of Appeal in *Kitco*, began by explaining that June 8, 2011 was the date of commencement of insolvency proceedings and therefore the date on which the creditors' remedies were stayed and their claims had to be established (para. 34 (CanLII)). He also took the view that the compensation effected by the Agency was unlawful. In his opinion, although s. 21 of the CCAA does not expressly state that compensation can be effected only in respect of debts that arose prior to insolvency proceedings, a literal interpretation of the section must be rejected because it would be incompatible with, among other things, the principle that ordinary creditors must be treated equally (para. 20). Such an interpretation would also undermine the status quo period that companies in financial difficulty need in order to develop a plan of arrangement (para. 43). Vézina J.A. therefore concluded that a literal interpretation would ultimately be contrary to the CCAA's restructuring objective (para. 45).

[109] This conclusion was based in large part on Vézina J.A.'s observation that the schemes of the BIA and the CCAA have [TRANSLATION] "close links" and are two "integrated" schemes, which means that "case law and scholarly opinion can be applied to both equally" (paras. 51-52). Relying on para. 56 of *D.I.M.S. Construction inc. (Trustee of) v. Quebec (Attorney General)*, 2005 SCC 52, [2005] 2 S.C.R. 564, he considered that "[t]he general principles of the BIA preclude any transaction that would have the effect of granting a security that did not exist before the bankruptcy" (*Kitco*, at para. 61). On this point, he found that the principles laid down in *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453, in which the Court stated that set-off is like a form of security, cannot readily be transposed into the civil law, in which compensation is automatic and is effected by operation of law once two debts coexist and are certain, liquid and exigible (para. 65). Lastly, he was of the view that s. 21 of the

cotisations fiscales qu'elle réclame à Kitco. Cette dernière présente avec succès une requête devant la Cour supérieure pour forcer l'Agence à lui rembourser 1,7 million de dollars au motif qu'il s'agit d'une compensation illégale.

[108] Dans l'arrêt *Kitco*, le juge Vézina, qui rédige les motifs de la Cour d'appel, explique d'abord que le 8 juin 2011 constitue la date d'ouverture de la procédure en insolvabilité, et donc la date à laquelle les recours des créanciers sont suspendus et leurs réclamations doivent être établies (par. 34). Il se dit aussi d'avis que la compensation opérée par l'Agence est illégale. Selon lui, bien que l'art. 21 de la LACC ne dise pas expressément que seules les dettes nées avant les procédures en insolvabilité sont susceptibles de compensation, il faut rejeter l'interprétation littérale de cet article, puisqu'elle serait contraire notamment au principe voulant qu'il faille traiter les créanciers ordinaires sur un pied d'égalité (par. 20). Elle fait également échec à la période de statu quo, laquelle est nécessaire aux entreprises en difficultés financières pour leur permettre d'élaborer un plan d'arrangement (par. 43). Il conclut donc qu'une interprétation littérale serait au final contraire à l'objectif de restructuration de la LACC (par. 45).

[109] Cette conclusion s'appuie en grande partie sur le constat du juge Vézina que les régimes de la LFI et de la LACC entretiennent des « liens étroits » et constituent « deux régimes intégrés », de telle sorte que « les enseignements de la jurisprudence et les avis des auteurs sont transposables de l'[un] à l'autre » (par. 51-52). Il s'appuie sur le par. 56 de l'arrêt *D.I.M.S. Construction inc. (Syndic de) c. Québec (Procureur général)*, 2005 CSC 52, [2005] 2 R.C.S. 564, et en retient que « [l]es principes généraux de la LFI s'opposent à toute opération qui aurait pour effet d'accorder une garantie qui n'existait pas avant la faillite » (*Kitco*, par. 61). À cet égard, il estime que les enseignements de l'arrêt *Husky Oil Operations Ltd. c. Ministre du Revenu national*, [1995] 3 R.C.S. 453, qui a précisé que la compensation s'apparentait à une forme de garantie, sont difficilement transposables en droit civil où la compensation est automatique et s'opère de plein droit dès que deux dettes coexistent et sont

CCAA and s. 97(3) of the *BIA* identify the point in time when compensation may be effected, that is, on the date on which the creditors' "provable claims" must be established, which is the date of commencement of insolvency proceedings:

[TRANSLATION] In my opinion, sections 21 *CCAA* and 97(3) *BIA*, which provide that the "law of set-off or compensation applies to all claims. . .", thereby identify the point in time when compensation is effected, or in other words, the moment at which the claims must be established: it is on the date of [commencement of proceedings] that temporal reciprocity is established. [para. 82]

[110] Vézina J.A. found, at para. 78, that the question of what constitutes a "provable claim" is answered by s. 121(1) of the *BIA*, which refers to "[a]ll debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt or to which the bankrupt may become subject before the bankrupt's discharge by reason of any obligation incurred before the day on which the bankrupt becomes bankrupt".

[111] With respect, I am of the view that several errors were made in *Kitco*. First, Vézina J.A. erred in relying on this Court's judgment in *D.I.M.S. Construction* to reach the conclusion that pre-post compensation can never be allowed under the *CCAA*, even though that judgment was rendered in the context of a bankruptcy under the *BIA*. Despite the similarities between the insolvency schemes established by the *CCAA* and the *BIA*, these are two different statutes, and their differences are significant in the case at bar. Secondly, *Kitco* was based on an inappropriate narrow interpretation of s. 21 of the *CCAA* that disregarded the "flexible" nature the *CCAA* is recognized as having (*Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379, at para. 14; R. J. Wood, *Bankruptcy and Insolvency Law* (2nd ed. 2015), at p. 337) as well as the broad discretion conferred on supervising judges, whereas courts of other Canadian provinces have held that pre-post set-off can be permitted. Thirdly, *Kitco* was decided in a context where a company in financial difficulty was actually restructured, and it

certaines, liquides et exigibles (par. 65). Finalement, il considère que l'art. 21 de la *LACC* et le par. 97(3) de la *LFI* précisent à quel moment peut s'opérer la compensation, soit à la date où doivent être établies les « réclamations prouvables » des créanciers, c'est-à-dire le jour de l'ouverture des procédures d'insolvabilité :

À mon avis, les articles 21 *L.a.c.c.* et 97 (3) *L.f.i.* qui édictent que « les règles de la compensation s'appliquent à toutes les réclamations. . . », précisent par là le moment où la compensation s'opère, soit au moment où doivent être établies les réclamations; c'est au jour d'Ouverture que s'établit la réciprocité temporelle. [par. 82]

[110] Le juge Vézina estime, au par. 78, que la réponse à la question de savoir en quoi consiste une « réclamation prouvable » se trouve au par. 121(1) de la *LFI*, c'est-à-dire « [t]outes créances et tous engagements, présents ou futurs, auxquels le failli est assujéti à la date à laquelle il devient failli, ou auxquels il peut devenir assujéti avant sa libération, en raison d'une obligation contractée antérieurement à cette date ».

[111] Avec égards, je suis d'avis que plusieurs erreurs ont été commises dans l'arrêt *Kitco*. Premièrement, le juge Vézina s'est erronément appuyé sur l'arrêt de la Cour dans *D.I.M.S. Construction* pour arriver à la conclusion que la compensation pré-post ne pouvait jamais être autorisée en vertu de la *LACC*, alors que cet arrêt a été rendu dans un contexte de faillite sous le régime de la *LFI*. Malgré les similitudes entre les régimes d'insolvabilité établis par la *LACC* et la *LFI*, ces deux lois sont distinctes — et de manière significative en l'espèce. Deuxièmement, l'arrêt *Kitco* repose sur une interprétation restrictive et inappropriée de l'art. 21 de la *LACC*, qui fait fi du caractère « souple » (*Century Services Inc. c. Canada (Procureur général)*, 2010 CSC 60, [2010] 3 R.C.S. 379, par. 14) et [TRANSLATION] « flexible » (R. J. Wood, *Bankruptcy and Insolvency Law* (2^e éd. 2015), p. 337) reconnu à la *LACC* ainsi que du vaste pouvoir discrétionnaire dont le juge surveillant est investi, alors que les tribunaux d'autres provinces canadiennes ont jugé que la compensation pré-post pouvait être permise. Troisièmement, l'arrêt *Kitco* a

cannot readily be transposed into a context such as the one in the instant case, which instead involves the liquidation of a company's assets and contracts.

A. Fundamental Differences Between the Two Insolvency Schemes

[112] It is important to underscore the fundamental differences between the scheme established by the CCAA and the one established by the BIA, differences that highlight that, under the CCAA scheme, the mutuality of debts is maintained and supervising judges have a broad discretion that allows them to authorize pre-post compensation. I do not question the notion that these two schemes must be viewed as “an integrated body of insolvency law” and that legislative efforts to harmonize them have been going on for several decades (*Century Services*, at paras. 19-24 and 78). As I recount below, however, there remain many differences between the two schemes (Wood, at p. 337).

[113] The three principal Canadian statutes dealing with insolvency, the CCAA, the BIA and the *Winding-up and Restructuring Act*, R.S.C. 1985, c. W-11 (“WURA”), have the following main objectives: “. . . to treat the claims of creditors fairly and equitably, to protect the public interest, to create a fair, timely and cost-effective process, and to achieve a balance of benefit and cost in deciding whether to restructure or liquidate a business, maximizing enterprise value” (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, objectives referred to with approval by the Court in *9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10, [2020] 1 S.C.R. 522, at para. 40). More specifically, the CCAA’s main objective is the financial and commercial rehabilitation of an insolvent company through the filing of a plan of arrangement with its creditors (Wood, at p. 338; B. Boucher, “Procédures en vertu de la *Loi sur les arrangements avec les créanciers des compagnies*”, in *JurisClasseur Québec — Collection*

été rendu dans un contexte de restructuration réelle d’une entreprise en difficultés financières, et il est difficilement transposable dans un contexte comme celui qui nous occupe, où il s’agit plutôt d’une liquidation des actifs et des contrats d’une entreprise.

A. Les distinctions fondamentales entre les deux régimes d’insolvabilité

[112] Il importe de souligner les différences fondamentales entre le régime établi par la LACC et celui établi par la LFI, lesquelles font ressortir, sous le régime de la LACC, le maintien de la réciprocité des dettes ainsi que le vaste pouvoir discrétionnaire permettant au juge surveillant d’autoriser la compensation pré-post. Je ne mets pas en doute l’idée que ces deux régimes doivent être perçus comme « un ensemble intégré de règles du droit de l’insolvabilité » et que des efforts législatifs visant à harmoniser les deux régimes ont été déployés depuis plusieurs décennies (*Century Services*, par. 19-24 et 78). Toutefois, comme nous le verrons ci-dessous, de nombreuses différences persistent entre ces deux régimes (Wood, p. 337).

[113] Les trois principales lois canadiennes en matière d’insolvabilité, c’est-à-dire la LACC, la LFI et la *Loi sur les liquidations et les restructurations*, L.R.C. 1985, c. W-11 (« LLR »), ont comme objectifs fondamentaux : [TRADUCTION] « . . . le traitement juste et équitable des réclamations des créanciers, la protection de l’intérêt public, la création d’un processus juste, opportun et efficient, et, lors de la prise de la décision de restructurer ou de liquider une entreprise, l’établissement d’un équilibre coûts-avantages maximisant la valeur de celle-ci » (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, objectifs mentionnés avec approbation par la Cour dans *9354-9186 Québec inc. c. Callidus Capital Corp.*, 2020 CSC 10, [2020] 1 R.C.S. 522, par. 40). La LACC a plus particulièrement comme objectif principal de permettre à une entreprise insolvable de se rétablir financièrement et commercialement par le dépôt d’un plan d’arrangement auprès de ses créanciers (Wood, p. 338; B. Boucher, « Procédures en vertu

Droit des affaires — Faillite, insolvabilité et restructuration (loose-leaf), by S. Rousseau, ed., fasc. 14, at Nos. 2 and 8). In seeking an initial order, an insolvent company shields itself from its creditors, staying their remedies for a certain period so that all its energy can be channeled into preparing a plan of arrangement for a viable recovery (Boucher, at No. 2).

[114] For these reasons, the scheme established by the CCAA is flexible and allows creative solutions to be put forward to achieve the objective mentioned above, the restructuring of a financially distressed company, in contrast to the BIA, which provides a set of pre-established rules (Boucher, at No. 8; Wood, at p. 337). The CCAA is therefore characterized as “remedial” legislation (J. P. Sarra, *Rescue! The Companies’ Creditors Arrangement Act* (2nd ed. 2013), at p. 500; Boucher, at No. 3).

[115] The Court has found that the CCAA’s provisions must be interpreted expansively to enable its remedial objectives to be achieved, and in particular to allow a company to continue its activities and to avoid the social and economic losses that can result from its liquidation (*Century Services*, at para. 70). Because of the remedial scope of the CCAA, a “broad” discretion is also conferred on supervising judges by s. 11 of the CCAA (*Callidus*, at para. 48; *Century Services*, at para. 14). This section provides that a supervising judge may make “any order that [the judge] considers appropriate”, although it specifies that such an order must be consistent with the restrictions set out in the CCAA and must be “appropriate” in light of the circumstances of each case. As this Court noted in *Callidus*, s. 11 is in a sense the “engine” of the CCAA (para. 48, quoting *Stelco Inc. (Re)* (2005), 253 D.L.R. (4th) 109 (Ont. C.A.), at para. 36). This discretion granted to supervising judges under the CCAA allows for the implementation of “creative and effective” solutions (*Century Services*, at para. 21, quoting Industry Canada, Marketplace Framework Policy Branch, *Report on the Operation and Administration of the Bankruptcy and Insolvency Act and the Companies’ Creditors*

de la *Loi sur les arrangements avec les créanciers des compagnies* », dans *JurisClasseur Québec — Collection Droit des affaires — Faillite, insolvabilité et restructuration* (feuilles mobiles), par S. Rousseau, dir., fasc. 14, n° 2 et 8). En demandant une ordonnance initiale, l’entreprise insolvable se met à l’abri de ses créanciers, suspendant ainsi leurs recours pendant une certaine période, afin de pouvoir concentrer toutes ses énergies sur la confection d’un plan d’arrangement permettant une relance viable (Boucher, n° 2).

[114] Pour ces raisons, le régime établi par la LACC est flexible et permet de mettre de l’avant des solutions créatives afin d’atteindre l’objectif énoncé précédemment, soit la restructuration d’une entreprise en difficultés financières, par opposition à la LFI, qui prévoit un ensemble de règles préétablies (Boucher, n° 8; Wood, p. 337). En tant que telle, la LACC est une loi qualifiée de « réparatrice » (Boucher, n° 3; J. P. Sarra, *Rescue! The Companies’ Creditors Arrangement Act* (2^e éd. 2013), p. 500).

[115] La Cour a reconnu que les dispositions de la LACC doivent être interprétées largement afin de permettre la réalisation de ses objectifs réparateurs, notamment permettre la survie des activités de l’entreprise et éviter les pertes sociales et économiques pouvant résulter de la liquidation de cette dernière (*Century Services*, par. 70). En raison de la portée réparatrice de la LACC, un « vaste » pouvoir discrétionnaire est également conféré au juge surveillant par l’art. 11 de la LACC (*Callidus*, par. 48; *Century Services*, par. 14). Cet article prévoit qu’un juge surveillant peut rendre « toute ordonnance qu’il estime indiquée », mais précise toutefois qu’une telle ordonnance ne peut être contraire aux restrictions prévues par la LACC et qu’elle doit être « indiquée » au regard des circonstances de chaque affaire. La Cour a indiqué dans l’arrêt *Callidus* que l’art. 11 est en quelque sorte le « moteur » de la LACC (par. 48, citant *Stelco Inc. (Re)* (2005), 253 D.L.R. (4th) 109 (C.A. Ont.), par. 36). Ce pouvoir discrétionnaire conféré au juge surveillant en vertu de la LACC permet la mise en place de solutions « créatives et efficaces » (*Century Services*, par. 21, citant Industrie Canada, Direction générale des politiques-cadres du marché, *Rapport sur la mise en application de la*

Arrangement Act (2002), at p. 41), in recognition of the “positional advantage” gained by supervising judges, who “acquir[e] extensive knowledge and insight into the stakeholder dynamics and the business realities of [CCAA] proceedings” (*Callidus*, at paras. 47-48). Examples of “creative” solutions adopted by courts under the CCAA include “security for debtor in possession financing or super-priority charges on the debtor’s assets” and the release of “claims against third parties as part of approving a comprehensive plan of arrangement and compromise, even over the objections of some dissenting creditors” (*Century Services*, at para. 62).

[116] As the Court again recently recognized, the broad discretion conferred on supervising judges by s. 11 of the CCAA enables them to propose solutions “that respond to the circumstances of each case and ‘meet contemporary business and social needs’” (*Callidus*, at para. 48, quoting *Century Services*, at para. 58). This broad discretion is unique to the CCAA and has no equivalent in the BIA, which is based instead on pre-established rules designed to apply to a range of situations. This is, therefore, one major difference between the two insolvency schemes.

[117] Another major difference between these two schemes is that the CCAA allows a company that has obtained an initial order to continue its business activities during the restructuring or reorganization period (*Callidus*, at para. 41). The continuation of a struggling company’s business activities averts “the social and economic losses resulting from liquidation of an insolvent company” (*Century Services*, at para. 70) and “preserves going-concern value” (*Callidus*, at para. 46). Accordingly, when an insolvent company has recourse to the CCAA, it is not divested of its property in favour of a third party, unlike with the measures put in place under the BIA that vest the bankrupt’s property in a trustee (s. 71 of the BIA). There is thus no loss of mutuality under

Loi sur la faillite et l’insolvabilité et de la Loi sur les arrangements avec les créanciers des compagnies (2002), p. 50), en reconnaissance de la « position avantageuse » du juge surveillant, lequel « acquiert une connaissance approfondie de la dynamique entre les intéressés et des réalités commerciales entourant la procédure [fondée sur la LACC] » (*Callidus*, par. 47-48). À titre de solutions « créatives » retenues par les tribunaux sous le régime de la LACC, mentionnons la « constitution de sûretés pour financer le débiteur demeuré en possession des biens ou encore la constitution de charges super-prioritaires grevant l’actif du débiteur », ainsi que la libération de « tiers des actions susceptibles d’être intentées contre eux, dans le cadre de l’approbation d’un plan global d’arrangement et de transaction, malgré les objections de certains créanciers dissidents » (*Century Services*, par. 62).

[116] Comme l’a reconnu la Cour encore récemment, le vaste pouvoir discrétionnaire conféré au juge surveillant par l’art. 11 de la LACC permet à ce dernier de mettre de l’avant des solutions « susceptibles de répondre aux circonstances de chaque cas et de “[s’adapter] aux besoins commerciaux et sociaux contemporains” » (*Callidus*, par. 48, citant *Century Services*, par. 58). Ce vaste pouvoir discrétionnaire du juge surveillant est unique à la LACC et n’a pas d’équivalent dans la LFI, laquelle est plutôt fondée sur des règles préétablies visant à régir une gamme de situations. Il s’agit donc là d’une distinction majeure entre les deux régimes d’insolvabilité.

[117] Une autre différence majeure entre ces deux régimes est le fait que la LACC permet à une entreprise, après qu’elle a obtenu une ordonnance initiale, de poursuivre ses activités commerciales pendant la période de restructuration ou de réorganisation (*Callidus*, par. 41). La poursuite des activités commerciales de l’entreprise en difficulté évite « les pertes sociales et économiques résultant de la liquidation d’une compagnie insolvable » (*Century Services*, par. 70) et permet de « protéger sa valeur d’exploitation » (*Callidus*, par. 46). Ainsi, lorsque l’entreprise insolvable a recours à la LACC, elle n’est pas dessaisie de ses biens au profit d’un tiers, contrairement aux mesures mises en place en vertu de la LFI, suivant lesquelles le syndic obtient la

the CCAA. The status of debtor or creditor of the insolvent company remains unchanged and is not bestowed on a third party.

[118] This mutuality, which survives the initial order, is what makes compensation possible under the CCAA, unlike under the BIA. This same fundamental difference between the CCAA scheme and the BIA scheme also played a crucial role in *D.I.M.S. Construction*, on which Vézina J.A. largely relied in *Kitco*. In *D.I.M.S. Construction*, this Court had to determine whether the schemes established in two Quebec labour law statutes subverted the scheme of distribution provided for by the BIA. Those two statutes created a similar mechanism that required an employer subject to one of them to pay an assessment due from a contractor whose services it had retained. Once the employer had paid the assessment, it was entitled to retain the amount it had paid out of any sums it owed to the contractor, thereby effecting compensation (para. 2). In that case, three employers had been directed to pay the assessments of a contractor, D.I.M.S. Construction inc., before it went bankrupt on April 1, 1999, but only one of them had done so before that date (paras. 3-4). D.I.M.S. Construction's trustee in bankruptcy, relying on the Court's judgment in *Husky Oil*, asked the Court to declare that two sections of the statutes in question were inoperable in the context of a bankruptcy under the BIA (para. 5).

[119] In her analysis, Deschamps J. began by discussing s. 97(3) of the BIA, which concerns compensation, and made two relevant observations. First, because s. 97(3) applies to claims against a bankrupt's estate, a creditor must meet the conditions set out in s. 121(1) of the BIA, which means that, in order to effect compensation, the creditor must "prove the bankrupt was subject to a debt by reason of an obligation incurred before the bankruptcy" (para. 40 (emphasis added)). Second, s. 97(3) states that compensation is effected in the same manner as if the

saisine des biens du failli (art. 71 de la LFI). Il n'y a donc pas de perte de réciprocité sous le régime de la LACC. La qualité de débitrice ou de créancière de l'entreprise insolvable demeure inchangée et n'est pas octroyée à un tiers.

[118] Cette réciprocité, qui subsiste au-delà de l'ordonnance initiale, est ce qui rend possible la compensation en vertu de la LACC, par opposition à la LFI. En outre, cette même distinction fondamentale entre le régime de la LACC et celui de la LFI a joué un rôle crucial dans l'arrêt *D.I.M.S. Construction*, sur lequel s'est en grande partie appuyé le juge Vézina dans l'arrêt *Kitco*. En effet, dans l'arrêt *D.I.M.S. Construction*, la Cour devait décider si les régimes législatifs établis dans deux lois québécoises en matière de droit du travail portaient atteinte au plan de répartition prévu par la LFI. Ces deux lois établissaient un mécanisme similaire par lequel un employeur assujéti à l'une de ces lois devait payer la cotisation due par un entrepreneur dont il retenait les services. Une fois la cotisation payée par l'employeur, ce dernier avait le droit de retenir sur les sommes qu'il devait à l'entrepreneur le montant de la cotisation qu'il avait déboursé, et donc d'opérer compensation (par. 2). Dans cette affaire, trois employeurs avaient été sommés de payer les cotisations de l'entrepreneur D.I.M.S. Construction inc. avant sa faillite le 1^{er} avril 1999, mais un seul d'entre eux avait payé la cotisation avant cette date (par. 3-4). Le syndic à la faillite de D.I.M.S. Construction demandait à la Cour de déclarer inopérants deux articles de ces lois dans le cadre d'une faillite sous le régime de la LFI en invoquant l'arrêt de la Cour dans *Husky Oil* (par. 5).

[119] Dans son analyse, la juge Deschamps s'attarde d'abord au par. 97(3) de la LFI portant sur la compensation et fait deux constats utiles. Premièrement, comme le par. 97(3) s'applique aux réclamations visant l'actif du failli, le créancier doit remplir les conditions prévues au par. 121(1) de la LFI, c'est-à-dire que, pour qu'il puisse opérer compensation, il doit « prouver une créance à laquelle le failli était assujéti en raison d'une obligation contractée antérieurement à la faillite » (par. 40 (je souligne)). Deuxièmement, le par. 97(3) précise que

bankrupt were a plaintiff or a defendant in a lawsuit and, exceptionally, makes it possible to proceed “as if the bankrupt’s patrimony had not vested in the trustee as a result of the bankruptcy” (para. 41).

[120] Deschamps J. concluded that there are three possible scenarios in Quebec civil law, depending on when an employer pays an assessment due from a contractor: (1) the payment is made by the employer *before* the bankruptcy, and the debts become certain, liquid and exigible *before* the bankruptcy; (2) the payment is made *before* the bankruptcy and the employer is in debt to the bankrupt contractor, but one of the conditions for legal compensation is not met; and (3) the payment is made *after* the bankruptcy (para. 42). Regarding the third scenario — one that also brings into play art. 1651 of the *Civil Code of Québec*, which provides that a person subrogated to the rights of another (the employer in that case) does not have more rights than the subrogating creditor — Deschamps J. concluded that when the employer pays after the contractor’s bankruptcy, “[t]he dual status of creditor and debtor”, and therefore the mutuality of the debts, does not arise until *after* the bankruptcy (para. 51). It must therefore be inferred that s. 97(3) of the *BIA*, read in conjunction with ss. 121, 136(3) and 141 of the *BIA*, requires that “the mutual debts come into existence *before* the bankruptcy” in order for compensation to be effected (para. 55 (emphasis added)). Deschamps J. added at para. 56 that, according to the rules specific to the bankruptcy scheme under the *BIA*, the trustee may object to the substitution of a creditor (the employer in that case) if this has the effect of giving the creditor a security that did not exist at the time of the bankruptcy:

What distinguishes a pre-bankruptcy payment from a post-bankruptcy payment is that, in the former case, the substitution of creditors takes place before the moment when the trustee acquires the bankrupt’s property. In the case of a post-bankruptcy payment, the substitution occurs after the bankruptcy, and the trustee can object to it. The general principles of the *BIA* preclude any transaction that would have the effect of granting a security that did not exist before the bankruptcy. [Emphasis added.]

la compensation s’opère de la même manière que si le failli était demandeur ou défendeur d’une action en justice, et elle permet exceptionnellement de faire « comme si le patrimoine du failli n’avait pas, par la faillite, été dévolu au syndic » (par. 41).

[120] La juge Deschamps conclut que trois scénarios sont possibles en droit civil québécois en fonction du moment où l’employeur paie la cotisation due par l’entrepreneur : (1) le paiement est fait par l’employeur *avant* la faillite et les dettes sont devenues certaines, liquides et exigibles *avant* la faillite, (2) le paiement est fait *avant* la faillite, l’employeur est endetté envers l’entrepreneur failli, mais l’une des conditions de la compensation légale n’est pas satisfaite et (3) le paiement est fait *après* la faillite (par. 42). Relativement au troisième scénario, lequel fait également interagir l’art. 1651 du *Code civil du Québec*, qui prévoit qu’une personne subrogée dans les droits d’une autre (ici, l’employeur) n’a pas plus de droits que le subrogeant, la juge Deschamps conclut que lorsque l’employeur paie après la faillite de l’entrepreneur, « [l]a double qualité de créancier et de débiteur » et donc la réciprocité des dettes ne survient qu’*après* la faillite (par. 51). Par conséquent, il faut en déduire que, lorsque lu en conjonction avec les art. 121, 136(3) et 141 de la *LFI*, le par. 97(3) de la *LFI* prévoit que « les créances mutuelles doivent avoir pris naissance *avant* la faillite » pour qu’il y ait compensation (par. 55 (je souligne)). La juge Deschamps ajoute, au par. 56, qu’en vertu des règles propres au régime de la faillite sous la *LFI*, le syndic peut s’opposer à la substitution du créancier (ici, l’employeur), si cela a pour effet de conférer à ce dernier une garantie qui n’existait pas au moment de la faillite :

Ce qui distingue le paiement avant la faillite du paiement après la faillite est le fait que, dans le premier cas, la substitution de créancier a lieu avant le moment où le syndic acquiert les biens du failli. Lorsque le paiement est fait après la faillite, la substitution est postérieure à la faillite et le syndic est en mesure de s’y opposer. Les principes généraux de la *LFI* s’opposent à toute opération qui aurait pour effet d’accorder une garantie qui n’existait pas avant la faillite. [Je souligne.]

[121] The argument is a simple one. For legal compensation to be effected, in addition to the fact that a claim must be shown to be certain, liquid and exigible, [TRANSLATION] “two persons must be reciprocally debtor and creditor of each other” (*Code civil du Québec: Annotations — Commentaires 2020-2021* (5th ed. 2020), by B. Moore, ed., et al., at p. 1558). This is one of the four essential conditions for compensation to be possible. This mutuality of claims is severed when an insolvent company becomes bankrupt, because a trustee in bankruptcy is appointed and the company’s property is vested in the trustee (s. 71 of the *BIA*). On the date of the initial bankruptcy event, the bankrupt company loses its status as creditor or debtor in favour of the trustee. As well, the bankrupt company ceases its business activities and normally does not incur any obligations after the bankruptcy. This is why claims provable under the *BIA* must be established on the date of the initial bankruptcy event and why, logically, compensation cannot be effected between pre- and post-bankruptcy debts (ss. 97(3) and 121(1)). However, as the intervenor Union des municipalités du Québec rightly noted at the hearing, the situation is very different when an insolvent company applies for an initial order under the *CCAA*, since the company continues its business activities while at the same time seeking a stay of its creditors’ remedies (transcript, at pp. 48-49). Under the *CCAA*, the property of the company applying for an initial order is not vested in a monitor. The mutuality of debts remains intact, as the company continues to be the debtor or creditor of a claim (see, on this point, L. Morin and G.-P. Michaud, “Set-Off and Compensation in Insolvency Restructuring under the *BIA/CCAA*: After the *Kitco* and *Beyond the Rack* Decisions”, in Sarra and Romaine, *Annual Review of Insolvency Law 2016*, 311, at pp. 343-44; see also A. R. Anderson, T. Gelbman and B. Pullen, “Recent Developments in the Law of Set-off”, in J. P. Sarra, ed., *Annual Review of Insolvency Law 2009* (2010), 1, at pp. 23-25 (these authors acknowledge that an insolvent company’s property is not vested in a monitor under the *CCAA* and that the mutuality of debts is not severed, but they advocate having the courts interpret the *CCAA* in such a way as to put an end to this mutuality)).

[121] L’argument est simple. Pour qu’il y ait compensation légale, en sus du fait que le caractère certain, liquide et exigible de la créance doit être démontré, « deux personnes doivent être réciproquement débitrices et créancières l’une de l’autre » (*Code civil du Québec : Annotations — Commentaires 2020-2021* (5^e éd. 2020), par B. Moore, dir., et autres, p. 1558). Il s’agit là d’une des quatre conditions essentielles pour qu’il soit possible d’opérer compensation. Cette réciprocité des créances cesse d’exister lorsqu’une entreprise insolvable devient faillie, puisqu’un syndic à la faillite est nommé et obtient la saisine de ses biens (art. 71 de la *LFI*). La qualité de créancière ou de débitrice de l’entreprise qui devient faillie s’éteint au profit du syndic le jour de l’ouverture de la faillite. De plus, l’entreprise faillie cesse ses opérations commerciales et n’encourt normalement pas d’obligations post-faillite. C’est pourquoi les réclamations prouvables visées par la *LFI* doivent être établies le jour de l’ouverture de la faillite, et il ne peut logiquement y avoir compensation entre des dettes pré et post-faillite (par. 97(3) et 121(1)). Or, comme l’a fait remarquer avec justesse l’intervenante l’Union des municipalités du Québec à l’audience, la situation est tout autre lorsqu’une entreprise insolvable demande la délivrance d’une ordonnance initiale en vertu de la *LACC*, puisqu’elle continue ses activités commerciales, tout en demandant la suspension des recours de ses créanciers (transcription, p. 48-49). Sous le régime de la *LACC*, le contrôleur n’obtient pas la saisine des biens de l’entreprise ayant demandé une ordonnance initiale. La réciprocité des dettes subsiste, l’entreprise demeurant débitrice ou créancière d’une réclamation (voir à ce sujet L. Morin et G.-P. Michaud, « Set-Off and Compensation in Insolvency Restructuring under the *BIA/CCAA* : After the *Kitco* and *Beyond the Rack* Decisions », dans Sarra et Romaine, *Annual Review of Insolvency Law 2016*, 311, p. 343-344; voir aussi A. R. Anderson, T. Gelbman et B. Pullen, « Recent Developments in the Law of Set-off », dans J. P. Sarra, dir., *Annual Review of Insolvency Law 2009* (2010), 1, p. 23-25 (ces auteurs reconnaissent que la saisine des biens de l’entreprise insolvable n’est pas dévolue au contrôleur dans le cadre de la *LACC*, et que la réciprocité des dettes n’est pas éteinte, mais prèchent pour que la *LACC* soit interprétée par les tribunaux de manière à mettre fin à cette réciprocité)).

[122] These two fundamental differences between the CCAA scheme and the BIA scheme suffice to explain why this Court should reject the approach proposed in *Kitco*. As we will see below, courts of other Canadian provinces have relied in part on these differences between the two schemes to find that s. 21 of the CCAA, unlike the equivalent provisions in the BIA (s. 97(3)) and the WURA (s. 73(1)), does not prohibit pre-post set-off.

B. Courts of Other Canadian Provinces Have Recognized the Possibility of Effecting Pre-post Set-off

[123] For two reasons, the right to effect set-off under the CCAA has been a subject of debate among Canadian courts. First, before the legislative reform of 1997 (*An Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act and the Income Tax Act*, S.C. 1997, c. 12) and the addition of s. 21 (formerly s. 18.1), this right was not formally recognized in the CCAA. Secondly, questions relating to the framework for the right to effect set-off have arisen in recent decades, particularly with regard to the possibility of staying this right temporarily after an initial order has been made (CCAA, s. 11.02(1); see *Quintette Coal Ltd. v. Nippon Steel Corp.* (1990), 51 B.C.L.R. (2d) 105 (C.A.); *Cam-Net Communications v. Vancouver Telephone Co.*, 1999 BCCA 751, 71 B.C.L.R. (3d) 226; *North American Tungsten Corp., Re*, 2015 BCCA 390, 377 B.C.A.C. 6 (“*Tungsten No. 1*”) (decision on application for leave to appeal), aff'd 2015 BCCA 426, 378 B.C.A.C. 116 (“*Tungsten No. 2*”); *Re Just Energy Corp.*, 2021 ONSC 1793); or of directly restricting the right in the language of an initial order under the CCAA (*Crystallex International Corp., Re*, 2012 ONSC 6812, 100 C.B.R. (5th) 132).

[124] More specifically, the question now before this Court is whether s. 21 of the CCAA allows pre-post compensation. This question is all the more relevant in the context of a restructuring process under

[122] Ces deux distinctions fondamentales entre les régimes de la LACC et de la LFI suffisent à expliquer pourquoi l'approche mise de l'avant dans l'arrêt *Kitco* doit être rejetée par la Cour. Comme nous le verrons ci-après, les tribunaux d'autres provinces canadiennes se sont notamment appuyés sur ces distinctions entre les deux régimes pour conclure que l'art. 21 de la LACC, contrairement aux dispositions équivalentes dans la LFI (par. 97(3)) et la LLR (par. 73(1)), n'interdit pas la compensation pré-post.

B. Les tribunaux d'autres provinces canadiennes ont reconnu la possibilité d'opérer compensation pré-post

[123] Le droit d'opérer compensation en vertu de la LACC a fait l'objet de débats dans la jurisprudence canadienne, et ce, pour deux raisons. D'abord, avant la réforme législative de 1997 (*Loi modifiant la Loi sur la faillite et l'insolvabilité, la Loi sur les arrangements avec les créanciers des compagnies et la Loi de l'impôt sur le revenu*, L.C. 1997, c. 12) et l'ajout de l'art. 21 (autrefois l'art. 18.1), le droit d'opérer compensation n'était pas formellement reconnu dans la LACC. Ensuite, des questions portant sur l'encadrement du droit d'opérer compensation se sont soulevées dans les dernières décennies, notamment en ce qui a trait à la possibilité de suspendre temporairement le droit d'opérer compensation à la suite de la délivrance d'une ordonnance initiale (LACC, par. 11.02(1); voir *Quintette Coal Ltd. v. Nippon Steel Corp.* (1990), 51 B.C.L.R. (2d) 105 (C.A.); *Cam-Net Communications v. Vancouver Telephone Co.*, 1999 BCCA 751, 71 B.C.L.R. (3d) 226; *North American Tungsten Corp., Re*, 2015 BCCA 390, 377 B.C.A.C. 6 (« *Tungsten n° 1* ») (décision sur la demande d'autorisation d'appel), conf. par 2015 BCCA 426, 378 B.C.A.C. 116 (« *Tungsten n° 2* »); *Re Just Energy Corp.*, 2021 ONSC 1793); ou de restreindre ce droit directement dans le texte d'une ordonnance initiale fondée sur la LACC (*Crystallex International Corp., Re*, 2012 ONSC 6812, 100 C.B.R. (5th) 132).

[124] Plus particulièrement, la question qui nous occupe ici est celle de savoir si l'art. 21 de la LACC permet d'opérer compensation pré-post. Cette question se pose avec une plus grande acuité dans le

the CCAA because the insolvent company continues its business activities.

[125] One of the first cases in which this question was considered after the 1997 legislative reform was *Air Canada, Re* (2003), 45 C.B.R. (4th) 13, a judgment of Farley J. of the Ontario Superior Court of Justice. There, Farley J. had to decide whether a paragraph included in an initial order whose purpose was to limit the right of Air Canada's creditors to effect set-off should be varied.² Air Canada essentially argued that under the CCAA, as under the BIA, legal set-off cannot be permitted between pre- and post-order debts (paras. 10-11). Because the BIA provides, in s. 71 (formerly s. 71(2)), that the bankrupt's property vests in the trustee on the date of the initial bankruptcy event, Farley J. concluded that there is no longer any mutuality between a creditor and a bankrupt debtor following a bankruptcy, despite such mutuality being a necessary condition for set-off:

In a bankruptcy, the trustee is inserted into the proceedings. Post-bankruptcy dealings of a creditor with the trustee in bankruptcy do not involve the same party, namely the debtor before the condition of bankruptcy. . . . Thus, creditors who incur post-bankruptcy obligations to trustees in bankruptcy cannot claim legal set-off to avoid paying such obligations by setting-off such obligations against their proven (pre-bankruptcy) claims against the bankrupt. The same parties are not involved so there cannot be mutual cross-obligations. [Emphasis in original; para. 14.]

[126] Farley J. next considered Air Canada's second argument, that s. 21 (then s. 18.1) of the CCAA must be interpreted similarly to s. 73(1) of the WURA (at paras. 16-17), which provides that the

cadre d'un processus de restructuration mené sous le régime de la LACC, puisque l'entreprise insolvable continue ses opérations commerciales.

[125] L'une des premières affaires dans lesquelles cette question a été examinée, après la réforme législative de 1997, est la décision *Air Canada, Re* (2003), 45 C.B.R. (4th) 13, rendue par le juge Farley de la Cour supérieure de justice de l'Ontario. Dans cette décision, le juge Farley devait déterminer si un paragraphe inséré dans l'ordonnance initiale et qui visait à limiter le droit pour les créanciers d'Air Canada d'opérer compensation devait être modifié². Essentiellement, Air Canada plaidait que la compensation légale prévue par la LACC ne pouvait être autorisée entre des dettes pré et post-ordonnance, comme c'est le cas en vertu de la LFI (par. 10-11). Puisque la LFI prévoit que, à l'ouverture de la faillite, les biens du failli sont dévolus au syndic en vertu de l'art. 71 (autrefois le par. 71(2)), le juge Farley a conclu qu'il n'y a alors plus de réciprocité entre un créancier et un débiteur failli post-faillite, condition pourtant nécessaire pour qu'il soit possible d'opérer compensation :

[TRADUCTION] *Lors d'une faillite*, le syndic est ajouté à l'instance. Lorsqu'un créancier effectue des opérations post-faillite avec le syndic de faillite, il ne traite pas avec la même partie, c'est-à-dire avec le débiteur avant la faillite. [. . .] Par conséquent, le créancier qui contracte des obligations post-faillite envers un syndic de faillite ne peut invoquer la compensation légale pour éviter d'acquitter de telles obligations en opérant compensation entre celles-ci et ses réclamations (pré-faillite) contre le failli dont il a fait la preuve. Comme ce ne sont pas les mêmes parties qui sont concernées, il ne saurait y avoir d'obligations réciproques. [En italique dans l'original; par. 14.]

[126] Ensuite, le juge Farley a analysé le second argument d'Air Canada qui prétendait que l'art. 21 de la LACC (alors l'art. 18.1), devait être interprété de façon similaire au par. 73(1) de la LLR (par. 16-17),

² The paragraph in question read as follows: "THIS COURT ORDERS that persons may exercise only such rights of set off as are permitted under Section 18.1 of the CCAA as of the date of this order. For greater certainty, no person may set off any obligations of an Applicant to such person which arose prior to such date" (para. 2). The last sentence was particularly problematic.

² Le paragraphe en question était rédigé ainsi : [TRADUCTION] « LA COUR ORDONNE que seuls peuvent être exercés par les personnes concernées les droits d'opérer compensation qui sont autorisés par l'article 18.1 de la LACC à compter de la date de la présente ordonnance. Il est entendu que nul ne peut opérer compensation sur des obligations d'un Demandeur envers une telle personne nées avant la date de la présente ordonnance. » (par. 2). La dernière phrase posait particulièrement problème.

law of set-off applies to “all claims on the estate of a company, and to all proceedings for the recovery of debts due or accruing due to a company at the commencement of the winding-up of the company”. He rejected this argument for several reasons, emphasizing in particular the differences between the words of s. 73(1) of the *WURA* and those of s. 21 of the *CCAA*. For example, s. 21 does not provide that set-off must be between claims accruing due as of the date an initial order is made. Farley J. noted that these differences in wording reflect a choice made by Parliament, which did not intend to enact identical set-off provisions in Canada’s three insolvency statutes (para. 23). For these reasons, he ordered that the paragraph of the order restricting the right to effect set-off be varied (para. 24).

[127] Although he struck out the part of the initial order that precluded pre-post set-off, Farley J. nonetheless stayed set-off until Air Canada’s situation was more stable in order to avoid the disruptive consequences that would result from allowing set-off during the status quo period. He suggested that the best time to effect set-off would be in conjunction with the formation of a plan of arrangement (para. 25).

[128] My colleagues argue (at para. 77) that “*Air Canada* and *Tungsten* [which I will discuss below] did not determine whether pre-post compensation is consistent with the interpretation and objectives of the *CCAA*, let alone establish a framework for the exercise of this right by creditors.” This, however, ignores that *Air Canada* is widely recognized as being authoritative and as standing for the proposition that mutuality is not severed by an initial order made under the *CCAA*, which means that pre-post set-off or compensation is possible but is subject to a supervising judge’s power to stay it (see R. Thornton, “Air Canada and Stelco: Legal Developments and Practical Lessons”, in J. P. Sarra, ed., *Annual Review of Insolvency Law* 2006 (2007), 73; *North American Tungsten Corp., Re*, 2015 BCSC 1382, 28 C.B.R.

lequel prévoit que la compensation s’applique à « toutes les réclamations sur l’actif d’une compagnie et à toutes les procédures en recouvrement de créances d’une compagnie, échues ou devenues exigibles à l’ouverture de la liquidation de la compagnie ». Le juge Farley a rejeté cet argument pour plusieurs raisons, insistant notamment sur les différences entre le texte du par. 73(1) de la *LLR* et celui de l’art. 21 de la *LACC*. Par exemple, ce dernier article ne prévoit pas que la compensation doit s’effectuer entre des réclamations devenues exigibles à la date de la délivrance de l’ordonnance initiale. Le juge Farley a souligné que ces différences rédactionnelles reflètent le choix du législateur, lequel n’a pas voulu adopter des dispositions législatives identiques en matière de compensation dans les trois lois canadiennes en matière d’insolvabilité (par. 23). Pour ces raisons, il a ordonné la modification du paragraphe de l’ordonnance qui limitait le droit d’opérer compensation (par. 24).

[127] Bien qu’il ait radié la partie de l’ordonnance initiale qui empêchait la compensation pré-post, le juge Farley a néanmoins suspendu la mise en œuvre de la compensation jusqu’à ce que la situation d’Air Canada se soit davantage stabilisée, afin d’éviter les conséquences perturbatrices qu’entraînerait le fait de permettre la compensation pendant la période de statu quo. Il a suggéré que le meilleur moment pour opérer compensation serait lors de la formulation d’un plan d’arrangement (par. 25).

[128] Mes collègues prétendent (au par. 77) que « les affaires *Air Canada* et *Tungsten* [que je décris ci-dessous] n’ont pas tranché la question de savoir si la compensation pré-post est conforme à l’interprétation et aux objectifs de la *LACC*, et encore moins établi les balises entourant l’exercice de ce droit par des créanciers ». Cette prétention ne tient toutefois pas compte du fait que la décision *Air Canada* est largement reconnue comme faisant autorité et appuyant la proposition selon laquelle la réciprocité n’est pas rompue par une ordonnance initiale rendue en vertu de la *LACC*, de sorte que la compensation pré-post est possible mais assujettie au pouvoir du juge surveillant d’en suspendre l’exécution (voir R. Thornton, « Air Canada and Stelco : Legal Developments and Practical Lessons », dans J.

(6th) 147 (“*Tungsten No. 3*”), at para. 15). For example, Robert Thornton writes:

Air Canada was indebted to certain parties as at the date of the Initial Order. Subsequent to the date of the Initial Order, those parties became indebted to Air Canada. They wished to set-off their post-CCAA debts against Air Canada’s pre-CCAA debts owing to them. . . .

...

. . . Farley J. held that there was no loss of mutuality upon the commencement of a CCAA proceeding. Accordingly, legal set-off is available both in respect of debts existing as at the date of an initial order and in respect of debts that arose after the date of an initial order. Farley J. was correct in so doing.

...

It now appears to be clear in Canada that legal and equitable set-off are unaffected by proceedings commenced under the CCAA other than (i) the right to exercise them may be “temporally” stayed and (ii) if the CCAA applicant refuses to acknowledge the set-off, it would be necessary for the creditor to seek judicial intervention.

It is the authors’ view that it is appropriate for set-off rights to continue after the commencement of a CCAA proceeding. The CCAA applicant continues to carry on business in the ordinary course. [Emphasis added; pp. 94-96.]

[129] In *Tungsten*, the British Columbia Court of Appeal also considered set-off under s. 21 of the CCAA — first in an application for leave to appeal two orders of the British Columbia Supreme Court (*Tungsten No. 1*, per Savage J.A.) and then in an appeal from that decision denying leave to appeal (*Tungsten No. 2*). The insolvent company had obtained an initial order under the CCAA effective June 9, 2015, at which time it owed approximately \$4.4 million to Global Tungsten and Powders Corp. (“GTP”) under a loan agreement. It subsequently continued selling tungsten to GTP, which gave notice

P. Sarra, dir., *Annual Review of Insolvency Law 2006* (2007), 73; *North American Tungsten Corp., Re*, 2015 BCSC 1382, 28 C.B.R. (6th) 147 (« *Tungsten n° 3* »), par. 15). Par exemple, Robert Thornton écrit :

[TRADUCTION] Air Canada était endettée envers certaines parties à la date de l’Ordonnance initiale. Après cette date, ces parties sont devenues débitrices d’Air Canada. Elles souhaitaient opérer compensation entre leurs dettes post-LACC envers Air Canada et les dettes pré-LACC de cette dernière envers elles. . . .

...

. . . Le juge Farley a conclu qu’il n’y a pas perte de mutualité dès l’introduction de procédures en vertu de la LACC. Par conséquent, la compensation légale est possible tant à l’égard de créances existant à la date d’une ordonnance initiale qu’à l’égard de créances nées après cette date. Le juge Farley était fondé à conclure ainsi.

...

Il semble maintenant clair au Canada que l’introduction de procédures en vertu de la LACC n’a pas d’incidence sur la compensation légale et sur la compensation en equity, sous réserve (i) du fait que le droit de les appliquer peut être « temporairement » suspendu et (ii) du fait que si la partie qui invoque la LACC refuse d’acquiescer à la compensation, il sera nécessaire de solliciter l’intervention des tribunaux.

Les auteurs sont d’avis qu’il est approprié que les droits d’opérer compensation continuent de s’appliquer après l’introduction de procédures en vertu de la LACC. La partie qui invoque cette loi continue d’exploiter son entreprise comme à l’habitude. [Je souligne; p. 94-96.]

[129] Dans l’affaire *Tungsten*, la Cour d’appel de la Colombie-Britannique s’est également penchée sur la compensation prévue par l’art. 21 de la LACC, d’abord dans le cadre d’une demande de permission d’appeler de deux ordonnances de la Cour suprême de la Colombie-Britannique (*Tungsten n° 1*, le juge Savage), puis en appel de cette décision refusant la permission d’appeler (*Tungsten n° 2*). L’entreprise insolvable avait obtenu, en vertu de la LACC, une ordonnance initiale prenant effet à compter du 9 juin 2015, date à laquelle elle devait approximativement 4,4 millions de dollars à Global Tungsten and

that it wished to set off its claim (the pre-order debt) against the amounts due or accruing due for the tungsten sold to it (the post-order debt) (*Tungsten No. 1*, at paras. 2 and 6). The chambers judge had held that GTP had a valid right of set-off (*Tungsten No. 2*, at para. 7).

[130] In these two decisions, the main question before the Court of Appeal was whether the chambers judge had erred in concluding that the right to effect set-off could be stayed, like the other creditors' remedies, once the initial order had been made. The question of whether pre-post set-off could be effected was never raised by the parties, which by implication showed that it was permitted under the CCAA. Relying on s. 21 of the CCAA as well as on s. 11 of that statute, which confers a broad discretion on a supervising judge, the Court of Appeal explained that nothing in the words of s. 21 prohibits a supervising judge from making the right of set-off subject to a stay of remedies (*Tungsten No. 1*, at paras. 12-13 and 16; *Tungsten No. 2*, at paras. 31 and 34-35).

[131] Contrary to what my colleagues say at para. 79, in that case both the chambers judge and the Court of Appeal considered the arguments relating to the effects of pre-post set-off on the status quo period and on the underlying objectives of this period, but they did so from the perspective of a stay of the right to effect set-off rather than by questioning the very possibility of pre-post set-off. This shows that my colleagues' concerns about the disruptive potential of pre-post set-off were given adequate consideration by the supervising judge in exercising his discretion to permit or to stay set-off.

[132] In particular, the chambers judge wrote the following: "... a temporal stay of rights can be

Powders Corp. (« GTP ») aux termes d'un contrat de prêt. Par la suite, l'entreprise insolvable continuait de vendre du tungstène à GTP, laquelle a envoyé un avis indiquant qu'elle souhaitait opérer compensation entre sa créance (soit la dette pré-ordonnance) et les sommes échues ou à échoir pour la vente de tungstène (soit la dette post-ordonnance) (*Tungsten n° 1*, par. 2 et 6). Le juge de première instance avait reconnu que GTP possédait un droit valide d'opérer compensation (*Tungsten n° 2*, par. 7).

[130] Dans ces deux décisions, la principale question dont la Cour d'appel était saisie consistait à déterminer si le juge de première instance avait fait erreur en concluant que le droit d'opérer compensation pouvait être suspendu, au même titre que les recours des autres créanciers, à partir de la délivrance de l'ordonnance initiale. La question de savoir si compensation pré-post pouvait être opérée n'a jamais été soulevée par les parties, ce qui démontrait implicitement que cette compensation était permise sous le régime de la LACC. S'appuyant sur l'art. 21 de la LACC ainsi que sur l'art. 11 de celle-ci, qui confère un large pouvoir discrétionnaire au juge surveillant, la Cour d'appel a expliqué que rien dans le texte de l'art. 21 n'interdit au juge surveillant d'assujettir le droit d'opérer compensation à la suspension des recours (*Tungsten n° 1*, par. 12-13 et 16; *Tungsten n° 2*, par. 31 et 34-35).

[131] Contrairement à ce qu'avancent mes collègues au par. 79, dans cette affaire, tant le tribunal de première instance que la Cour d'appel ont considéré les arguments relatifs aux incidences de la compensation pré-post sur la période de statu quo et sur les objectifs sous-jacents de cette dernière, mais dans l'optique de la suspension du droit d'opérer compensation plutôt qu'en s'interrogeant sur la possibilité même de la compensation pré-post. Cela démontre que les inquiétudes de mes collègues quant au potentiel perturbateur de la compensation pré-post sont adéquatement prises en compte par le juge surveillant dans l'exercice de son pouvoir discrétionnaire d'autoriser la compensation ou d'en suspendre l'application.

[132] Le juge de première instance a notamment écrit ce qui suit : [TRADUCTION] « ... une suspension

granted to further the purpose of the initial order and the purposes of the *Act*” (*Tungsten No. 3*, at para. 25). While conceding that there was some merit to the arguments on the effects of pre-post set-off, he was not prepared to reverse the decision in *Air Canada* (paras. 17-18). Moreover, he stayed the right to effect set-off on the basis that, “[i]n order to preserve the status quo to effect a restructuring, a stay of the set-off is, and was, absolutely essential”, and he added, among other things, that if the stay of set-off were not continued, the restructuring efforts “would be thrown into disarray” and “[t]he status quo would be significantly altered and the restructuring would effectively be at an end” (para. 32). The judge who considered the application for leave to appeal noted in turn that, “[c]learly, if an attempt at compromise or arrangement is to have any prospect of success there must be a means of holding creditors at bay” (*Tungsten No. 1*, at para. 16). He added that not staying the right to effect set-off would favour GTP to the detriment of the other creditors (paras. 18 and 25). Groberman J.A., who wrote the judgment of the Court of Appeal, stressed the principle that a creditor should not be able to exercise a right of set-off to circumvent a compromise or arrangement under the *CCAA* (*Tungsten No. 2*, at paras. 37-39).

[133] Despite my colleagues’ protestations to the contrary, the state of the law elsewhere in Canada is clear: pre-post set-off is possible under the *CCAA*, subject to a supervising judge’s discretion to stay such set-off having regard to its effects on the status quo period, the underlying objectives of this period, the advancement of efforts to reach an arrangement, and the remedial objectives of the *CCAA*.

[134] It must be concluded that the approach proposed by the Quebec Court of Appeal in *Kitco* has created an asymmetry between the interpretation given to s. 21 of the *CCAA* by the Quebec courts and the interpretation given to it by the courts of other Canadian provinces. This asymmetry is contrary to

temporaire des droits peut être accordée pour appuyer l’application de l’ordonnance initiale et la réalisation des objectifs de la *Loi* » (*Tungsten n° 3*, par. 25). Il a reconnu que les arguments relatifs aux incidences de la compensation pré-post ont du mérite, mais il n’était pas prêt à renverser la décision *Air Canada* (par. 17-18). Il a en outre suspendu le droit d’opérer compensation parce que, [TRADUCTION] « [a]fin de préserver le statu quo en vue d’effectuer la restructuration, la suspension du droit d’opérer compensation est, et était, absolument essentielle », ajoutant entre autres que, si la suspension de la compensation n’était pas reconduite, les efforts de restructuration « seraient désorganisés » et « [l]e statu quo serait considérablement affecté et cela mettrait effectivement un terme à la restructuration » (par. 32). Le juge saisi de la demande d’autorisation d’appel a quant à lui souligné que, [TRADUCTION] « [d]e toute évidence, pour qu’une tentative de transaction ou d’arrangement ait quelque chance de succès, il faut un moyen de tenir les créanciers à distance » (*Tungsten n° 1*, par. 16). Il a ajouté que l’absence de suspension du droit d’opérer compensation aurait pour effet de favoriser GTP au détriment des autres créanciers (par. 18 et 25). Rédigeant l’arrêt de la Cour d’appel, le juge Groberman a insisté sur le principe selon lequel un créancier ne devrait pas pouvoir se prévaloir du droit d’opérer compensation afin de contourner une transaction ou un arrangement fondé sur la *LACC* (*Tungsten n° 2*, par. 37-39).

[133] Malgré les protestations à l’effet contraire de mes collègues, l’état du droit ailleurs au Canada est clair : la compensation pré-post est possible sous le régime de la *LACC*, sous réserve du pouvoir discrétionnaire du juge surveillant d’en suspendre l’application pour tenir compte des incidences de la compensation pré-post sur la période de statu quo et de ses objectifs sous-jacents, du bon déroulement des efforts déployés pour réaliser un arrangement et des objectifs réparateurs de la *LACC*.

[134] Force est de constater que l’approche avancée par la Cour d’appel du Québec dans l’arrêt *Kitco* crée une asymétrie entre l’interprétation de l’art. 21 de la *LACC* par les tribunaux du Québec et par les tribunaux d’autres provinces canadiennes. Cette asymétrie va à l’encontre du principe de l’interprétation

the principle of homogenous interpretation of federal statutes (Morin and Michaud, at p. 344).

C. Restructuring an Insolvent Company Versus Liquidating Its Assets

[135] Finally, in *Kitco*, Vézina J.A. noted that his conclusions were based on the fact that the insolvent company was engaged in a genuine restructuring process and that staying its creditors' remedies was crucial to bringing this process to a successful conclusion. He stressed that Kitco's restructuring plan was in jeopardy because the Agency was effecting compensation with the amounts it was supposed to pay Kitco. Kitco was required to carry on its activities while paying 15 percent in taxes on its gold inputs without receiving the refund to which it was entitled in this regard. It was thus in an [TRANSLATION] "untenable" position relative to competitors in its field (paras. 47-48).

[136] Staying the remedies of an insolvent company's creditors under the CCAA to allow the company to develop a plan of arrangement is of critical importance, particularly where the exercise of a creditor's right to effect pre-post compensation might sabotage the company's efforts to regain financial health.

[137] In this case, however, and in the opinion of the monitor and the interveners themselves, there has never been any question of SM Group proposing a plan of arrangement. Once SM Group's principal creditors filed an application for an initial order under the CCAA, it was clear that they wished to opt for a liquidation process — that is, the sale of the insolvent company to a new buyer. In this particular situation, where a plan of arrangement cannot be contemplated and the insolvent company will be liquidated or sold in any event, to conclude that pre-post compensation is never allowed could be unfair to the company's creditors with claims that are certain, liquid and exigible. In such cases, the creditors' remedies will be stayed indefinitely and they will never be able to

uniforme des lois fédérales (Morin et Michaud, p. 344).

C. La restructuration d'une entreprise insolvable versus la liquidation des actifs de cette entreprise

[135] Enfin, dans l'arrêt *Kitco*, le juge Vézina a souligné que ses conclusions étaient fondées sur le fait que l'entreprise insolvable était engagée dans un véritable processus de restructuration et que la suspension des recours de ses créanciers était essentielle pour lui permettre de mener à bien ce processus. Il a insisté sur le fait que le plan de restructuration de Kitco était mis en péril parce que l'Agence opérait compensation sur les sommes qu'elle devait verser à Kitco. En effet, Kitco était obligée de poursuivre ses activités tout en payant des taxes de l'ordre de 15 p. 100 sur ses intrants d'or sans recevoir le remboursement auquel elle avait droit à cet égard. Elle se trouvait ainsi dans une position « insoutenable » comparativement aux entreprises concurrentes dans son domaine (par. 47-48).

[136] La suspension, en vertu de la LACC, des recours des créanciers d'une entreprise insolvable afin de permettre à celle-ci d'élaborer un plan d'arrangement revêt une importance cruciale, en particulier lorsque l'exercice du droit d'un créancier d'opérer compensation pré-post risque de saboter les efforts déployés par l'entreprise pour retrouver sa santé financière.

[137] En l'espèce, toutefois, et de l'avis même du contrôleur et des intervenants, il n'a jamais été question pour Groupe SM de proposer un plan d'arrangement. Dès le dépôt d'une demande d'ordonnance initiale en vertu de la LACC par les principaux créanciers de Groupe SM, il était clair que ces derniers souhaitaient opter pour un processus de liquidation, soit la vente de l'entreprise insolvable à un nouvel acquéreur. Dans ce cas particulier, alors qu'un plan d'arrangement n'est pas envisageable et que l'entreprise insolvable sera de toute manière liquidée ou vendue, conclure que la compensation pré-post n'est jamais permise pourrait être injuste pour les créanciers de cette entreprise ayant une créance certaine, liquide et exigible. En effet, dans ces cas, les recours

effect pre-post compensation, since the insolvent company will become an “empty shell” after the sale. Moreover, because a plan of arrangement cannot be contemplated, allowing pre-post compensation will not have the effect of derailing the company’s restructuring process, as there is no such process.

II. Discretion Not Exercised by the Supervising Judge in This Case

[138] In my view, pre-post compensation is permitted under s. 21 of the *CCAA*, but it must be subject to the exercise of a supervising judge’s discretion. In *Callidus*, this Court clarified the framework for the exercise of this discretion under s. 11 of the *CCAA*. The first two criteria are found in s. 11, which provides that a supervising judge may make any order that is “appropriate” in the circumstances of the case and consistent with the restrictions set out in the *CCAA*. The Court added that the exercise of the discretion must also further the remedial objectives of the *CCAA* and be focused in particular on the criteria of appropriateness, good faith and due diligence (para. 70).

[139] My colleagues make a series of arguments against compensation in general and pre-post compensation in particular: the high disruptive potential of compensation; respect for the status quo period; the loss of incentive for the debtor to provide goods and services during the stay period because it would fear not being paid for them, which would deprive it of the funds needed to continue operating; the fact that an interim lender would most likely refuse to continue to finance the debtor’s operations if the loaned funds were destined to enrich another creditor; the fact that the rampart set up by a stay to protect against attacks by creditors would crumble; the fact that compensation deviates from the principle of equality among ordinary creditors and that pre-post compensation amounts to giving certain creditors an additional “type of security interest” in respect of new assets acquired by the debtor after

des créanciers seront suspendus indéfiniment et ils ne pourront jamais exercer compensation pré-post, l’entreprise insolvable étant devenue après la vente une « coquille vide ». Par ailleurs, puisqu’un plan d’arrangement n’est pas envisageable, permettre la compensation pré-post n’aura pas comme effet de faire dérailler le processus de restructuration de l’entreprise, ce processus étant inexistant.

II. L’absence d’exercice du pouvoir discrétionnaire par la juge surveillante en l’espèce

[138] À mon avis, la compensation pré-post est permise en vertu de l’art. 21 de la *LACC*, mais elle doit être assujettie à l’exercice du pouvoir discrétionnaire du juge surveillant. La Cour a précisé, dans l’arrêt *Callidus*, les balises encadrant l’exercice de ce pouvoir discrétionnaire en vertu de l’art. 11 de la *LACC*. Les deux premiers critères sont énoncés à l’art. 11, qui précise que le juge surveillant peut rendre toute ordonnance qui est « indiquée » dans les circonstances de l’affaire et qui n’est pas contraire aux restrictions prévues par la *LACC*. De plus, la Cour a ajouté que l’exercice du pouvoir discrétionnaire doit permettre la réalisation des objets réparateurs de la *LACC* en s’attachant plus particulièrement aux critères de l’opportunité, de la bonne foi et de la diligence (par. 70).

[139] Mes collègues avancent une série d’arguments à l’encontre de la compensation en général et de la compensation pré-post en particulier : le fort potentiel perturbateur d’une compensation; le respect de la période de statu quo; la perte d’incitatifs pour la débitrice de fournir des biens et services durant la période de suspension, de crainte de ne pas être payée en retour, ce qui aurait pour effet de la priver des fonds nécessaires pour poursuivre ses opérations; le fait que le prêteur intérimaire refuserait fort probablement de continuer à financer les opérations de la débitrice si les sommes prêtées sont destinées à enrichir un autre créancier; le fait que le rempart érigé par la suspension contre les attaques des créanciers s’effriterait; le fait que la compensation déroge au principe de l’égalité entre les créanciers ordinaires et le fait que la compensation pré-post équivaut à attribuer à certains créanciers une « sorte

the commencement of proceedings; etc. (paras. 59, 61 and 73).

[140] Most of these arguments presuppose that pre-post compensation will be systematically allowed without regard for the circumstances of each case and without considering whether it is “appropriate” — hence my colleagues’ position that pre-post compensation should never be authorized unless there are exceptional circumstances. Although these arguments are legitimate, they must be left to the supervising judge, who will weigh them — along with the other relevant considerations and circumstances — in exercising the discretion to permit or to deny pre-post compensation in a particular case, having regard to the remedial objectives of the CCAA.

[141] Believing herself to be bound by the conclusions of the Quebec Court of Appeal in *Kitco*, the supervising judge in this case did not exercise her discretion under s. 11 of the CCAA. Given that this discretion was not exercised by the supervising judge, it is not for this Court to exercise it to determine whether to permit compensation between the amounts owed by the City to SM Group and the claim held by the City against SM Group. The Court has made it clear that supervising judges are in the best position to decide whether to exercise their discretion in a particular case based on “a circumstance-specific inquiry that must balance the various objectives of the CCAA” (*Callidus*, at para. 76).

[142] My colleagues are of the view that remanding the case to the court of original jurisdiction would be unhelpful and not in the interests of justice (paras. 84 and 98). I respectfully disagree. In fact, this Court recently noted in *Canadian Broadcasting Corp. v. Manitoba*, 2021 SCC 33, [2021] 2 S.C.R. 704, that in cases involving an exercise of discretion by a court of first instance, “it is not in the interests of justice for this Court to step into [that court’s] shoes and decide these matters at first instance”, and that this

de garantie » additionnelle sur de nouveaux éléments d’actif acquis par la débitrice après l’ouverture des procédures; etc. (par. 59, 61 et 73).

[140] La plupart de ces arguments présument que la compensation pré-post sera systématiquement accordée sans égards aux circonstances propres à chaque affaire, et nonobstant la question de savoir si celle-ci est « indiquée » — d’où la position de mes collègues selon laquelle la compensation pré-post ne devrait jamais être autorisée, sauf circonstances exceptionnelles. Bien que légitimes, ces arguments doivent être laissés à l’appréciation du juge surveillant qui, dans l’exercice de son pouvoir discrétionnaire d’accorder ou non la compensation pré-post dans une affaire donnée, les soupèsera avec les autres considérations et circonstances pertinentes, le tout à la lumière des objectifs réparateurs de la LACC.

[141] Estimant être liée par les conclusions de la Cour d’appel du Québec dans l’arrêt *Kitco*, la juge surveillante n’a pas exercé le pouvoir discrétionnaire que lui confère l’art. 11 de la LACC. Vu l’absence d’exercice de ce pouvoir par la juge surveillante, il ne revient pas à la Cour de l’exercer afin de décider s’il y a lieu d’autoriser ou non la compensation entre les sommes dues par la Ville de Montréal à Groupe SM et la créance de cette dernière à l’encontre de Groupe SM. La Cour a précisé que les juges surveillants sont les mieux placés pour décider s’ils doivent exercer leur pouvoir discrétionnaire dans une situation donnée en s’appuyant sur « une analyse fondée sur les circonstances propres à chaque situation qui doit mettre en balance les divers objectifs de la LACC » (*Callidus*, par. 76).

[142] Mes collègues sont d’avis que le renvoi du dossier en première instance serait inutile et contraire aux intérêts de la justice (par. 84 et 98). Avec égards, je ne suis pas d’accord. En effet, la Cour a récemment rappelé dans l’arrêt *Société Radio-Canada c. Manitoba*, 2021 CSC 33, [2021] 2 R.C.S. 704, que dans les affaires qui reposent sur l’exercice d’un pouvoir discrétionnaire par un tribunal de première instance, « il n’est pas dans l’intérêt de la justice que notre Cour se mette à la place de [ce tribunal] et

Court's role is limited to reviewing the exercise of the discretion "through [a] deferential lens" (para. 88).

III. Conclusion

[143] For these reasons, I would allow the appeal solely for the purpose of remanding the case to the Superior Court to have it determine whether the City may effect compensation between SM Group's pre-initial order debts and the post-initial order amounts owed by the City to SM Group. I would also allow the appeal so that it can be determined whether the City may effect compensation in respect of its water meter claim.

Appeal dismissed with costs, BROWN J. dissenting.

Solicitors for the appellant: IMK, Montréal.

Solicitors for the respondent: Stikeman Elliott, Montréal.

Solicitors for the interveners the Alaris Royalty Corp. and the Integrated Private Debt Fund V LP: McCarthy Tétrault, Montréal.

Solicitors for the intervenor Thornhill Investments Inc.: Fasken Martineau DuMoulin, Montréal.

Solicitor for the intervenor Ville de Laval: Service des affaires juridiques de la Ville de Laval, Laval.

Solicitors for the intervenor Union des municipalités du Québec: Borden Ladner Gervais, Montréal.

tranche ces questions en première instance » et que le rôle de la Cour se limite à réviser l'exercice de ce pouvoir « avec un regard empreint de déférence » (par. 88).

III. Conclusion

[143] Pour ces raisons, j'accueillerais l'appel à seule fin de retourner le dossier devant la Cour supérieure afin qu'il soit décidé si la Ville peut opérer compensation entre les dettes de Groupe SM pré-ordonnance initiale et les sommes dues par la Ville à Groupe SM post-ordonnance initiale. J'accueillerais également l'appel afin qu'il soit décidé si la Ville peut opérer compensation quant à sa réclamation à l'égard des compteurs d'eau.

Pourvoi rejeté avec dépens, le juge BROWN est dissident.

Procureurs de l'appelante : IMK, Montréal.

Procureurs de l'intimée : Stikeman Elliott, Montréal.

Procureurs des intervenantes Alaris Royalty Corp. et Integrated Private Debt Fund V LP : McCarthy Tétrault, Montréal.

Procureurs de l'intervenante Thornhill Investments Inc. : Fasken Martineau DuMoulin, Montréal.

Procureur de l'intervenante la Ville de Laval : Service des affaires juridiques de la Ville de Laval, Laval.

Procureurs de l'intervenante l'Union des municipalités du Québec : Borden Ladner Gervais, Montréal.

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CITATION: Carillion Canada Inc., 2022 ONSC 4617
COURT FILE NO.: CV-18-590812-00CL
DATE: 2022-09-02

SUPERIOR COURT OF JUSTICE - ONTARIO

**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 CARILLION CANADA HOLDINGS INC., CARILLION CANADA INC.,
CARILLION CANADA FINANCE CORP., CARILLION CONSTRUCTION INC.,
CARILLION PACIFIC CONSTRUCTION INC., CARILLION SERVICES INC.,
CARILLION SERVICES (FSCC) INC., BEARHILLS FIRE INC., OUTLAND
CAMPS INC., OUTLAND RESOURCES INC., ROKSTAD POWER GP INC.,
0891115 B.C. LTD., GOLDEN EARS PAINTING & SANDBLASTING LTD.,
PLOWE POWER SYSTEMS LTD., AND CARILLION GENERAL PARTNER
(B.C.) LIMITED**

Applicants

BEFORE: Chief Justice G.B. Morawetz

COUNSEL: *Monique Jilesen, Madison Robins and Laura Cobb*, for Carillion Canada Inc.

Mark A Freake and John J. Salmas, for HSBC Canada

Carlo Di Carlo, for Ernst & Young Inc., Monitor

HEARD: May 12, 2022

ENDORSEMENT

[1] This motion was first argued before Hainey J. on July 15, 2020. His decision remained under reserve at the time of his passing and was re-argued before me.

[2] Carillion Canada Inc. ("CCI") brings this motion for an order directing HSBC Bank Canada ("HSBC") to return or make payment of \$6,823,000 to CCI or the Monitor, and a declaration that HSBC is prohibited from exercising any rights against CCI to set-off, indemnification, damages, reimbursement or otherwise sweep or debit CCI's bank accounts during the CCAA Stay Period.

FACTS

[3] On January 15, 2018, Carillion plc commenced liquidation proceedings in the United Kingdom. As a result of cash flow issues associated with the liquidation of its UK parent, CCI and

its related companies (the “Applicants” or “Carillion Canada Group”), applied on January 25, 2018 for protection under the *Companies’ Creditors Arrangement Act* (“CCAA”) (the “CCAA Proceeding”).

[4] Prior to the commencement of the liquidation proceedings of Carillion plc, the Carillion Canada Group and other global Carillion entities were part of a Global Cash Concentration Arrangement with HSBC UK, whereby all cash was swept on a daily basis to a CCI bank account with HSBC UK, resulting in a zero dollar balance at the start of every day in the Canadian bank accounts of the Carillion Canada Group.

[5] The Carillion Canada Group terminated its participation in the Global Cash Concentration Arrangements immediately upon Carillion plc’s liquidation. In conjunction, HSBC cancelled the overdraft facility on which CCI relied for liquidity.

[6] The initial order (the “Initial Order”) in the CCAA Proceeding appointed Ernst & Young Inc. (“EY”) as the Monitor. The Initial Order contained a number of provisions which affected the Carillion Canada Group’s operations during the period of CCAA protection (the “Stay Period”), including:

- (a) a defined Stay prohibiting any person or entity from “exercising any option, right or remedy or taking any enforcement steps under or in respect of any agreement or agreements with respect to which any of the Applicants are party, borrower, principal obligor or guarantor”;
- (b) a Non-Derogation of Rights provision which required persons who “provided any kind of letter of credit” for the benefit of the Carillion Canada Group before the date of the Initial Order to “continue honouring” these assurances “in accordance with their terms”;
- (c) several charges appointed over the property of the debtor: an Administration Charge with first priority up to the amount of \$5 million, a Directors’ Charge with second priority up to the amount of \$11 million, plus an Intercompany Charge having third priority up to a maximum amount outstanding from time to time;
- (d) a restriction on the Carillion Canada Group’s use of funds during the Stay Period to on-going business operations, tax payments, and payments to critical suppliers; and
- (e) an entitlement to continue to utilize the pre-existing cash management system, or, with the consent of the Monitor, replace it with a substantially similar cash management system.

[7] The Stay Period has been extended several times.

[8] At all relevant times, HSBC was aware of the CCAA Proceeding.

[9] HSBC and CCI had previously entered into a Master Indemnity and Reimbursement Agreement for the Letters of Credit (the “Master Indemnity Agreement”), which authorized HSBC “to set-off and appropriate and to apply any and all deposits” against the obligations of CCI to reimburse HSBC for letters of credit. HSBC and CCI also entered into Counter Indemnity Agreements for each of the Letters of Credit.

[10] The Indemnity Agreements expressly granted HSBC the contractual right of set-off in the event HSBC had to make any payments under any of the Letters of Credit. Paragraph 10 of the Master Indemnity Agreement provides as follows:

10. In addition to and not in limitation of any rights now or hereafter available to HSBC, whether under applicable law or arising under other agreements, HSBC is authorized at any time and from time to time, without prior written notice to the Customer, to set-off and appropriate and to apply any and all deposits (general and special) and any other indebtedness at any time held by or owing by HSBC to or for the creditor of the Customer against and on account of the obligations and liabilities of the Customer to HSBC under this Agreement without any demand being made therefore, and HSBC may (i) create an overdraft in such account or accounts if there is an insufficient credit balance to cover such debit entry; or (ii) make an advance under any existing facility between the Customer and HSBC.

[11] CCI’s bank accounts with HSBC, including the CCI Main Account, were governed by HSBC’s Commercial Account Operating Agreement (the “Account Agreement”). Section 9 of the Account Agreement provides that HSBC may “consolidate and set-off” any amounts owing by CCI against CCI’s funds or accounts held by HSBC.

[12] Immediately following the granting of the Initial Order, CCI (as the main operating company for the Carillion Canada Group) took certain steps to implement a restructuring strategy including:

- (a) it began the process of downsizing employees or moving them to new employers and ceased making payments in respect of supplemental executive retirement plans (“SERPs”). CCI had previously requested, and HSBC issued four separate letters of credit in respect of the SERPs: LC 781 in the amount of \$2,748,000; LC 787 and the amount of \$719,000; LC 778 in the amount of \$2,486,000; and LC 789 in the amount of \$870,000 (collectively, the “Letters of Credit”). CCI was unable to pay severance for its laid-off employees. The SERPS were transferred to Royal Trust, which called on outstanding Letters of Credit.
- (b) the Carillion Canada Group sold certain assets to Fairfax Financial Holdings Limited (the “Fairfax Transaction”). The Fairfax Transaction provided immediate liquidity in the form of a \$50 million cash deposit which was made available to CCI for short-term liquidity and for other general corporate purposes (the “Fairfax Deposit”). The Fairfax Deposit initially

paid to the Monitor in trust, was released to CCI's Operating Account on February 8, 2018.

[13] CCI continued to utilize the Operating Account with HSBC as its primary general account for day-to-day business expenses. The Operating Account was controlled by CCI and overseen by the Monitor, who approved all significant disbursements.

[14] The Letters of Credit were unsecured by any cash or other collateral. CCI generally had little or no funds in its bank account because of the global cash concentration arrangements with Carillion plc. HSBC granted CCI an operating loan facility by way of an overdraft, supported by an unsecured guarantee from Carillion plc. In addition to its primary purpose of providing CCI with liquidity as needed, this facility could also be drawn on by HSBC to reimburse any payments for the Letters of Credit under the terms of the Master Indemnity Agreement. This facility was cancelled by HSBC on January 15, 2018 when the Carillion Canada Group terminated its participation in the Carillion global cash concentration arrangement.

[15] On February 8, 2018 Royal Trust called on the Letters of Credit. HSBC paid out \$6.8 million for the Letters of Credit on February 15, 2018.

[16] On February 27, 2018, HSBC notified CCI that it would be taking \$6.8 million from the Operating Account by "exercising the set-off right afforded to it pursuant to the Counter Indemnity Agreements, the Master Indemnity Agreement, and in law." Without waiting for a reply from CCI, HSBC took the money.

[17] HSBC did not seek leave from the court as to whether it could debit funds from CCI's account for the Letters of Credit, nor did it ask CCI or the Monitor for permission to debit the funds.

[18] That same day, within hours of receiving the notification from HSBC, CCI and the Monitor asked HSBC to hold-off on taking the funds for a few days so that they could consider their position, as they were not aware that HSBC had already taken the money. CCI promised it would keep the funds in the account so as not to prejudice HSBC's rights during that time. HSBC refused.

[19] On February 27, 2018 the Operating Account held about \$60.5 million, of which CCI states it had allocated all but \$2,471,012 to accrued business and operating expenses and/or impressed with super priority charges. CCI contends that the \$6.8 million taken by HSBC included \$4.3 million of encumbered funds, which forced CCI to dip into the charged monies to continue running its day-to-day business.

[20] Immediately after HSBC's debit of the Operating Account, CCI and the Monitor transferred all the remaining funds into the Monitor's trust account and subsequently to an Operating Account at another banking institution.

[21] The Monitor anticipates making a distribution to creditors in the near future and the allocation to employees, professionals and trade creditors have been satisfied.

ISSUES

[22] From the standpoint of CCI, the issues are as follows:

1. HSBC was not entitled to take \$6.8 million from CCI's Operating Account on February 27, 2018 and must return the funds to CCI immediately because:
 - a. the terms of the Initial Order prohibit HSBC from exercising any rights of set-off or any other legal rights against the Carillion Canada Group during the Stay Period;
 - b. in any event, funds in CCI's Operating Account were already allocated to specific operating expenses and/or impressed with priority charges and were not available for set-off purposes; and
 - c. HSBC's exercise of a self-help remedy in order to obtain full recovery of its unsecured claim was a bad faith maneuver contrary to the purposes and policy of the CCAA. Carillion Canada Group's other unsecured creditors are prejudiced because their own recovery has been reduced as a result of HSBC's conduct.

[23] HSBC states the issues as follows:

- a. whether HSBC had, as of February 27, 2018, a valid right of set-off as against CCI; and
- b. if it did, whether HSBC's exercise of its right of set-off contravened the CCAA or adversely affected CCI's restructuring in a manner contrary to the CCAA.

[24] Supplementary factums were filed by both parties following the decision of the Supreme Court of Canada in *Montréal (City) v. Deloitte Restructuring Inc.*, 2021 SCC 53. In its supplemental factum, CCI augments its statement of issues as follows:

HSBC argues that unless the initial order in a CCAA proceeding expressly stays rights of set-off, creditors are free to exercise rights of set-off without giving proper notice to the insolvent company or seeking leave of the court. This position is untenable following the Supreme Court's decision in *Montréal*.

[25] HSBC states as follows:

- a. if the obligations and liabilities HSBC set-off against were pre-filing obligations and liabilities, whether the Initial Order temporarily stayed the exercise of such set-off rights; and

- b. if such a stay did exist on a temporary basis, which is not admitted but expressly denied, whether HSBC's set-off rights can be extinguished given the express wording of section 21 of the CCAA.

[26] For the following reasons, I conclude that HSBC is entitled to retain the \$6.8 million as a valid set-off as against CCI.

LAW and ANALYSIS

[27] Paragraph 18 of the Initial Order provides:

THIS COURT ORDERS THAT during the Stay Period, all rights and remedies

...

are hereby stayed and suspended, except with the written consent of the Applicants and the Monitor, or leave of the Court, including, without limitation, by way of terminating, making any demand, accelerating, amending or declaring in default, sweeping any cash in any of the Applicants' bank account (if available), exercising any option or right or remedy or taking any enforcement steps under or in respect of any agreement or agreements with respect to which any of the Applicants are a party, borrower, principal obligor as guarantor...

[28] Section 21 of the CCAA provides:

21. Law of set-off or compensation to apply – The law of set-off or compensation applies to all claims made against a debtor company and to all actions instituted by it for the recovery of debts due to the company in the same manner and to the same extent as if the company were plaintiff or defendant, as the case may be.

[29] In *Montréal*, the Supreme Court characterized the broad discretion afforded to supervising judges to grant orders to “ensure that restructuring is successful and that the CCAA objectives are achieved” as the “fundamental feature” of the CCAA and the true “engine” driving the statutory scheme. The court specifically concluded that the broad discretion under ss. 11 and 11.02, which sets out the stay power under the CCAA, allows the supervising judge to stay rights held by creditors if the exercise of those rights could jeopardize the restructuring process, including a creditor's right to effect pre-post compensation. The scope of Section 21 of the CCAA was specifically considered in *Montreal* at paras. 63 – 73.

[63] In addition, we note that s. 21 of the CCAA does not grant creditors a right to pre-post compensation that would be shielded from a supervising judge's power to order a stay under ss. 11 and 11.02 of the CCAA. Although s. 21 of the CCAA indicates that there is a right to effect compensation in proceedings under that statute, we are of the opinion that it applies only to compensation between debts that arise *before an initial order is made* (in other words, “pre-pre compensation”).

The modern approach to statutory interpretation dictates this conclusion (*Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21, citing E. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87). Our interpretation of s. 21 of the CCAA is not based on an inappropriate analogy with the provisions of the BIA.

[64] Section 21 does state that it is possible to effect compensation in insolvency proceedings under the CCAA, but it does not specifically deal with pre-post compensation. It reads as follows:

21 The law of set-off or compensation applies to all claims made against a debtor company and to all actions instituted by it for the recovery of debts due to the company in the same manner and to the same extent as if the company were plaintiff or defendant, as the case may be.

Read in light of its context, its purpose and the scheme of the CCAA, s. 21 is, in our view, limited to authorizing pre-pre compensation for the purpose of quantifying creditors' claims on the date of commencement of proceedings. (Emphasis Added)

[65] With regard to the context, s. 21 is in a different part of the statute than the one that provides for a court's discretion to order a stay. The power to order a stay (ss. 11 and 11.02) and most of the exceptions to it (see, e.g., ss. 11.01, 11.08 and 11.1) appear in Part II, which is entitled "Jurisdiction of Courts". Section 21, meanwhile, is in the division of Part III entitled "Claims", which also includes ss. 19 and 20. This indicates that Parliament probably did not consider 21 to be an exception to the stay period. If Parliament had in fact intended s. 21 to be an exception, it would have included it in Part II or expressly stated that it was an exception. (Emphasis Added)

[66] What is more, when s. 21 is considered in the broader context of the "Claims" division, it becomes clear that this provision is part of a set of rules governing the claims that may be dealt with by a compromise or arrangement and the quantification of the resulting amounts. (Emphasis Added)

[67] Section 19 specifies which claims may be dealt with by a compromise or arrangement (s. 19(1)) and those which will remain intact despite the creditors' agreement to a compromise or arrangement and its sanction by a court (s. 19(2)). Only claims arising before the date of commencement of bankruptcy or insolvency proceedings are "claims" that fall under s. 19 and therefore give creditors a right to vote on a compromise or arrangement. As for s. 20, it contains rules for determining the amount of claims. Once that amount has been determined, it can then be used to define the relative weight of the voting rights of each creditor with a claim. (Emphasis Added)

[68] Section 21 complements ss. 19 and 20; the compensation authorized by s. 21 is intended, among other things, to determine the value of the claim that a

creditor may have against the debtor on the date of commencement of proceedings. In other words, the purpose of s. 21 is to provide an accurate picture of the pecuniary interest each creditor has in the restructuring on the date of commencement of proceedings, and of the number of votes each creditor should have (see *Kitco*, at para. 83). This provision is not concerned with what might happen to the debtor's business after that date, because the date of commencement of proceedings is when [TRANSLATION] "the claims must be established" and therefore when the mutuality of debts must be assessed (B. Boucher, "Procédures en vertu de la *Loi sur les arrangements avec les créanciers des compagnies*", in *JurisClasseur Québec — Collection Droit des affaires — Faillite, insolvabilité et restructuration* (loose-leaf), by S. Rousseau, ed., fasc. 14, at No. 70; see also *Kitco*, at para. 34). (Emphasis Added)

[69] With all due respect for our colleague, in light of the context of s. 21, it is evident that this provision is not meant to legitimize pre-post compensation.

[70] This contextual interpretation of s. 21, which limits its scope to pre-pre compensation, is also confirmed by the section's purpose. It was added to the CCAA to prevent the unfair situation that would result from a creditor being required to pay its debt to the debtor company in full but receiving almost nothing from the debtor in payment of its claim under an arrangement or compromise. The effect of s. 21 is that the creditor receives payment of its claim up to the value of the debt it owes to the debtor (Anderson, Gelbman and Pullen, at p. 27; Boucher, at No. 70; McElcheran, at p. 116). (Emphasis Added)

[71] It is true that compensation "creat[es] a type of security interest in the [insolvent company's] estate" because it "[authorizes] the party claiming set-off [to] 'reorde[r]' ... his priority" by reducing the value of that party's claim (Husky Oil Operations Ltd. v. Minister of National Revenue, [1995] 3 S.C.R. 453, at paras. 59-60; see Kitco, at paras. 63-68). The creditor uses its indebtedness to the debtor as a form of security for its claim, security that is equal in value to its debt to the insolvent company (*Stein v. Blake*, [1996] 1 A.C. 243 (H.L.), at p. 251). This portion of its claim is therefore sure to be paid in full (*Husky Oil*, at para. 58). The effect of compensation is thus to deviate from the principle of equality among ordinary creditors, a fundamental principle of insolvency law that applies with equal force in proceedings under the CCAA, one of the remedial objectives of which is to ensure the fair and equitable treatment of the claims made against a debtor (Callidus, at para. 40). The exception created by compensation must therefore be interpreted narrowly. As a general rule, "[o]nce a formal insolvency process commences, all unsecured creditor remedies are stayed and the creditor must stand in line behind secured and preferred creditors and share any remaining recoveries in the estate *pro rata* with all other unsecured creditors" (McElcheran, at p. 78). (Emphasis Added)

[72] The prejudice suffered by a creditor wishing to effect pre-post compensation does not justify expanding the scope of s. 21. When the debt owed by the creditor arises after a stay order has been made, prejudice is merely illusory. The fact that the creditor contracted obligations toward the debtor company during the stay period does not place it in a worse situation than it would have been in had it contracted with a third party instead. If it had contracted with a third party, it would likewise have had to pay the full price of the goods or services it obtained (*Tungsten* (S.C.), at para. 27). A creditor that contracts with the debtor company during the status quo period knows or ought to know that it will probably receive only pennies on the dollar in payment of its pre-order claim and that payment of its post-order debt will benefit it and the other creditors.

[73] Because there is really prejudice only in the case of pre-pre compensation, this exception to the principle of equality should apply to only one of the debtor's assets on the date of commencement of insolvency proceedings, that is, the debt owed to it by the creditor (Kitco, at para. 68; Husky Oil, at para. 59). Otherwise, giving the green light to pre-post compensation would amount to granting certain creditors an additional "type of security interest" in respect of new assets acquired by the debtor after the commencement of proceedings (for example, amounts received as interim financing). Professor Wood aptly describes the injustice that would thus befall the other ordinary creditors whose rights and remedies have been stayed:

The ability to exercise a right of set-off in restructuring proceedings can operate to improve greatly the position of one creditor at the expense of the other creditors. This is illustrated in the following example. Suppose that the debtor company owes \$1,000 to a creditor. The debtor company then initiates restructuring proceedings. While the proceedings are under way, the debtor company sells and delivers goods to the creditor for \$1,000. By exercising its right of set-off, the creditor obtains full recovery of its claim at the expense of the other unsecured creditors whose claims will be compromised or otherwise affected by the plan. [p. 400]

(Emphasis Added)

[30] CCI concedes that HSBC was entitled to exercise its right to set-off under the Master Indemnity Agreement in the ordinary course.

[31] CCI submits that while set-off rights are preserved under the CCAA, the exercise of these rights can (and, in this case, should) be stayed during the period of CCAA protection to preserve the status quo and further the objectives of the CCAA regime and that creditors should not be permitted to derail restructuring or liquidation efforts by asserting set-off rights or debts arising during the period of the CCAA protection, absent a court ordered priority status or carveouts from the stay.

[32] CCI contends that as a result of HSBC taking the money from CCI's Operating Account, HSBC improved its position to obtain "full recovery", while all other creditors can expect to recover only a small fraction of their claims. As a result of HSBC's actions, CCI contends it has \$6.8 million less of funds available to distribute to creditors through the claims process.

[33] In this case, CCI takes the position that,

(i) HSBC's exercise of set-off is of pre-filing claims and post-filing claims;

(ii) the stay provision of the Initial Order applies to HSBC;

(iii) s. 21 of the CCAA does not grant HSBC Canada a right of set-off (para. 63 of *Montréal*).

Did HSBC's exercise of set-off breach the Initial Order?

[34] HSBC submits that the stay provision in the Initial Order does not prohibit HSBC's exercise of set-off as the debts arose before the Initial Order was made.

[35] However, HSBC does not challenge the jurisdiction of the court to temporally stay set-off rights in a CCAA proceeding, where the immediate exercise of such rights will put a debtor company's restructuring efforts in jeopardy.

[36] The difficulty with this acknowledgement is that in many cases a determination has not been made at the time that CCAA proceedings are initiated as to whether the immediate exercise of set-off rights will put a debtor company's restructuring efforts in jeopardy. In this case, HSBC exercised set-off rights shortly after the Initial Order was pronounced and at a time when CCI stated it was engaged in a restructuring. In any event, it was uncertain as to whether CCI would be engaged in a restructuring or liquidation.

[37] In addition, it is often difficult to ascertain at the time of commencement of CCAA proceedings as to whether the set-off that a party purports to exercise relates to pre-pre obligations or pre-post obligations. This is one of the issues being determined on this motion.

[38] In any event, HSBC was clearly aware of the CCAA proceeding and when the set-off was exercised, HSBC was certainly aware of the stay provisions in the Initial Order.

[39] By exercising its unilateral right of set-off, HSBC exercised a remedy and an enforcement step under agreements to which the Applicants are party, borrower, principal obligor as guarantor.

[40] In my view, a plain language reading of the stay provision leads to the conclusion that the stay provision was broad enough to cover the exercise of set-off rights. The exercise by HSBC of set-off breached paragraph 18 of the Initial Order.

[41] Further, the guidance provided by the Supreme Court in *Montréal* at paragraphs 65 and 66 makes it clear that the court has the discretion to order such a stay.

[42] In summary, on this issue, the following is the state of affairs that existed at the time the Initial Order was granted.

1. Paragraph 18 of the Initial Order has the effect of staying the exercise of set-off remedies.
2. No determination had been made as to whether CCI would be able to restructure or whether it was in a liquidation mode.
3. No determination had been made by the court as to whether the contractual or legal set-off rights of HSBC were with respect to pre-pre or pre-post set-off.

[43] On this issue, I conclude that if HSBC wished to exercise its right of set-off, it was required to seek leave to do so. HSBC did not seek leave and proceeded to knowingly breach the stay provision.

Were the funds in CCI's Operating Account available for set-off purposes?

[44] The second issue to be determined is whether the funds in CCI's Operating Account were already allocated to specific operating expenses and/or impressed with priority charges and were not available for set-off purposes.

[45] CCI submits at para. 43 of its factum that HSBC was not entitled to set-off funds from the CCI Main Account because such funds "were allocated to accrued operating expenses and/or impressed with the court ordered priority charges", as set out in the allocation chart, such that only \$2,471,012 of the \$60,530,000 in the CCI Main Account on February 21, 2018 was "free cash" available to CCI.

[46] The foregoing submission is at odds with CCI's factum, specifically at paragraphs 25 and 26:

25. HSBC did not seek instructions from the Court as to whether it could debit funds from CCI's account for the SERP Letters of Credit. It did not ask CCI or the Monitor for permission to debit the funds. Instead, on February 27, 11:39 a.m. PST, HSBC notified CCI that it would unilaterally take \$6.8 million from the Operating Account by "exercising the set-off right afforded to it pursuant to the Counter Indemnity Agreements, the Master Indemnity Agreement, and in law." Less than two hours later, without waiting for a reply from CCI, HSBC took the money.

26. That same day, within hours of receiving the letter, CCI and the Monitor asked HSBC to hold-off on taking the funds for a few days so that they could consider their position, as they were not aware (and were not advised) that HSBC had already taken the money. CCI promised it would keep the funds in the account so as not to prejudice HSBC's rights during that time. HSBC refused.

[47] I find it difficult to reconcile the position that CCI puts forth in paragraphs 25 and 26 with its submission that the funds in the CCI account “were allocated to accrued operating expenses and/or impressed with the court ordered priority charges”, as set out in the allocation chart attached to the affidavit of Keith Hamilton. If the funds were already allocated and/or impressed with the trust, the funds could not be available to HSBC as they had been earmarked for other purposes.

[48] The submissions of CCI on this point are premised on the argument that the funds taken by HSBC were not available to any creditors because they were allocated to accrued operating expenses and/or impressed with the court ordered priority charges. The submissions go on to note that priority charges are central to the CCAA purpose and objectives that monitors and other professionals require protection for the work they do in stabilizing, restructuring and/or liquidating an insolvent company.

[49] CCI also submits that the primary goal at the outset of the CCAA Proceeding was “preserving the going concern value of the applicant’s business and that CCI needed access to much-needed liquidity. However, I find myself in agreement with the statement of HSBC to the effect that CCI’s position has no basis in law and appears to conflate an account subject to court ordered charges with a segregated account that is impressed with a trust.

[50] HSBC has, in my view, provided a complete answer to this argument in its factum commencing at paragraph 63 and in particular at paragraphs 65 – 68 which read as follows:

65. Funds in a general operating account that are subject to court-order charges are not rendered “untouchable” pending payment of the beneficiaries of such charges. Court-ordered charges attach to the assets of a debtor company and act as a backstop in the event there is a distribution shortfall. Likewise, the “allocations” set out in the Allocation Chart was simply CCI’s accounts payable in the ordinary course and were not segregated funds.

66. Approximately \$50 million of the \$60 million in the CCI Main Account on February 27, 2018 came from a deposit (the “Fairfax Deposit”) advanced by Fairfax Financial Holdings Limited (“Fairfax”) in respect of a sale transaction among the applicants and Fairfax (the “Fairfax Transaction”). The Court approved the Fairfax Transaction by order dated February 8, 2018 (“the “AVO”) in the Fairfax Deposit was soon thereafter released from the Monitor’s trust account and delivered to CCI to be used for its “short-term liquidity purposes and for general corporate purposes”. The AVO includes certain restrictions in respect of the Fairfax Deposit and creates the “Deposit Charge” but does not reference rights of set-off.

67. In the Allocation Chart, CCI subtracts the amount of the Fairfax Deposit from the “free cash available to CCI”, apparently on the basis of the “Deposit Charge”, but ignores the plain language of AVO which provides that the Fairfax Deposit can be used to satisfy its “short-term liquidity purposes and for general corporate purposes”, which would include the payables set out in the Allocation Chart. Further, even if the Fairfax Deposit was impressed with trust characteristics

by virtue of the Deposit Charge, which is expressly denied, such characteristics were lost one CCI deposited the Fairfax Deposit into the CCI Main Account and commingled that with other funds. Moreover, there were no such Deposit Charge conditions impressed on the other approximately \$10 million in the CCI Main Account as at February 27, 2018.

68. In any event, HSBC Canada's set-off has not prejudiced beneficiaries of the court-ordered charges or allocations. Mr. Hamilton confirmed on cross-examination that all "allocations" to employees, professionals and trade creditors in the Allocation Chart have been satisfied. The Fairfax Transaction closed and the Fairfax Deposit never became interim financing. There is also no evidence whatsoever that any of the beneficiaries of the Administration Charge or KERP Charge have not, or will not, be paid as a result of HSBC Canada's set-off. (Emphasis Added)

[51] Further, as noted in [21] above, the underlined portion in para. 68 makes it clear that the beneficiaries of the court-ordered charges or allocations have not been prejudiced.

[52] I also question the submission at paragraph 51 of the CCI factum, specifically the concluding sentence which reads,

"Not only did HSBC breach the Initial Order by taking the funds from CCI's account, it also upset the order of priority which governs recovery and ensures the fair and equitable treatment of all creditors."

[53] I do not view the exercise of set-off rights as an attempt to elevate the priority position of HSBC. At all times, HSBC is an unsecured creditor. It does have preferred treatment in certain prescribed circumstances, such as that outlined in s. 21 of the CCAA.

[54] CCI's position is also at odds with the comments of the Supreme Court in *Montreal* at paragraphs 70 - 73, which confirms that in cases of pre-pre set-off, there is an exception to the principle of equality.

[55] In the circumstances of this case, I conclude that the funds in the Operating Account were available if set-off was permitted under s. 21 of the CCAA.

Did HSBC's exercise of set-off contravene s. 21 of the CCAA?

[56] The next issue to be determined is whether the set-off claim of HSBC is a pre-pre-or pre-post. This issue is addressed in the supplementary factums filed by CCI and HSBC.

[57] In *Montreal*, the Supreme Court concluded that s. 21 of the CCAA allows pre-pre set-off for the purpose of quantifying creditors claims on the date of commencement of proceedings.

[58] CCI submits that the majority of *Montréal* held that s. 21 of the CCAA "applies only to compensation between debts that arise before an Initial Order is made". The preservation of set-

off rights is an aspect of the plan of arrangement that assists in quantifying the value of the creditors claim against the insolvent company only “on the date of commencement of proceedings.”

[59] CCI submits that HSBC’s claim to set-off arose after the commencement of CCAA Proceedings when the SERP Letters of Credit were paid out. While HSBC may have a valid claim to contractual set-off, that claim is not protected by s. 21 of the CCAA and cannot be exercised during the Stay Period. It is simply an unsecured claim that should have been dealt with through the claims process, like those of all other unsecured creditors.

[60] HSBC submits that its obligations to pay out under the Letters of Credit, on the one hand, and CCI’s indemnity obligations owing to HSBC under the Indemnity Agreements, on the other hand, are both either pre-filing or post-filing obligations and liabilities, they cannot be both or a mix of the two.

[61] The claims process in this proceeding is governed by the Claims Procedure Order granted on July 6, 2018. The Claims Procedure Order defines a “prefiling claim” as follows:

“Pre-filing Claim” means any Claim of any Person in whole or in part against the Applicants that (A) is based in whole or in part on facts existing prior to the Filing Date, (B) relates to a time period prior to the Filing Date, or (C) is a right or claim of any kind that would be a claim provable in bankruptcy within the meaning of the BIA had the Applicants become bankrupt on the Filing Date and includes an Equity Claim and a Secured Claim.

[62] HSBC submits that the rights and claims of HSBC and CCI connection with the letters of credit and indemnity agreements satisfy each of (A), (B) and (C).

[63] The legal argument of HSBC is further developed commencing at paragraph 10 of the supplementary factum.

10. HSBC issued the Letters of Credit between 2002 and 2009 and CCI executed the Indemnity Agreements,... during the same time period. As such, the rights, obligations and liabilities of each of HSBC Canada and CCI arose between nine and 16 years before the Filing Date and relate to facts existing prior to the Filing Date, even if such rights, obligations and liabilities were contingent in nature....

11. The fact that the HSBC Canada’s claims and CCI’s liabilities under the Indemnity Agreements were not quantified until after the Filing Date does not transform the claims into post-filing claims, rather it simply renders the claims contingent prefiling claims. In *AbitibiBowater Inc. Re*, [2012 SCC 67 (“*AbitibiBowater*”)] the SCC held that “[u]nlike in proceedings governed by the common law or the civil law, a claim may be asserted in insolvency proceedings even if it is contingent on an event that has not yet occurred... [and]... thus, the broad definition of ‘claim’ in the BIA includes contingent and future claims that would be unenforceable at common law or in civil law.”

12. Regarding the test for determining a contingent claim, the SCC in *AbitibiBowater* held that the “criterion used by courts to determine whether a contingent claim will be included in the insolvency process is whether the event that has not yet occurred is too remote or speculative”. As discussed below, far from being remote or speculative, the events leading to HSBC exercising its set-off rights were triggered by CCI’s own decision to cease funding its SPA premiums after the Filing Date.

13. Additionally, in this case, the definition of “Claims” in the Claims Procedure Order expressly captures “contingent” claims.

[64] HSBC also references s. 19(1) of the CCAA which sets out which claims may be dealt with by compromise or arrangement.

19 (1) Subject to subsection (2), the only claims that may be dealt with by a compromise or arrangement in respect of a debtor company are

- (a) claims that relate to debts or liabilities, present or future, to which the company is subject on the earlier of
 - (i) the day on which proceedings commenced under this Act, and
 - (ii) if the company filed a notice of intention under section 50.4 of the *Bankruptcy and Insolvency Act* or commenced proceedings under this Act with the consent of inspectors referred to in section 116 of the *Bankruptcy and Insolvency Act*, the date of the initial bankruptcy event within the meaning of section 2 of that Act; and;
- (b) claims that relate to debts or liabilities, present or future, to which the company may become subject before the compromise or arrangement is sanctioned by reason of any obligation incurred by the company before the earlier of the days referred to in subparagraphs (a)(i) and (ii).

[65] HSBC goes on to submit that s. 19 does not only capture debts that crystallized prior to the Filing Date, as CCI asserts, but also any “liabilities” in relation to “any obligation incurred by the company” before the date on which the CCAA Proceedings commenced. Here, HSBC set-off was in relation to contractual indemnity obligations incurred by CCI and set-off rights granted by CCI to HSBC on consent, prior to the filing date.

[66] In *AbitibiBowater*, the Supreme Court determined that in order to qualify as claims subject to the CCAA process –

- (1) there must be a debt;

- (2) the debt, liability or obligation must be incurred before commencement of the CCAA proceedings; and
- (3) it must be possible to attain a monetary value to the debt, liability or obligation.

[67] In my view, the *AbitibiBowater* analysis supports the position that HSBC's claim for set-off may be asserted in these proceedings on the basis that they arose out of pre-pre-obligations. In addition, a plain reading of s. 19 supports the position put forth by HSBC, as does a plain reading of the definition of "Pre-filing Claim" in the Claims Procedure Order.

[68] In addition, the Non-Derogation of Rights provision at paragraph 23 of the Initial Order required HSBC to honour the Letters of Credit in accordance with their terms. As such, it is clear to me that CCI considered HSBC's obligation under the Letters of Credit to have existed prior to the commencement of the CCAA Proceeding.

[69] I find that the contractual set-off claim of HSBC is a pre-pre set-off which, as the Supreme Court of Canada acknowledged in *Montréal* at paragraphs 63 – 64 is preserved pursuant to section 21 of the CCAA.

SUMMARY

[70] The foregoing results in the following conclusions:

1. Prior to the Initial Order, HSBC had contractual set-off rights.
2. The Initial Order temporally stayed HSBC from exercising its rights of contractual set-off.
3. The set-off rights of HSBC are pre-pre-set-off rights which are preserved pursuant to s. 21 of the CCAA.
4. There was no prohibition that would restrict the funds in CCI's Operating Account from being available for set-off purposes.
5. Although HSBC knowingly breached the Initial Order by unilaterally exercising set-off rights, this activity did not result in prejudice to other unsecured creditors of Carillion Canada Group. The recovery of unsecured creditors is dependent upon whether HSBC's set-off rights are preserved pursuant to s. 21 of the CCAA.

[71] I have no doubt that, prior to exercising its set-off rights, HSBC was well aware that there was a significant likelihood that a court would find that it was stayed from exercising its set-off rights unilaterally. However, the actions that HSBC took are not such that should alter the legal conclusion that HSBC is entitled to a set-off claim. There is no evidence that the exercise of the set-off had the effect of undermining CCI's restructuring efforts. Simply put, I am not prepared,

nor do I think it appropriate, to override HSBC's set-off claim and reduce HSBC's claim to the same priority as any other general unsecured claim in the CCAA Proceeding. Section 21 of the CCAA recognizes and preserves the pre-pre set-off claim of HSBC. HSBC set-off rights have been found to be valid and consequently are to be enforced separate and apart from any distribution to general unsecured creditors.

DISPOSITION

[72] In the result, the motion of CCI for an order directing HSBC to return or make payment in the amount of \$6,820,000 CCI is dismissed. The request for a declaration that HSBC be prohibited from exercising any rights against CCI to set-off is dismissed.

[73] With respect to costs, the parties had reached an agreement that the successful party would be entitled to its costs in the amount of \$50,000. Notwithstanding this agreement, the conduct of HSBC in unilaterally exercising set-off rights in the face of the stay provisions in the Initial Order, is such that, in my view, the appropriate disposition is for HSBC to pay costs in the amount of \$50,000 to CCI.

Chief Justice G.B. Morawetz

Date: September 2, 2022

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CITATION: *In Re Hudson's Bay Company*, 2025 ONSC 1530
COURT FILE NO.: CV-25-00738613-00CL
DATE: 20250310

**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, Maria Konyukhova, Philip Yang and Brittney Ketwaroo*, for the
Applicants
Sean Zweig and Preet Gill for Alvarez & Marsal Canada Inc., the Proposed
Monitor
Linc Rogers and Caitlin McIntyre for Restore Capital LLC, Proposed DIP Lender
Evan Cobb for Bank of America
David Rosenblatt for Pathlight Capital LP

HEARD: March 7, 2025

REASONS FOR JUDGMENT

OSBORNE J.

1. It is hard not to have a sense of melancholy when considering the Application before me. Hudson's Bay is the oldest company in North America and a very prominent Canadian department store. It was founded in 1670. Now, approximately 355 years later, it is insolvent and seeks protection from its creditors.

2. At the conclusion of the initial hearing of this Application on Friday, I granted the requested relief with reasons to follow. These are those reasons.

The Application

3. The Applicants, Hudson's Bay Company ULC Compagnie De La Baie D'Hudson SRI ("Hudson's Bay" or the "Company"), HBC Canada Parent Holdings Inc. ("Hudson's Bay Parent 1"), HBC Canada Parent Holdings 2 Inc. ("Hudson's Bay Parent 2"), The Bay Holdings ULC ("The Bay Holdings"), HBC Bay Holdings I Inc. ("Hudson's Bay Holdings 1") and HBC Bay Holdings II ULC ("Hudson's Bay Holdings 2"), HBC Centerpoint GP Inc. ("Centerpoint GP"), HBC YSS 1 LP Inc. ("YSS 1 LP"), HBC YSS 2 LP Inc. ("YSS 2 LP"), HBC Holdings GP Inc. ("Hudson's Bay Holdings GP"), Snospmis Limited ("Snospmis"), 2472596 Ontario Inc. ("596 Ontario"), 2472598 Ontario Inc. ("598 Ontario", and collectively, the "Applicants" or the "Companies") bring this Application pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA").

4. Today, the Applicants seek an Initial Order providing for:

- a. an urgent stay of proceedings (the "Stay of Proceedings") for the permitted initial ten-day period (the "Initial Stay Period") under s. 11.02(2) of the *CCAA*;
- b. an extension of the Stay of Proceedings to certain Non-Applicant Stay Parties (as defined below);
- c. the appointment of Alvarez & Marsal Canada Inc. as monitor (the "Proposed Monitor");
- d. the approval of a DIP Agreement and authority to access the DIP Facility;
- e. authority to maintain the existing Cash Management System;
- f. authority to pay certain pre-filing amounts to Critical Suppliers; and
- g. approval of an Administration Charge, a Directors' Charge and a DIP Lenders' Charge,

together with certain other relief necessary to preserve the Applicants' business and stakeholder value during the Initial Stay Period.

5. The Applicants rely on the Affidavit of Jennifer Bewley sworn March 7, 2025. Ms. Bewley is the Chief Financial Officer of Hudson's Bay and holds a number of other offices within the Applicants' corporate structure. The Applicants also rely on the Pre-Filing Report of the Proposed Monitor.

6. Defined terms in this Endorsement have the meaning given to them in the Application materials and/or the Pre-Filing Report, unless otherwise stated. All references to currency are expressed in Canadian dollars.

Background to the Application

7. Hudson's Bay currently operates, across seven provinces, 88 full-line Hudson's Bay-branded stores, three stores operating under a licence agreement as "Saks Fifth Avenue", and 13 stores operating under a licence agreement as "Saks OFF 5TH". It leases four distribution centres, one of which is in British Columbia with the remaining three in Ontario. It has approximately 9,364 employees, of whom 647 are employed subject to collective bargaining agreements. It has pension plans with both defined benefit and defined contribution elements.

8. When Hudson's Bay was founded in 1670, it was granted a right of sole trade and commerce over an expansive area of land known as Rupert's Land, which included what is today all of Manitoba, most of Saskatchewan, the southern parts of Alberta and Nunavut, and the northern parts of Ontario and Québec.

9. By the middle of the nineteenth century, Hudson's Bay evolved into a mercantile business selling a wide variety of products from furs to fine homeware in shops across Canada. Hudson's Bay officially became a Canadian company in 1970, when it rechartered under Canadian law.

10. Today, Hudson's Bay and its subsidiaries collectively operate as a premier North American department store retailer with significant real estate assets in Canada. In 2012, the Company completed an initial public offering of its common shares, which traded on the Toronto Stock Exchange. One year later, it acquired Saks Incorporated which then operated luxury department stores in the United States under the banners "Saks Fifth Avenue" and "Saks OFF 5TH".

11. The retail landscape in Canada and across North America has evolved dramatically and rapidly over the decades since those events. So-called "brick-and-mortar" stores have struggled to compete with e-commerce players, resulting in a decline in traffic at those stores. This trend has had a material negative impact on Hudson's Bay and its financial and operating results as well as its real estate assets.

12. As a result of these challenges, Hudson's Bay was taken private on March 3, 2020 by a group of then-existing shareholders. Saks Inc., together with its US subsidiaries, became a sister company and affiliate of Hudson's Bay. Between 2020 and 2024, Hudson's Bay and Saks Global shared the same ownership group and refinanced as a single credit group for credit facility purposes, while trade creditors and other service providers (with certain exceptions) transacted with each business separately.

13. The challenges noted above were exacerbated significantly by the Covid 19 pandemic and associated lockdown which resulted in a further significant decline in foot traffic at Hudson's Bay stores across Canada. The lasting impacts of the pandemic, including the widespread and continuing trend towards remote work, has decreased further still foot traffic at retail stores, and increased associate economic pressures.

14. The Company's flagship downtown stores have been disproportionately impacted since they have historically relied on office workers and commuters for a significant proportion of their revenue. At the same time, these locations represent some of Hudson's Bay's highest cost operations due to rent and other expenses.

15. Notwithstanding repeated and continuing efforts by the Company to address its financial and operational challenges since its privatization, including the pursuit of an aggressive e-commerce expansion strategy to counteract the impact of the decline in foot traffic at retail stores, and cost-cutting, the challenges have continued.

16. In December, 2024, Saks Global acquired Neiman Marcus. That transaction significantly reduced the funded debt obligations on Hudson's Bay's Canadian business, which then became separately financed with standalone credit facilities.

17. Recent and continuing uncertainty in financial markets, together with trade tensions with the United States and the threat of tariffs, have created even more challenging conditions for refinancing and business operations.

18. Earlier this year, Hudson's Bay had advanced discussions with potential lenders, pursuant to which, it was hoped, the Company could refinance some or all of its Credit Facilities and improve its liquidity position. Regrettably, those were not successful, and the potential lenders were ultimately unwilling to provide further financing, resulting in the liquidity crisis facing the Company today.

19. Put simply, Hudson's Bay is out of money and cannot meet its financial obligations as they come due. It therefore brings this Application today seeking the relief set out above.

Jurisdiction

20. Subsection 9(1) of the *CCAA* provides that an application for a stay of proceedings under the *CCAA* may be made to the court that has jurisdiction in the province in which the head office or chief place of business of the company in Canada is situated.

21. In *Nordstrom Canada Retail, Inc.*, 2023 ONSC 1422 ("*Nordstrom*") at paras. 15 and 27, this Court found that the company's "chief place of business" was Ontario, notwithstanding the fact that the debtor was incorporated and had significant business operations in British Columbia. In determining whether the court had jurisdiction over the proceedings, this Court considered multiple factors, including the location of the company's assets, employees and sales. The Court found that there was sufficient evidence establishing Ontario as the proper jurisdiction based on the following:

[...] 8 of the 13 Nordstrom Canada retail stores are located in Ontario, while approximately 1,450 out of Nordstrom Canada's 2,500 full and part- time employees work in Ontario. Further, during

fiscal year 2022, store sales in Ontario totalled \$220 million, compared to \$148 million in British Columbia and \$77 million in Alberta.

22. Here, 41 of the Applicants' 90+ stores are located in Ontario - more than in any other province - and its head office is in Toronto. Approximately 51.6% of the Applicants' employees are also located in Ontario, and its pension plan is registered with the Financial Services Regulatory Authority of Ontario.

23. I am satisfied that this Court has jurisdiction to grant the relief sought.

24. Further, and while this Court has broad discretion pursuant to section 11 of the *CCAA* to make any order it considers appropriate in the circumstances, section 11.001 requires that the relief sought on an initial application be limited to what is "reasonably necessary for the continued operations of the debtor company in the ordinary course of business" during the initial 10 day period.

25. This provision is intended to "limit the decisions that can be taken at the outset of a *CCAA* proceeding to measures necessary to avoid the immediate liquidation of an insolvent company, thereby improving participation of all players". See: *Lydian International Limited (Re)*, 2019 ONSC 7473 ("*Lydian*") at para 25. Whether any particular relief is necessary to stabilize a debtor company's operations during the initial stay period is inherently a factual determination, based on all of the circumstances of a particular debtor: *Boreal Capital Partners Ltd et al. (Re)*, 2021 ONSC 7802 at para 16.

The Applicants are Insolvent

26. The *CCAA* applies to a "debtor company" or affiliated debtor companies where the total amount of claims against the debtor or its affiliates exceeds \$5 million. The Applicants are each a "company" for the purposes of s. 2 of the *CCAA* as they do business in or have assets in Canada: *Lydian* at para. 35-36.

27. The *CCAA* defines "company" in s. 2(1) as, among other things, "[a]ny company, corporation or legal person incorporated by or under an Act of Parliament or of the legislature of a province and any incorporated company having assets or doing business in Canada, wherever incorporated [...]." The Applicants, as corporations existing under the laws of the Province of Ontario and British Columbia, meet the definition of "company".

28. A "debtor company" means, *inter alia*, a company that is insolvent: *CCAA*, ss. 2 and 3(1). The *CCAA* defines a "debtor company" as, among other things, any company that is insolvent or has committed an act of bankruptcy within the meaning of the *Bankruptcy and Insolvency Act* ("*BIA*").

29. The term “insolvent” is not defined in the *CCAA* and therefore a determination of whether a company is insolvent requires consideration of the definition of “insolvent person” in the *BIA*, as:

a person who is not bankrupt and who resides, carries on business or has property in Canada, whose liabilities 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.

30. Each of the above factors is disjunctive.

31. Courts have also considered the expanded concept of insolvency adopted in *Stelco Inc., Re*, 2004 CarswellOnt 1211 at para. 26 (“*Stelco*”), in which this court held that a debtor is insolvent where there is a looming liquidity crisis such that it is reasonably foreseeable that the debtor will run out of cash unless its business is restructured. This approach to the insolvency criteria has been applied in other cases, including *Target Canada Co. (Re)*, 2015 ONSC 303 (“*Target*”) at para. 26; *Just Energy Corp. (Re)*, 2021 ONSC 1793 (“*Just Energy*”) at paras. 48 to 51; and *Nordstrom* at para. 26.

32. I am satisfied that the Applicants here are insolvent in that they are unable to meet their obligations as they generally become due. As of January 1, 2025, the Applicants had approximately \$3 million in cash on hand. They owed approximately \$315 million in trade payables and \$422 million in pre-filing secured debt in addition to \$724.4 million in mortgage obligations, for approximate total Secured Debt Obligations of \$1.1294 billion.

33. Hudson’s Bay today is facing an imminent liquidity crisis. It has not paid rent at several of its leased stores and a number of its trade creditors have not been paid. The failure to pay rent will imminently trigger an escalating chain of events leading to defaults under other leases, where Hudson’s Bay has failed to pay rent and cross defaults on its secured obligations. As reflected in the Cash Flow Forecast prepared by Hudson’s Bay and reviewed by the Proposed Monitor, the Companies have a critical need for immediate financing to continue operating in the ordinary course.

34. Accordingly, I am satisfied that the Applicants are corporations that collectively owe over \$5 million in outstanding liabilities. They have delivered the documents and financial statements required under s. 10(2) of the *CCAA*.

Stay of Proceedings

35. Section 11.02(1) of the *CCAA* provides that the Court may order a stay of proceedings on an initial *CCAA* application for a period of not more than 10 days. Section 11.001 of the *CCAA* provides that relief granted on an initial *CCAA* application shall be limited to relief that is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that initial 10-day period.

36. In *Lydian*, the Chief Justice observed that the Initial Stay Period preserves the status quo and allows for operations to be stabilized and negotiations to occur, followed by requests for expanded relief on proper notice to affected parties at the full comeback hearing.

37. The relief requested in this first-day Application meets these criteria. Each aspect of the relief sought by the Applicants in the Initial Stay Period is interdependent, and collectively the relief is critical to allow the Applicants to properly respond to their current circumstances.

38. A stay of proceedings is clearly necessary here if any form of restructuring process is to be successful. The Applicants are in a liquidity crisis and absent a stay of proceedings, there is a significant risk that individual creditors will seek to enforce their rights on a haphazard basis without regard for the survival of the Companies or maximization of their value. Indeed, landlords and creditors in Ontario and Nova Scotia are already seeking to do just that.

39. A stay of proceedings is necessary to provide the Applicants with the breathing space necessary to develop an orderly restructuring process while maintaining business operations in the ordinary course.

The Stay should be Extended to Non-Applicant Stay Parties

40. I am also satisfied that the stay and the protections and authorizations proposed in the draft Initial Order should be extended to the defined Non-Applicant Stay Parties, including the RioCan-Hudson's Bay JV.

41. The authority of the Court to extend a stay to non-filing affiliates is derived from the broad jurisdiction given to the Court under ss. 11 and 11.01(2) of the *CCAA*. The Supreme Court of Canada has described this judicial discretion - which plays a prominent role in *CCAA* restructurings - as the "true 'engine'" driving the statutory scheme of the *CCAA*: *Montreal (City) v. Deloitte Restructuring Inc.*, ("Montreal v. Deloitte"), 2021 SCC 53 at para. 48.

42. In *JTI-Macdonald Corp.*, this Court outlined the factors determining when it is appropriate to extend a *CCAA* stay over non-filing affiliates, including where the business of the non-filing affiliate is significantly intertwined with that of the debtors and extending the stay would help

maintain stability during the *CCAA* process: *JTI-Macdonald Corp. (Re)*, 2019 ONSC 1625 at para. 15 (“*JTI-Macdonald*”).

43. In considering whether to extend a stay of proceedings to non-applicant parties, this Court has previously considered factors including: whether (a) the non-applicant parties had guaranteed the debtor’s secured loans; (b) the non-applicant parties were deeply integrated into the business operations of the debtor; and (c) the claims against the non-applicant parties were derivative of the primary liability of the debtor: *BZAM Ltd. Plan of Arrangement*, 2024 ONSC 1645 (“*BZAM*”) at para 42.

44. Certain of the Non-Applicant Stay Parties here are partnerships. Where the operations of partnerships are integral and closely related to the operations of the applicants, it is well-established that the *CCAA* court has the jurisdiction to extend the protection of the stay of proceedings to those partnerships to ensure that the purposes of the *CCAA* can be achieved. To decide otherwise would “defeat the entire purpose” of a *CCAA* restructuring: *Just Energy* at para 117.

45. One of the Non-Applicant Stay Parties, RioCan-Hudson’s Bay JV, is a joint venture between Hudson’s Bay and a third-party non-applicant, RioCan Real Estate Investment Trust. Hudson’s Bay, through its wholly owned subsidiary Hudson’s Bay Holdings LP, holds a 78.0136% interest as a limited partner in RioCan-Hudson’s Bay JV. The general partner of RioCan-Hudson’s Bay JV is RioCan-Hudson’s Bay GP. Hudson’s Bay Holdings GP, a wholly owned subsidiary of Hudson’s Bay, has a 50% share ownership interest in RioCan-Hudson’s Bay GP and RioCan Financial Services Limited has the remaining 50% share ownership interest in RioCan-Hudson’s Bay GP. Certain of RioCan-Hudson’s Bay JV’s subsidiaries are proposed Non-Applicant Stay Parties.

46. This Court has previously granted stays of proceedings over entities in which the applicants lacked majority control. In *Re Imperial Tobacco Canada Limited*, 2019 ONSC 1684 at para. 11 – 12, the Court granted a stay over an entity in which the debtors held a 50% voting interest and 70% equity interest, noting that the non-applicant stay entity was “highly integrated with the [a]pplicants and indispensable to the [a]pplicants’ business and restructuring.” The Court concluded by noting that extending the stay to the non-applicant entity would not prejudice any claimants.

47. In the present case, the Non-Applicant Stay Parties are highly integrated with and indispensable to the business of the Applicants. RioCan-Hudson’s Bay JV and the other Non-Applicant Stay Parties are the Applicants’ real estate subsidiaries (whether wholly or partially owned by Hudson’s Bay) and represent all of Hudson’s Bay Canada’s owned real property interests and certain head leasehold interests.

48. The business and operations of the Non-Applicant Stay Parties is fully intertwined with those of the Applicants. Any proceedings commenced against the Non-Applicant Stay Parties

would necessarily involve the Applicants' key personnel and consume the Applicants' limited resources. Extending the stay to the Non-Applicant Stay Parties prevents uncoordinated realization and enforcement attempts in different jurisdictions, all of which would be counterproductive to the maximization and protection of value for Applicants' stakeholders. Accordingly, the Applicants submit that it is appropriate to extend the stay of proceedings to the Non-Applicant Stay Parties. I agree with that submission.

The Stay Should Prohibit Pre/Post Set-Off

49. The proposed stay of proceedings would prohibit any person from setting off pre-filing obligations against post-filing obligations.

50. While section 21 of the *CCAA* contemplates set-off within a *CCAA* proceeding, it does not specifically address the issue of pre-/post set-off. However, the Supreme Court of Canada has confirmed that this Court can stay pre-/post set-off pursuant to its broad jurisdiction that flows from ss. 11 and 11.02 of the *CCAA*: *Montreal v. Deloitte* at para 62. This Court has in fact done so in other cases. See, for example, *Re Tacora Resources Inc.* (October 2023), Toronto CV-23-00707394-00CL (Initial Order) at para. 13.

51. I am satisfied that such an element of the proposed stay is appropriate here.

The Stay Should Suspend Certain Rent Payments

52. In addition, I am satisfied that, pursuant to section 11 of the *CCAA*, the stay should, as proposed, suspend the payment of rent by Hudson's Bay to Rio-Can-Hudson's Bay JV, YSS1 or YSS 2 (the "JV Sublandlords") pending further order of the Court, other than with respect to that amount of rent payable by the JV Sublandlords, as applicable, to third party Landlords under the JV Head Lease until such JV Head Lease is disclaimed or terminated.

53. The circumstances here are somewhat unique and, in my view, warrant the exercise of discretion to stay the payment of post-filing rent in this curated fashion, since the JV Sublandlords are Non-Applicant Stay Parties in which Hudson's Bay indirectly owns a 78.0136% equity interest and which form an integrated and integral part of the business of the Applicants.

54. Five of the leases between the Applicants and the JV Sublandlords are subleases. Those JV Sublandlords in turn have head leases with third-party Landlords. The majority of the sublease structures are subject to third party property-specific mortgages. The rent payable to the Landlords is lower than current market rents. The rent payable to the JV Sublandlords by Hudson's Bay reflects market rents as they existed in 2015 when the structure was put in place.

55. In the normal course, the rent paid by Hudson's Bay to the JV Sublandlords would be used to pay the rent payable to the Landlords under the head lease, administrative costs, and the servicing of mortgage debt, with the remainder being distributed to Hudson's Bay and RioCan by way of equity distribution.

56. The extension of the stay to the Non-Applicant Stay Parties will stay pre-filing debt obligations of the JV Sublandlords owed to the third party mortgage lenders. While RioCan and Hudson's Bay would normally receive equity distributions from RioCan-Hudson's Bay JV, such distributions will be stayed by the *CCAA* proceedings.

57. The proposed stay of the payment of rent by Hudson's Bay to the JV Sublandlords (other than any amount necessary to satisfy the amount of rent payable under any head leases), will mitigate any prejudice to the Landlords, and is consistent with s. 11.01 of the *CCAA*.

58. The Applicants are facing a severe liquidity crisis and require immediate access to DIP financing to continue operating, all as is discussed further below. The Applicants' ability to avoid a complete liquidation and restructure around a lower number of locations – thereby preserving the jobs of thousands of employees – is dependant upon preserving as much liquidity as possible. If Hudson's Bay is required to pay rent in full to the JV Sublandlords, that cash (net of payments to Landlords and for other expenses) would pool in the JV Sublandlord entities resulting in a potential windfall recovery for the JV Sublandlords' secured creditors, to the detriment of Hudson's Bay and its stakeholders generally.

59. The terms of the proposed DIP Facility do not permit Hudson's Bay to make post-filing payments to RioCan Hudson's Bay JV. A similar approach was endorsed by this Court in *Nordstrom*, where this Court stayed and suspended the payment of certain post-filing amounts arising from subleases between the debtor (as sublessee) and a non-applicant stay party (as sublessor). Basic rent was not stayed, but amounts incurred in constructing, fixturing, and furnishing the premises that would otherwise be due under the subleases were stayed: *Nordstrom* at paras. 9 and 44.

60. I recognize that other courts have taken different approaches, but in my view, each case reflects the fact that, as contemplated by the *CCAA*, the exercise of discretion should be considered on a case-by-case basis according to the specific facts in each. The British Columbia and Québec courts have, on occasion, declined to relieve debtors of paying post-filing rent. See, for example: *Re Quest University Canada*, 2020 BCSC 921; and *Groupe Dynamite inc. C. Deloitte Restructuring Inc.*, 2021 QCCS 3. Both of these cases, however, are in my view distinguishable from the present situation as they did not involve a related-party landlord, and the debtors in those cases proposed deferring or not paying all of the rent owing under their leases.

61. In the particular and unique circumstances of this case, I am satisfied that the stay of proceedings should suspend post-filing rent payments to the JV Sublandlords, other than with respect to any amounts necessary to pay the rent due on the head lease.

Co-Tenancy Stay

62. The proposed stay would also apply to co-tenants. Many retail leases provide that tenants have certain rights against their landlords which rights are triggered upon the insolvency of an anchor tenant or an anchor tenant ceasing operations at the location of the co-tenancy.

63. The Applicants are requesting that the stay here apply to any rights that tenants or occupants may have against the owners, operators, managers and landlords of the commercial properties where Hudson's Bay stores are located that arise as a result of the insolvency by Hudson's Bay Canada, the granting of the proposed Initial Order, or any actions taken by the Applicants pursuant thereto. This is supported by the Proposed Monitor.

64. I recognize that such relief has been granted by other Courts in retail insolvencies pursuant to the broad discretion given to the court under sections 11 and 11.02(1) of the *CCAA* to make an initial order on "any terms that it may impose". See, for example, *Re T. Eaton Co.*, 1997 CarswellOnt 1914 (Gen. Div.), *Target* at paras. 44 - 48, and *Nordstrom* at paras 33 - 35.

65. The rationale is that extending the stay of proceedings in such a manner prevents a so-called "run on the bank" in the sense that many other co-tenants might seek, as a result of this proceeding, to terminate their own leases with landlord locations where Hudson's Bay currently operates. As observed by the Court in *Target* at para. 44, if tenants were permitted to exercise these co-tenancy rights during the stay, the claims of the landlord against the debtor company could greatly increase, with the potentially detrimental impact on the restructuring efforts of the debtor company.

66. In the particular and unique circumstances of this case, and given the prominent nature of the business of Hudson's Bay, both generally in the retail landscape across Canada and specifically at various shopping mall locations, I am prepared to grant that relief today for the initial stay period to ensure stability of operations.

67. However, and consistent with the approach adopted by the Court in *Target*, to the extent that the affected parties wish to challenge the broad nature of this stay, such can be addressed at the comeback hearing: *Target*, at para. 48.

68. I would add that, in my view, such co-tenancy stays are representative of relief that lies towards the limit of the judicial discretion permitted by ss. 11 and 11.02 of the *CCAA* and should generally be granted only in relatively unique circumstances and where justified on the evidence before the Court.

69. Such stays suspend the enforcement of contractual rights of parties that are quite remote to the present proceeding and the insolvency of the debtor on which it is based. Such co-tenancy stays operate, in practical terms, to protect and stabilize the operations not of the debtor, but of landlords who are contractual counterparties to the debtor (i.e., through retail leases). Those landlords are not insolvent. While I appreciate that the object of such stays is to minimize the risk of that very event occurring, such stays represent a significant compromise of rights of third parties.

70. There are many examples of stays that compromise or suspend the rights of third parties. Usually, however, those third parties are counterparties in contracts or have some other relationship with the debtor. Here, such co-tenancy stays suspend the rights of parties one step even further removed from the insolvency of the debtor - other retail tenants who have their own leases with the landlords. The only factor joining those parties to the debtor is that they have a common landlord at a common retail location.

71. The exercise of termination rights by those other retail tenants sought to be suspended must depend on those termination rights existing in the first place according to the terms of the leases in place between those other tenants and the landlord. If a co-tenant bargained for the right to terminate its own lease in the event that an anchor tenant at the same location ceased operations or became insolvent, and its landlord agreed to give that co-tenant such a right (presumably for economic consideration), the landlord made the business decision to take risks in respect of other retail tenancies based on its own assessment of the risk of insolvency of the anchor tenant.

72. Finally in this regard, it does not automatically follow that even if a co-tenant terminated its lease, the landlord would have a valid claim against the debtor in the insolvency proceeding.

73. Accordingly, in my view, an analysis of whether the rights of co-tenants should be suspended pursuant to a stay of proceedings will be fact-specific in each case, and if granted at the initial order hearing of an application, will be subject to review at the comeback hearing as noted by the Chief Justice in *Target*.

74. I would add that it will also be subject to review at any time throughout the proceeding by a co-tenant pursuant to the seven day comeback clause in the Commercial List Model Order pursuant to which any affected party may request that the Court review, amend or vacate an initial order at any time.

Cash Management System Should be Maintained

75. Finally, I am satisfied that the terms of the stay should be such that the existing Cash Management System is preserved for the time being, and that Hudson's Bay and The Bay LP should have continued and uninterrupted access to the Bank accounts, with the associated banks not having the ability to restrict the rights of those parties in any way associated with the Cash Management System.

76. The Cash Management System centralizes the payment of funds and expenses associated with the operations of Hudson Bay through 46 bank accounts with 28 accounts at RBC, 16 accounts at TD, and two at Bank of America. Store receipts are deposited into depository accounts at RBC, and debit and credit card receipts (excluding American Express) are deposited daily into the TD depository accounts.

77. The Company maintains 22 bank accounts that process outgoing wires, Automatic Clearing House and cheque payments for disbursements to landlords, vendors, tax authorities, and

employees. Those accounts are funded by the main cash accounts in each respective entity. In addition, Hudson's Bay Canada holds nominal cash to ensure sufficient cash flow to the stores. Excess cash is deposited into the main cash account of Hudson's Bay as needed, typically twice per week.

78. I am satisfied that the existing Cash Management System should be maintained in order that the Company can continue to efficiently collect, manage and disperse cash. The Proposed Monitor has familiarized itself with the Cash Management System, is supportive of its maintenance, and opines that the appropriate processes, controls, and reporting are in place to enable the Applicants, with the oversight of the Proposed Monitor, to continue to use the Cash Management System during this CCAA Proceeding.

Appointment of Alvarez & Marsal Canada Inc. as Monitor

79. Pursuant to section 11.7 of the *CCAA*, the Court shall appoint a person to monitor the business and financial affairs of the company when an order is made on the initial application. The person appointed must be a trustee within the meaning of subsection 2 (1) of the *BIA*.

80. The Applicants propose to have Alvarez & Marsal Canada Inc. ("A&M") appointed as the Monitor.

81. A&M is a "trustee" within the meaning of subsection 2(1) of the *BIA*, is established and qualified, and has consented to act as Monitor. The involvement of A&M as the court-appointed Monitor will lend stability and assurance to the Applicants' stakeholders. A&M is not subject to any of the restrictions set out in s. 11.7(2) of the *CCAA*.

82. I am satisfied that A&M should be appointed as Monitor in these *CCAA* Proceedings.

The DIP and DIP Facility

83. The Applicants seek approval of the DIP Facility and approval of an interim financing charge (the DIP Charge) to secure the proposed DIP Facility pursuant to section 11.2 of the *CCAA*.

84. Section 11.2(4) of the *CCAA* sets out a non-exhaustive list of criteria that the Court must consider in deciding whether to grant a DIP lender's charge. Those criteria apply to the period during which the Applicants are expected to be subject to *CCAA* proceedings, how the Applicants' business and financial affairs are to be managed during the proceedings, whether the Applicants' management has the confidence of its major creditors, whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the Applicants, the nature and value of the Applicants' property, whether any creditor would be materially prejudiced as a result of the security or charge, and whether the monitor supports the charge.

85. When an application for interim financing is made at the same time as an initial application, the applicant must additionally satisfy the Court 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: s. 11.2(5).

86. It is important that an applicant meet the criteria in section 11.2(1) as well as those in section 11.2(4). See *CanWest Publishing Inc., Re*, 2010 ONSC 222 (“*CanWest II*”) at paras. 42-44.

87. When considering the s. 11.2(4) factors, the Court “must determine which proposal is most appropriate and most importantly, which will best serve the interests of the stakeholders of the [Applicants] as a whole by enhancing the prospects of a successful restructuring.” The Court is to make an “independent determination” when selecting a DIP proposal, having regard to the factors in subsection 11.2(4): *Crystallex (Re)*, 2012 ONCA 404 at para 85.

88. The terms of the DIP Facility, in the principal amount of \$16 million, are reflected in the Junior DIP Term Sheet dated as of March 7, 2025. The Company is the Borrower, and various affiliates are Guarantors. The Agent is Restore Capital, LLC on behalf of a syndicate of lenders as set out in the materials. The Applicants are seeking on this initial Application a corresponding DIP Charge, which would rank according to the waterfall priority set out in the proposed Initial Order.

89. I am satisfied that the DIP Facility and DIP Charge are appropriate here. The Applicants are facing an urgent and immediate liquidity crisis. They are unable to pay rent, current commitments to suppliers, and they will be unable to fund payroll within a matter of days. A loss of employees or material contracts could have significant negative impacts on the business of the Applicants.

90. The proposed DIP facility does not contain any commitment fee, and the proposed exit fee is comparable to DIP Facilities of a similar size. In the view of the Proposed Monitor, while the proposed interest rate is on the higher end of the range for comparable DIP facilities of similar size (CORRA+11.5%, or approximately 14.5%), it is reasonable relative to the existing FILO Credit Facility rate (CORRA+9.75%, or approximately 12.75%), and in my view is reflective of both the challenges and risks associated with a bricks and mortar retail operation in Canada today and the challenges facing these Applicants in particular.

91. The cash flow projections demonstrate that debtor-in-possession financing is urgently required to fund the needed liquidity to preserve the value in going-concern operations of the business. The DIP Lenders require the DIP Charge as a condition of the DIP Facility.

92. The Applicants believe, and the Proposed Monitor supports the view, that the DIP Facility represents the best interim financing that is available in the circumstances, and further that the economic terms of the DIP Facility are reasonable in the circumstances. It was selected following discussions with multiple potential lenders.

93. I accept the submission. The DIP Lender is an existing pre-filing secured creditor. Notice has been given to secured creditors that are proposed to be primed by the DIP Charge as required

by subsection 11.2(1) of the *CCAA*. The terms of the proposed Initial Order are clear that the proposed DIP Charge does not secure any pre-filing obligations of the Applicants.

94. As required by section 11.2(5), the proposed DIP Facility is limited on this initial application to what is “reasonably necessary” to meet the needs of the debtor during the initial interim period.

95. The Cash Flow Forecast provided by the Proposed Monitor shows that the funds to be made available by the DIP Facility of \$16 million are required to stabilize and maintain operations and fund these proceedings through the initial stay period. Without that, the total projected disbursements for this period of approximately \$30.7 million would be unfunded.

96. I observe that the Cash Flow Forecast reflects receipts forecasted from sales of retail stores and e-commerce channels consistent with recent sales trends for the Company, inventory purchases represent estimated disbursements to purchase inventory for continuing stores, and occupancy costs include post-filing rent for the period March 7-17, 2025 for all store, corporate and distribution centre locations.

97. For all of these reasons, the DIP Facility and the DIP Charge are approved.

Administration Charge

98. The Applicants are seeking an Administration Charge to secure the professional fees and disbursements of the Proposed Monitor, its counsel, and counsel to the Applicants up to a maximum of \$2.8 million for the duration of the Initial Stay Period.

99. The Administration Charge was developed in consultation with the Proposed Monitor and is proposed to be secured by the Property with first priority over all other charges and security interests.

100. The Court has jurisdiction to grant an administration charge under s. 11.52 of the *CCAA*. It is to consider: the size and complexity of the business being restructured, the proposed role of the beneficiaries of the charge, whether there is an unwarranted duplication of roles, whether the quantum of the proposed charge appears to be fair and reasonable, the position of the secured creditors likely to be affected by the charge, and the position of the Monitor. See *CanWest Publishing Inc.*, 2010 ONSC 222 at para. 54.

101. The proposed Administration Charge sought for the initial 10-day period meets this test and is appropriate. It is supported by the Proposed Monitor.

The Directors’ Charge

102. The Court has jurisdiction to grant a directors’ charge under section 11.51 of the *CCAA*, provided notice is given to the secured creditors who are likely to be affected by it.

103. The purpose of such a charge is to keep the directors and officers in place during the restructuring by providing them with protections against liabilities that could be incurred.

104. Such a charge may not be made if “the company could obtain adequate indemnification insurance for the director or officer at a reasonable cost” and the court shall declare that the charge does not apply in respect of a specific obligation or liability incurred by a director or officer “if, in its opinion, the obligation or liability was incurred as a result of the director’s or officer’s gross negligence or wilful misconduct”: *CCAA*, s 11.51; see also *Laurentian University of Sudbury*, 2021 ONSC 1098, supra at para 81; and *Jaguar Mining Inc, Re*, 2014 ONSC 494 at para 45.

105. The Applicants here seek a Directors’ Charge in the amount of \$26,300,000 to secure the indemnity of their directors and officers for liabilities they may incur during the *CCAA* proceedings.

106. I am satisfied that the proposed Directors’ Charge is appropriate here. The directors and officers have advised that they are prepared to continue to serve, conditional upon the granting of the Directors’ Charge. It will apply only to the extent that the directors’ and officers’ respective insurance is insufficient or ineffective, and only in respect of obligations and liabilities incurred after the commencement of the *CCAA* Proceedings excluding wilful misconduct or gross negligence.

107. The Proposed Monitor supports the Applicants’ request for the Directors’ Charge. I am satisfied it is appropriate here.

108. I recognize that the quantum of the proposed charge is significant. I am satisfied, however, that it is appropriate here, due in large part to the fact that the business of the Applicants is largely retail consumer sales. The payroll of the Applicants (which will cycle during the initial stay period) is very significant given the large number of employees (approximately 9,364 as of February 28, 2025), and that triggers regular remittance obligations. So too do all retail sales in respect of HST remittance obligations.

109. I am satisfied that the proposed amount is reasonable in the circumstances, and limited to the potential exposure during the initial 10 day period. For all of these reasons, the Directors’ Charge is approved.

Pre-Filing Payments to Critical Third Parties

110. The Applicants seek the authorization but not the requirement to make payments with the consent of the Monitor, of pre-filing amounts to certain critical third parties.

111. Authority to grant an order for the payment of critical suppliers flows from section 11.4 of the *CCAA* which gives the Court specific authority to declare a person to be a critical supplier and to grant a corresponding charge on the property of the debtor to secure amounts owing for services provided after the filing.

112. The proposed order here would grant authority to the Applicants to pay pre-filing critical suppliers. I accept the submission that section 11.4 does not oust the inherent jurisdiction of the Court to authorize the payment of pre-filing amounts to suppliers whose services are viewed as critical to the post-filing operations of the debtor. See, for example: *BZAM* at para. 73; and *Cline Mining Corporation (Re)*, 2014 ONSC 6998 at paras 39-40.

113. The Court has exercised its jurisdiction on multiple occasions to grant similar relief in other cases: See, for example, *Target*, at para. 62 to 65; *Nordstrom*, at paras. 50-53; *Just Energy*, at para. 99; *Original Traders Energy Ltd. and 2496750 Ontario Inc. (Re)*, 2023 ONSC 753 at paras. 72-74; and *Boreal Capital* at paras. 20-22.

114. The factors that courts have considered in determining whether to grant such authorization include: (a) whether the goods and services are integral to the business of the applicants; (b) the applicants' dependency on the uninterrupted supply of the goods or services; (c) the fact that no payments will be made without the consent of the Monitor (which is a requirement under the proposed Initial Order); and (d) the effect on the debtors' operations and ability to restructure if it could not make such payments: *Index Energy Mills Road Corporation (Re)*, 2017 ONSC 4944 at para. 31; *Clover Leaf Holdings Company, Re.*, 2019 ONSC 6966 at para 25; *Re Just Energy* at para 99; and *BZAM* at paras 73-74.

115. These factors are fulfilled in this case, as these categories of suppliers are fundamental to the continuing operations of the Applicant.

Initial Order and Comeback Hearing

116. For all of these reasons, the Initial Order was granted with immediate effect according to its terms and without the necessity of issuing and entering.

117. The comeback hearing shall take place on Monday, March 17, 2025 commencing at 9:00am ET at the Courthouse.

Osborne J.

Released: March 10, 2025

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SUPERIOR COURT OF JUSTICE

COUNSEL/ENDORSEMENT SLIP

COURT FILE NO.: CV-23-00696017-00CL

DATE: 20 March 2023

NO. ON LIST: 2

TITLE OF PROCEEDING: LOYALTYONE, CO.

BEFORE MADAM JUSTICE: Conway

PARTICIPANT INFORMATION

For Plaintiff, Applicant, Moving Party, Crown:

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ENDORSEMENT OF MADAM JUSTICE CONWAY

All defined terms used in this Endorsement shall, unless otherwise defined, have the meanings ascribed to them in the Factum of LoyaltyOne, Co. dated March 17, 2023.

[1] On March 10, 2023, the Applicant was granted protection under the CCAA pursuant to the Initial Order, which provides for a Stay of Proceedings up to March 20, 2023. This is the comeback motion. The Applicant seeks two orders today with a wide variety of relief.

[2] The first is the Amended and Restated Initial Order that, among other things, authorizes the DIP Financing Facility and the DIP Lender's Charge, authorizes the Applicant to enter into the Transaction Support Agreement *nunc pro tunc* and approves that agreement, extends the Stay of Proceedings to May 18, 2023, increases the Administration Charge and the Directors' Charge to the maximum of \$3 million and \$15.408 million, respectively, approves the Employee Retention Plans and grants the related charge to the maximum of \$5.35 million, and approves the retention of the Financial Advisor and grants the Financial Advisor Charge to a maximum of US\$6 million to secure the Transaction Fee.

[3] The second is the SISP Approval Order that authorizes the Applicant to enter into the Stalking Horse Purchase Agreement, approves the Bid Protections and related charge to the maximum of \$US 4 million, and authorizes the Applicant to conduct the SISP along with the Financial Advisor and the Monitor.

[4] All of the relief sought is supported by BMO, the Consenting Stakeholders representing over 66-2/3% of the Credit Agreement Lenders by value, the Monitor, and is otherwise unopposed.

[5] With respect to the DIP Financing Facility of US\$70 million, I have considered the interests of all of the Applicant's stakeholders and specifically the factors in s. 11.2(4) of the CCAA. The financing will provide sufficient financing to support the Applicant throughout the proposed SISP. The Applicant otherwise lacks the liquidity required to continue the business as a going concern during the sales process. It will permit the Applicant to pursue a going concern transaction for the business. No creditor will be materially prejudiced as a result of the charge given that it will rank behind the Reserve Account established for Collectors and, as noted, it has been consented to by the Consenting Stakeholders whose interests would be directly affected by the DIP Financing Facility. The Monitor considers the cash flow statement to be reasonable and is supportive of the financing.

[6] The DIP Financing Facility contemplates the making of the Intercompany DIP Loan from the Applicant to LVI of up to US\$30 million. This will enable LVI to continue to provide the Intercompany Services to Applicant and provide LVI with liquidity to pursue the U.S. Proceedings, including the establishment of a liquidating trust and a claim against Bread and others, which is expected to yield further recovery for stakeholders. Subject to the granting of an order in the U.S. Proceedings, the Intercompany DIP Loan will be secured by a charge in the U.S. Proceedings over LVI's current and future assets.

[7] I am approving the DIP Financing Facility.

[8] The Transaction Support Agreement between the Applicant and the Consenting Stakeholders is designed to support the Applicant in its efforts to find a going-concern solution. The Monitor supports the agreement. It will provide stability and certainty to the Applicant's stakeholders as it pursues the going concern solution. I approve it under s. 11 of the CCAA.

[9] The Employee Retention Plans (both the retention plan for approximately 500 employees and the KERP for 20 key executives and employees) were developed with the assistance of the Monitor. They will ensure that the Applicant has the continued services of those required to continue the business while these CCAA proceedings unfold. I approve those plans and the related Employee Retention Plan Charge.

[10] The Stay of Proceedings to May 18, 2023 is designed to tie into the milestones in the SISP. I am satisfied that the Applicant is acting in good faith and with due diligence and that the extension should be granted under s. 11 and 11.02 of the CCAA. In addition, I am staying any setoff of pre-filing against post-filing obligations subject to further court order.

[11] The increased Administration Charge and Directors Charge have been developed in consultation with the Monitor and are reasonable. I approve same.

[12] The Financial Advisor engagement and related charge for the Transaction Fee are approved in light of the complexity of the restructuring.

[13] The Stalking Horse Agreement and the Bid Protections Charge are acceptable to me. The agreement is designed to provide a floor for an acquisition transaction while the Applicant runs the SISP. The quantum of the Bid Protections are, according to the Monitor, well within the reasonable range, 2.5% of the purchase price. I note that the Applicant is NOT seeking approval of any transaction at this time.

[14] The SISP is approved. The milestones and timelines are reasonable. The process seeks to maximize the recovery for the Applicant and its stakeholders. It satisfies the requirements of s. 36 of the CCAA.

[15] Orders to go as signed by me and attached to this Endorsement. These orders are effective from today's date and are enforceable without the need for entry and filing.

A handwritten signature in blue ink, appearing to read "Conway J.", is located below the text of paragraph [15].

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SUPERIOR COURT OF JUSTICE - ONTARIO

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 U.S. STEEL CANADA INC.

BEFORE: Mr. Justice H. Wilton-Siegel

COUNSEL: *Paul Steep* and *Stephen Fulton*, for the Applicant U.S. Steel Canada Inc.

Alan Mark and *Gale Rubenstein*, for the Province of Ontario

Lily Harmer and *Kris Borg-Olivier*, for the USW, Local 1005 and Local 8782

Andrew Hatnay, *James Sayce* and *Barbara Walancik*, Representative Counsel for the non-unionized active employees and retirees

Michael E. Barrack, *Jeff Galway*, *Kiran Patel* and *Max Shapiro*, for United States Steel Corporation

Robert Staley, for the Monitor Ernst & Young Inc.

Mike Kovacevic, for the City of Hamilton

Patrick Riesterer, for Brookfield Partners

HEARD: April 29, 2016

ENDORSEMENT

[1] The applicant, U.S. Steel Canada Inc. (the “applicant” or “USSC”), sought an extension of the stay of proceedings under the *Companies’ Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the “CCAA”) to July 28, 2016, as the previous stay expired on April 29, 2016. At the conclusion of the hearing, the Court advised that the extension would be granted for written reasons to follow. This Endorsement sets out the written reasons for the Court’s determination.

[2] Section 11.02(3) of the CCAA provides that a court shall not make an order of the nature sought unless the applicant satisfies the court that circumstances exist that make the order appropriate and that “the applicant has acted, and is acting, in good faith and with due diligence.”

[3] These requirements are satisfied in the present circumstances. A sales and investment process (the “SISP”) is underway in Phase II, with a deadline for binding offers of May 13, 2016. There is reason to expect that one or more offers for the applicant to continue on a going-concern basis will be received. There is little doubt that the applicant is acting in good faith and with due diligence.

[4] The request for an extension of the stay under the CCAA to July 28, 2016 is supported by the chief restructuring officer of the applicant, the Monitor and the principal stakeholders of the applicant, save for United States Steel Corporation (“USS”) which seeks a shorter extension on conditions described below. Accordingly, there is no objection before the Court to an extension of the stay. The only issue is whether the extension should be to July 28 or May 26, as USS argues, and whether it should be on the terms sought by USS.

[5] USS argues that the stay should not be extended beyond a reasonable period for evaluation of the bids received on Phase II of the SISP. In addition, USS argues that the Court should mandate disclosure of the Phase II bids to all stakeholders, including USS, upon receipt. It also seeks an order that USSC prepare an updated liquidation analysis, based on the Phase II bids, to enable a comparison of the options available to the applicant after receipt of any offers under the SISP.

[6] The applicant has indicated that it proposes to develop a plan for disclosure of the bids received in the Phase II process of the SISP after the deadline. Clearly, such a plan will be necessary to reach a restructuring plan, given that the successful bidder will need to address the positions of the major stakeholders. It will also be necessary to address stakeholder concerns, including USS, regarding the impact of continuation of the SISP process on their positions. However, USSC opposes the imposition at this time of any requirement to provide USS with summaries, or copies, of any bids received on Phase II of the SISP, or of any requirement to prepare an updated liquidation analysis based on such bids.

[7] The Court’s determination to grant the extension of the stay requested by USSC to July 28, 2016 was based on the following considerations.

[8] First, in USSC’s estimation, the SISP currently underway will require a more extended period of time than is proposed by USS to complete negotiations with any successful bidder and to permit satisfaction of any conditions, including negotiations between such bidder and other affected stakeholders. This view is shared by the Union, the Province of Ontario and Representative Counsel. The applicant is proceeding under the CCAA. It is entitled to manage the restructuring process without restrictions which could jeopardize the prospects for a successful outcome.

[9] Second, there can be little doubt that a longer stay extension also furthers the prospect of a successful, going-concern restructuring, insofar as it provides greater certainty to USSC’s suppliers, its customers and its employees regarding the continued operations of the applicant.

[10] Third, as the Monitor points out, even if a going-concern restructuring were not feasible, a longer stay would be required to implement other arrangements to satisfy the claims of the creditors of the applicant, whether under the CCAA or otherwise.

[11] Fourth, USS submits that the Court should impose a shorter extension period to enable the Court to monitor the potential for value destruction to the detriment of the applicant's creditors during the extension period. In particular, USS suggests that there is a serious, ongoing material deterioration in its position both as a secured creditor as well as an unsecured creditor of USSC. I am not persuaded, however, that the evidence before the Court on this issue is sufficient to require a shorter extension period for the following three reasons.

[12] First, USS places considerable emphasis on EBITDA losses of the applicant since October 1, 2015 as evidence of the deterioration of its secured position. However, the evidence before the Court – in the form of the current liquidation analysis, which has been provided to the parties on a confidential basis – evidences a fully secured position to the extent of USS' secured claim.

[13] Second, USS argues that such historical EBITDA losses are suggestive of further losses that should be projected during the extension period. However, the Monitor's Twenty-Fifth Report, dated April 22, 2016, addresses the EBITDA situation in two respects which indicate a reasonable possibility that there will be no material adverse change in that position over the period of the proposed extension. In paragraph 34 of that Report, the Monitor indicates that the preliminary forecast EBITDA is estimated to be positive for Q2 2016. It also states that cumulative EBITDA at the end of Q2 2016 is estimated to be consistent with, or slightly exceed, the Independent Business Plan the applicant implemented in October 2015 and substantially better by the end of fiscal 2016.

[14] Third, while USS is also a substantial unsecured creditor, it will not be the only significant unsecured creditor affected by the applicant's failure to achieve a successful restructuring if that were to occur. The other significant unsecured creditors in such event – principally, the Province of Ontario, the Union and the non-unionized employees and retirees – will have very substantial claims as well. As noted above, these creditors support the extension and oppose the additional relief sought by USS. Moreover, in the event of an unsuccessful restructuring, it is not realistic to expect that there will be an expeditious process for satisfying the claims of the applicant's creditors given the issues of quantum and priority of security that will be disputed.

[15] For the foregoing reasons, I conclude that a stay to July 28, 2016 is appropriate in the circumstances. I also conclude that it is not appropriate to impose the conditions sought by USS requiring the delivery of information by USSC for the following four principal reasons.

[16] First, and most important, at the present time, as mentioned, there is no clarity regarding the nature and number of bids for USSC or its assets that may be received under the SISP. That information will drive a determination not only of the manner in which USSC proceeds with respect to a restructuring plan, but also of the appropriate involvement of the other stakeholders, including USS, and the nature of disclosure that should be made to those stakeholders. It is therefore premature and unwise to mandate any particular disclosure at this time without being able to assess the consequences of such disclosure for the applicant's prospects for a successful restructuring

[17] Second, as mentioned above, the applicant has indicated that it proposes to develop a plan for disclosure of the bids received in the Phase II process of the SISP that is consistent with

furthering the prospects for a successful restructuring. Given that intention, I think it is more appropriate to address disclosure issues after the parties have reviewed, and if possible informally negotiated, a proposed USSC plan for the involvement of stakeholders that USSC has developed based on the actual results of the SISP rather than to impose conditions based on speculation as to the likely outcome of the SISP.

[18] Third, for the reasons set out above, the USS concern for the potential for value destruction during the stay extension period is not a sufficient basis for ordering the immediate preparation of a new liquidation analysis.

[19] Fourth, USS is effectively seeking to amend the SISP order of the Court, dated January 12, 2016 (the “SISP Order”), to mandate disclosure of the Phase II bids that was not provided for in that Order. Instead, the SISP Order effectively left it to the applicant to fashion appropriate disclosure based on the results of the Phase II process, as the applicant’s obligations are limited to consultation with the stakeholders. In particular, there is no obligation on USSC to disclose offers received under Phase II, unlike the obligation to disclose letters of interest received under Phase I of the SISP. Any motion to amend the SISP Order should be brought on a basis that is informed by changed circumstances from those contemplated at the time of the SISP Order. At a minimum, that requires completion of Phase II of the SISP.

[20] Based on the foregoing, the relief sought by USS in its Notice of Objection dated April 15, 2016, in particular the relief sought in paragraph 24 thereof, is denied.

Wilton-Siegel J.

Date: May 10, 2016