2025 01G 1510
IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
IN BANKRUPTCY AND INSOLVENCY

IN THE MATTER OF the *Companies Creditors Arrangement Act* R.S.C., 1985 c. C-36 as Amended (the "**CCAA**"); and

AND IN THE MATTER OF an application by Nemori Farms Ltd. (the "**Applicant**") for relief under s. 11 of the CCAA

MEMORANDUM OF FACT AND LAW OF THE APPLICANT

SUMMARY OF CURRENT DOCUMENT	
Court File Number:	2025 01G 1510
Date of Filing of Document:	25 June 2025
Name of Filing Party or Person:	Applicant, Nemori Farms Ltd
Application to which Documents Being Filed Relates:	Notice of Motion filed by the Applicant
Statement of Purpose of Filing:	In support of the Motion by the Applicant seeking extension of stay of proceedings and extending creditor protection to Calvin Cameron and Sheldon Cameron
Court Sub-File Number, if any:	N/A

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TO: **Supreme Court of Newfoundland & Labrador**
General Division (In Bankruptcy)
P.O. Box 937
309 Duckworth Street
St. John's, NL A1C 5M3

AND TO: The Service List attached as **Schedule "A"**

2025 01G 1510
IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
IN BANKRUPTCY AND INSOLVENCY

IN THE MATTER OF the *Companies Creditors Arrangement Act* R.S.C., 1985 c. C-36 as Amended (the "**CCAA**"); and

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OVERVIEW:

1. This Memorandum is filed in Support of the Applicant's Motion seeking an order for extension of the Stay Period and an extension of creditor protection to Calvin Cameron and Sheldon Cameron.

2. Capitalized terms used but not defined in this Memorandum shall have the meanings given to them in the Affidavit of Sheldon Cameron, the first Amended and Restated Initial Order (the "**ARIO**") and Applicant's Motion.

FACTS:

3. On 07 March 2025, the Applicant, Nemori Farms Ltd., was granted protection under s. 11 of the CCAA (the "**Initial Order**").

4. Among other things, the Initial Order appointed Grant Thornton Limited as monitor (the "**Monitor**"), The relief outlined in the Initial Order was extended by virtue of the First Amended and Restated Initial Order ("**ARIO**") granted 14 March 2025.

5. The stay of proceedings granted under the above Orders was further extended to 30 June 2025 (the "**Stay Period**") to accommodate the SISP timelines and a hearing scheduled for that date.

6. The Monitor has advised the Applicant that the deadline for the selection of a successful Bidder will be extended. In doing so, the Monitor suggested that the Applicant seeks a 30-day extension to the Stay Period up to and including 31 July 2025.

7. The Applicant's principals, Sheldon and Calvin Cameron, personally obtained or guaranteed loans used to fund the operations of the Applicant, including to the Royal Bank of Canada ("**RBC**") in the amount of $1,000,000.00 each. RBC has threated enforcement actions by writing to each of the Camerons advising that they have instructions to enforce if adequate arrangement to pay in full is not made within 10 days of the demand dated 19 June 2025.

8. The Applicant is seeking an order extending the CCAA Stay Period and extending creditor protection to both Sheldon and Calvin Cameron personally for the duration of the Stay Period with respect to matters related to the Applicant's debts and liabilities.

LAW AND ARGUMENT:

<u>Extension of the Stay Period</u>

9. The Applicant seeks to continue under the CCAA and requires an extension of the Stay Period until 31 July 2025.

10. Section 11 of the CCAA confers jurisdiction on the Court in the broadest of terms: "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".

11. Orders made under s. 11 are appropriate where they support and accord with the objectives of the CCAA and other insolvency legislation in Canada. These include 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 claims; protecting the public interest; and, in the context of a commercial insolvency, balancing the costs and benefits of restructuring or liquidating the company.[1]

12. Under s. 11.02 of the CCAA, a court may rely on its broad discretion to extend a stay of proceedings previously granted to a debtor company, provided that: (a) circumstances exist that make the order appropriate; and (b) the debtor company satisfies the court that it has acted, and is acting, in good faith and with due diligence.

13. The Applicant has acted in good faith and with due diligence throughout this CCAA Proceeding and has actively cooperated in advancing the SISP and other matters that will enable this process to conclude successfully, to the benefit of all stakeholders. This will be confirmed by the Monitor.

14. The Applicant submits that the continuation of the SISP process and the CCAA Proceeding remains preferable to any alternative option when considering the nature of the assets, the current stage of the process, and competing interests of various stakeholders. As noted above, the Monitor specifically has requested that the SISP evaluation timeline be elongated and suggested this extension to the Stay Period.

Stay of Proceedings – Sheldon and Calvin Cameron

15. As noted above, the CCAA provides that a court acting within a CCAA proceeding may make any order that it considers appropriate in the circumstances, on any terms that it may propose, to achieve the objectives of CCAA's objectives. Courts have routinely used

[1] ***9354-9186 Québec Inc. v. Callidus Capital Corp.***, 2020 SCC 10 **[TAB 1]**

these broad powers of discretion to extend stays of proceedings to non-parties. This is despite the wording of s. 11.04, which states:

> Persons obligated under letter of credit or guarantee
>
> 11.04. No order made under section 11.02 has effect on any action, suit or proceeding against a person, other than the company in respect of whom the order is made, who is obligated under a letter of credit or guarantee in relation to the company.

16. This provision has not been interpreted as prohibiting stays of proceedings from being extended to non-debtors with respect to liability for the debts of a CCAA debtor company, because of the extent to which such a reading would have the potential of complicating certain CCAA restructurings.[2]

17. In ***Pride Group Holdings Inc.***[3], Chief Justice Morawetz extended the stay of proceedings to include guarantors who had provided personal guarantees in respect of the CCAA applicant's obligations, and against whom certain lenders had threatened proceedings:

> Section 11.04 of the CCAA provides that a stay pursuant to section 11.02 will not affect claims against third party guarantors of an applicant company, and section 11.03(2) provides that a stay pursuant to section 11.02 does not affect 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...
>
> Notwithstanding sections 11.04 and 11.03(2) of the CCAA, this Court has found that it has broad inherent jurisdiction under section 11 to grant stays in favour of third-party guarantors, including director guarantors, to ensure that the intent and purpose of the CCAA proceedings are not frustrated. [citations omitted]
>
> This Court has granted stays in favour of non-applicant director guarantees where their involvement in defending potential claims would unduly strain the Applicants' resources and be a significant distraction from the restructuring efforts to the detriment of all stakeholders.

18. Similar relief was granted in favour of third parties in ***Nordstrom Canada Retail Inc.***, and in ***Bed Bath & Beyond Canada Limited (Re)***. In the latter case, Chief Justice Morawetz granted a stay of any proceedings 'arising out of or in connection with' any indemnity, guarantee, or surety relating to a lease of real property by the applicant or related parties subject to the existing stay of proceedings under the CCAA.[4]

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[2] Staying Guarantees By Non-Debtors and Section 11.04 of the CCAA, 2022 CanLIIDocs 4310 **[TAB 2]**
[3] ***Pride Group Holdings Inc***., 2024 ONSC 1830, paras. 33-35 **[TAB 3]**
[4] ***Bed Bath & Beyond Canada Limited (Re)***, 2023 ONSC 1014, para. 34 **[TAB 4]**

19. This line of authorities was recently considered in ***2675970 Ontario Inc. et al.***[5], where the court found that there was 'compelling' logic for the view that the court may stay guarantee claims under s. 11 in appropriate circumstances, and further determined that they existed:

> [48] While there is a debate between the parties as to whether or not the evidence demonstrates that the applicants' management will be distracted and occupied by the Canopy Arbitration to the extent they claim, I accept and rely upon the Monitor's view, as a court-appointed officer, that allowing the Canopy Arbitration to proceed would be counterproductive to the SISP and the overall restructuring effort.

20. The above decision was then cited in a December 2024 Quebec Superior Court case, ***Arrangement relatif à Elna Medical Group Inc./Groupe médicale Elna inc.***[6], where the Court extended the stay of proceedings to the applicants' sole director, shareholder and founder, on an application for an initial order under the CCAA. The Court considered the following factors before granting initial relief that extended to not only to personal guarantees but to loans that he had taken out in his personal capacity and fully invested in the debtor company:

> [57] In determining whether to extend a stay of proceedings to non-applicant third parties, including directors, the following non-exhaustive list of factors have been considered by the Courts:
>
> 57.1. the business and operations of the third party was significantly intertwined and integrated with those of the debtor company;
>
> 57.2. extending the stay to the third party would help maintain stability and value during the CCAA process;
>
> 57.3. not extending the stay to the third party would have a negative impact on the debtor company's ability to restructure, potentially jeopardizing the success of the restructuring and the continuance of the debtor company.
>
> 57.4. if the debtor company is prevented from concluding a successful restructuring with its creditors, the economic harm would be far-reaching and significant.
>
> 57.5. failure of the restructuring would be even more harmful to customers, suppliers, landlords and other counterparties whose rights would otherwise be stayed under the third party stay;
>
> 57.6. if the restructuring proceedings are successful, the debtor company will continue to operate for the benefit of all of its stakeholders, and its stakeholders will retain all of its remedies in the event of future breaches by the debtor company or breaches that are not related to the released claims; and
>
> 57.7. the balance of convenience favours extending the stay to the third party.

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[5] ***2675970 Ontario Inc. et al.*** 2024 ONSC 6174, paras. 28-41, 46-48 **[TAB 5]**

[6] ***Arrangement relatif à Elna Medical Group Inc./Groupe médicale Elna inc.***, 2024 QCCS 4541**[TAB 6]**

21. In each of the cases discussed herein, the court found that there was nothing to prevent a CCAA judge from exercising their discretion to extend a debtor company's stay of proceedings to a third-party where doing so would further the purposes of the CCAA, or where not doing so would present an obstacle to the success of the proceeding.

22. Sheldon and Calvin Cameron's personal financial circumstances are deeply intertwined with the circumstances of the Applicant. This includes the personal guarantees given in their personal capacity connected to the Applicant's operations.

23. Sheldon and Calvin's roles in the Applicant's ongoing management and operations, as well as within the CCAA process, is central to its success and to the stability of their business while the reorganization and the SISP are being pursued. The distraction of dealing with RBC (or other third party) taking enforcement steps will hinder their ability to continue effectively supporting the Monitor and contributing to an optimal outcome in this proceeding.

24. The Applicant repeats the foregoing and submits that it is appropriate in this case for the Court to exercise its jurisdiction to extend a stay of proceedings to Sheldon Cameron and Calvin Cameron as a guarantors or otherwise for liability personally incurred by them in direct connection with their funding and operation of the Applicant, provided that the direct connect can be established.

CONCLUSION:

25. The Applicant submits that the Court has jurisdiction to extend the Stay Period until 31 July 2025 and that it is appropriate to do so as the Applicant has acted with good faith and due diligence in actively advancing the SISP and in taking other steps within this CCAA.

26. The Applicant states that this CCAA Proceeding remains the best solution available to stabilize its operational and financial situation and maximize value for stakeholders, including the SISP.

27. The Applicant states that, at this stage, DIP Facility in place is sufficient for the extended Stay Period.

28. The Applicant further submits that it is appropriate to expand the stay of proceedings to include Sheldon Cameron and Calvin Cameron in their personal capacity with respect to

guarantees or debts incurred wholly in support of the Applicant during the extended Stay Period.

29. The Applicant therefore seeks an order substantially in the form of draft order circulated to the Court and Service List in advance of the hearing.

All of which is respectfully submitted.

DATED at St. John's, in the Province of Newfoundland and Labrador, this 25 day of June 2025.

O'KEEFE & SULLIVAN

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To: The Service List attached hereto as **Schedule "A"**

NEMORI FARMS LTD
Schedule "A"

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TAB 1

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 *Interveners*

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

Nº 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.

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.

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.

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.

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

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

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.

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.

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.

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

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

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.

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.

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.

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

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.

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.

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*.

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*.

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APPEALS from a judgment of the Quebec Court of Appeal (Dutil, Schrager and Dumas JJ.A.), 2019 QCCA 171, [2019] AZ-51566416, [2019] Q.J. No. 670 (QL), 2019 CarswellQue 94 (WL Can.), setting aside a decision of Michaud J., 2018 QCCS 1040, [2018] AZ-51477967, [2018] Q.J. No. 1986 (QL), 2018 CarswellQue 1923 (WL Can.). Appeals allowed.

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

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

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

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

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

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

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

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

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

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

The reasons for judgment of the Court were delivered by

THE CHIEF JUSTICE AND MOLDAVER J.—

I. Overview

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

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

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

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

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

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

Version française des motifs de jugement de la Cour rendus par

LE JUGE EN CHEF ET LE JUGE MOLDAVER —

I. Aperçu

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

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

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

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

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. 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

II. Les faits

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[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. *The Initial Competing Plans of Arrangement*

B. *Les premiers plans d'arrangement concurrents*

[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.

[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] 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.

[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] 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.

[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] 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

[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.

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

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

[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.

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

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

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

[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

[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 superprioritaire de 20 millions de dollars en faveur de Bentham (« charge liée au financement du litige »).

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

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

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

[2] 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 JJ.A. and Dumas J. (ad hoc))*

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

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

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

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

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

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

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

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

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

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

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

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

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

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*?

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. 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.

V. Analyse

A. *Considérations préliminaires*

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

(1) The Evolving Nature of *CCAA* Proceedings

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Good faith

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

Good faith — powers of court

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

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

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

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

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

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

Bonne foi

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

Bonne foi — pouvoirs du tribunal

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

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

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

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

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] 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).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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] 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.

[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] 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

[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.

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] 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.

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

[61] 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.

[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.

[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] Our view is further supported by Industry Canada's explanation of the rationale for s. 22(3) as being to "reduce the ability of <u>debtor companies</u> to organize a restructuring plan that confers additional benefits to <u>related parties</u>" (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).

[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 <u>compagnies débitrices</u> d'établir un plan de restructuration apportant des avantages supplémentaires à des <u>personnes qui leur sont liées</u> » (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] 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.

[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) <u>Discretion to Bar a Creditor From Voting in Furtherance of an Improper Purpose</u>

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

[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

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

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

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

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

General power of court

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

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

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

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

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

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

Pouvoir général du tribunal

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

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

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

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

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

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

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

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

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

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

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

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

(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] 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.

[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] 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)).

[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] 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

[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.

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

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

[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.

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

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

[4] 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.

[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.

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] 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.

[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] 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.

[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] 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

[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.

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

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

[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.

[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) Interim Financing and Section 11.2 of the *CCAA*

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

[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

[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.

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] 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.

[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] 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".

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

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

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

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] 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.

[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) Supervising Judges May Approve Third Party Litigation Funding as Interim Financing

(2) Les juges surveillants peuvent approuver le financement d'un litige par un tiers à titre de financement temporaire

[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*).

[93] Le financement d'un litige par un tiers met généralement en cause [TRADUCTION] « un tiers, n'ayant par ailleurs aucun lien avec le litige, [qui] accepte de payer une partie ou la totalité des frais de litige d'une partie, en échange d'une portion de la somme recouvrée par cette partie au titre des dommages-intérêts ou des dépens » (R. K. Agarwal et D. Fenton, « Beyond Access to Justice : Litigation Funding Agreements Outside the Class Actions Context » (2017), 59 *Rev. can. dr. comm.* 65, p. 65). Le financement d'un litige par un tiers peut revêtir diverses formes. Un modèle courant met en cause un bailleur de fonds de litiges qui s'engage à payer les débours du demandeur et à indemniser ce dernier dans l'éventualité d'une adjudication des dépens défavorable, en échange d'une partie de la somme obtenue dans le cadre d'un procès ou d'un règlement couronné de succès (voir *Dugal c. Manulife Financial Corp.*, 2011 ONSC 1785, 105 O.R. (3d) 364; *Bayens*).

[94] 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

[94] En dehors du cadre de la *LACC*, l'approbation des accords de financement d'un litige par un tiers a été quelque peu controversée. Une partie de cette controverse découle de la possibilité que ces accords portent atteinte aux doctrines de common

maintenance.[6] The tort of maintenance prohibits "officious intermeddling with a lawsuit which in no way belongs to one" (L. N. Klar et al., *Remedies in Tort* (loose-leaf), vol. 1, by L. Berry, ed., at p. 14-11, citing *Langtry v. Dumoulin* (1884), 7 O.R. 644 (Ch. Div.), at p. 661). Champerty is a species of maintenance that involves an agreement to share in the proceeds or otherwise profit from a successful suit (*McIntyre Estate v. Ontario (Attorney General)* (2002), 218 D.L.R. (4th) 193 (Ont. C.A.), at para. 26).

[95] Building on jurisprudence holding that *contingency fee* arrangements are not champertous where they are not motivated by an improper purpose (e.g., *McIntyre Estate*), lower courts have increasingly come to recognize that *litigation funding* agreements are also not *per se* champertous. This development has been focussed within class action proceedings, where it arose as a response to barriers like adverse cost awards, which were stymieing litigants' access to justice (see *Dugal*, at para. 33; *Marcotte v. Banque de Montréal*, 2015 QCCS 1915, at paras. 43-44 (CanLII); *Houle v. St. Jude Medical Inc.*, 2017 ONSC 5129, 9 C.P.C. (8th) 321, at para. 52, aff'd 2018 ONSC 6352, 429 D.L.R. (4th) 739 (Div. Ct.); see also *Stanway v. Wyeth*, 2013 BCSC 1585, 56 B.C.L.R. (5th) 192, at para. 13). The jurisprudence on the approval of third party litigation funding agreements in the class action context — and indeed, the parameters of their legality generally — is still evolving, and no party before this Court has invited us to evaluate it.

[6] The extent of this controversy varies by province. In Ontario, champertous agreements are forbidden by statute (see *An Act respecting Champerty*, R.S.O. 1897, c. 327). In Quebec, concerns associated with champerty and maintenance do not arise as acutely because champerty and maintenance are not part of the law as such (see *Montgrain v. Banque nationale du Canada*, 2006 QCCA 557, [2006] R.J.Q. 1009; G. Michaud, "New Frontier: The Emergence of Litigation Funding in the Canadian Insolvency Landscape" in J. P. Sarra et al., eds., *Annual Review of Insolvency Law 2018* (2019), 221, at p. 231).

law concernant la champartie (*champerty*) et le soutien abusif (*maintenance*)[6]. Le délit de soutien abusif interdit [TRADUCTION] « l'immixtion trop empressée dans une action avec laquelle on n'a rien à voir » (L. N. Klar et autres, *Remedies in Tort* (feuilles mobiles), vol. 1, par L. Berry, dir., p. 14-11, citant *Langtry c. Dumoulin* (1884), 7 O.R. 644 (Ch. Div.), p. 661). La champartie est une sorte de soutien abusif qui comporte un accord prévoyant le partage de la somme obtenue ou de tout autre profit réalisé dans le cadre d'une action réussie (*McIntyre Estate c. Ontario (Attorney General)* (2002), 218 D.L.R. (4th) 193 (C.A. Ont.), par. 26).

[95] S'appuyant sur la jurisprudence voulant que les conventions d'*honoraires conditionnels* ne constituent pas de la champartie lorsqu'elles ne sont pas motivées par un but illégitime (p. ex., *McIntyre Estate*), les tribunaux d'instance inférieure en sont venus progressivement à reconnaître que les accords de *financement d'un litige* ne constituent pas non plus de la champartie *en soi*. Cette évolution s'est opérée surtout dans le contexte des recours collectifs, en réaction aux obstacles, comme les adjudications de dépens défavorables, qui entravaient l'accès des parties à la justice (voir *Dugal*, par. 33; *Marcotte c. Banque de Montréal*, 2015 QCCS 1915, par. 43-44 (CanLII); *Houle c. St. Jude Medical Inc.*, 2017 ONSC 5129, 9 C.P.C. (8th) 321, par. 52, conf. par 2018 ONSC 6352, 429 D.L.R. (4th) 739 (C. div.); voir également *Stanway c. Wyeth*, 2013 BCSC 1585, 56 B.C.L.R. (5th) 192, par. 13). La jurisprudence relative à l'approbation des accords de financement de litige par un tiers dans le contexte des recours collectifs — et même les paramètres de leur légalité en général — continue d'évoluer, et aucune des parties au présent pourvoi ne nous a invités à l'analyser.

[6] L'ampleur de la controverse varie selon les provinces. En Ontario, les accords de champartie sont interdits par la loi (voir *An Act respecting Champerty*, R.S.O. 1897, c. 327). Au Québec, les questions relatives à la champartie et au soutien abusif ne se posent pas de façon aussi aiguë parce que la champartie et le soutien abusif ne font pas partie du droit comme tel (voir *Montgrain c. Banque nationale du Canada*, 2006 QCCA 557, [2006] R.J.Q. 1009; G. Michaud, « New Frontier : The Emergence of Litigation Funding in the Canadian Insolvabilité Landscape » dans J. P. Sarra et autres, dir., *Annual Review of Insolvency Law 2018* (2019), 221, p. 231).

[96] That said, insofar as third party litigation funding agreements are not *per se* illegal, there is no principled basis upon which to restrict supervising judges from approving such agreements as interim financing in appropriate cases. We acknowledge that this funding differs from more common forms of interim financing that are simply designed to help the debtor "keep the lights on" (see *Royal Oak*, at paras. 7 and 24). However, in circumstances like the case at bar, where there is a single litigation asset that could be monetized for the benefit of creditors, the objective of maximizing creditor recovery has taken centre stage. In those circumstances, litigation funding furthers the basic purpose of interim financing: allowing the debtor to realize on the value of its assets.

[96] Cela dit, dans la mesure où les accords de financement de litige par un tiers ne sont pas illégaux *en soi*, il n'y a aucune raison de principe qui permet d'empêcher les juges surveillants d'approuver ce type d'accord à titre de financement temporaire dans les cas qui s'y prêtent. Nous reconnaissons que cette forme de financement diffère des formes plus courantes de financement temporaire qui visent simplement à aider le débiteur à [TRADUCTION] « payer les frais courants » (voir *Royal Oak*, par. 7 et 24). Toutefois, dans des circonstances semblables à celles en l'espèce, lorsqu'il existait un seul élément d'actif susceptible de monétisation au bénéfice des créanciers, l'objectif visant à maximiser le recouvrement des créanciers a occupé le devant de la scène. En pareilles circonstances, le financement de litige favorise la réalisation de l'objectif fondamental du financement temporaire : permettre au débiteur de réaliser la valeur de ses éléments d'actif.

[97] We conclude that third party litigation funding agreements may be approved as interim financing in *CCAA* proceedings when the supervising judge determines that doing so would be fair and appropriate, having regard to all the circumstances and the objectives of the Act. This requires consideration of the specific factors set out in s. 11.2(4) of the *CCAA*. That said, these factors need not be mechanically applied or individually reviewed by the supervising judge. Indeed, not all of them will be significant in every case, nor are they exhaustive. Further guidance may be drawn from other areas in which third party litigation funding agreements have been approved.

[97] Nous concluons que les accords de financement de litige par un tiers peuvent être approuvés à titre de financement temporaire dans le cadre des procédures fondées sur la *LACC* lorsque le juge surveillant estime qu'il serait juste et approprié de le faire, compte tenu de l'ensemble des circonstances et des objectifs de la Loi. Cela implique la prise en considération des facteurs précis énoncés au par. 11.2(4) de la *LACC*. Cela dit, ces facteurs ne doivent pas être appliqués machinalement ou examinés individuellement par le juge surveillant. En effet, ils ne seront pas tous importants dans tous les cas, et ils ne sont pas non plus exhaustifs. Des enseignements supplémentaires peuvent être tirés d'autres domaines où des accords de financement de litige par un tiers ont été approuvés.

[98] The foregoing is consistent with the practice that is already occurring in lower courts. Most notably, in *Crystallex*, the Ontario Court of Appeal approved a third party litigation funding agreement in circumstances substantially similar to the case at bar. *Crystallex* involved a mining company that had the right to develop a large gold deposit in Venezuela. Crystallex eventually became insolvent and (similar to Bluberi) was left with only a single significant asset: a US$3.4 billion arbitration claim against Venezuela. After entering *CCAA* protection,

[98] Ce qui précède est compatible avec la pratique qui a déjà cours devant les tribunaux d'instance inférieure. Plus particulièrement, dans *Crystallex*, la Cour d'appel de l'Ontario a approuvé un accord de financement de litige par un tiers dans des circonstances très semblables à celles en l'espèce. Cette affaire mettait en cause une société minière ayant le droit d'exploiter un grand gisement d'or au Venezuela. Crystallex est finalement devenue insolvable, et (comme Bluberi) il ne lui restait plus qu'un seul élément d'actif important : une réclamation

Crystallex sought the approval of a third party litigation funding agreement. The agreement contemplated that the lender would advance substantial funds to finance the arbitration in exchange for, among other things, a percentage of the net proceeds of any award or settlement. The supervising judge approved the agreement as interim financing pursuant to s. 11.2. The Court of Appeal unanimously found no error in the supervising judge's exercise of discretion. It concluded that s. 11.2 "does not restrict the ability of the supervising judge, where appropriate, to approve the grant of a charge securing financing before a plan is approved that may continue after the company emerges from CCAA protection" (para. 68).

[99] A key argument raised by the creditors in *Crystallex* — and one that Callidus and the Creditors' Group have put before us now — was that the litigation funding agreement at issue was a plan of arrangement and not interim financing. This was significant because, if the agreement was in fact a plan, it would have had to be put to a creditors' vote pursuant to ss. 4 and 5 of the *CCAA* prior to receiving court approval. The court in *Crystallex* rejected this argument, as do we.

[100] There is no definition of plan of arrangement in the *CCAA*. In fact, the *CCAA* does not refer to plans at all — it only refers to an "arrangement" or "compromise" (see ss. 4 and 5). The authors of *Bankruptcy and Insolvency Law of Canada* offer the following general definition of these terms, relying on early English case law:

> A "compromise" presupposes some dispute about the rights compromised and a settling of that dispute on terms that are satisfactory to the debtor and the creditor. An agreement to accept less than 100¢ on the dollar would be a compromise where the debtor disputes the debt or lacks the means to pay it. "Arrangement" is a broader word

d'arbitrage de 3,4 milliards de dollars américains contre le Venezuela. Après s'être placée sous la protection de la *LACC*, Crystallex a demandé l'approbation d'un accord de financement de litige par un tiers. L'accord prévoyait que le prêteur avancerait des fonds importants pour financer l'arbitrage en échange, notamment, d'un pourcentage de la somme nette obtenue à la suite d'une sentence ou d'un règlement. Le juge surveillant a approuvé l'accord à titre de financement temporaire en vertu de l'art. 11.2. La Cour d'appel a conclu à l'unanimité que le juge surveillant n'avait commis aucune erreur dans l'exercice de son pouvoir discrétionnaire. Elle a conclu que l'art. 11.2 [TRADUCTION] « n'empêche pas le juge surveillant d'approuver, s'il y a lieu, avant qu'un plan soit approuvé, l'octroi d'une charge garantissant un financement qui pourra continuer après que la compagnie aura émergé de la protection de la *LACC* » (par. 68).

[99] Dans *Crystallex*, l'un des principaux arguments soulevés par les créanciers — et l'un de ceux qu'ont soulevés Callidus et le groupe de créanciers dans le présent pourvoi — était que l'accord de financement de litige en cause était un plan d'arrangement et non pas un financement temporaire. Il s'agissait d'un argument important car, si l'accord était en fait un plan, il aurait dû être soumis à un vote des créanciers conformément aux art. 4 et 5 de la *LACC* avant de recevoir l'aval du tribunal. La cour, dans *Crystallex*, a rejeté cet argument, et nous en faisons autant.

[100] La *LACC* ne définit pas le plan d'arrangement. En fait, la *LACC* ne fait aucunement allusion aux plans — elle fait uniquement état d'un « arrangement » ou d'une « transaction » (voir art. 4 et 5). S'appuyant sur l'ancienne jurisprudence anglaise, les auteurs de *Bankruptcy and Insolvency Law of Canada* proposent la définition générale suivante de ces termes :

> [TRADUCTION] La « transaction » suppose d'emblée l'existence d'un différend au sujet des droits visés par la transaction et d'un règlement de ce différend selon des conditions jugées satisfaisantes par le débiteur et le créancier. L'accord visant à accepter une somme inférieure à 100 ¢ par dollar constituerait une transaction lorsque

than "compromise" and is not limited to something analogous to a compromise. It would include any scheme for reorganizing the affairs of the debtor: *Re Guardian Assur. Co.*, [1917] 1 Ch. 431, 61 Sol. Jo 232, [1917] H.B.R. 113 (C.A.); *Re Refund of Dues under Timber Regulations*, [1935] A.C. 185 (P.C.).

(Houlden, Morawetz and Sarra, at §33)

[101] The apparent breadth of these terms notwithstanding, they do have some limits. More recent jurisprudence suggests that they require, at minimum, some compromise of creditors' rights. For example, in *Crystallex* the litigation funding agreement at issue (known as the Tenor DIP facility) was held not to be a plan of arrangement because it did not "compromise the terms of [the creditors'] indebtedness or take away . . . their legal rights" (para. 93). The Court of Appeal adopted the following reasoning from the lower court's decision, with which we substantially agree:

A "plan of arrangement" or a "compromise" is not defined in the CCAA. It is, however, to be an arrangement or compromise between a debtor and its creditors. The Tenor DIP facility is not on its face such an arrangement or compromise between Crystallex and its creditors. Importantly the rights of the noteholders are not taken away from them by the Tenor DIP facility. The noteholders are unsecured creditors. Their rights are to sue to judgment and enforce the judgment. If not paid, they have a right to apply for a bankruptcy order under the BIA. Under the CCAA, they have the right to vote on a plan of arrangement or compromise. None of these rights are taken away by the Tenor DIP.

(*Re Crystallex International Corporation*, 2012 ONSC 2125, 91 C.B.R. (5th) 169, at para. 50)

[102] Setting out an exhaustive definition of plan of arrangement or compromise is unnecessary to resolve these appeals. For our purposes, it is sufficient to conclude that plans of arrangement require at least

le débiteur conteste la dette ou n'a pas les moyens de la payer. Le mot « arrangement » a un sens plus large que le mot « transaction » et ne se limite pas à quelque chose qui ressemble à une transaction. Il viserait tout plan de réorganisation des affaires du débiteur : *Re Guardian Assur. Co.*, [1917] 1 Ch. 431, 61 Sol. Jo 232, [1917] H.B.R. 113 (C.A.); *Re Refund of Dues under Timber Regulations*, [1935] A.C. 185 (C.P.).

(Houlden, Morawetz et Sarra, §33)

[101] Malgré leur vaste portée apparente, ces termes connaissent quand même certaines limites. Selon une jurisprudence plus récente, ils exigeraient, à tout le moins, une certaine transaction à l'égard des droits des créanciers. Dans *Crystallex*, par exemple, on a conclu que l'accord de financement de litige en cause (également appelé [TRADUCTION] « facilité de DE Tenor ») ne constituait pas un plan d'arrangement parce qu'il ne comportait pas [TRADUCTION] « une transaction visant les conditions [des] dettes envers [des créanciers] ni ne [. . .] privait [ceux-ci] de [. . .] leurs droits reconnus par la loi » (par. 93). La Cour d'appel a fait sien le raisonnement suivant du tribunal de première instance, auquel nous souscrivons pour l'essentiel :

[TRADUCTION] Le « plan d'arrangement » et la « transaction » ne sont pas définis dans la *LACC*. Il doit toutefois s'agir d'un arrangement ou d'une transaction entre un débiteur et ses créanciers. La facilité de DE Tenor ne constitue pas, à première vue, un arrangement ou une transaction entre Crystallex et ses créanciers. Fait important, les détenteurs de billets ne sont pas privés de leurs droits par la facilité de DE Tenor. Les détenteurs de billets sont des créanciers non garantis. Leurs droits se résument à poursuivre en vue d'obtenir un jugement et à faire exécuter ce jugement. S'ils ne sont pas payés, ils ont le droit de demander une ordonnance de faillite en vertu de la LFI. Sous le régime de la *LACC*, ils ont le droit de voter sur un plan d'arrangement ou une transaction. La facilité de DE Tenor ne les prive d'aucun de ces droits.

(*Re Crystallex International Corporation*, 2012 ONSC 2125, 91 C.B.R. (5th) 169, par. 50)

[102] Il n'est pas nécessaire de définir exhaustivement les notions de plan d'arrangement ou de transaction pour trancher les présents pourvois. Il suffit de conclure que les plans d'arrangement doivent au

some compromise of creditors' rights. It follows that a third party litigation funding agreement aimed at extending financing to a debtor company to realize on the value of a litigation asset does not necessarily constitute a plan of arrangement. We would leave it to supervising judges to determine whether, in the particular circumstances of the case before them, a particular third party litigation funding agreement contains terms that effectively convert it into a plan of arrangement. So long as the agreement does not contain such terms, it may be approved as interim financing pursuant to s. 11.2 of the *CCAA*.

[103] We add that there may be circumstances in which a third party litigation funding agreement may contain or incorporate a plan of arrangement (e.g., if it contemplates a plan for distribution of litigation proceeds among creditors). Alternatively, a supervising judge may determine that, despite an agreement itself not being a plan of arrangement, it should be packaged with a plan and submitted to a creditors' vote. That said, we repeat that third party litigation funding agreements are not necessarily, or even generally, plans of arrangement.

[104] None of the foregoing is seriously contested before us. The parties essentially agree that third party litigation funding agreements *can* be approved as interim financing. The dispute between them focusses on whether the supervising judge erred in exercising his discretion to approve the LFA in the absence of a vote of the creditors, either because it was a plan of arrangement or because it should have been accompanied by a plan of arrangement. We turn to these issues now.

(3) The Supervising Judge Did Not Err in Approving the LFA

[105] In our view, there is no basis upon which to interfere with the supervising judge's exercise of his discretion to approve the LFA as interim financing.

moins comporter une certaine transaction à l'égard des droits des créanciers. Il s'ensuit que l'accord de financement de litige par un tiers visant à apporter un financement à la compagnie débitrice pour réaliser la valeur d'un élément d'actif ne constitue pas nécessairement un plan d'arrangement. Nous sommes d'avis de laisser aux juges surveillants le soin de déterminer si, compte tenu des circonstances particulières de l'affaire dont ils sont saisis, l'accord de financement de litige par un tiers comporte des conditions qui le convertissent effectivement en plan d'arrangement. Si l'accord ne comporte pas de telles conditions, il peut être approuvé à titre de financement temporaire en vertu de l'art. 11.2 de la *LACC*.

[103] Ajoutons que, dans certaines circonstances, l'accord de financement de litige par un tiers peut contenir ou incorporer un plan d'arrangement (p. ex., s'il contient un plan prévoyant la distribution aux créanciers des sommes obtenues dans le cadre du litige). Subsidiairement, le juge surveillant peut décider que, bien que l'accord lui-même ne constitue pas un plan d'arrangement, il y a lieu de l'accompagner d'un plan et de le soumettre à un vote des créanciers. Cela dit, nous le répétons, les accords de financement de litige par un tiers ne constituent pas nécessairement, ni même généralement, des plans d'arrangement.

[104] Rien de ce qui précède n'est sérieusement contesté en l'espèce. Les parties s'entendent essentiellement pour dire que les accords de financement de litige par un tiers *peuvent* être approuvés à titre de financement temporaire. Le différend qui les oppose porte sur la question de savoir si le juge surveillant a commis une erreur en exerçant son pouvoir discrétionnaire d'approuver l'AFL en l'absence d'un vote des créanciers, soit parce qu'il constituait un plan d'arrangement, soit parce qu'il aurait dû être accompagné d'un plan d'arrangement. Nous abordons maintenant cette question.

(3) Le juge surveillant n'a pas commis d'erreur en approuvant l'AFL

[105] À notre avis, il n'y a aucune raison d'intervenir dans l'exercice par le juge surveillant de son pouvoir discrétionnaire d'approuver l'AFL à titre de

The supervising judge considered the LFA to be fair and reasonable, drawing guidance from the principles relevant to approving similar agreements in the class action context (para. 74, citing *Bayens*, at para. 41; *Hayes*, at para. 4). In particular, he canvassed the terms upon which Bentham and Bluberi's lawyers would be paid in the event the litigation was successful, the risks they were taking by investing in the litigation, and the extent of Bentham's control over the litigation going forward (paras. 79 and 81). The supervising judge also considered the unique objectives of *CCAA* proceedings in distinguishing the LFA from ostensibly similar agreements that had not received approval in the class action context (paras. 81-82, distinguishing *Houle*). His consideration of those objectives is also apparent from his reliance on *Crystallex*, which, as we have explained, involved the approval of interim financing in circumstances substantially similar to the case at bar (see paras. 67 and 71). We see no error in principle or unreasonableness to this approach.

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] 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

[106] Certes, le juge surveillant n'a pas examiné à fond chacun des facteurs énoncés au par. 11.2(4) de la *LACC* de façon individuelle avant de tirer sa conclusion, mais cela ne constituait pas une erreur en soi. L'examen des motifs du juge surveillant dans leur ensemble, conjugué à la reconnaissance de son expérience évidente des procédures intentées par Bluberi sous le régime de la *LACC*, nous mène à conclure que les facteurs énumérés au par. 11.2(4) concernent des questions qui n'auraient pu échapper à son attention et à son examen adéquat. Il convient de rappeler qu'au moment où il a rendu sa décision, le juge surveillant était saisi des procédures en question depuis plus de deux ans et avait pu bénéficier de l'aide du contrôleur. En ce qui a trait à chacun des facteurs énoncés au par. 11.2(4), nous soulignons ce qui suit :

- le rôle de surveillance du juge lui aurait permis de connaître la durée prévue des procédures intentées par Bluberi sous le régime de la *LACC* ainsi que la mesure dans laquelle les dirigeants de Bluberi bénéficiaient du soutien des créanciers appear to be less significant than the others in the context of this particular case (see para. 96);

- the LFA itself explains "how the company's business and financial affairs are to be managed during the proceedings" (s. 11.2(4)(b));

- the supervising judge was of the view that the LFA would enhance the prospect of a viable plan, as he accepted (1) that Bluberi intended to submit a plan and (2) Bluberi's submission that approval of the LFA would assist it in finalizing a plan "with a view towards achieving maximum realization" of its assets (para. 68, citing 9354-9186 Québec inc. and 9354-9178 Québec inc.'s application, at para. 99; s. 11.2(4)(d));

- the supervising judge was apprised of the "nature and value" of Bluberi's property, which was clearly limited to the Retained Claims (s. 11.2(4)(e));

- the supervising judge implicitly concluded that the creditors would not be materially prejudiced by the Litigation Financing Charge, as he stated that "[c]onsidering the results of the vote [on the First Plan], and given the particular circumstances of this matter, the only potential recovery lies with the lawsuit that the Debtors will launch" (para. 91 (emphasis added); s. 11.2(4)(f)); and

- the supervising judge was also well aware of the Monitor's reports, and drew from the most recent report at various points in his reasons (see, e.g., paras. 64-65 and fn. 1; s. 11.2(4)(g)). It is worth noting that the Monitor supported approving the LFA as interim financing.

[107] In our view, it is apparent that the supervising judge was focussed on the fairness at stake to all parties, the specific objectives of the *CCAA*, and the particular circumstances of this case when he approved the LFA as interim financing. We cannot say that he erred in the exercise of his discretion.

(al. 11.2(4)a) et c)), mais nous constatons que ces facteurs semblent revêtir beaucoup moins d'importance que les autres dans le contexte de la présente affaire (voir par. 96);

- l'AFL lui-même indique « la façon dont les affaires financières et autres de la compagnie seront gérées au cours de ces procédures » (al. 11.2(4)b));

- le juge surveillant était d'avis que l'AFL favoriserait la conclusion d'un plan viable, car il a accepté (1) le fait que Bluberi avait l'intention de présenter un plan et (2) l'argument de Bluberi selon lequel l'approbation de l'AFL l'aiderait à conclure un plan [TRADUCTION] « visant à atteindre une réalisation maximale » de ses éléments d'actif (par. 68, citant la demande de 9354-9186 Québec inc. et de 9354-9178 Québec inc., par. 99; al. 11.2(4)d));

- le juge surveillant était au courant de la « nature et [de] la valeur » des biens de Bluberi, qui se limitaient clairement aux réclamations retenues (al. 11.2(4)e));

- le juge surveillant a conclu implicitement que la charge relative au financement de litige ne causerait pas un préjudice sérieux aux créanciers, car il a affirmé que [TRADUCTION] « [c]ompte tenu du résultat du vote [sur le premier plan] et des circonstances particulières de la présente affaire, la seule possibilité de recouvrement réside dans l'action que vont intenter les débiteurs » (par. 91 (nous soulignons); al. 11.2(4)f));

- le juge surveillant était aussi bien au fait des rapports du contrôleur, et s'est appuyé sur le plus récent d'entre eux à divers endroits dans ses motifs (voir, p. ex., par. 64-65 et note 1; al. 11.2(4)g)). Il convient de souligner que le contrôleur appuyait l'approbation de l'AFL à titre de financement temporaire.

[107] À notre avis, il est manifeste que le juge surveillant a mis l'accent sur l'équité envers toutes les parties, les objectifs précis de la *LACC* et les circonstances particulières de la présente affaire lorsqu'il a approuvé l'AFL à titre de financement temporaire. Nous ne pouvons affirmer qu'il a commis une erreur

Although we are unsure whether the LFA was as favourable to Bluberi's creditors as it might have been — to some extent, it does prioritize Bentham's recovery over theirs — we nonetheless defer to the supervising judge's exercise of discretion.

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] 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.

[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] 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).

[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] 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.

[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] 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

[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. c. Fisgard Capital Corp.*, 2008 BCCA 327, 296 D.L.R. (4th) 577).

[112] C'est exactement la même conclusion qui a été tirée dans *Crystallex* dans des circonstances semblables :

[TRADUCTION] Les faits de l'espèce sont inhabituels : la « marmite d'or » ne contient qu'un seul élément d'actif qui, s'il est réalisé, rapportera beaucoup plus que ce qui est nécessaire pour rembourser les créanciers. Le juge surveillant était le mieux placé pour établir un équilibre entre les intérêts de toutes les parties intéressées. J'estime que l'exercice par le juge surveillant de son pouvoir discrétionnaire d'approuver le prêt de DE Tenor était raisonnable et approprié, bien qu'il ait eu pour effet de limiter la position de négociation des créanciers.

. . .

. . . 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.

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] 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).

[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] 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

[115] Troisièmement, nous estimons que la Cour d'appel a eu tort de conclure que le juge surveillant aurait dû soumettre l'AFL accompagné d'un plan à l'approbation des créanciers (par. 89). Comme nous l'avons indiqué, la décision d'exiger que le débiteur accompagne d'un plan son accord de financement

with a plan is a discretionary decision for the supervising judge to make.

[116] Finally, at the appellants' insistence, we point out that the Court of Appeal's suggestion that the LFA is somehow "akin to an equity investment" was unhelpful and potentially confusing (para. 90). That said, this characterization was clearly *obiter dictum*. To the extent that the Court of Appeal relied on it as support for the conclusion that the LFA was a plan of arrangement, we have already explained why we believe the Court of Appeal was mistaken on this point.

VI. Conclusion

[117] For these reasons, at the conclusion of the hearing we allowed these appeals and reinstated the supervising judge's order. Costs were awarded to the appellants in this Court and the Court of Appeal.

Appeals allowed with costs in the Court and in the Court of Appeal.

Solicitors for the appellants/interveners 9354-9186 Québec inc. and 9354-9178 Québec inc.: Davies Ward Phillips & Vineberg, Montréal.

Solicitors for the appellants/interveners IMF Bentham Limited (now known as Omni Bridgeway Limited) and Bentham IMF Capital Limited (now known as Omni Bridgeway Capital (Canada) Limited): Woods, Montréal.

Solicitors for the respondent Callidus Capital Corporation: Gowling WLG (Canada), Montréal.

Solicitors for the respondents International Game Technology, Deloitte LLP, Luc Carignan, François Vigneault, Philippe Millette, Francis Proulx and François Pelletier: McCarthy Tétrault, Montréal.

Solicitors for the intervener Ernst & Young Inc.: Stikeman Elliott, Montréal.

de litige par un tiers est une décision discrétionnaire qui appartient au juge surveillant.

[116] Enfin, sur les instances des appelantes, nous soulignons que l'affirmation de la Cour d'appel selon laquelle l'AFL [TRADUCTION] « s'apparente [en quelque sorte] à un placement à échéance non déterminée » était inutile et pouvait prêter à confusion (par. 90). Cela dit, il s'agissait manifestement d'une remarque incidente. Dans la mesure où la Cour d'appel s'est fondée sur cette qualification pour conclure que l'AFL constituait un plan d'arrangement, nous avons déjà expliqué pourquoi nous croyons que la Cour d'appel a fait erreur sur ce point.

VI. Conclusion

[117] Pour ces motifs, à l'issue de l'audience, nous avons accueilli les pourvois et rétabli l'ordonnance du juge surveillant. Les dépens devant notre Cour et la Cour d'appel ont été adjugés aux appelantes.

Pourvois accueillis avec dépens devant la Cour et la Cour d'appel.

Procureurs des appelantes/intervenantes 9354-9186 Québec inc. et 9354-9178 Québec inc. : Davies Ward Phillips & Vineberg, Montréal.

Procureurs des appelantes/intervenantes IMF Bentham Limited (maintenant connue sous le nom d'Omni Bridgeway Limited) et Corporation Bentham IMF Capital (maintenant connue sous le nom de Corporation Omni Bridgeway Capital (Canada)) : Woods, Montréal.

Procureurs de l'intimée Callidus Capital Corporation : Gowling WLG (Canada), Montréal.

Procureurs des intimés International Game Technology, Deloitte S.E.N.C.R.L., Luc Carignan, François Vigneault, Philippe Millette, Francis Proulx et François Pelletier : McCarthy Tétrault, Montréal.

Procureurs de l'intervenante Ernst & Young Inc. : Stikeman Elliott, Montréal.

Solicitors for the interveners the Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals: Norton Rose Fulbright Canada, Montréal.

Procureurs des intervenants l'Institut d'insolvabilité du Canada et l'Association canadienne des professionnels de l'insolvabilité et de la réorganisation : Norton Rose Fulbright Canada, Montréal.

TAB 2

Staying Guarantees By Non-Debtors and Section 11.04 of the *CCAA*

*James D Gage and Trevor Courtis**

It seems that no one has ever known quite what to make of section 11.04 of the *Companies' Creditors Arrangement Act*[1] as it relates to guarantees. Section 11.04 provides:

> **Persons obligated under letter of credit or guarantee**
> **11.04** No order made under section 11.02 has affect on any action, suit or proceeding against a person, other than the company in respect of whom the order is made, who is obligated under a letter of credit or guarantee in relation to the company.[2]

On first reading, the provision appears to prohibit stays of proceedings from being extended to non-debtors that have issued letters of credit or guarantees with respect to a *CCAA* debtor company. However, if courts are unable to extend a *CCAA* stay to third-party guarantors in appropriate circumstances, this section would have the potential to complicate certain restructurings. For example, in large corporate groups with obligations that have been guaranteed and cross-collateralized across some or all of the entire enterprise, all of those entities would have to file for protection as *CCAA* debtors, even if some of the guarantors are not central to the restructuring effort. Some guarantors may not even be eligible to file for protection as *CCAA* debtors.

Despite the potential for a broad reading and application of section 11.04, stays of proceedings have been extended to related companies and others that have guaranteed the indebtedness of the debtor company on numerous occasions. It does not appear that section 11.04 is expressly addressed by the parties or considered by the court in most cases. In the rare cases when section 11.04 has

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[1] *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 [*CCAA*].
[2] *Ibid*, s 11.04.

been discussed in any detail, a consistent interpretation of its intended scope has not emerged.

Part I of this article provides an overview of letters of credit and guarantees and canvasses the state of the law on the jurisdiction of *CCAA* courts to grant stays of proceedings, including with respect to letters of credit and guarantees, prior to the introduction of the restriction on staying letters of credit and guarantees in 1997. During this period, the jurisdiction of *CCAA* courts had been interpreted broadly and stays had been extended to letters of credit and guarantees that had raised some concerns.

Part II reviews the legislative history of the restriction, which was initially introduced as section 11.2 of the *CCAA*, and the limited commentary on the provision in the years following its adoption. From the outset, commentators were unsure about the intended scope of the restriction that Parliament had imposed.

Part III discusses the legislative history leading up to the 2009 amendments to the *CCAA*, which reworded the restriction and relocated it to section 11.04, and the case law on extending stays to non-debtor guarantors since that time. A consistent interpretation of section 11.04 has not emerged. Some cases have taken a more expansive view of the scope of section 11.04, some have taken a narrower view and most do not discuss it.

Part IV analyzes three potential interpretations of section 11.04 of the *CCAA* and the factors militating for and against adopting each of them:

- **Narrow interpretation:** Section 11.04 only provides that stays against *debtor companies* do not affect the ability of a creditor to call on a letter of credit or guarantee. It does not prohibit third-party stays from being extended to guarantors.
- **Broad interpretation:** Section 11.04 prohibits a *CCAA* court from extending stays to third parties that are issuers of letters of credit or guarantees in relation to the debtor company *in any circumstances*.

- **Standalone interpretation:** Section 11.04 prohibits a *CCAA* court from extending stays to *standalone* financial obligations of the third party but not obligations that are derivative of the debtor company's liability.

Part V concludes by noting that section 11.04 would benefit from clarification by the legislature or the courts to resolve the uncertainty around the scope and application of the restriction.

I. BACKGROUND TO THE INTRODUCTION OF THE RESTRICTION ON STAYS AFFECTING GUARANTEES

1. Letters of Credit and Guarantees

A letter of credit is, generally speaking, an instrument that is typically issued by a bank upon the instructions of the debtor company for the benefit of a third-party beneficiary, such as a supplier, landlord or other creditor of the debtor company.[3] A letter of credit is generally considered an autonomous or standalone obligation in that it typically contemplates that the creditor may make a demand and obtain payment directly from the issuing bank upon the satisfaction of the conditions for payment set out in the letter of credit, whether or not the debtor company has failed to make any payment.[4]

A guarantee is, generally speaking, an instrument whereby the guarantor undertakes to perform an obligation toward a creditor in the event that the debtor fails to do so.[5] A guarantee is generally considered a derivative or secondary obligation in that the creditor is only entitled to seek satisfaction of the obligation from the guarantor if the primary debtor defaults on the obligation.[6]

The purpose of both letters of credit and guarantees is generally to provide the creditor with an alternate means of recourse against a potentially more

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[3] Lazar Sarna, *Letters of Credit: The Law and Current Practice* (Toronto: Carswell, 2020) (looseleaf updated 2020, release 5) at § 1:1.
[4] *Ibid* at § 5:1.
[5] Kevin Patrick McGuinness, *The Law of Guarantee*, 3rd ed (Toronto: LexisNexis Canada, 2013) at § 2.1.
[6] *Ibid* at § 2.4.

creditworthy counterparty, such as a bank or an affiliate of the debtor company. In this way, a creditor can reduce the credit risk that it perceives it is assuming by dealing with the debtor company. This may allow the debtor company to obtain goods, services and other things from a creditor that may not have otherwise been inclined to deal with the debtor company, or that would have only been willing to deal with it on more expensive or onerous terms.

While letters of credit and guarantees may share some features, depending on their terms,[7] letters of credit in particular have been recognized as "an important and unique type of financial instrument designed to facilitate the flow of goods and trade."[8] As a result, courts should "ensure that [letters of credit] are not interpreted and enforced in a way that might jeopardize their uniqueness and commercial efficacy or the relative certainty that must surround their use."[9]

2. *CCAA* Jurisdiction Interpreted Broadly

The *CCAA* initially was skeletal in nature, and judges supervising *CCAA* proceedings often made decisions based on discretionary grants of jurisdiction in the statute or pursuant to their inherent jurisdiction as superior courts of law.[10] Prior to 1997, the *CCAA* only provided the court with the express jurisdiction to stay proceedings against the debtor company.[11] During that period, section 11 of the *CCAA* read:

> 11. Notwithstanding anything in the Bankruptcy Act or in the Winding-up Act, whenever an application has been made under this Act in respect of any company, the court, on the application of any person interested in the matter, may, on such notice to any other person, or without notice as it may see fit, make an order staying until such time

[7] For example, letters of credit can include a requirement that the creditor provide notice to the debtor before it can make a demand against the issuer under the letter of credit. Guarantees can provide the creditor with direct recourse to the guarantor without first having to seek satisfaction from the debtor.
[8] *Nareerux Import Co v Canadian Imperial Bank of Commerce*, 2009 ONCA 764 at para 48.
[9] *Ibid* at para 49.
[10] *Century Services Inc v Canada (Attorney General)*, 2010 SCC 60 at paras 57–58 [*Century Services*].
[11] *Companies' Creditors Arrangement Act*, RSC 1970, c C-25. This contains the *CCAA*, *supra* note 1, s 11 as it appeared before 25 April 1997.

> as the court may prescribe or until further order all proceedings taken or that might be taken in respect of such company under the Bankruptcy Act and the Winding-up Act or either of them, [...] restrain further proceedings in any action, suit or proceeding against the company upon such terms as the court sees fit, and [...] make an order that no suit, action or other proceeding shall be proceeded with or commenced against the company except with the leave of the court and subject to such terms as the court imposes.[12]

In the 1980s and early 1990s, as the *CCAA* came to be used more frequently, the courts began to interpret their jurisdiction to grant stays of proceedings and other relief more broadly to fill in perceived gaps in the legislation and facilitate the reorganization of debtor companies.[13] The decisions from this period are unclear at times as to whether the broad jurisdiction being exercised was grounded in an expansive interpretation of the statutory jurisdiction granted by section 11 of the *CCAA* or from the court's inherent jurisdiction.[14] It was not until after the turn of the century that the modern "hierarchal" approach to *CCAA* jurisdiction gained traction and the courts began to more clearly articulate that, when making *CCAA* orders affecting the rights of third parties, they were exercising the discretion granted by the then-section 11 of the *CCAA* and not their inherent jurisdiction.[15]

Regardless of the source, the dominant tide in the case law during this period was toward a liberal interpretation of the *CCAA* court's jurisdiction. The courts held that the benefit of stays of proceedings could be extended to third parties

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[12] *Ibid*, s 11 [emphasis added].
[13] See eg, *Chef Ready Foods Ltd v Hongkong Bank of Canada*, 4 CBR (3d) 311, 1990 CarswellBC 394 at para 25 (WL Can) (CA); *Quintette Coal Ltd v Nippon Steel Corp*, 2 CBR (3d) 303, 1990 CarswellBC 384 at para 17 (WL Can) (CA); *Re Lehndorff General Partner Ltd*, 17 CBR (3d) 24, 1993 CarswellOnt 183 (WL Can) at paras 10–16 (Ont Ct (Gen Div)) [*Lehndorff*].
[14] Madam Justice Georgina R Jackson and Dr Janis Sarra, "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters" in Janis P Sarra, ed, *Annual Review of Insolvency Law 2007* (Toronto: Carswell, 2008) [Jackson and Sarra].
[15] *Skeena Cellulose Inc v Clear Creek Contracting Ltd*, 2003 BCCA 344 at para 46; *Re Stelco Inc*, 75 OR (3d) 5, 2005 CanLII 8671 at paras 33, 36 (Ont CA) [*Stelco*] (concept began to take hold following the decisions of the British Columbia and Ontario appellate courts); Jackson and Sarra, *supra* note 14, cited in *Century Services, supra* note 10 at para 65 (concept became entrenched following citation of landmark article on topic by the Supreme Court of Canada).

other than the debtor company that filed for protection under the *CCAA* whenever the court was satisfied that it was just and reasonable to do so.[16]

The courts began to grapple with the question of whether it was appropriate to extend stays to third parties that had granted letters of credit or guarantees related to the obligations of the debtor company. On the one hand, as noted above, the very purpose of these instruments is to provide the creditor with another avenue of recourse if the debtor cannot pay. On the other hand, in the case of a letter of credit that is cash collateralized or otherwise secured against the assets of the debtor company, or in the case of a guarantee from another key member of a corporate group, calling on these instruments can, in some cases, have negative impacts on the debtor company.

As discussed in sections 3 and 4, below, while for some courts this extension of their broad jurisdiction was a "bridge too far," notable decisions during this period did extend stays to third-party issuers of letters of credit and guarantors.

3. Letters of Credit: The *Woodward's* Problems

In *Re Woodward's Ltd*,[17] the company had established retiring allowance plans that were administered by two trust companies, Canada Trust and Montreal Trust. A bank had issued letters of credit to Canada Trust and Montreal Trust as security for the payment of these retiring allowances. The bank held deposits from the company as cash collateral and held other security against the assets of the company. The company commenced *CCAA* proceedings and sought a stay enjoining the trust companies from calling on the letters of credit.

Justice Tysoe of the British Columbia Supreme Court noted the "very broad interpretation" that had been given to the court's jurisdiction to stay proceedings pursuant to section 11 of the *CCAA*.[18] The main purpose of the stay of proceedings was to "preserve the status quo among the creditors of the company

[16] *Lehndorff, supra* note 13 at para 16.
[17] *Re Woodward's Ltd*, 17 CBR (3d) 236, 1993 CarswellBC 530 (WL Can) (CA) [*Woodward's*].
[18] *Ibid* at para 12.

so that no creditor will have an advantage over other creditors while the company attempts to reorganize its affairs."[19] Accordingly, Justice Tysoe determined that the term "proceeding" in section 11 should be interpreted broadly to include not only formal proceedings before a court or tribunal but also the exercise of remedies and procedural steps that are necessary to exercise those remedies.[20]

A decade prior to *Woodward's*, the Alberta Court of King's Bench in *Meridian Developments Inc v Toronto Dominion Bank* held that a creditor calling on a letter of credit was a "proceeding" but not one that was "against the debtor company" unless the money to be paid was the property of the debtor.[21] If the creditor was calling on the letter of credit directly from the issuer and it was being paid from the issuer's funds, the Court held that it was not appropriate for that to be stayed pursuant to the court's jurisdiction under section 11 of the *CCAA*.

In *Woodward's*, Justice Tysoe endorsed this position regarding the scope of section 11 and found that it held, even where the letter of credit was cash collateralized.[22] However, Justice Tysoe observed that the section 11 stay *would* encompass situations where the creditor is required to first take some step involving the debtor company that falls within the broad meaning of "proceeding" before it is entitled to call on the letter of credit.[23] Examples of some potential prerequisite steps are making a demand against the debtor company or delivering a notice or certificate of some sort to the debtor company.

In *Woodward's*, the trust agreement applicable to Montreal Trust required the trustee to deliver a certificate and report to the debtor company before the trustee could call on the letter of credit. Justice Tysoe held that these were "proceedings" that were stayed by the initial order, which practically stayed the ability of the

[19] *Ibid.*
[20] *Ibid* at para 26.
[21] *Meridian Developments Inc v Toronto Dominion Bank*, 27 ACWS (2d) 97, 1984 CarswellAlta 973 at paras 35, 44 (WL Can) (QB).
[22] *Woodward's, supra* note 17 at para 18.
[23] *Ibid* at para 26.

trustee to call on the letters of credit.[24] On the other hand, the trust agreement applicable to Canada Trust did not have any prerequisite steps involving the debtor company, so Canada Trust was not similarly stayed from calling on the letters of credit by an order made under section 11.[25]

To avoid the situation where the retired executives under the trust agreement with Canada Trust would be paid immediately, whereas those under the trust agreement with Montreal Trust would be stayed, the Court held that it had the inherent jurisdiction to extend the stay of proceedings to the letters of credit issued to Canada Trust as well.[26] To mitigate any prejudice to the retired senior executives, Justice Tysoe lifted the stay to allow partial draws on the letters of credit in the amount of the monthly retiring allowance payments.[27]

The *Woodward's* decision raised concerns in the financial and restructuring community because it included two holdings that threatened to undercut the reliability of letters of credit as security in the event of the insolvency of the principal debtor. First, if the instrument required any steps to be taken in relation to the debtor company, it would be presumptively stayed by the stay in favour of the debtor company upon the commencement of *CCAA* proceedings. Second, even if no such steps were required, the court could rely on its inherent jurisdiction to stay the creditor calling on the instrument. As Michael B Rotszain and Kenneth D Kraft noted in a 1994 article, from the perspective of landlords:

> The *Woodward's* reasoning underscores the importance of making a guarantor's obligation to a landlord or other creditor totally independent of the tenant's obligations so that enforcement of the guarantee does not require serving a notice or taking any other steps against the tenant, which would be caught by the stay. Even this might not be

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[24] *Ibid* at para 25.
[25] *Ibid* at para 24.
[26] *Ibid* at para 31.
[27] *Ibid* at paras 40, 44–45.

> effective, however, since according to *Woodward's*, in these circumstances the court has an inherent jurisdiction to grant a stay.[28]

4. Guarantees: Unclear Whether Stay Is Available

Courts reached divergent conclusions on whether it was appropriate to extend stays to third-party guarantors of the debtor company's obligations during this period.

On the one hand, in *Keddy Motor Inns Ltd*, Justice Nathanson of the Nova Scotia Supreme Court found that it was *not* appropriate to extend the stay to third-party guarantors.[29] In that case, the Court had granted an *ex parte* initial order under the *CCAA* that extended the stay of proceedings to "any guarantor of the obligations of [the debtor]".[30] A creditor brought an application to amend the initial order to remove the stay related to guarantors. Justice Nathanson held that the Court did not have jurisdiction to stay proceedings against guarantors of the debtor company as section 11 only referred to stays against the debtor company. While the Court recognized that the *CCAA* should be interpreted broadly to facilitate the restructuring of the debtor company, Justice Nathanson held that extending the stay to guarantors was stretching the *CCAA* too far:

> I am unable to accept that the words of s.11 of the *Act*, which appear clear on their face, can be stretched without limit. If Parliament intends the *Act* to apply to guarantors, it would be a simple matter to amend the *Act* to say so explicitly. Until Parliament does so, I am of the view that the courts go too far if they implement a perceived intention of Parliament based not upon any specific language of the *Act* but, rather, derived from little more than the long title of the *Act*.[31]

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[28] Michael B Rotszain and Kenneth D Kraft, "Landlords and Leases in Bankruptcy and Insolvency Act and Companies' Creditors Arrangement Act Reorganizations" (1994) IIC-Art 1994-5 at para 68.
[29] *Re Keddy Motor Inns Ltd*, 107 NSR (2d) 419, 1991 CarswellNS 651 (WL Can) (SC (TD)) [*Keddy*].
[30] *Ibid* at para 2.
[31] *Ibid* at para 14. See also *Re Fairview Industries Ltd*, 109 NSR (2d) 8, 1991 CarswellNS 34 at para 11 (WL Can) (SC (TD)); *Browne v Southern Canada Power Co*, 23 CBR 131, 1941 CarswellQue 14 at para 21 (WL Can) (KB (CA)); *Guardian Trust Co v Gaglardi*, 64 DLR (4th) 351, 1989 CanLII 5211 at para 39 (BCSC).

On the other hand, in *Horowitz v Sprackman*,[32] Justice Cumming of the Ontario Court of Justice held that a stay *could* be extended to third-party guarantors. In that case, the plaintiff had loaned money to a company that was guaranteed by Sprackman. The company commenced *CCAA* proceedings and implemented a *CCAA* plan that included a stay and release in favour of the guarantor, Sprackman. The plaintiff commenced an action against Sprackman for recovery of the loan amount, and Sprackman sought to have the action dismissed, as the guarantee had been stayed and released under the *CCAA* plan. The plaintiff relied on *Keddy* in arguing that the *CCAA* court did not have the statutory jurisdiction to stay enforcement of the guarantee. Justice Cumming disagreed, noting the broad interpretation that had been given to the *CCAA* court's jurisdiction to grant a stay of proceedings:

> In my view, the Court has jurisdiction to grant a stay in respect of enforcement of a guarantee that relates to a company debtor which is the subject of a plan of arrangement under the CCAA. Moreover, this stay is a corollary to a stay of the obligations of the primary debtor under a plan of arrangement. If the primary debt is held in abeyance through a stay consequential to a sanction order, then a secondary obligation through a guarantee that is operative only upon a default of the primary obligation in turn should incur a stay. In my view, the wording of the preamble to the CCAA, and of s. 11 thereof, are supportive of this interpretation.[33]

As a result of the above-noted divergence in the case law, commentators observed at the time that the "[c]ourts have not directly and conclusively answered the question of whether there is jurisdiction under Section 11, or otherwise, to stay proceedings against a guarantor of a debtor corporation's obligations."[34]

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[32] *Horowitz v Sprackman*, 63 ACWS (3d) 1010, 1996 CarswellOnt 2758 (Ct J (Gen Div)).
[33] *Ibid* at para 15. See also *Re Quintette Coal Ltd*, 7 CBR (3d) 165, 1991 CarswellBC 488 (SC).
[34] Alex Zimmerman and Douglas Knowles, "Developments and Trends in the Companies' Creditors Arrangement Act" (Paper delivered at the Insolvency Institute of Canada, Barrie, 20–22 October 1991) at 28.

II. 1997–2009: SECTION 11.2 OF THE *CCAA*

1. Development of the Restriction

As part of the passage of major amendments to the *Bankruptcy and Insolvency Act*[35] in 1992, the federal government was required to refer the *BIA* to committee after three years to undertake a comprehensive review of the operation of the *BIA* and report to Parliament.[36]

The government created the Bankruptcy and Insolvency Advisory Committee ("BIAC") to solicit input from various interest groups and develop policy recommendations for insolvency reform.[37] The BIAC established various working groups including one focused on issues—including stays—related to commercial reorganizations.[38] In the summary of its recommendations, the BIAC noted that the *CCAA* "gives very wide discretion to the court as regards both procedural and substantive rights respecting stays"[39] and that the BIAC's recommendations would "provide for clarity as to the rights and obligations of the parties involved, and for uniform, consistent and equitable treatment of creditors and debtors under the [*CCAA*]."[40]

The BIAC's recommendation with respect to stays against letters of credit and guarantees was summarized as follows:

> <u>Stays of Proceedings:</u>
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> ...

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[35] *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 [*BIA*].
[36] Bill C-22, *An Act to amend the Bankruptcy Act and to amend the Income Tax Act in consequence thereof*, 3rd Sess, 34th Parl, 1992, cl 92.
[37] Stanley J Kershman, Office of the Superintendent of Bankruptcy Canada, "Working Groups of the Bankruptcy and Insolvency Advisory Committee" (1993) 13:3 Insolvency Bulletin at 342, online: <https://publications.gc.ca/collections/collection_2009/ic/RG36-4-13-3.pdf>.
[38] *Ibid* at 346.
[39] Office of the Superintendent of Bankruptcy Canada, "Companies' Creditors Arrangement Act" (1996) 16:3 Insolvency Bulletin at 51, online: <https://publications.gc.ca/collections/collection_2009/ic/RG36-4-16-3E.pdf>.
[40] *Ibid*.

ii) Letters of Credit: provide that the court may not stay demands on letters of credit or upon guarantors.[41]

Amendments to both the *BIA* and *CCAA* were developed by the federal government based on the BIAC's recommendations and were introduced in Parliament as Bill C-22 on 4 March 1996.[42] The addition of the restriction on stays against letters of credit and guarantees does not appear to have been the subject of any material discussion during any of the parliamentary debates or the proceedings before the House of Commons and Senate committees that reviewed Bill C-22. The provision does not appear to have been amended during the legislative process. The amendments were enacted into law and came into force on 25 April 1997.[43]

2. The Restriction in Section 11.2 of the *CCAA*

The restriction on stays against issuers of letters of credit and guarantees was introduced into the *CCAA* as section 11.2. It read:

> **No stay, etc. in certain cases**
>
> **11.2** No order may be made under section 11 staying or restraining any action, suit or proceeding against a person, other than a debtor company in respect of which an application has been made under this Act, who is obligated under a letter of credit or guarantee in relation to the company.[44]

Section 11.2 specifically provided that the restriction applied to stays made under section 11 of the *CCAA*. Section 11 of the *CCAA* was also amended in the 1997

[41] George F Redling, "Summary of Recommendations made by the Bankruptcy and Insolvency Advisory Committee: December 28, 1994" (Paper delivered at the Insolvency Institute of Canada's Sixth Annual General Meeting and Conference, White Point, Nova Scotia, 21–23 October 1995), at 10-5 [BIAC Recommendations].
[42] Jacob Ziegel, "New and Old Challenges in Approaching Phase Three Amendments to Canada's Commercial Insolvency Laws" (2002) 37 Can Bus LJ 75 at 79.
[43] *An Act to Amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act and the Income Tax Act*, SC 1997, c 12, s 124 [*Amending Act*].
[44] *CCAA*, *supra* note 1, s 11.2 as it appeared between 25 April 1997 and 17 September 2009.

amendments; however, at that time, it still only expressly referred to stays against the debtor company.[45]

3. Scope of Exception Is Immediately Questioned

In the immediate aftermath of the amendments, commentators were unsure of the intended scope of the section 11.2 exception. Max Mendelsohn and Arnold Cohen noted that the ambiguous wording of the new provision made it uncertain how broadly or narrowly the provision would be interpreted:

> There seems to exist, however, certain ambiguity in the wording of the CCAA amendment provisions with respect to letters of credit and guarantees (new section 11.2). The provision provides that there will be no stay with respect to a person who is obligated under a "letter of credit or guarantee". The French text uses the phrase "*des lettres de crédit ou de garantie*" (emphasis added). It may be that a stay order may only be prohibited in the case of a "letter of credit" or a "letter of guarantee", but that a stay could otherwise be ordered with respect to a guarantee (*cautionnement* in French) which does not constitute a "letter of guarantee".
>
> We consider the restriction to be a welcome step by Parliament to limit the extent to which orders made under the CCAA affect the relationship between creditors and third parties. We are uncertain, however, as to how broadly or narrowly the provisions will be interpreted.[46]

The authors also noted that it was unclear whether section 11.2 fixed the procedural problem introduced by *Woodward's*—ie, that the stay of proceedings against the debtor company would stay calling on a letter of credit or guarantee where some notice or other process involving the debtor company was required:

> Another interpretational difficulty arises in that while proceedings or claims made against a person under a letter of credit or guarantee may not be the subject of a stay order, there is no specific provision in the amendments prohibiting a stay against such a claimant performing whatever preliminary steps may be required in a specific instance to

[45] *Ibid*, s 11 as it appeared between 25 April 1997 and 17 September 2009.
[46] Max Mendelsohn and Arnold Cohen, "Commercial Arrangements under the BIA & CCAA Bill C-5 Amendments to the CCAA and BIA Proposals: A Small Step Forward" (Paper delivered at *Insolvency Law Reform: New Changes under Bill C-5*, Canadian Bar Association, 23 July 1997) at 5–6 [Mendelsohn and Cohen].

> enforce its claim, such as the sending of notices of default to the debtor under protection if such notice is required, for example, under a letter of credit. Logic and equity would dictate that such actions, such as the sending of notices, would not be precluded.[47]

4. No Judicial Commentary Discussing the Scope of the Exception

Section 11.2 appears to have been subject to very little judicial commentary in the decade following the 1997 amendments and none where the court had to grapple with the intended scope of the restriction in any detail.

In *Hydro-Québec c Meubles Dinec inc*,[48] after the debtor company commenced *CCAA* proceedings, Hydro-Québec called on a letter of credit that had been cash collateralized. The issuing bank paid the amount due and debited the account of the debtor company. Hydro-Québec applied the payment to pre-filing amounts owing and demanded payment for electricity provided post-filing. The debtor company brought a motion arguing that Hydro-Québec had breached the stay by calling on the letter of credit and applying the payments against pre-filing indebtedness. The Québec Court of Appeal disagreed, holding that by virtue of section 11.2 of the *CCAA*, the *CCAA* court does not have the power to affect legal relationships between the parties to the letter of credit where a third party is involved. Since the amount paid by the bank was never part of the debtor company's assets, Hydro-Québec could allocate the payment as it wished.[49]

In *Ontario v Canadian Airlines Corp*,[50] Canadian Airlines asserted that the Province of Ontario no longer had a secured claim with respect to a letter of credit issued in its favour as, following the implementation of its *CCAA* plan, the underlying debt had been extinguished. Justice Romaine of the Alberta Court of King's Bench dismissed this argument, stating that the effect of section 11.2 of the *CCAA* was that "insolvency is irrelevant to a letter of credit"[51] and "letters of

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[47] *Ibid* at 6.
[48] *Hydro-Québec c Meubles Dinec inc*, 2006 QCCA 747.
[49] *Ibid* at paras 21–26.
[50] *Ontario v Canadian Airlines Corp*, 2001 ABQB 983.
[51] *Ibid* at para 23.

credit are designed to operate outside and not be subject to the compromises typically involved in insolvency."[52]

III. POST-2009: SECTION 11.04 OF THE *CCAA*

1. Development of the Reworded Restriction

The 1997 amendments to the *BIA* and *CCAA* also contemplated that those statutes would be referred to committee within three years to review their administration and operation and that the results of that review would be reported to Parliament.[53]

The federal government did not reconvene the BIAC for this purpose. Instead, it organized regional meetings across Canada to solicit feedback about the operation of the *BIA* and *CCAA*. The Corporate and Insolvency Law Policy Directorate published its report on these consultations in September 2002 (the "2002 Policy Directorate Report").[54] This review of the *BIA* and *CCAA* was referred to the Senate Standing Committee on Bankruptcy Trade and Commerce, which held hearings in 2003 and produced a report in November 2003 (the "2003 Senate Report").[55]

The Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals also established a Joint Task Force, which produced a report in March 2002 on commercial insolvency law reforms (the "2002 IIC/CAIRP Report"). This report was approved by the membership of the two organizations and submitted to Industry Canada.[56] The Joint Task Force

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[52] *Ibid* at para 44(e). See also *Re Papiers Gaspésia inc*, 1 CBR (5th) 308, 2004 CarswellQue 1126 (WL can) at para 9 (Sup Ct).
[53] *Amending Act, supra* note 43, ss 114, 126.
[54] Canada, Marketplace Framework Policy Branch, *Report on the Operation and Administration of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act* (Ottawa: Industry Canada, 2002).
[55] Senate, Standing 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: Report of the Standing Committee on Banking, Trade and Commerce* (November 2003) (Chair: The Honourable Richard H Kroft).
[56] The Insolvency Institute of Canada Canadian Association of Insolvency and Restructuring Professionals Joint Task Force on Business Insolvency Law Reform, "Report" (15 March 2002),

produced a supplemental report in June 2005 (the "2005 IIC/CAIRP Report" and, collectively with the 2002 Policy Directorate Report, 2003 Senate Report and 2002 IIC/CAIRP Report, the "2002–2005 Reform Reports"), which was also submitted to Industry Canada and included additional recommendations.[57]

Section 11.2 of the *CCAA* was not referenced in any of the 2002–2005 Reform Reports. On the topic of stays, the reports only discussed and recommended excepting regulatory bodies from the scope of the stay.[58] They did not discuss letters of credit or guarantees or whether section 11.2 of the *CCAA* was operating as intended.

The 2002–2005 Reform Reports informed the drafting of further significant reforms to the *BIA* and *CCAA*, which were introduced as Bill C-55 on 3 June 2005.[59] Bill C-55 was expedited through Parliament due to the Liberal minority government's desire to have the bill approved before Parliament was dissolved. Only approximately six weeks elapsed between second reading of the bill in the House of Commons and it receiving royal assent.[60] In order to secure this speedy passage, the government undertook that the amendments would not be proclaimed into force until after the upcoming election.[61] Parliament was dissolved on 29 November 2005, and the majority of the amendments to the *CCAA* were not, in fact, proclaimed into force until 18 September 2009.

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online: *IIC* <https://www.insolvency.ca/en/iicresources/resources/JTF_Report_ReformProposals_2002.pdf>.

[57] The Insolvency Institute of Canada Canadian Association of Insolvency and Restructuring Professionals Joint Task Force on Business Insolvency Law Reform, "Supplemental Report" (30 June 2005), online: *IIC* <https://www.insolvency.ca/en/iicresources/resources/JTF_SupplementalReport_ReformProposals_2005.pdf>.

[58] This recommendation was adopted in the *CCAA*, *supra* note 1, s 11.1.

[59] Bill C-55, *An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts*, 1st Sess, 38th Parl, 2004–2005 (assented to 25 November 2005).

[60] Jacob Ziegel, "The Travails of Bill C-55" (2005) 42:3 Can Bus LJ 440 at 441–42.

[61] Jacob Ziegel, "Bill C-55 and Canada's Insolvency Law Reform Process" (2006) 43 Can Bus LJ 76 at 77.

2. The Reworded Restriction in Section 11.04 of the *CCAA*

As a result of the Bill C-55 amendments to the *CCAA*, section 11.2 was relocated to section 11.04 and reworded. To facilitate comparison, the initial language of the restriction in section 11.2 and the reworded language of the restriction in section 11.04 are set out below:

> **No stay, etc. in certain cases**
>
> **11.2** No order may be made under **section 11** staying or restraining any action, suit or proceeding against a person, *other than a debtor company in respect of which an application has been made under this Act*, who is obligated under a letter of credit or guarantee in relation to the company.[62]
>
> **Persons obligated under letter of credit or guarantee**
>
> **11.04** No order made under **section 11.02** has affect on any action, suit or proceeding against a person, *other than the company in respect of whom the order is made*, who is obligated under a letter of credit or guarantee in relation to the company.[63]

The language of the provision was changed in three ways:

- First, the section providing the statutory jurisdiction that the restriction applies to was changed from section 11 to section 11.02 (bolded above). The specific jurisdiction to grant stays in relation to the debtor company was relocated from section 11 to section 11.02, so this was a technical amendment to change the cross-reference.
- Second, the wording of the reference to the debtor company was changed (italicized above). This was another technical amendment that tracked a similar wording change to section 11.02.
- Third, the restriction was reworded from prohibiting any order "staying or restraining" any proceedings against the issuer of a letter of credit or a guarantor to prohibiting any order from having "affect" on any such proceedings (underlined above).

[62] *CCAA*, *supra* note 1, s 11.2 as it appeared between 25 April 1997 and 17 September 2009 [emphasis added].
[63] *Ibid*, s 11.04 as it has appeared since 18 September 2009 [emphasis added].

Industry Canada developed a clause-by-clause briefing book on the 2009 amendments to the *BIA* and *CCAA* that was placed before the Standing Senate Committee on Banking, Trade and Commerce in 2007 and sets out the rationale for each of the amendments (the "2007 Briefing Book").[64] The 2007 Briefing Book indicated that the three amendments to section 11.04 outlined above were in the nature of "technical amendments" and were not intended to substantively change the scope of the restriction:

> The reform is a technical amendment to re-order provisions of this Act, correct cross-referencing and correct for grammatical error.
>
> The current section refers to an order made in respect of a company, which has made an application under this Act. Because of reforms to section 11 and 11.02, it was necessary to amend the language of the section to refer to "the company in respect of whom the order is made." <u>The language changes do not affect the provision's effect.</u>[65]

3. No Consistent Interpretation of Section 11.04 in Case Law

The cases engaging section 11.04 of the *CCAA* since the 2009 amendments can be broadly grouped into three categories:

1. Cases taking a more expansive view of the scope of section 11.04;
2. Cases taking a narrower view; and
3. Cases where stays have been extended to guarantors without explicit consideration of section 11.04.

i. Broad interpretation of section 11.04: Re Northern Transportation Company Limited

The most detailed discussion of section 11.04 of the *CCAA* by a court to date was undertaken by Justice Dario of the Alberta Court of King's Bench in *Northern Transportation*.[66]

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[64] Industry Canada, "Bill C-55: clause by clause analysis (cl00908)" (Ottawa, 2007) ["2007 Briefing Book"].
[65] *Ibid*, cl 128, s 11.04 [emphasis added].
[66] *Re Northern Transportation Company Limited*, 2016 ABQB 522 [*Northern Transportation*].

In that case, Northern Transportation Company Limited ("NTCL") chartered 19 marine vessels and related assets primarily located in the Northwest Territories from ITB Marine Group Ltd ("ITB"). The parent of NTCL, NorTerra Inc ("NorTerra"), entered into letter agreements with ITB whereby it agreed to be jointly and severally responsible for the payments owing by NTCL to ITB.

After NTCL missed multiple lease payments, ITB declared an event of default and demanded payment of the outstanding lease payments and the balance of the purchase price for the vessels from NorTerra. NTCL commenced *CCAA* proceedings and sought an order extending the stay of proceedings to NorTerra. NTCL argued that it was necessary to extend the stay of proceedings to NorTerra; otherwise, the *CCAA* proceedings would be frustrated. If the liability of NorTerra to ITB was not stayed, and NorTerra failed to pay the amounts owing to ITB, it would be in breach of covenants on its main operating line and the lending syndicate would be in a position to enforce its security and seize assets necessary for NTCL to operate its business.

The Court found that the letter agreements between ITB and NorTerra were guarantees within the meaning of section 11.04 of the *CCAA*. While they provided for joint and several liability on the part of NTCL and NorTerra, and did not use the term "guarantee", they required ITB to take reasonable steps to seek recourse against NTCL before being entitled to seek payment from NorTerra. The Court described a guarantee as the existence of a "primary and secondary liability, and only after the primary debtor defaults on some covenant or obligation is the secured party entitled to turn to the guarantor to make good on the guarantee".[67] Since the letter agreements had those features, the Court found that they were guarantees and subject to the restriction in section 11.04 of the *CCAA*.

NTCL argued that the language of section 11.04 was only intended to clarify that the initial order did not automatically extend to guarantors and that it should not

[67] *Ibid* at para 69.

be interpreted as prohibiting stays being granted to suspend steps against guarantors. NTCL argued that the Court could continue to exercise its inherent jurisdiction to extend the *CCAA* stay of proceedings to guarantors in appropriate circumstances.

The Court held that this interpretation was inconsistent with a plain reading of section 11.04 and would render it meaningless.[68] The Court cited *Keddy* and noted that courts had been reluctant in the past to extend stays of proceedings to guarantors.[69] On a policy basis, the Court posited that if stays could be extended to guarantors, it "could significantly negatively impact the ability of entities to obtain necessary financing with the assistance of a parent or related company guarantee."[70]

The Court stopped short of saying that section 11.04 was a full prohibition on extending stays to third-party guarantors, leaving the door open to such an order being granted "to ensure that the intent and purpose of the *CCAA* proceedings are not frustrated."[71] However, it was only appropriate to do so in exceptional cases "in light of the clear wording of s.11.04."[72]

ii. Narrow interpretation of section 11.04: Re Charles Morissette inc

An example of a narrow interpretation being applied to section 11.04 in order to stay proceedings against a third party can be found in the judgment of Justice Pronovost of the Quebec Superior Court in *Morissette*.[73]

In *Morissette*, the debtor company had obtained an initial order that extended the stay of proceedings to a surety. The debtor company needed the surety to continue to operate and the surety would only continue to assist the debtor company if it was not subject to claims and actions being commenced against it

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[68] *Ibid* at paras 78, 91.
[69] *Ibid* at para 79.
[70] *Ibid* at para 100.
[71] *Ibid* at para 101.
[72] *Ibid* at para 101.
[73] *Arrangement relatif à Charles Morissette inc*, 2014 QCCS 385 [*Morissette*].

during the pendency of the *CCAA* proceedings. A creditor brought a motion to amend the initial order to remove the stay against the surety, arguing, among other things, that it was prohibited by section 11.04 of the *CCAA*.

The Court held that the meaning of "guarantee" in section 11.04 did not include a suretyship.[74] The Court looked to section 179 of the *BIA*, which provides that an order discharging a bankrupt does not release debts against others that were jointly liable with the bankrupt or a surety for the bankrupt. The Court noted that section 179 of the *BIA* used "surety" and section 11.04 of the *CCAA* used "guarantee", and since both came from the 2009 amendments, Parliament must have intended that they would mean different things.[75] Thus, the Court was not prohibited from extending the stay of proceedings to the surety and held that it was appropriate to do so to allow the debtors to attempt to restructure with the support of the surety. The creditor was not materially prejudiced, as the stay only prevented it from exercising its rights during the pendency of the *CCAA*.[76]

iii. Stays extended to guarantees without section 11.04 being discussed

The largest category of cases engaging section 11.04 of the *CCAA* since 2009 comprises cases where stays have been extended to non-debtor guarantors without section 11.04 being discussed.

[74] *Ibid* at para 35.
[75] *Ibid* at paras 19–24. While both the *BIA, supra* note 35, s 179, and the *CCAA, supra* note 1, s 11.04, were amended as part of the 2009 amendments, those amendments did not introduce or alter the use of the words "surety" and "guarantee", which were introduced at different times. Section 179 of the *BIA* had referred to a surety since at least 1985, and section 11.04 of the *CCAA* was not adopted (in its prior form and location in section 11.2) until 1997. The Court in *Northern Transportation, supra* note 66 at para 95, expressed doubt about the correctness of the interpretation in *Morissette* that the restriction in section 11.04 did not include a surety but found that the obligation in that case was not a suretyship, so *Morissette* did not apply.
[76] *Ibid* at paras 32–38. See also *Arrangement relatif à Magasin Laura (PV) inc/Laura's Shoppe (PV) Inc*, 2015 QCCS 4716 (where the Court applied a similar restriction in section 11.03(2) of the *CCAA* that prevents stays from being extended to personal guarantees given by directors). The Court held that while section 11.03(2) did not provide it with the statutory jurisdiction to extend the stay to personal guarantees, it could grant that relief under its general jurisdiction if it was appropriate to do so. The Court concluded that it was not appropriate to do so in that case.

A recent example is *McEwan Enterprises Inc*, which involved the restaurant and catering business of celebrity chef Mark McEwan.[77] The debtor company experienced financial difficulty caused by certain unprofitable locations and the impacts of the coronavirus disease 2019 (COVID-19) pandemic; it commenced *CCAA* proceedings in October 2021. The debtor company sought to extend the stay of proceedings to Mr McEwan as he had given personal guarantees, indemnities and security in respect of the obligations of the business. The Court extended the stay of proceedings to Mr McEwan, noting his importance to the business and the fact that the obligations that were guaranteed were not anticipated to be affected by the *CCAA* proceedings.[78] Section 11.04 of the *CCAA* is not discussed by the Court in its judgment.

Courts have extended stays of proceedings to non-debtor guarantors without referencing section 11.04 of the *CCAA* in numerous other cases, including the following:

- *Re Canwest Global Communications Corp*: The stay of proceedings was extended to partnerships that were guarantors of the senior notes of the debtor company but could not be applicants because they did not fall within the *CCAA* definition of a "company".[79]
- *Re Cinram International Inc*: The stay of proceedings was extended to subsidiaries of the debtor company that were parties to an agreement with an applicant as surety, guarantor or otherwise.[80]
- *Re SinoForest Corp*: The stay of proceedings was extended to a number of subsidiaries that acted as guarantors of the obligations of the debtor company;[81]

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[77] *McEwan Enterprises Inc*, 2021 ONSC 6453 [*McEwan*].
[78] *Ibid* at paras 43–45.
[79] *Re Canwest Global Communications Corp*, 59 CBR (5th) 72, 2009 CanLII 55114 (WL Can) at paras 28–30 (Ont Sup Ct) [*Canwest*].
[80] *Re Cinram International Inc*, 2012 ONSC 3767 at paras 61–65 [*Cinram*].
[81] *Re Sino-Forest Corp*, 2012 ONSC 2063 at paras 26–29.

- *Re Tamerlane Ventures Inc*: The stay of proceedings was extended to a US subsidiary of the debtor company that had guaranteed the debtor company's secured loans[82]
- *Re Forme Development Group Inc*: The stay of proceedings was extended to personal guarantees granted by the director, founder and sole shareholder of the debtor company.[83]
- *Re Lydian International Limited*: The stay of proceedings was extended to numerous affiliates that had guaranteed certain obligations under loans or gold and silver streaming agreements.[84]
- *Re Boreal Capital Partners Ltd*: The stay of proceedings was extended to an affiliated partnership that had guaranteed the indebtedness of the applicants.[85]

Indeed, the fact that a non-debtor is a related company that has guaranteed the obligations of the debtor company has been included in the list of factors militating *in favour* of extending the stay to third parties.[86]

4. Non-Derogation Provisions in Model Initial Orders

The model *CCAA* initial orders in Ontario and British Columbia each contain a non-derogation provision that says, among other things, that "[n]othing in this Order shall derogate from the rights conferred and obligations imposed by the *CCAA*."[87] The model orders include an explanatory footnote that provides:

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[82] *Re Tamerlane Ventures Inc*, 2013 ONSC 5461 at para 21 [*Tamerlane*].
[83] *Re Forme Development Group Inc* (30 November 2018), Toronto CV-18-608313-00CL (Ont Sup Ct [Comm List]), Initial Order at para 18.
[84] *Re Lydian International Limited*, 2019 ONSC 7473 at para 39.
[85] *Re Boreal Capital Partners Ltd* (3 December 2021), Toronto CV-21-00672654-00CL (Ont Sup Ct [Comm List]), Amended and Restated Initial Order at para 12.
[86] See, eg, *Re Laurentian University of Sudbury*, 2021 ONSC 659 at para 39 [*Laurentian*]. See also *Cinram supra* note 80 at para 64.
[87] Ontario Superior Court of Justice, "Companies' Creditors Arrangement Act Initial Order Form" (21 January 2014), online: <https://www.ontariocourts.ca/scj/files/forms/com/intitial-order-CCAA-EN.doc> at para 18 [Ontario Model Initial Order] [emphasis added]; Supreme Court of British Columbia, "Model Companies' Creditors Arrangement Act Initial Order" (1 August 2015), online: <https://www.bccourts.ca/supreme_court/practice_and_procedure/practice_directions/civil/CCAA_Model_Initial_Order.docx> at para 20 [BC Model Initial Order] [emphasis added].

> This non-derogation provision has acquired more significance due to the recent amendments to the CCAA, since a number of actions or steps cannot be stayed, or the stay is subject to certain limits and restrictions. See, for example, CCAA Sections 11.01, 11.04, 11.06, 11.07, 11.08, 11.1(2) and 11.5(1).[88]

The model *CCAA* initial order in Alberta does not contain this non-derogation provision.[89]

It is unclear whether the result of the non-derogation provision in the Ontario and BC model orders is that the stays of proceedings remain subject to the section 11.04 restriction. One could perhaps argue that the initial orders granted in the Ontario cases listed above did not actually extend the stay to non-debtor guarantors because they remained subject to the section 11.04 restriction (if section 11.04 is to be interpreted broadly and is considered to be a "right conferred" or an "obligation imposed" by the *CCAA*).

The possibility that there may be a carve-out in initial orders for the restriction in section 11.04 provides another reason why a consistent interpretation of section 11.04 should be developed and recognized.

IV. INTERPRETING SECTION 11.04

1. Modern Approach to Statutory Interpretation

Statutory interpretation is not founded on the wording of the legislation alone.[90] The modern purposive approach to statutory interpretation contemplates that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act,

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[88] Ontario Model Initial Order *supra* note 87 at 18, n 6; BC Model Initial Order *supra* note 87 at 18, n 18 [emphasis added].
[89] Court of King's Bench of Alberta, "Alberta Template CCAA Initial Order" (January 2019), online: <https://www.albertacourts.ca/docs/default-source/qb/cal01---2470918-v2-ccaa-order-(alberta)---jakr-markup.docx?sfvrsn=ed86ad80_4> at para 18.
[90] *Re Rizzo & Rizzo Shoes Ltd*, [1998] 1 SCR 27, 1998 CanLII 837 at para 21 (SCC).

and the intention of Parliament."[91] This purposive approach is "the crucial tool for construing skeletal legislation such as the *CCAA*."[92]

The ordinary meaning of a legislative text is the starting point for the interpretive exercise. The ordinary meaning is "the natural meaning which appears when the provision is simply read through".[93] However, even if the ordinary meaning is plain and appears unambiguous, all of the other contextual factors must be taken into account, including the purpose of the legislation, the "mischief" or problem that the legislation was intended to address, related provisions in the same legislation and others, legislative drafting conventions and other rules of construction. An alternative interpretation that modifies or departs from the ordinary meaning may be adopted if it is plausible and the contextual factors justify the departure from the ordinary meaning.[94]

2. Interpreting the *CCAA*: General Principles

The *CCAA* is remedial legislation, the purpose of which is to, where possible, facilitate the reorganization and survival of the debtor company as a going concern and avoid the social and economic costs of liquidating its assets.[95] The *CCAA* also has the subsidiary objectives of providing for the timely, efficient and impartial resolution of a debtor's insolvency; preserving and maximizing the value of a debtor company's assets; ensuring fair and equitable treatment of the claims against the debtor company; protecting the public interest; and enhancing the credit system generally.[96]

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[91] *Ibid.*
[92] *Re US Steel Canada Inc*, 2016 ONCA 662 at para 45.
[93] Ruth Sullivan, *The Construction of Statutes*, 7th ed (Markham: Lexis Nexis Canada, 2022) at § 3.02(1) [Sullivan], citing *Canadian Pacific Air Lines Ltd v Canadian Air Line Pilots Assn*, [1993] 3 SCR 724 at 735, 1993 CanLII 31 (SCC).
[94] *Ibid* at § 3.01(3).
[95] *Century Services, supra* note 10 at paras 15, 70. See also *9354-9186 Québec inc v Callidus Capital Corp*, 2020 SCC 10 at paras 40–41 [*Callidus*].
[96] *Callidus, supra* note 95 at paras 40, 42; *Re Kerr Interior Systems Ltd*, 2011 ABQB 214 at para 23.

As remedial legislation, the provisions of the *CCAA* are given a broad and liberal interpretation to facilitate its objectives.[97] As the Ontario Court of Appeal stated in *Re Metcalfe & Mansfield Alternative Investments II Corp* in the course of endorsing the inclusion of third-party releases in *CCAA* plans where appropriate:

> The CCAA is skeletal in nature. It does not contain a comprehensive code that lays out all that is permitted or barred. Judges must therefore play a role in fleshing out the details of the statutory scheme. The scope of the Act and the powers of the court under it are not limitless. It is beyond controversy, however, that the CCAA is remedial legislation to be liberally construed in accordance with the modern purposive approach to statutory interpretation. It is designed to be a flexible instrument and it is that very flexibility which gives the Act its efficacy [...]. As Farley J. noted in *Dylex Ltd. (Re)*, [...] "[t]he history of CCAA law has been an evolution of judicial interpretation".[98]

This has two implications. First, the provisions of the *CCAA* that *provide* the court with the jurisdiction to facilitate the restructuring of the debtor company should be given a broad reading. The jurisdiction of the court to stay proceedings, which has been described as "the key element of the CCAA process"[99] and "the engine that drives this broad and flexible statutory scheme",[100] has accordingly been construed expansively.[101]

Second, the provisions of the *CCAA* that *restrict* the jurisdiction of the court and potentially hamper its ability to facilitate the *CCAA*'s remedial objectives should be narrowly construed.[102]

3. Considering a Narrow Interpretation of Section 11.04

One interpretation of section 11.04 of the *CCAA* is that it only provides that stays against *debtor companies* do not affect the ability of a creditor to call on a letter

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[97] *Stelco, supra* note 15 at para 32; *Interpretation Act*, RSC 1985, c I-21, s 12.
[98] *Re Metcalfe & Mansfield Alternative Investments II Corp*, 2008 ONCA 587 at para 44 [citations omitted], citing *Re Dylex Ltd*, 31 CBR (3d) 106, 1995 CanLII 7370 at para 10 (Ont Sup Ct (Gen Div)).
[99] *Re Canadian Airlines Corp*, 19 CBR (4th) 1, 2000 CarswellAlta 622 at para 13 (QB).
[100] *Stelco, supra* note 15 at para 36.
[101] *Callidus, supra* note 95 at para 67.
[102] *Sproule v Nortel Networks Corporation*, 2009 ONCA 833 at para 17, aff'g 55 CBR (5th) 68, 2009 CarswellOnt 3583 at para 66 (Sup Ct [Comm List]).

of credit or guarantee. It does not prohibit third-party stays from being extended to guarantors.

i. Reading section 11.04 together with section 11.02

This interpretation of section 11.04 is consistent with an interpretation of section 11.02, the *CCAA* section that is incorporated by reference, as a stay provision aimed at the debtor company only. Section 11.04 reads:

> **Persons obligated under letter of credit or guarantee**
>
> **11.04** No order made under section 11.02 has affect on any action, suit or proceeding against a person, other than the company in respect of whom the order is made, who is obligated under a letter of credit or guarantee in relation to the company.[103]

The restriction in section 11.04 applies to orders made under section 11.02 of the *CCAA* which reads, in part:

> **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,

[103] *CCAA*, *supra* note 1, s 11.04.

> **(a)** staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);
>
> **(b)** restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
>
> **(c)** prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.
>
> [...]
>
> **Restriction**
>
> **(4)** Orders doing anything referred to in subsection (1) or (2) may only be made under this section.[104]

The language in section 11.02 appears to be aimed at stays of steps and proceedings against the debtor company. Subsections (b) and (c) refer to stays against "the company", not "a company" or "any company", which indicates a reference back to the "debtor company" in the introductory sentence in sections 11.02(1) and 11.02(2).

Section 11.02(4) provides that the orders in sections 11.02(1) and 11.02(2) may only be made under section 11.02. It does not refer to orders made under the general jurisdiction provided in section 11. Sections 11.02(1) and 11.02(2) deal with stays against the debtor company. Thus, only stays against the debtor company are subject to the restriction that they must be made under section 11.02.

Accordingly, reading the language in sections 11.02 and 11.04 in its entirety supports an interpretation that section 11.04 only applies to stays of proceedings against the debtor company issued under section 11.02.

[104] *Ibid*, s 11.02 [emphasis added].

ii. Case law supports that third-party stays may be granted under section 11

The 2009 amendments also introduced the current section 11 of the *CCAA*, which codified the *CCAA* court's broad general jurisdiction to make any order that it considers appropriate in the circumstances.[105]

There has been some divergence in the case law since that time around the source of the *CCAA* court's jurisdiction to issue third-party stays. Some cases have held that third-party stays are grounded in section 11,[106] while other cases have indicated they can be grounded in both sections 11 and 11.02.[107] Some have continued to rely on inherent jurisdiction,[108] and some have even relied on all three potential sources of jurisdiction.[109]

In *9354-9186 Québec inc v Callidus Capital Corp*, the Supreme Court of Canada recently indicated that section 11 of the *CCAA* should be the provision of first resort in anchoring jurisdiction and should be relied upon unless there is another *CCAA* provision that confers more specific jurisdiction:

> 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 provision of first resort in anchoring jurisdiction.[110]

This rule is supported by the fact that many of the restrictions on the *CCAA* court's jurisdiction refer solely to orders made under section 11.02.[111] By defaulting to an interpretation that orders are made under section 11 and not section 11.02 unless they are stays against the debtor company, the applicability of these restrictions will be narrowed, which will maximize the flexibility provided to the *CCAA* court to facilitate the achievement of the *CCAA*'s objectives.

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[105] *Ibid*, s 11.
[106] *Re Pacific Exploration & Production Corp*, 2016 ONSC 5429 at para 26; *Re JTI-Macdonald Corp*, 2019 ONSC 1625 at para 14.
[107] *Re Target Canada Co*, 2015 ONSC 303 at para 45 [*Target*]; *Laurentian, supra* note 85 at para 39; *Montréal (City) v Deloitte Restructuring Inc*, 2021 SCC 53 at para 65.
[108] *Tamerlane, supra* note 82 at para 21; *Re 4519922 Canada Inc*, 2015 ONSC 124 at para 37.
[109] *McEwan, supra* note 77 at para 42.
[110] *Callidus, supra* note 95 at para 68.
[111] See, eg, *CCAA*, *supra* note 1, ss 11.04, 11.08, 11.1.

iii. The language of the restriction seems designed to fix the Woodward's problem

Section 11.04 provides that no order made under section 11.02—that is, a stay order against the debtor company—"has affect on" a proceeding against an obligor under a letter of credit or guarantee in relation to the company. It is instructive to compare this wording with that contained in the restriction prior to 2009, when it was section 11.2.

The legislative evolution of statutory provisions may be relied on by courts to assist interpretation, as "prior enactments may throw some light on the intention of the legislature in repealing, amending, replacing or adding to it."[112] It is presumed that amendments to the wording of a legislative provision are made for a good reason.[113]

Section 11.2 provided that no order could be made "staying or restraining" a proceeding against an obligor under a letter of credit or guarantee in relation to the company.[114] This language was arguably inadequate to fix the procedural problem introduced by *Woodward's*, a fact that was noted by commentators at the time.[115] If a letter of credit or guarantee required a demand or notice to be sent to the debtor company, the stay of proceedings against the debtor company would only have stayed the delivery of that demand or notice. It would have the practical effect of preventing the creditor from calling on the letter of credit or guarantee, but the order itself would not provide that it was staying the letter of credit or guarantee.

The language "has affect on" in section 11.04 is broader and does appear better suited to fix this procedural problem. A stay against the debtor company may "have affect on" the creditor's ability to call on a letter of credit or guarantee if a prerequisite step against the debtor company is required. Section 11.04 provides

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112 Sullivan, *supra* note 93 at § 23.02(2).
113 *Ibid* at § 23.02(3).
114 *CCAA*, *supra* note 1, s 11.2 as it appeared between 25 April 1997 and 17 September 2009.
115 Mendelsohn and Cohen, *supra* note 46 at 6.

that a debtor company's stay cannot affect the creditor's ability to call on the letter of creditor or guarantee. If section 11.04 is interpreted as being intended only to fix the procedural problem introduced by *Woodward's*, meaning is given to this amendment.

iv. Consistent with majority of case law

A narrow interpretation of section 11.04 is consistent with many orders made since 2009, which have extended non-debtor stays to guarantors, and with cases that have indicated that the existence of a guarantee has become a factor in favour of a non-debtor stay.

v. Potential inconsistency with legislative history

It is possible to argue that a narrow interpretation is inconsistent with certain elements of the legislative history. Legislative history, including reports of law reform commissions and other authoritative bodies submitted to Parliament, legislative and committee debates, explanatory notes and backgrounders may be relied upon in determining the intent of legislation.[116]

In 1997, at the time the restriction in section 11.2 of the *CCAA* was being adopted, third-party stays had been granted in favour of issuers of letters of credit and guarantors in a few cases; however, third-party stays and releases were not as prevalent as they would become in later years.[117] The recommendation of the BIAC that led to the adoption of the initial restriction was expressed as the need to "provide that the court may not stay *demands* on letters of credit or upon guarantors."[118] On the one hand, it refers to demands specifically, so it could potentially be interpreted as only being directed toward addressing the procedural problem introduced by *Woodward's*. On the other hand, it does not refer to demands against the debtor company that are a

[116] Sullivan, *supra* note 93 at § 23.03(1)(a).
[117] Luc Morin and Arad Mojtahedi, "Catch Me If You Can: Third Party Releases Under the Companies' Creditors Arrangement Act" in Jill Corraini & the Honourable D Blair Nixon, eds, *Annual Review of Insolvency Law*, 19th ed, 2021 CanLIIDocs 13544.
[118] BIAC Recommendations, *supra* note 41 at 10-5 [emphasis added].

precondition of calling on letters of creditor or guarantees specifically, so it could also be interpreted as being intended to apply more broadly to any demands against issuers of letters of credit or guarantors. As the BIAC did not elaborate further on the intended scope of the restriction, it is unclear from the legislative history what problem the restriction was intended to address.

If the restriction initially included in section 11.2 of the *CCAA* was intended to apply broadly, the 2009 amendments do not appear to have been intended by the legislature to narrow the scope of the restriction. In the 2007 Briefing Book, Industry Canada indicated that the language change in section 11.04 was not intended to change the provision's legal effect.[119]

The 2007 Briefing Book can also be read as supporting that it was the legislature's intention that all stays would be granted under section 11.02 and be subject to its restrictions such as section 11.04. Industry Canada indicated that the broad general jurisdiction in section 11 of the *CCAA* was intended to provide *CCAA* courts with jurisdiction to make orders *other than stay orders*, which continued to be grounded in section 11.02:

> The intention of the reform is to codify existing practice.
>
> Currently, the courts read subsection 11(1) to grant them the power to make any order it considers appropriate in order to facilitate a restructuring despite that section only referring to stay orders.
>
> This provision will allow the court to make orders, <u>other than stay orders</u>, that may be necessary or appropriate in respect of the restructuring. <u>The authority to order a stay has been included in section 11.02 of the reform</u>.[120]

The commentary in the 2007 Briefing Book on the amendments to section 11.02 similarly states:

> The reform in paragraphs (1), (2) and (3) is a technical amendment to re-order provisions of this Act, correct cross-referencing and correct for grammatical errors.

[119] 2007 Briefing Book, *supra* note 64, cl 128, s 11.04.
[120] *Ibid,* cl 128, s 11 [emphasis added].

> Paragraph (4) is added to ensure that court ordered stays are only granted pursuant to this section, including the limitations within this section.[121]

Clause-by-clause briefing books developed by the federal government with respect to proposed legislation have been applied on numerous occasions by courts, including the Supreme Court of Canada, in interpreting those statutes.[122] In particular, the Supreme Court of Canada relied on the 2007 Briefing Book in *Saskatchewan (Attorney General) v Lemare Lake Logging Ltd* to interpret the scope of the national receiver provision in section 243 of the *BIA*.[123]

However, the usefulness of clause-by-clause briefing books and other legislative materials is lessened when it is unclear whether the legislature turned its mind to the particular interpretive issue.[124] In *Re Sino-Forest Corp*, the Ontario Court of Appeal was required to determine whether the definition of "equity claim" in section 2(1) of the *CCAA*, which was added as part of amendments to the *CCAA* in 2005, included claims for contribution and indemnity by auditors and underwriters that were subject to class actions alleging misrepresentations in the securities filings of the debtor company.[125] The Court stated that the clause-by-clause analysis published by Industry Canada "provided very little insight into the intended meaning of the amendments", as the limited commentary was brief and imprecise and did not address the position of auditors and underwriters.[126]

The commentary in the 2007 Briefing Book that seems to indicate that section 11.02 should be the sole source of the jurisdiction to grant stays does not specifically address third-party stays, whether against issuers of letters of credit and guarantors or otherwise. The commentary does not state that the reason for

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[121] *Ibid*, cl 128, s 11.02(4) [emphasis added].
[122] See, eg, *Re Canada 3000 Inc*, 2006 SCC 24 at para 59; *Bell Canada v Canada (Attorney General)*, 2019 SCC 66 at para 54; *Kinsel v Canada (Minister of Citizenship and Immigration)*, 2014 FCA 126 at para 63.
[123] *Saskatchewan (Attorney General) v Lemare Lake Logging Ltd*, 2015 SCC 53 at para 59.
[124] *Ebrahim v Canada (Minister of Citizenship and Immigration)*, 2002 CanLII 47164 at para 20 (IRB).
[125] *Re Sino-Forest Corp*, 2012 ONCA 816.
[126] *Ibid* at paras 51–52.

section 11.02 being the sole source of jurisdiction is so that all of the restrictions found in other sections of the *CCAA* (such as section 11.04) will apply to those stays. In fact, the commentary suggests that the legislature was primarily concerned with ensuring that the restrictions *in* section 11.02—such as the restriction that initial stays can only be granted for a period of 30 (and now 10) days—continued to be applied to stays.[127]

Accordingly, it is not clear that the legislature turned its mind to third-party stays against issuers of letters of credit and guarantors and determined that they should only be issued pursuant to section 11.02 and be subject to the restriction in section 11.04.

vi. Impacts on reliability of letters of credit and guarantees

In *Keddy* and *Northern Transportation*, the courts raised a policy concern around courts retaining the ability to extend stays to issuers of letters of credit and guarantors.[128] The concern is that these instruments may be viewed as less valuable to lenders, landlords, suppliers and other counterparties and it may be more difficult and/or expensive for a company to obtain the financing, goods and other things that are necessary to run its business.

Despite the potential concern, courts have been extending stays to third-party guarantors on numerous occasions over the last decade. Whether the feared consequences have come to fruition is not apparent.

This argument is also undermined by the fact that, even if the court has the jurisdiction to extend stays to issuers of letters of credit and guarantors, the court is not required to do so. In this regard, letters of credit and guarantees may give rise to different public policy and other considerations depending on their terms in a particular case. A "one size fits all" approach may not be desirable for all letters of credit and guarantees. The court can decline to exercise its jurisdiction to

[127] 2007 Briefing Book, *supra* note 64, cl 128, s 11.02.
[128] *Keddy, supra* note 29 at para 13; *Northern Transportation, supra* note 66 at para 100.

extend the stay, or it can lift a stay that was previously granted, if it determines that the stay is not appropriate in the circumstances. Judges supervising *CCAA* proceedings are specialized, sophisticated jurists who are capable of balancing these interests while keeping an eye on the impact that extending the stay in particular circumstances would have on the business and credit environment more generally.

4. Considering a Broad Interpretation of Section 11.04

Another interpretation of section 11.04 of the *CCAA* is that it prohibits a *CCAA* court from extending stays to third parties that are issuers of letters of credit or guarantees in relation to the debtor company *in any circumstances*.

i. Remedial purpose of the CCAA

A broad interpretation of section 11.04 could impinge on the remedial purpose of the *CCAA*. The willingness of courts to extend stays to third-party guarantors in recent years indicates that courts have determined that it is appropriate to do so in many circumstances and will assist the debtor company in maintaining the status quo while attempting to restructure its business. A broad interpretation of section 11.04 would reduce the flexibility of the *CCAA* and lessen the *CCAA* court's ability to facilitate the restructuring of the debtor company's business.

A broad interpretation that frustrates the legislative purpose or undermines the legislative scheme should not be adopted where a more restrictive interpretation is available.[129]

ii. Narrow interpretations have been applied to other restrictions

As noted above, it is a general interpretive principle that restrictions on a *CCAA* court's jurisdiction should be narrowly construed. Accordingly, narrow interpretations have been given to other restrictions on the court's jurisdiction to

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[129] Sullivan, *supra* note 93 at § 10.04(2).

grant stays of proceedings with respect to eligible financial contracts,[130] regulatory proceedings[131] and payment for goods and services provided to the debtor company post-filing.[132] It would be anomalous if a broad interpretation were given to section 11.04.

iii. A broad interpretation could extend the restriction beyond guarantees

If section 11.04 was interpreted very broadly, and read literally, it would prohibit a stay being extended to *any* action, suit or proceeding against a non-debtor guarantor—not just those actions, suits or proceedings related to the guarantee. There does not appear to be any reason why a court should not be able to grant a stay to a non-debtor guarantor for obligations that are unrelated to the guarantee in appropriate circumstances.

Where a broad interpretation of general words may lead to unintended negative consequences, the absurdity principle of statutory interpretation may be employed to reject that interpretation in favour of a narrower one.[133]

iv. A broad interpretation may force otherwise solvent entities to file for CCAA protection

It is not uncommon in large corporate groups for some types of obligations to be guaranteed and cross-collateralized across some or all of the enterprise. If section 11.04 were to be interpreted broadly to prohibit a third-party stay from being extended to a related company guarantor of the obligations of the debtor company, the guarantor may be forced to file for *CCAA* protection even if they otherwise do not need the full protection of being a *CCAA* debtor. Including the guarantor as a *CCAA* debtor may have undesired effects on the business, which

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130 *Re Blue Range Resource Corp*, 2000 ABCA 239 at para 39. See also *Re Calpine Canada Energy Ltd*, 2006 ABQB 153 at para 24 [*Calpine*].
131 *Re Northstar Aerospace Inc*, 2012 ONSC 4423 at para 51.
132 *Re Smith Brothers Contracting Ltd*, 53 BCLR (3d) 264, 1998 CanLII 3844 at para 41 (BCSC); *Royal Bank of Canada v Cow Harbour Construction Ltd*, 2012 ABQB 59 at para 20 *Re Quest University Canada*, 2020 BCSC 921 at para 54.
133 Sullivan, *supra* note 93 at § 10.03(2).

could be disadvantageous to creditors and other stakeholders as well. This could be lessened with the use of a more limited stay in favour of the guarantor.

v. A broad interpretation may result in stays being unavailable to partnerships and individuals

The case law has generally held that individuals and partnerships do not fall within the definition of a "debtor company" and therefore cannot file for protection under the *CCAA* and obtain a stay of proceedings in their own right.[134] *CCAA* stays that are extended to individuals and partnerships are generally third-party stays.[135]

Third-party stays have been extended to partnerships, including guarantors, on numerous occasions where their operations and obligations are so intertwined with those of the debtor companies that irreparable harm may result if the stay is not extended to them.[136] Under a broad interpretation of section 11.04, a third-party stay could not be extended to an individual or partnership that is a guarantor.

If key individuals or partnerships cannot obtain the benefit of a stay of proceedings, a corporate group's ability to successfully restructure may be undermined, which is inconsistent with the purpose of the *CCAA*.

vi. Inconsistent with increased use of stays for other types of joint or derivative obligations

In recent years, *CCAA* proceedings have increasingly been used as a forum to settle complex multi-party litigation involving the debtor company. The first notable use of the *CCAA* for this purpose occurred in 2006, in the proceedings of

[134] CCAA, *supra* note 1, s 2(1) "company"; *Lehndorff, supra* note 13 at para 15.
[135] There is at least one decision that has held that, in the context of a limited partnership, it is unnecessary to extend the stay of proceedings to the partnership where the general partner is a debtor company: *Asset Engineering LP v Forest & Marine Financial Limited Partnership*, 2009 BCCA 319 at para 20. However, the general practice has remained to seek a third-party stay with respect to partnerships.
[136] *Canwest, supra* note 79 at para 29; *Calpine, supra* note 130 at paras 33–34; *Re Boreal Capital Partners Ltd et al*, 2021 ONSC 7802 at paras 18–19.

Muscletech Research and Development Inc.[137] It has continued in the *CCAA* proceedings of Sino-Forest Corporation, Montreal, Maine & Atlantic Canada Co, 4519922 Canada Inc, CannTrust Holdings Inc and the ongoing *CCAA* proceedings of Imperial Tobacco Canada Limited, JTI-Macdonald Corp and Rothmans, Benson & Hedges, Inc, among others.

In each of these cases, *CCAA* courts extended stays of proceedings to third parties such as co-defendants in the litigation, including with respect to joint or derivative obligations of those third parties, to facilitate a global resolution of the litigation. For example, Imperial Tobacco Canada Limited, JTI-Macdonald Corp and Rothmans, Benson & Hedges, Inc, were unrelated companies that had been held jointly and severally liable to pay a significant class action judgment and were subject to various other litigation. In the *CCAA* initial order granted to each of these companies, the stay of proceedings was extended to the other companies with respect to their joint and several liability.[138]

As the *CCAA* has continued to evolve to meet the progressively more complex restructuring challenges facing businesses, courts have increasingly recognized the value of the flexibility that the *CCAA* provides to grant broad stays where appropriate, including stays of joint or derivative obligations of third parties. This evolution supports a narrow interpretation of the restriction in section 11.04, as it would be anomalous if a *CCAA* court could not grant a third-party stay with respect to one type of joint or derivative obligation—guarantees—but was free to grant stays for other joint and several obligations and had repeatedly recognized that as a valuable tool to achieve the *CCAA*'s objectives.

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[137] Alain Riendeau and Brandon Farber, "Using the CCAA to Achieve a Global Resolution of Complex Litigation 'To Infinity and Beyond!' (Buzz Light Year, Toy Story)" in Janis P Sarra and Barbara Romaine, eds, *Annual Review of Insolvency Law 2016* (Toronto: Thomson Reuters, 2017).

[138] *Re JTI-Macdonald Corp*, 2019 ONSC 1625 at paras 12–13; *Re Imperial Tobacco Canada Limited et al*, 2019 ONSC 1684 at paras 3–5; *Re Rothmans, Benson & Hedges Inc* (22 March 2019), Toronto CV-19-616779-00CL (Ont Sup Ct [Comm List]), Initial Order.

5. Considering the Standalone Interpretation of Section 11.04

In *Re Target Canada Co*,[139] the debtor company made an attempt to articulate a middle-of-the-road interpretation of section 11.04 that would still permit the *CCAA* court to extend stays to certain third-party guarantors.

In that case, the US parent company of Target Canada had given guarantees of Target Canada's obligations under certain leases and other contracts. In its initial order factum, Target Canada argued that section 11.04 should be interpreted as only preventing the stay of proceedings from affecting actions, suits or proceedings in relation to *standalone* financial obligations of the third party, but should not preclude a stay of proceedings from being extended to obligations that are *derivative* of the debtor company's liability and dependent on the resources of the debtor company to resolve.[140]

Justice Morawetz, as he then was, granted the relief sought and extended the stay to the US parent without mentioning section 11.04 of the *CCAA* or the interpretation of that provision that had been advanced by Target Canada.[141]

This interpretation may be difficult to implement, as it may not be straightforward to determine whether a third-party obligation is standalone or derivative. For example, consider a guarantee that provides that the guarantor is jointly and severally liable for the debts of the debtor company. Assume that the creditor is entitled to seek recourse from the guarantor directly without being required to first exhaust any remedies against the debtor company, or provide any notice to the debtor company. Would that guarantee be considered a standalone or a derivative obligation? It is standalone in the sense that the creditor can seek recourse from the guarantor directly without involving the debtor company at all, but it is derivative in the sense that the primary debt was incurred by the debtor company.

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[139] *Target, supra* note 107.
[140] *Re Target Canada Co*, 2015 ONSC 303 at paras 74–77 (for the factum of the applicants).
[141] *Target, supra* note 107 at paras 49–50.

V. CONCLUSION

The intended scope of the restriction in section 11.04 of the *CCAA* has been unclear since it was adopted in 1997. As a result of the ambiguity in the language of section 11.04, there are at least three potential interpretations of its intended scope, each of which has factors militating for and against its adoption.

On balance, the factors seem to weigh in favour of a narrow interpretation of section 11.04 that would maintain the *CCAA* court's flexibility to grant stays of proceedings that are necessary to facilitate the restructuring of the debtor company while preserving the court's discretion to refuse to extend stays to issuers of letters of credit and guarantors if it is not appropriate to do so in the circumstances of a particular case. It that regard, it would be reasonable to expect that courts may draw a distinction between the treatment of letters of credit and guarantees in light of different policy and other considerations relating to them depending on their terms.

Section 11.04 would benefit from clarification by the legislature or the courts to resolve the ambiguity in its wording and provide guidance and greater certainty to debtor companies, guarantors, creditors and other stakeholders in *CCAA* proceedings.

TAB 3

CITATION: Pride Holdings Group Inc., 2024 ONSC 1830
COURT FILE NO.: CV-24-00717340-00CL
DATE: 2024-03-28

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-3, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF **PRIDE GROUP HOLDINGS INC.** and those entities listed in **Schedule "A"** hereto

APPLICANTS

BEFORE: Chief Justice Geoffrey B. Morawetz

COUNSEL: *Leanne Williams, Rachel Nicholson and Puya Fesharaki,*, for the Applicants

Pamela Huff, Chris Burr and Daniel Loberto, for the Proposed Monitor, Ernst & Young Inc.

Stuart Brotman and Daniel Richer, for the Syndicate Leaders

Marc Wasserman and Harvey Chaiton, for Mitsubishi

Raj Sahni, for the Directors and Officers

Lee Nicholson, for Move Trust

John Salmas, for the Bank of Montreal

HEARD and DETERMINED: March 27, 2024

REASONS: March 28, 2024

ENDORSEMENT

INTRODUCTION

[1] At the conclusion of this hearing, an order was granted with reasons to follow. These are the reasons.

[2] This application is brought by Pride Group Holdings Inc. and the other applicant companies (together, the "Applicants"), certain limited partnerships (the "LPs") and other related non-

Applicant entities (the "Additional Stay Parties") set out in Schedule "A" hereto (collectively, the "Pride Group") for 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").

[3] The Proposed Initial Order provides for, among other things:

(i) a stay of proceedings until April 6, 2024 in respect of the Pride Group, together with Sulakhan, Jasvir and Amrinder Johal (collectively, the "Personal Guarantors");

(ii) the appointment of Ernst & Young Inc. ("EYI") as the Court-appointed Monitor (in such capacity, the "Proposed Monitor");

(iii) the appointment of RC Benson Consulting Inc. ("RCB") as the Chief Restructuring Officer (the "CRO");

(iv) the approval of an Administration Charge and Directors' Charge (as each term is defined below);

(v) subject to the Governance Protocol (as defined below) which the Pride Group is required to comply with, the authority to (a) continue selling used or new trucks and trailers, and (b) remit proceeds of vehicle sales and lease collections from customers to the Pride Group's secured lenders in repayment of pre-filing indebtedness, each in the ordinary course of business;

(vi) the authority for Sulakhan Johal and the CRO to act as foreign representative in an application to recognize these proceedings under Chapter 15 of Title 11 of the United States Code (the "Bankruptcy Code"); and

(vii) an order sealing the unredacted copy of the CRO Engagement Letter, as defined and attached as a confidential appendix to the Proposed Monitor's Pre-Filing Report.

[4] The Pride Group is a privately held cross-border trucking and logistics conglomerate operating from more than fifty leased and owned facilities across Canada and the U.S. The Pride Group is responsible in some manner for the management of, or logistics in respect of, over 20,000 trucks across North America and has 558 employees, the majority of which are based in Ontario.

[5] The Applicants submit that the North American trucking and logistics industry is facing a prolonged downturn which can be traced to the COVID-19 pandemic and major geopolitical events.

[6] While the Pride Group has made significant efforts to manage its limited liquidity and sustain ordinary course operations, it has been forced to implement restructuring measures and to cease paying certain obligations to its lenders.

[7] Due to such non-payment, a majority of the Pride Group's lenders have begun to take enforcement measures and exercise self-help remedies. The Pride Group has been unable to negotiate an acceptable standstill arrangement with its principal lenders.

[8] The Applicants state that without the relief requested, the Pride Group will be forced to cease operations.

FACTS

[9] The facts are set out in the Affidavit of Sulakhan Johal sworn March 26, 2024 (the "Johal Affidavit").

[10] The Pride Group was founded by two brothers, Sulakhan and Jasvir Johal, as a used-truck dealer in 2010 operating from the back of a tractor-trailer in Mississauga, Ontario. The brothers remain involved with the Pride Group as directors and officers, shareholders and personal guarantors.

[11] Since its founding, the Pride Group has grown into a multi-national conglomerate with many different business lines, including:

(i) logistics and brokering services;

(ii) selling and leasing new and used trucks, principally to entrepreneurial owner-operators (the "Owner-Operators");

(iii) providing trucking parts, servicing and fuel sales services to the Owner-Operators and others; and

(iv) owning and operating more than forty real estate properties, which include dealerships, truck stops and other services and solutions.

[12] The Applicants consist of the operating companies, real estate holding companies and certain other holding companies that are either insolvent in their own right or have been rendered insolvent as a result of the Pride Group's inability to continue to provide financial support to them. Many of the Applicants are borrowers and/or guarantors under the Pride Group's various credit facilities with its lenders and are integral to its operations.

[13] The LPs and the Additional Stay Parties are entities that do not qualify as applicants under the CCAA by virtue of being limited partnerships or not being insolvent, but which are intertwined with the Applicants and the Pride Group's operations. The Applicants submit that the LPs and the Additional Stay Parties require some of the same protections, including the stay of proceedings, in order for the Pride Group to continue to operate as a going concern.

[14] The Pride Group has numerous credit facilities, including the following:

(a) *Operating Facilities* - these facilities provide working capital to the Pride Group;

(b) *Floorplan Facilities* – these facilities permit the acquisition of trucks that are subsequently made available for sale by the Pride Group;

(c) *Wholesale Leaseline and Lease Facilities* – these facilities permit the leasing of trucks to end customers and include the financing arms of major truck manufacturers among others;

(d) *Securitization Facilities* – several Pride Group entities are parties to securitization arrangements, whereby certain of the Pride Group entities sell "packages of leases" to securitization lenders, while continuing to service the transferred lease assets for the benefit of the Securitization Lenders who purchased the lease receivables; and

(e) *Real Estate and Mortgage Facilities* – several lenders provide real property mortgages to certain of the Applicants.

[15] Each of these types of financing are used regularly in the business of the Pride Group and are necessarily intertwined to permit it to operate its various lines of business.

[16] The Applicant's financial position has materially deteriorated as a result of the industry-wide downturn. The Pride Group has made significant efforts to improve its bottom-line, including winding-down unprofitable business lines, re-financing available equity, and selling excess assets.

[17] The Applicants state that higher delinquency rates, combined with additional strains on the Pride Group's human resources and its financing flow-through structure, may have contributed to certain trucks having been pledged more than once and more than one lender now claiming an interest in the same collateral, a significant concern for all stakeholders.

[18] The Pride Group has not been able to mitigate the post-pandemic industry downturn. As a result, the Pride Group stopped paying its lenders in the ordinary course which caused those parties to begin to exercise their rights and remedies against the Pride Group and the Personal Guarantors.

[19] The Pride Group engaged EYI as its financial advisor and RCB as its CRO to assist it in addressing its financial and operational challenges and the multiple-pledging of truck assets. Among other things, EYI and RCB have assisted the Pride Group in developing a more robust governance structure and creating controls (the "Governance Protocol") to ensure that the Pride Group's various creditors' security interests are protected.

[20] The Pride Group states that the protection of the CCAA is required in order to give it the breathing room it needs in order to:

(i) stabilize and continue its business operations;

(ii) preserve jobs and serve its customers;

(iii) collect outstanding receivables, maximize realizations on its inventory of trucks, excess real estate and other assets; and

(iv) develop a restructuring plan with the goal of maximizing the ongoing value of the business for the benefit of its creditors, employees, customers, suppliers and other stakeholders and the communities affected by the Pride Group's business activities.

ISSUES

[21] The principal issues on this Application are whether:

(a) the Applicants meet the criteria to obtain relief under the CCAA;

(b) the stay of proceedings should be granted to the Applicants and extended to the LPs, Additional Stay Parties and Personal Guarantors;

(c) the Applicants should be authorized to make certain pre-filing and post-filing payments;

(d) the appointment of the Monitor, the CRO and the Foreign Representatives should be approved;

(e) the Administration Charge and Directors' Charge should be granted; and

(f) the sealing order should be granted.

[22] The CCAA applies to a "debtor company" or affiliated debtor companies where the total of claims against the debtor or its affiliates exceeds five million dollars.

[23] I am satisfied that the Applicants are insolvent. They are facing a significant liquidity crisis and cannot satisfy their liabilities as they come due. Each of the Applicants is an "insolvent person" and a "debtor company" to which the CCAA applies.

[24] 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.

[25] While certain of the Applicants include U.S. affiliates of the Pride Group, the Applicants' chief place of business is Ontario, and its head offices are in Mississauga, Ontario. All of the U.S. members of the Pride Group report to the Canadian head office and the Canadian entities, and the Canadian employees provide operational and administrative functions for the Pride Group as a whole.

[26] If the proposed Initial Order and related relief is granted, the Pride Group has advised that it intends to commence recognition proceedings under Chapter 15 of the U.S. Bankruptcy Code in Delaware (the "Chapter 15 Proceedings").

[27] Section 11.02(1) of the CCAA permits this Court to grant an initial stay of up to 10 days on an application for an initial order.

[28] The Applicants submit that they require the stay of proceedings and the other relief set out in the Initial Order to preserve the *status quo* and provide them with the breathing room necessary to advance their restructuring efforts. I am satisfied that this relief should be granted.

[29] The Applicants request that the benefit of the stay be extended to the LPs, Additional Stay Parties and Personal Guarantors.

[30] This Court has found it just and reasonable to extend the protection of the stay of proceedings to non-applicant limited partnerships and non-applicant affiliates where such parties are integrally and closely interrelated to the debtor companies' business in order to ensure that the purposes of the CCAA can be achieved. (See: *Re Canwest Publishing Inc.*, 2010 ONSC 222 at paras. 33-34 [*Canwest Publishing*]; (*Target Canada Co. (Re)*, 2015 ONSC 303 at paras. 42-43 [*Target Canada*]; *Re Just Energy Corp.*, 2021 ONSC 1783 ("*Just Energy*")at para. 116; *Bed Bath & Beyond Canada Limited (Re)*, 2023 ONSC 1014 at para. 28 [*BBB Canada*]; *4519922 Canada., Re*, 2015 ONSC 124 at para 37).

[31] The Applicants submit that it is just and reasonable in the circumstances to extend the stay of proceedings to the LPs and Additional Stay Parties. The business and operations of the Applicants, the LPs and the Additional Stay Parties are heavily intertwined, and the stay of proceedings needs to be extended to the LPs and the Additional Stay Parties to maintain the overall stability of the Pride Group and preserve value for its stakeholders. I am satisfied that this relief is appropriate.

[32] The Applicants further submit that it is just and reasonable for this Court to exercise its discretion to extend the stay of proceedings in respect of the Personal Guarantors, who granted personal guarantees in respect of the indebtedness of the Pride Group to certain of its lenders, and against whom certain lenders have threatened personal proceedings.

[33] Section 11.04 of the CCAA provides that a stay pursuant to section 11.02 of the CCAA will not affect claims against third party guarantors of an applicant company, and section 11.03(2) provides that a stay pursuant to section 11.02 does not affect 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.

[34] Notwithstanding sections 11.04 and 11.03(2) of the CCAA, this Court has found that it has broad inherent jurisdiction under section 11 to grant stays in favour of third-party guarantors, including director guarantors, to ensure that the intent and purpose of the CCAA proceedings are not frustrated. (See: *Balboa Inc. et al. (Re),* (January 23, 2024), Toronto, CV-24-00713254-00CL at para. 32; *Nordstrom Canada Retail, Inc.*, 2023 ONSC 1422, at paras. 40-42).

[35] This Court has granted stays in favour of non-applicant director guarantors where their involvement in defending potential claims would unduly strain the Applicants' resources and be a significant distraction from the restructuring efforts to the detriment of all stakeholders.

[36] In the circumstances of this case, I am satisfied that this relief is appropriate to include in the Initial Order.

[37] The Applicants seek the Court's authorization to make payments of certain (i) pre-filing amounts owing to independent contractors and subcontractors (including those providing office support as well as truck drivers) that provide services to the Pride Group incurred in the ordinary course of business and consistent with existing payment arrangements; and (ii) pre-filing amounts owing to fuel suppliers that are integral to the Pride Group's ability to operate during the restructuring period.

[38] The Applicants submit that case law demonstrates that a supplier is considered critical when the uninterrupted supply of goods and/or services is sufficiently integral to the debtor's business that it would be prejudicial to the debtor's restructuring efforts for supply to be interrupted. (See: *Target* at paras. 62-65)

[39] The Applicants also submit that, given the nature of the Pride Group's business, the fuel suppliers and independent contractors' continued services are critical to the Pride Group's ability to operate its business in the ordinary course during the CCAA proceedings. The Pride Group's independent contractors should be afforded the same rights to payment for their services as its employees.

[40] I am satisfied that it is appropriate to provide this relief.

[41] The Applicants seek authorization to remit the proceeds from the sale of vehicles and the receipts of lease receivables from its customers in the ordinary course of business to the applicable lenders in reduction of such lenders' pre-filing indebtedness, in accordance with the Governance Protocol. I am satisfied that this relief is appropriate.

[42] I am satisfied that EYI is qualified to act as Monitor.

[43] I am also satisfied that the approval of the Governance Protocol is appropriate in the circumstances, and in the best interests of all stakeholders. The Proposed Monitor helped design the Governance Protocol and is agreeable to performing the proposed duties thereunder.

[44] Prior to the filing of this application, the Pride Group, at the request of certain of its lenders, engaged RCB to provide the services of Randall Benson to act as CRO. The Applicants seek an order approving the engagement of the CRO pursuant to the terms set out in the CRO Engagement Letter they entered into with RCB. The Applicants state that they require the CRO's expertise in order to successfully develop and implement a successful restructuring.

[45] The CRO has consented to act in these proceedings, and the Proposed Monitor has reviewed the CRO Engagement Letter and supports the appointment of the CRO. I am satisfied that it is appropriate to approve of the engagement of the CRO.

[46] As noted above, the Applicants intend to seek recognition of these proceedings in the U.S. Section 56 of the CCAA grants the Court unfettered authority to appoint "any person or body" to act as a representative for the purpose of having CCAA proceedings recognized in any jurisdiction outside of Canada, including the U.S.

[47] The Pride Group submits that it is appropriate for this Court to exercise its jurisdiction to authorize Mr. Johal and the CRO to act as the foreign representatives of the Pride Group. In my view, the appointment of two individuals as foreign representatives could give rise to an undesirable ambiguity and should be avoided. It seems to me that, given the role of the CRO, the CRO should be the foreign representative.

[48] The Applicants propose that the Proposed Monitor, its counsel, Canadian and U.S. counsel to the Applicants, the CRO and Canadian counsel to the Pride Group's board of directors be granted a Court-ordered charge on the Applicants and LP's Property as security for their respective fees and disbursements relating to services rendered in respect of the Pride Group (the "Administration Charge"). With the concurrence of the Proposed Monitor, the Applicants are proposing that the Administration Charge for the first ten days be limited to $2.0 million and will be seeking to increase the charge at the comeback hearing.

[49] I am satisfied that the Administration Charge is reasonable in the circumstances.

[50] The Application was brought on an *ex parte* basis and accordingly, the Administration Charge does not have any super priority.

[51] In light of the potential liabilities and insufficiency of available insurance, the directors and officers have indicated to the Applicants that their continued service to the Pride Group and involvement in this proceeding is conditional upon the granting of a charge in the amount of $4.1 million on the Applicants and LPs' Property (the "Directors' Charge").

[52] I am satisfied that a Directors' Charge should be created. However, due to the *ex parte* nature of this application, such charge does not have any super priority.

[53] The proposed Initial Order provides that the Confidential Appendix "A" to the Monitor's Pre-Filing Report, consisting of an unredacted copy of the CRO Engagement Letter, be sealed and not form part of the public record until further Order of the Court.

[54] Pursuant to section 137(2) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, the Court has the jurisdiction and the discretion to order that any document filed in a civil proceeding be treated as "confidential, sealed and not form part of the public record".

[55] The Supreme Court of Canada set out the applicable test for a sealing order *in Sierra Club of Canada v. Canada (Minister of Finance)* 2002 SCC 41, at para. 53, as subsequently refined in

Sherman Estate v. Donovan 2021 SCC 25 at paras. 37-38, wherein the Supreme Court held that held that a person asking a court to exercise its discretion in a way that limits the open court presumption must establish that: (i) court openness poses a serious risk to an important public interest; (ii) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and (iii) as a matter of proportionality, the benefits of the order outweigh its negative effects.

[56] The unredacted CRO Engagement Letter includes a breakdown of the CRO's monthly fees and expenses and success fee, which the Applicants seek to keep confidential and not part of the public record. The Applicants submit that the CRO in this case is an individual, and individuals have the reasonable expectation that their personal and financial information will be kept confidential and not form part of the public record.

[57] In the CCAA proceedings of *MJardin Group, Inc. et al.* (June 2, 2022, Toronto, CV-22-00682101), I granted a sealing order in order to keep confidential the fees and expenses attributable to the individuals working for a chief restructuring company.

[58] The Applicants submit that there are no satisfactory alternatives to the sealing order in the circumstances. Further, no stakeholders will be materially prejudiced by sealing the unredacted CRO Engagement Letter, and the salutary effects of granting the sealing order outweigh any deleterious effects.

[59] In my view, the request for a sealing order is appropriate with one caveat. The monthly fees should not be redacted. The success fee details are to be sealed on the basis that it could impair realization efforts which affect all stakeholders.

<u>DISPOSITION</u>

[60] The CCAA protection is granted. The Order has been signed. Due to the *ex parte* nature of this application, a "true" comeback hearing will be scheduled.

Chief Justice G.B. Morawetz

Date: March 28, 2024

TAB 4

CITATION: BBB Canada Ltd., 2023 ONSC 1014
COURT FILE NO.: CV-23-00694493-00CL
DATE: 2023-02-13

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 **BBB BED BATH & BEYOND CANADA LTD.**

Applicant

BEFORE: Chief Justice G.B. Morawetz.

COUNSEL: *Marc Wasserman, Shawn Irving, Dave Rosenblat and Emily Paplawski*, for the Applicant

Kevin Zych, Michael Shakra and Joshua Foster, for the Monitor, Alvarez & Marsal Canada Inc.

Evan Cobb, for JPMorgan Chase (ABL Lenders)

Wael Rostom and Jeffrey Levine, for Sixth Street Specialty Lending, Inc. (FILO Agent)

HEARD and DETERMINED: February 10, 2023

REASONS: February 13, 2023

ENDORSEMENT

[1] At the conclusion of the hearing on February 10, 2023, the Initial Order was granted with reasons to follow. These are the reasons.

Introduction

[2] BBB Canada Limited (the "Applicant") brings this application for an Initial Order and related relief under the *Companies' Creditors Arrangement Act* ("CCAA").

[3] While Bed Bath & Beyond Canada LP ("BBB LP" and together with the Applicant, "BBB Canada") is not an applicant, the Applicant seeks to have the stay of proceedings and other benefits of the Initial Order under the CCAA extended to BBB LP.

[4] The Applicant also seeks a temporary stay of any proceeding against its parent company Bed Bath & Beyond Inc., ("BBBI") and together with its various U.S. subsidiaries and BBB Canada, (the "Bed Bath & Beyond Group") arising out of any indemnity, guarantee or surety relating to a lease of real property by BBB LP or the Applicant.

[5] The evidentiary basis for the requested relief is set out in the Affidavit of Holly Etlin, Interim Chief Financial Officer of the Bed Bath & Beyond Group.

[6] The Bed Bath & Beyond Group has been in financial difficulty for a number of years, suffering significant net losses since 2018 and over this period, BBB Canada has had a decline in revenues.

[7] Ms. Etlin states that in an effort to improve the Bed Bath & Beyond Group's financial performance, former management embarked on a series of initiatives designed to transform the business. Unfortunately, the financial situation deteriorated. The Bed Bath & Beyond Group's situation significantly worsened throughout 2022, with declining sales in both the United States and Canada, multiple credit rating downgrades, cash flow constraints, and significant inventory reductions.

[8] Ms. Etlin also states that the financial situation continued to decline in January 2023. The ABL Agent (as defined below) declared events of default and delivered notices of acceleration under both the ABL Facility and BBBI's then US $375 million FILO Facility (of which BBB LP is also a borrower and the Applicant is a guarantor), thereby causing the principal amount of such facilities, together with interest and other fees and obligations, to become immediately due and payable. The ABL Agent also declared cash dominion, which restricted the entire Bed Bath & Beyond Group, including BBB Canada, from spending any cash on hand.

[9] Very recently, BBBI announced a proposed underwritten public offering of shares (the "Offering"), which, if all conditions are met, will provide BBBI with additional time to continue its restructuring efforts for Bed Bath & Beyond Group's business in the United States outside of a bankruptcy filing.

[10] Ms. Etlin states, however, that efforts to identify a going concern solution for Canada have not been successful. The Bed Bath & Beyond Group has concluded that there is not enough capital available to restructure both its business in the United States and properly restructure the Canadian business to achieve profitability.

[11] Ms. Eltin states that BBB Canada is not profitable on a standalone basis and after consideration of all strategic alternatives, the Bed Bath & Beyond Group has determined that it is no longer in a position to provide financial and operational support to BBB Canada. BBB Canada is insolvent and will be unable to satisfy its obligations. BBB Canada has commenced these proceedings in order to effect an orderly liquidation of its remaining inventory with assistance from a third-party professional liquidator and intends to vacate its leased retail stores and premises.

Business Strucgture

[12] The Applicant is a federal corporation incorporated pursuant to the *Canada Business Corporations Act* and has a registered office in Toronto, Ontario. The Applicant is a wholly owned subsidiary of BBBI, a corporation incorporated in the State of New York with a head office in Union, New Jersey. BBBI is the ultimate parent corporation of the entire Bed Bath & Beyond Group.

[13] BBB LP is a limited partnership formed under the laws of Ontario with its principal place of business in Richmond Hill, Ontario. The Applicant is the general partner and 99% unitholder of BBB LP and while BBB LP is not an applicant in this proceeding, the Applicant seeks to have the stay of proceedings and other provisions of the Initial Order extended to BBB LP. BBB LP is the operating entity in Canada which conducts substantially all of Bed Bath & Beyond's retail operations and is party to all commercial real property leases in Canada.

Business of the Bath Bed & Beyond Group

[14] The Bed Bath & Beyond Group is a retailer that sells a wide assortment of merchandise in the home, baby, beauty and wellness markets. Within Canada, BBB Canada operates 54 Bed Bath & Beyond stores and 11 buybuy Baby stores. As of January 31, 2023, BBB LP employed approximately 387 full-time employees and 1038 part-time employees in connection with its retail operations across Canada.

[15] Ms. Etlin further states that each BBB Canada retail store is located in premises leased by BBB LP. The vast majority of retail leases to which BBB LP is party are indemnified by BBBI.

[16] BBB Canada relies on BBB on for certain administrative and business support services (the "Shared Services") that are integral to BBB Canada's operations. In addition, all procurement of merchandise for BBB Canada is completed by Liberty Procurement Co. Inc., a wholly owned subsidiary of BBBI. Ms. Etlin states that BBB Canada cannot operate or function without the provision of the Shared Services from BBBI.

Financial Position of the Applicant

[17] As at November 26, 2022, the Bed Bath & Beyond banner in Canada had total assets of approximately \$427.4 million, and total liabilities of approximately \$342.8 million. The buybuy Baby banner in Canada has total assets of approximately \$52.7 million in total liabilities of approximately \$86.9 million.

[18] With respect to the secured debt position, Ms. Etlin states that BBBI, certain of its US and Canadian subsidiaries (including BBB LP), JPMorgan Chase Bank, N.A., as administrative agent and collateral agent (in such capacity, the "ABL Agent"), Sixth Street Specialty Lending, Inc. as the "first in, last out" agent ("Sixth Street"), and certain lenders, are parties to an Amended Credit Agreement.

[19] The Amended Credit Agreement provides for aggregate revolving commitments of US $565 million (the "ABL Facility") and a "first in, last out" term loan facility of US $475 million (the "FILO Facility" and together with the ABL Facility, the "Credit Facilities"). Prior to the Second Amendment to the Amended Credit Agreement, (the "Second Amendment"), the aggregate revolving commitments under the ABL Facility were US $1.13 billion and the FILO Facility was US $375 million.

[20] In Canada, the Credit Facilities are secured against all present and after-acquired personal property of BBB LP and the Applicant.

[21] On or around January 13, 2023, certain events of default were triggered under the Amended Credit Agreements (collectively, the "Events of Default") as a result of BBBI's failure to prepay an over-advance and satisfy a financial covenant, among other things. On January 23, 2023, the ABL Agent informed the Bed Bath & Beyond Group that, as a result of the ongoing events of default, a cash dominion (the "Cash Dominion Period") had occurred and the ABL Agent had delivered the applicable dominion notices. Ms. Etlin states that such significant restrictions on the Bed Bath & Beyond Groups cash use severely hampered its ability to continue operating in both Canada and the United States. On January 25, 2023, the ABL Agent sent a notice of acceleration and default interest (the "Acceleration Notice") to the Bed Bath & Beyond Group (including BBB Canada) as a result of the ongoing Events of Default.

[22] The Bed Bath & Beyond Group undertook a further in-depth review of all strategic alternatives. On February 6, 2023, BBBI announced that an equity offering was proceeding in the United States but no acceptable bids were received for any executable transaction involving the Canadian business.

Need for CCAA Relief

[23] Ms. Etlin advises that BBB Canada is in urgent need of protection under the CCAA. BBB Canada is not profitable on a standalone basis. In 2021, both the Applicant and BBB LP reported net losses. For the nine-month period ending November 26, 2022, both the Bed Bath & Beyond and the buybuy Baby banners in Canada reported significant net losses and negative EBITDA. Ms. Etlin further states that BBB Canada does not have the capacity or ability to independently effect a recapitalization or restructuring of the Canadian operations without the support of BBBI. BBB Canada is insolvent from a balance sheet and cash flow perspective.

Discussion

[24] Having reviewed the record and hearing submissions, I am satisfied that the Applicant is insolvent and there are claims against the Applicant in excess of $5 million. The Applicant is a "debtor company" as defined in the CCAA. In arriving at the conclusion that the Applicant is insolvent, I have taken into account that BBB Canada is not profitable on a standalone basis. For the nine-month period ending November 26, 2022, the Bed Bath & Beyond banner in Canada reported a net loss of $87.6 million and EBITDA was negative $81.8 million. For the same period, the buybuy Baby banner in Canada reported a net loss of $11.9 million and its EBITDA was negative $10.4 million. In addition, I am satisfied that the Applicant does not have the capacity to

effect a recapitalization or restructuring of its operations without the support of BBBI and finally, the Bed Bath & Beyond Group has determined that it is no longer in a position to provide financial and operational support to BBB Canada.

[25] I am also satisfied that this court has jurisdiction over these proceedings. The chief place of business for the Applicant is Ontario. The Applicant's registered office is in Toronto, Ontario and BBB LP is formed pursuant to the laws of Ontario. The corporate office is located in Mississauga, Ontario and a substantial number of retail stores are located in Ontario.

[26] The Applicant wishes to conduct a controlled and orderly winddown of operations in Canada for the benefit of all stakeholders. The CCAA can be used for the purpose of winding down a business. Examples include *Target Canada Co. (Re)*, 2015 ONSC 303 at para. 31; *Express Fashion Apparel Canada Inc.* and *Express Canada GC GP, Inc. (Re),* (May 4, 2017) Ontario SCJ (Commercial List), Court File No. CV–17–11785–00CL (Initial Order) at para. 10 and *Forever XXI ULC (Re)*, September 29, 2019, Ontario SCJ, (Commercial List), Court File No. CV–19–00628233–00CL (Endorsement).

[27] With respect to the request for a stay of proceedings and related relief during the Initial Stay Period, section 11.02(1) of the CCAA permits the court to grant an initial stay of up to 10 days, provided such a stay is appropriate and the applicants have acted with due diligence and in good faith. At an initial hearing the relief 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.

[28] The CCAA expressly applies to debtor companies, but not partnerships. However, where the operations of partnerships are integral and closely related to the operations of the Applicant, the CCAA Court has 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 in *Target*, *supra* above at paras. 42 – 43 and in *4519922 Canada Inc. (Re)*, 2015 ONSC 124, para. 37.

[29] In this case, the Applicant seeks to have the stay of proceedings and other provisions of the Initial Order extended to BBB LP, as it is related to the Applicant, carries on operations that are integral to the business of the Applicant, is party to all Canadian retail leases, and is a guarantor under the Credit Facilities.

[30] I am satisfied that it is appropriate to grant the Stay of Proceedings and to extend such stay to cover BBB LP.

[31] The Applicant also requests a stay of certain derivative claims against BBBI. Most of the retail leases to which BBB LP is a party are subject to an indemnity provided by BBBI in favour of the landlord. Although BBBI is not an applicant, the Proposed Initial Order includes the temporary stay of any proceeding against or in respect of BBBI arising out of or in connection with any indemnity, guarantee or surety relating to a lease of real property by BBB LP or the Applicant. The proposed Initial Order also provides that any landlord claim pursuant to a guarantee in relation to either BBB LP or the Applicant shall be unaffected and shall not be released or

affected in any way in any Plan filed by the Applicant under the CCAA, or any proposal filed by the Applicant under the *Bankruptcy and Insolvency Act* ("BIA").

[32] The Applicant submits that the CCAA Court has jurisdiction under section 11 to grant a third party stay and references *Target, supra* at para. 50, *McEwan Enterprises Inc.*, 2021 ONSC 6453 at para. 45, *Laurentian University of Sudbury* 2021 ONSC 659 at paras. 30 – 33 and *Lydian International Limited*, 2019 ONSC 7473 at para. 39. The Applicant submits that section 11.04 of the CCAA does not prevent the court from granting such a remedy in its discretion on the basis that the section is inapplicable, as the indemnities at issue here are not guarantees. In its factum, the Applicant also references that the Alberta Court of Queen's Bench in *Northern Transportation Company Limited (Re)*, 2016 ABQB 522 at para. 69 took a contrary view. The contrary view was also expressed in *Cannapiece Group Inc. v. Carmela Marzili*, 2022 ONSC 6379.

[33] This issue is not free of doubt and affected landlords have not been served and did not appear at this hearing.

[34] There are outstanding issues as between the Applicant and the landlords that have to be addressed in the near future. In an effort to encourage discussions as between the Applicant and the various Landlords, I am prepared to grant this requested stay of proceedings in respect of BBBI for the initial 10 day period prior to the comeback hearing. To be clear, this stay of proceedings will expire on February 21, 2023, unless further extended at the comeback hearing.

[35] I am also satisfied that it is appropriate to permit the Applicant to make prefiling payments, with the consent of the Monitor, to critical suppliers up to a maximum aggregate amount of $500,000, on terms set out in the Initial Order.

[36] In addition, the Applicant proposes that the Monitor, its counsel, counsel to BBB Canada be granted a Court-ordered charge as security for their respective fees and disbursements relating to services rendered in respect of BBB Canada (the "Administration Charge"). With the concurrence of the proposed Monitor, the Applicant proposes that the Administration Charge for the first 10 days be limited to $0.55 million and will be seeking to increase the Charge at the comeback hearing. The court has jurisdiction to grant such relief pursuant to section 11.52 of the CCAA and in the circumstances, I am satisfied that it is appropriate to grant the requested relief.

[37] I am also satisfied that it is appropriate to grant a Charge in favour of the Directors and Officers of BBB Canada (the "D&O Charge"), in the requested amount of $7.5 million for the first 10-day period.

[38] In summary, an Initial Order is granted with Alvarez & Marsal Canada Inc. being appointed as Monitor. The comeback hearing has been scheduled for Tuesday, February 21, 2023, at 9:00 a.m.

Chief Justice G.B. Morawetz

Date: February 13, 2023

TAB 5

CITATION: 2675970 Ontario Inc., 2024 ONSC 6174
COURT FILE NO.: CV-24-00726584-00CL
DATE: 20241106

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF 2675970 ONTARIO INC., 2733181 ONTARIO INC., 2385816 ALBERTA LTD., 2161907 ALBERTA LTD., 2733182 ONTARIO INC., 2737503 ONTARIO INC., 2826475 ONTARIO INC., 14284585 CANADA INC., 2197130 ALBERTA LTD., 2699078 ONTARIO INC., 2708540 ONTARIO CORPORATION, 2734082 ONTARIO INC., TS WELLINGTON INC., 2742591 ONTARIO INC., 2796279 ONTARIO INC., 10006215 MANITOBA LTD., AND 80694 NEWFOUNDLAND & LABRADOR INC.

RE: 2675970 ONTARIO INC., 2733181 ONTARIO INC., 2385816 ALBERTA LTD., 2161907 ALBERTA LTD., 2733182 ONTARIO INC., 2737503 ONTARIO INC., 2826475 ONTARIO INC., 14284585 CANADA INC., 2197130 ALBERTA LTD., 2699078 ONTARIO INC., 2708540 ONTARIO CORPORATION, 2734082 ONTARIO INC., TS WELLINGTON INC., 2742591 ONTARIO INC., 2796279 ONTARIO INC., 10006215 MANITOBA LTD., AND 80694 NEWFOUNDLAND & LABRADOR INC., individually, an "Applicant" and collectively, the "Applicants"

BEFORE: W.D. Black J.

COUNSEL: *Sharon Kour, William Main, Gabrielle Schachter and Caitlin Fell*, for the Applicants

Shayne Kukulowicz, Colin Pendrith, Natalie Levine, Alec Hoy and Kate Byers, for Canopy Growth Corporation

Josh Nevsky and Skylar Rushton, Alvarez & Marsal Canada, Monitor

Maria Konyukhova, for the Monitor

Martino Calvaruso, for the DIP Lender

Kyle Plunkett and Adrienne Ho, for the Bank of Montreal

Simon Bieber and Jacqueline Houston, Counsel for DAK Capital

HEARD: October 18, 2024

ENDORSEMENT

Overview

[1] On August 28, 2024, this court granted an initial order under the *Companies' Creditors Arrangement Act*, R.S.C. 1985 c. C-36 (the "CCAA") providing for, among other items, an initial stay of proceedings against the applicants and certain of their affiliates and the appointment of Alvarez & Marsal Canada Inc. as monitor (the "Monitor"). The applicants own, operate and franchise retail dispensaries and an online platform selling cannabis products and accessories under the name "Tokyo Smoke."

[2] On September 6, 2024, Cavanagh J. issued an amended and restated initial order (the "ARIO") that extended the stay of proceedings up to and including December 6, 2024, and provided various other related relief.

[3] Justice Cavanagh approved a sale and investment solicitation process on September 18, 2024, and on that day adjourned the applicants' motion for a related proceeding stay, the motion before me today, to today's date.

[4] The applicants are currently in the throes of the court-approved sale and investment solicitation process within the CCAA proceedings ("SISP") for which the current bid deadline is November 11, 2024. The closing of the Successful Bid (as defined in the SISP) is expected to take place by December 6, 2024.

[5] Prior to the CCAA proceeding, on March 8, 2024, certain of the applicants, and DAK Capital Inc. ("DAK") were named as defendants (collectively the "TS Respondents") in a Notice of Arbitration filed by Canopy Growth Corporation ("Canopy" and the "Canopy Arbitration").

[6] The Canopy Arbitration alleges breaches of a Share Purchase Agreement dated September 23, 2022, as amended by an Amendment to Share Purchase Agreement dated December 30, 2022 (the "SPA"). DAK is alleged to have guaranteed certain payments claimed to be owing under the SPA. As a result of the stay of proceedings under the initial order and the ARIO, the Canopy Arbitration is (undisputedly) stayed as against all of the defendants therein except DAK.

[7] The issue before me is whether Canopy may proceed in the near term with the Canopy Arbitration as against DAK.

The Parties' Positions Generally

[8] Canopy maintains that there is no impediment to the Canopy Arbitration proceeding as against DAK, and that the Canopy Arbitration ought to proceed expeditiously.

[9] The applicants say that although DAK is solvent and is not subject to the CCAA stay, DAK and the TS Respondents share a centralized management team, that the ongoing Canopy Arbitration will therefore necessitate substantial participation from the TS Respondents, and that such participation would, if required in the near term, distract from and undermine the engagement of the management team in the SISP and restructuring effort, at a critical time in those endeavors.

[10] I note that the Monitor echoes and supports the applicants' position. In a Supplement to its Second Report, at para. 4.3, the Monitor expresses the view that:

> [T]he attention of the directors, officers and/or employees of the Applicants should be focused on the Applicants' ongoing operational restructuring efforts – including supporting the SISP process. Accordingly, if the continuation of the Canopy Arbitration against DAK necessitates the involvement of the Applicants' management team which may create a distraction for the Applicants, the Monitor would recommend a third party stay in favour of DAK pending completion of the CCAA Proceedings subject to the Court's discretion.

[11] While of course the Monitor's input on the practical implications of the court's decision is helpful and warrants careful consideration, the resolution of the motion before me entails a determination of contested legal issues.

Canopy's Argument Relying on Sections 11.02 and 11.04

[12] That is, specifically, the parties disagree on the threshold question as to whether or not, in these circumstances, this court has the jurisdiction under section 11 of the CCAA to extend the stay of proceedings to encompass DAK.

[13] Canopy asserts that, while orders extending stays of proceedings to third-party guarantors have been made in Ontario, such orders have only ever been made on an unopposed basis, and even then, with cautions uttered by this court about whether or not jurisdiction exists to do so.

[14] Canopy's position is based on the interplay between subsections 11.02 and 11.04 of the CCAA.

[15] Its argument begins with the language of s. 11.04, which provides that:

> No order made under section 11.02 has affect on any action, suit or proceeding against a person, other than the company in respect of whom the order is made, who is obligated under a letter of credit or guarantee in relation to the company.

[16] Canopy characterizes this language as clear and unambiguous, and argues that it prohibits the extension of the stay of proceedings to a third-party guarantor.

[17] It points out that s. 11.04 does not, like other sections within Part II of the CCAA (concerning Jurisdiction of the Courts) feature express exceptions and/or provide the court with discretion.

[18] For example, Canopy notes, the prohibition regarding the appointment of a company's auditor as monitor in section 11.7(2) is prefaced with the words "Except with the permission of the court and on any conditions that the court may impose…"

[19] Canopy also argues that it is important to distinguish between a stay of third-party litigation and proceedings involving a guarantee. It says that courts have clearly exercised discretion under s. 11 to stay third-party litigation not involving a guarantee, and that there is no prohibition in the CCAA against the court doing so. On the other hand, Canopy emphasizes, guarantees and letters of credit are singled out in s. 11.04. In response to the applicants' primary submission, discussed below, Canopy asserts that it is "not credible" and in fact "absurd" to suggest that the purpose of s. 11.04 is to ensure that an order under s. 11.02 does not stay proceedings against guarantors while a party can circumvent that prohibition simply by invoking s. 11.

[20] Canopy also maintains, from a policy perspective that it says should influence the interpretation of provisions of the CCAA, that the legislation is explicitly intended to facilitate compromises and arrangements between companies and their creditors, and that it is not the scheme of the CCAA to undermine the rights of a creditor against a third-party guarantor.

The Applicants' Responding Arguments

[21] The applicants' spin on the overriding policy objectives is to note that the CCAA serves important remedial objectives, and that among those objectives is the notion that generally companies retain greater value as going concerns. As such, the applicants assert, reorganization serves the public interest by facilitating the survival of companies for the good of the economy and the "complex web of interdependent relationships, avoiding the harmful consequences of liquidation" (see *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379).

[22] The applicants rely, for support of the court's jurisdiction to make the order they seek, on s. 11 of the CCAA. They note the broad purview of s. 11, and that, subject to specified restrictions set out in the Act, the court may make any order that it considers appropriate in the circumstances at hand.

[23] They observe that courts have repeatedly used these broad powers to extend stays of proceedings to non-parties, including guarantors.

[24] In that regard, the applicants reference *Pride Group Holdings Inc.*, 2024 ONSC 1830, a case from earlier this year in which Morawetz C.J. extended a stay of proceedings to include certain guarantors who had provided personal guarantees relative to a CCAA applicant's obligations, and against whom certain lenders had threatened proceedings.

[25] To similar effect, the applicants rely on Morawetz C.J.'s decision in *Nordstrom Canada Retail Inc.*, 2023 ONSC 1422 and *Bed Bath & Beyond Canada Limited (Re)*, 2023 ONSC 1014 ("*BBB*").

[26] The applicants also cite Kimmel J.'s decision earlier this year in *Balboa Inc. et al. (Re)*, Court File No. CV-24-00713254, in which Her Honour, in granting a stay in favour of non-applicant parties who had provided guarantees in respect of certain of the applicants' obligations, wrote:

> This is an order that is within the discretion of the court to make when it is considered just and convenient to do so, and I find it to be so in this case. That jurisdiction is derived from s. 11 of the CCAA and further embodied in section 106 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43.

Canopy's Reliance on "Non-Opposition » in *Nordstrom* and *BBB*

[27] In response to these authorities, Canopy points to passages in Morawetz C.J.'s decisions in *Nordstrom* and *BBB*, respectively, in which His Honour extended a "Parent Stay" in the absence of opposition by any landlord (in *Nordstrom*) and extended a Third-Party Stay relative to certain indemnities, again without opposition from affected landlords, (in *BBB*). In doing so, Morawetz C.J. in each case said that, in view of the consensual nature of the requests, the extension of the stays had "no precedential value" and added that "the issue of [non-party stay orders] is not free from doubt."

Discussion of the Recent Relevant Cases

[28] While that is fair and accurate, it does not, in my view, address the decision of Kimmel J. in *Re Balboa*, nor Morawetz C.J.'s decision in *Pride*, which decisions do not repeat Morawetz C.J.'s proviso (in Nordstrom and BBB) about the implications of non-opposition.

[29] In *Re Balboa*, Kimmel J. specifically turned her mind to the passages from Morawetz C.J.'s decisions in *Nordstrom* and *BBB* on which Canopy relies before me, and, after reviewing those and additional authorities bearing on these issues, noted that even in *Nordstrom* and *BBB* Morawetz C.J. had ultimately granted a stay in favour of certain non-applicant guarantors on an initial CCAA application, notwithstanding the language of s. 11.04.

[30] Moreover, Kimmel J. said, at para. 34:

> It is not in the best interests of the Applicants' stakeholders or the administration of justice for the Additional Stay Parties to be forced to respond to uncoordinated actions in respect of their purported guarantees of the very indebtedness that the Applicants are attempting to restructure under the CCAA. The Non-Applicant Stay is consistent with the "single-proceeding model" that favours the resolution of claims within a CCAA process and avoids the "inefficiencies and chaos" that could otherwise result from uncoordinated attempts at recovery.

[31] Justice Kimmel then stated her conclusion that s. 11 confers the jurisdiction to make the (extended) stay order.

[32] Equally compelling is Morawetz C.J.'s decision in *Pride*.

[33] In discussing the submission of the applicants before him that the stay of proceedings should be extended to the Personal Guarantors, he wrote, at paras. 33-35:

> Section 11.04 of the CCAA provides that a stay pursuant to section 11.02 will not affect claims against third party guarantors of an applicant company, and section 11.03(2) provides that a stay pursuant to section 11.02 does not affect 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...
>
> **Notwithstanding sections 11.04 and 11.03(2) of the CCAA, this Court has found that it has broad inherent jurisdiction under section 11 to grant stays in favour of third-party guarantors, including director guarantors, to ensure that the intent and purpose of the CCAA proceedings are not frustrated. (See: *Balboa Inc, et al. (Re)* (January 23, 2024), Toronto, CV-24-00713254-00CL at para. 32; *Nordstrom Canada Retail, Inc.*, 2023 ONSC 1422, at paras. 40-42).**
>
> **This Court has granted stays in favour of non-applicant director guarantees where their involvement in defending potential claims would unduly strain the Applicants' resources and be a significant distraction from the restructuring efforts to the detriment of all stakeholders.** [Emphasis added]

[34] Accordingly, notwithstanding Morawetz C.J.'s earlier caution about the precedential value (or otherwise) of an unopposed order, it appears clear in *Re Balboa*, cited by Morawetz C.J. with approval in the passage above, and in particular in His Honour's own decision in *Pride*, that he recognizes the jurisdiction conferred by s. 11 to order this type of relief notwithstanding the provisions of s. 11.04.

[35] The applicants argue that this interpretation is supported also by parsing the language of ss. 11.02 and 11.04 and the interplay between them.

[36] The applicants observe, first, that the subparagraphs of subsection 11.02(2) in each case contemplate a stay order in certain prescribed circumstances "against the company." Correspondingly, these provisions do not speak to the court's jurisdiction to grant stays in respect of any other entity.

[37] Section 11.04, the applicants argue, clarifies that orders under s. 11.02 do not on their own affect guarantees in relation to the debtor company. Specifically, s. 11.04 says that:

> No order made under section 11.02 has affect on any action, suit or proceeding against a person other than the company in respect of whom the order is made, who is obligated under a letter of credit or guarantee in relation to the company.

[38] The applicants assert that s. 11.04 simply means that any stay granted by the court over the debtor company using its powers under section 11.02 (which again are expressly limited to "the company") does not affect a guarantee in respect of the debtor company.

[39] In other words, the applicants argue, s. 11.04 is a deeming provision intended to clarify the scope and effect of an order made under s. 11.02, and is not prohibitive. To that end, the applicants contrast the language of s. 11.04 with the language of, for example, s. 11.08: "No order may be made under section 11.02 that..."

[40] The applicants argue that Parliament made a choice not to use such prohibitive language in s. 11.04, and that therefore s. 11.04 does not bar any relief under s. 11.02, or delimit the court's authority generally (as found in s. 11) to make an order staying a guarantee.

[41] The applicants also note in this respect that s. 11.04 does not purport to limit or clarify the relief that may be granted under the general powers of s. 11. As such, say the applicants, s. 11.04 must be read by the court so as not to frustrate the remedial effect of the CCAA by restricting the court's broad powers under s. 11.

The Gage and Courtis Article

[42] In support of their argument concerning the proposition that s. 11.04 only applies to specified stays of proceedings against the debtor company under s. 11.02, the applicants rely on the 2022 article by James D. Gage and Trevor Courtis: "Staying Guarantees by Non-Debtors and Section 11.04 of the CCAA" (2022) 20 Annual Rev. Insolvency L., 2022 CanLIIDocs 4310 (the "Gage and Courtis Article").

[43] The Gage and Courtis Article traces the evolution of the relevant provisions, and notes that the predecessor to s. 11.04 did contain the kind of blanket prohibition that the respondents wish to read into s. 11.04. That predecessor section, s. 11.2, provided that:

> No order may be made under section 11 staying or restraining any action, suit or proceeding against a person, other than a debtor company in respect of which an application has been made under this Act, who is obligated under a letter of credit or guarantee in relation to the company.

[44] This blanket prohibition was removed as part of a 2009 amendment to the CCAA.

[45] Mr. Gage and Mr. Courtis conclude:

> On balance, the factors seem to weigh in favour of a narrow interpretation of section 11.04 that would maintain the CCAA court's flexibility to grant stays of proceedings that are necessary to facilitate the restructuring of the debtor company while preserving the court's discretion to refuse to extend stays to issuers of letters of credit and guarantors if it is not appropriate to do so in the circumstances of a particular case.

Conclusion re Operation of Section 11

[46] I find this logic compelling, and it leads me to join company with Kimmel J. and Morawetz C.J. in the view that the court may stay guarantee claims under s. 11 in appropriate circumstances.

[47] I also find that the circumstances before me qualify as appropriate circumstances in which to extend the stay to DAK.

[48] While there is a debate between the parties as to whether or not the evidence demonstrates that the applicants' management will be distracted and occupied by the Canopy Arbitration to the extent they claim, I accept and rely upon the Monitor's view, as a court-appointed officer, that allowing the Canopy Arbitration to proceed would be counterproductive to the SISP and the overall restructuring effort.

Discussion of Two Alberta Cases Cited by Canopy

[49] I should note before concluding that Canopy cites and relies on two cases from Alberta that it says support its interpretation of the interplay between s. 11.02 and s. 11.04, and its position that no stay should be extended here.

[50] It appears to me that the first of those cases, *Northern Transportation Company Limited (Re)*, 2016 ABQB 522, was driven by factors other than an analysis of the effect of s. 11, 11.02 and 11.04 of the CCAA.

[51] Paragraphs 43 and 44 of that decision, in my view, provide insight into what was animating the court in that case, being such factors as the location of the corporate debtor, the location of the non-consumer good collateral, and conflicts with the governing law clause chosen by the parties in their contract, and a concern that the B.C. PPSA did not give the court the ability to intervene "to relieve the debtor from the consequences of the default, or to stay enforcement of any payment acceleration provision of a security agreement that triggers upon default."

[52] Meaning no disrespect, the court's interpretation of the effect of the relevant provisions of s. 11 of the CCAA is not the subject of detailed analysis and is not in any event the basis on which the decision turns.

[53] The other Alberta decision, the decision of Nixon A.C.J. in *Mantle Materials Group Ltd. (Re)*, 2024 ABKB 19, in fact references a passage from Northern Transportation leaving open the granting of stays in "certain exceptional circumstances", cites the Gage and Courtis Article with approval, and finds that the case was one in which it was appropriate to extend the stay as requested: at paras. 57-58. I find that this decision is consistent with the Ontario cases cited above, and in no way disinclines me to grant the relief I propose to grant.

Conclusion

[54] Accordingly, I grant the applicants' motion, and extend the stay to DAK as requested.

[55] I do not propose to do so indefinitely. Once there is an approved bid pursuant to the current SISP and once the resulting transaction is completed, the stay vis-à-vis DAK should be lifted and the Canopy Arbitration should proceed.

W.D. BLACK J.

DATE: November 6, 2024

TAB 6

SUPERIOR COURT
(Commercial Division)

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No.: 500-11-065011-245

DATE: December 11, 2024

BY THE HONOURABLE MARTIN F. SHEEHAN, J.S.C.

IN THE MATTER OF THE COMPROMISE OR ARRANGEMENT OF:

ELNA MEDICAL GROUP INC. / GROUPE MÉDICAL ELNA INC.
and
9508503 CANADA INC.
and
ELNA Pediatrics Inc.
and
Tiny Tots Medical Centre Ltd.
and
7503881 Canada Inc.
and
Clinique Médicale ELNA Unimed Inc.
and
Gestion ELNA 2 Inc. (ELNA Plateau Mont-Royal)
and
CDL Protontherapy Center Inc.
and
CDL Proton Management Inc.
and
Clinique Médicale ELNA Châteauguay Inc.
and
Clinique Métro-Medic Centre-Ville Inc.
and
9248-5994 Québec Inc. (ELNA Pierrefonds)

and
Créa-Med Clinique de Médecine Privée Inc.
and
GBMC Medical Office Management Inc.
and
Omni-Med Stillview Inc.
and
ELNA ROCKLAND MANAGEMENT INC.and
ELNA Rockland Clinic Inc.
and
ELNA Clinique A Inc.
and
ELNA Group Inc. (ELNA Cosmetics)
and
ELNA Anti-Aging Inc.
and
Clinique Médicale ELNA Décarie Inc.
and
ELNA Plus Decarie Square Inc.
and
ELNA Mental Health Inc.
and
ELNA Technologies Inc.
and
Montreal Perfusion Center Inc.
and
Gestion ELNA 1 Inc.
and
Clinique Privamed Inc.
and
M-Health Solutions Inc.
and
1000224328 Ontario Inc.
and
CDL Laboratories Inc.
and
1127603 Canada Inc.
and
7159099 Canada Inc.
and
CDL Cardiology Inc.
and
ELNA Acquisitions Inc.
and

Medicentres Canada Inc.
and
9472-1024 Québec Inc.
Applicants
and
LAURENT AMRAM
Impleaded Party
and
RAYMOND CHABOT INC.,
Proposed Monitor

JUDGMENT ON REQUEST FOR AN INITIAL ORDER

OVERVIEW

[1] Applicants, Elna Medical Group Inc. ("**EMG**"), 9508503 Canada Inc. ("**950 Canada**"), as well as other Applicants listed in Schedule A to the attached initial order (collectively with EMG and 950 Canada, the "**Applicants**") have filed an application (the "**Application**") seeking the issuance of an initial order (the "**Initial Order**") pursuant to the *Companies' Creditors Arrangement Act*[1] (the "**CCAA**"):

1.1. declaring that the CCAA applies to the Applicants;

1.2. staying all proceedings and remedies taken or that might be taken in respect of the Applicants, Laurent Amram, and any of their property (the "**Stay**"), for an initial period of ten days in accordance with the CCAA (the "**Stay Period**");

1.3. appointing Raymond Chabot Inc. ("**RCI**" or the "**Monitor**") as the monitor of the Applicants in these proceedings and granting the Monitor the powers sought by the present Application;

1.4. ordering the procedural consolidation of these CCAA proceedings in respect of each of the Applicants, for administrative purposes only;

1.5. granting the Administration Charge (as defined below);

1.6. granting a D&O Charge (as defined below);

1.7. authorizing the engagement of the CFO (as defined below);

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

1.8. authorizing National Bank of Canada ("**NBC**") to provide the DIP Facility (as defined below) to the Applicants and granting a DIP Charge (as defined below) in relation thereto;

1.9. authorizing the Applicants, with the consent of the Monitor, to convey, assign, lease or in any other manner dispose of property, outside the normal course of business, in whole or in part, provided that the price in each case does not exceed $300,000 in the aggregate;

1.10. authorizing the Applicants to pay, with the consent of the Monitor, any pre-filing unpaid claims of suppliers it deems critical, up to an aggregate amount of $300,000;

1.11. authorizing the Applicants to establish the MRP and granting the related MRP Charge (as these terms are defined below);

1.12. the scheduling of a comeback hearing on December 17, 2024 (the "**Comeback Hearing**"); and

1.13. ordering the sealing of certain confidential exhibits supporting this Application.

[2] The Applicants also seek an order (the "**SISP Approval Order**") approving the initiation of a Sale and Investment Solicitation Process (the "**SISP**").

[3] At the Comeback Hearing, the Applicants intend to seek an Amended and Restated Initial Order (the "**ARIO**"):

3.1. extending the Stay Period until on or about February 12, 2025;

3.2. increasing certain CCAA Charges; and

3.3. granting any other relevant relief sought by the Applicants or deemed necessary by this Court.

CONTEXT

1. The ELNA Clinic Network

[4] ELNA was founded in Quebec over 30 years ago by Mr. Laurent Amram through a wholly owned subsidiary, CDL Laboratories.

[5] ELNA is a leading Canadian medical clinic consolidator and operator that offers primary and specialty medical care (in over 30 in-house specialties), including laboratory diagnostics and remote patient monitoring services (collectively the "**ELNA Group**").

[6] The ELNA Group comprises more than 100 clinics and points of care in five provinces (Quebec, Ontario, Alberta, Saskatchewan and Manitoba), including 10 medical complexes (9 of which are in Quebec). It employs approximately 1,000 physicians and an additional 1,000 employees and healthcare professionals. It serves approximately three million Canadians.

[7] The ELNA Group is Canada's largest network of integrated medical clinics, diagnostic laboratory services, and remote patient monitoring services. It generates approximately $200 million of annual gross revenue.

[8] The ELNA Group's head office is in Montreal, Québec. Most of its employees are in Quebec. Most strategic and corporate decisions regarding the ELNA Group are made by the management team in Montreal.

[9] ELNA Group has satellite administrative offices in Edmonton (AB) and Hamilton (ONT).

[10] The ELNA Group operates under various banners divided into three main business lines (clinics, laboratories and remote monitoring) which include:

ELNA Clinic Network:

10.1. ELNA branded clinics (the "**ELNA Clinics**");

10.2. Brunswick Health Group Inc. and related entities ("**Brunswick Health Group**");

10.3. La Cité Médicale Inc. – Ste-Foy and Charlesbourg ("**La Cité Médicale**");

10.4. Physimed Health Group Inc. and related entities ("**Physimed Health Group**");

10.5. Gestion Privamed Inc. and related entities ("**Privamed**");

10.6. Medicentres Canada Inc. and related entities ("**Medicentres**");

Diagnostic Laboratory:

10.7. CDL Laboratories Inc. and related entities ("**CDL**");

Remote Monitoring:

10.8. M-Health Solutions Inc. and related entities ("**M-Health**").

[11] The present CCAA proceedings solely relate to the Applicants listed in Schedule A of the Initial Order, which are ELNA Group entities operating under the banners: ELNA Clinics, Medicentres, Privamed, CDL, and M-Health.

[12] The real estate holding entities (Gestion Privamed Inc., 9074-2743 Québec Inc. and Gestion Elna Pierrefonds Inc.) as well as the entities operating under the Brunswick Health Group, Physimed Health Group and La Cité Médicale banners are not affected by the present proceedings.

2. Financial Difficulties

[13] Throughout the COVID-19 pandemic, the ELNA Clinic Network struggled as a result of diminishing patient visits. It suffered material revenue losses. However, the laboratory component of the business thrived. These revenues (as well as additional financing) were used to proceed with further acquisitions.

[14] Among those, the Medicentres and Brunswick Health Group acquisitions were both turnaround situations, While the cash burn has reduced since the acquisitions, the operations remain cash flow negative such that additional funds are required on a monthly basis to meet their obligations in the ordinary course. The current monthly burn rate is approximately $1.5 million.

[15] Some initiatives were implemented but unfortunately, they failed to generate sufficient revenues to address ELNA's financial woes.

[16] The ELNA Group is facing liquidity challenges and significant financial hardship such that it cannot meet its obligations as they become due, nor can it continue its operations in the normal course without additional funding.

2.1 Assets

[17] The Applicants' assets and property, on a consolidated basis, consist primarily of a combination of intangible assets, including patient data, contractual and service revenue, intellectual property, laboratory, medical and office equipment.

2.2 Secured Debts

[18] The Applicants' operations are principally financed by a number of secured creditors, each of which hold security on various assets of the ELNA Group, as well as in certain instances personal guarantees from Mr. Laurent Amram. These include:

18.1. Various credit agreements (the "**NBC Credit Agreements**") pursuant to which the National Bank of Canada ("**NBC**") provided credit facilities to EMG and m-Health Solutions Inc. (the "**NBC Borrowers**") which are guaranteed by sevral of the ELNA Group entities (the "**NBC Guarantors**"). The NBC Borrowers owe approximately $43 million. In conjunction with these CCAA proceedings, NBC, the NBC Borrowers and the NBC Guarantors entered into a new Forbearance Agreement (the "**NBC Forbearance Agreement**") pursuant to which NBC has agreed to continue to support the ELNA Group in the context of these CCAA proceedings and to provide additional interim financial to the ELNA Group through the DIP Facility (as defined below).

18.2. A loan agreement (the "**Norea Loan Agreement**") through which Norea Capital ("**Norea**") loaned money to M-Health Solutions Inc. ("**M-Health**") to provide financing to allow the ELNA Group to acquire M-Health in 2022. M-Health currently owes Norea approximately $6,148,000.00, subject to interest and adjustments, pursuant to the terms of the Norea Loan Agreement and is in default of its obligations thereunder.

18.3. A loan agreement (the "**IQ Loan Agreement**") pursuant to which Investissement Québec ("**IQ**") loaned money to CDL for research and development initiatives. CDL currently owes approximately $2,146,588, subject to interest and adjustments, to IQ pursuant to the terms of the IQ Loan Agreement.

18.4. On October 29, 2024, Medicentres Canada Inc. ("**Medicenters**") entered into a term loan agreement (the "**McKesson Loan Agreement**") with La Corporation McKesson Canada ("**McKesson**"). Medicenters currently owes McKesson approximately $2,800,000, subject to interest and adjustments, pursuant to the terms of the McKesson Loan Agreement.

18.5. On May 21, 2020, CDL Laboratories Inc. entered into a secured loan agreement with BDC with respect to a working capital loan (the "**BDC CDL Loan**"). CDL Laboratories Inc. owes approximately $231,966 to BDC pursuant to the BDC CDL Loan, subject to interest and fees.

18.6. On January 31, 2024, EMG entered into a secured loan agreement with Mr. Jason Rabin for an amount of $1,500,000 (USD). This amount remains outstanding.

18.7. In the last year, m-Health Solution Inc., CDL Laboratories Inc. and Clinique Privamed Inc. entered into several secured loan agreements with Merchant Capital Group LLC for an amount of approximately $428,500, subject to interest and adjustments.

[19] Mr. Amram also took out certain personal loans as follows:

19.1. Pursuant to various personal loan agreements (the "**CFC Loans**") entered into in 2023 between Mr. Laurent Amram and Crawford & Finchley Capital ("**CFC**"), Mr. Amram is currently indebted for approximately $2,500,000, subject to interest and adjustments.

19.2. Pursuant to various personal loan agreements (the "**143 Loans**") entered into in recent years between Mr. Laurent Amram and 143956 Canada Inc. ("**143 Canada**"), Mr. Amram is currently indebted for approximately

$4,500,000, subject to interest and adjustment.

19.3. Pursuant to two personal loan agreements (the "**Placement SP Loans**") entered into in 2023 and 2024 between Mr. Laurent Amram and Les Placements SP Canada Inc. ("**Placements SP**"), Mr. Amram is currently indebted for approximately $3,200,000, subject to interest and adjustments.

19.4. On April 25, 2023, K&S Financial Group Inc. ("**K&S**") advanced the sum of $750,000 to Mr. Laurent Amram the proceeds of which were used to fund the operations of the ELNA Group (the "**K&S Loan**"). This amount, subject to interest and adjustments, remains outstanding.

19.5. In addition to the foregoing, various personal loans to Mr. Laurent Amram, the proceeds of which were advanced to fund the operations of the ELNA Group (collectively referred to herein as the "**Secured Business Loans**").

2.3 Unsecured Debts

[20] Applicants also have unsecured debt which includes funds indirectly advanced to the ELNA Group in recent years to fund certain acquisitions and cash flow requirements ("**Unsecured Business Loans**"). Unsecured Business Loans were borrowed by Mr. Laurent Amram directly, for the sole benefit and use of the ELNA Group.

[21] In addition, there remains a balance owing to the prior owner/vendor in connection with the M-Health acquisition in the amount of approximately $1,500,000.

2.4 Tax Authorities

[22] Applicants also owe the following approximate amounts to various provincial and federal tax authorities ("**Tax Authorities**"):

22.1. GST/QST: $654,000

22.2. Corporate Income Tax: $4,370,000

2.5 Trade Liabilities

[23] As of December 6, 2024, the Applicants' indebtedness to their suppliers, landlords and other unsecured creditors (excluding the Unsecured Business Loans) is in the aggregate amount of approximately $24,000,000.

2.6 Employee Liabilities and Doctor Compensation

[24] Although all normal pay obligations are current. The aggregate gross employee pay obligations total approximately $3,000,000 per month.

[25] Additionally, the estimated amount of accrued, unused vacation time as of the date hereof is approximately $1,870,000.

[26] The majority of the Québec-based physicians, doctors of the ELNA Group practicing in the public healthcare system attend to their own billings and collections, including directly with respect to the healthcare authorities, and pay a monthly fee to the ELNA Group.

[27] Other than with respect to certain amounts owing to the Medicentres' doctors for certain services rendered in November 2024 (discussed below), all amounts owing to the doctors of the ELNA Group for services rendered both prior to and following the date of these CCAA proceedings are intended to be paid in full in the ordinary course.

3. Operational Restructuring Efforts

3.1 The Equity Raise Process

[28] In order to fund its growth strategy and address its liquidity needs, the ELNA Group retained the services of National Bank Financial Inc. ("**NBF**") as its financial advisor in May 2023 to initiate an equity raise process with the goal of raising approximately $50,000,000 (the "**Equity Raise Process**").

[29] The Equity Raise Process resulted in a non-binding letter of intent for 10% of the equity of the ELNA Group in the amount of $25 million (the "**Equity Offer**"), representing an overall valuation of no less than $250 Million as at September 2024.

[30] The Equity Offer is currently in the due diligence process but given the Applicants' current financial situation and the time required to close on the Equity Offer, ELNA is unable to pursue the Equity Raise Process without initiating the present CCAA proceedings.

[31] The Equity Raise Process will continue as part of the revised SISP discussed below.

3.2 The Initial SISP

[32] Given the delays associated with the Equity Raise Process, NBF was also retained in September 2024 to initiate, in parallel with the Equity Raise Process, an initial sale investment solicitation process (the "**Initial SISP**") with a view of identifying one or more transactions in respect of the sale, investment in, or refinancing of all or part of the business.

[33] NBF, with the assistance of the Applicants, managed all Initial SISP-related documents (including the preparation of a teaser letter ("**Teaser**") and confidential information memorandum regarding the business ("**CIM**"), a target list of potential

purchasers or investors, and non-disclosure agreements) and provided all required information to potential bidders.

[34] On or about October 7, 2024, the Initial SISP was initiated by the communication of the Teaser to potential bidders from both strategic and financial sectors.

[35] All parties who signed confidentiality agreements were provided with a copy of the CIM, and invited to submit non-binding letters of intent by no later than November 19, 2024.

[36] The Applicants received non-binding letters of interest from potential bidders ("**LOIs**"), and after carefully reviewing the LOIs, the Applicants, on the recommendation of NBF, advised potential bidders that they would be proceeding to Phase 2 of the SISP.

[37] Unfortunately, given the ELNA Group's financial situation, the Applicants do not have the required liquidity to carry the SISP to its conclusion.

[38] The Applicants' limited financial resources leave them with no alternative but to continue these efforts in the context of CCAA proceedings, while maintaining reduced uninterrupted operations.

[39] Through the DIP Facility (as defined below), NBC is offering to provide interim financing on reasonable terms and conditions which shall allow for the continuation of the SISP in the context of these CCAA proceedings.

ANALYSIS

[40] The various criteria for the issuance of an initial order under the CCAA have been met.

[41] The Applicants are affiliated debtor companies within the meaning of section 2 of the CCAA.

[42] The Applicants are insolvent because the value of their assets in a liquidation context would be insufficient to meet all their obligations to their creditors, and they are unable to meet their obligations as they become due. A looming liquidity crisis such that it is reasonably foreseeable that the debtor will run out of cash unless its business is restructured is sufficient to meet the requirements of the CCAA.[2]

[43] The Applicants' total indebtedness exceeds the $5,000,000 threshold required by the CCAA.

2 *Stelco Inc., Re*, 48 C.B.R. (4th) 299, paras. 26 et 28.

[44] The Quebec Superior Court has jurisdiction to issue the sought order as the ELNA Group has its head office or chief place of business in Quebec[3].

[45] Considering the number of Applicant entities (37) it is in the best interest of all stakeholders that this Court order the administrative consolidation of the Applicants' filings under a single CCAA proceeding.

[46] The clauses of the proposed Initial Order are in line with the standard draft order subject to certain matters which will be discussed below.

1. Stay of Proceedings Against Applicants and Mr. Amram Personally

[47] The Applicants are in real danger of no longer being able to maintain their activities without the protection of the CCAA. The stay of proceedings for an initial period of 10 days, subject to extensions is necessary to avoid a possible liquidation at a discount of the Applicants' assets in the context of multiple potential litigation and hypothecary recourses of the Applicants' various creditors.

[48] Mr. Amram also requests a stay of all potential lawsuits against him.

[49] The principal secured creditors support the application of the stay to Mr. Amram.

[50] At least one secured creditor of Mr. Amram has opposed the extension of the Stay.

[51] Subsection 11.03(1) of the CCAA allows the court to stay proceedings against directors if they relate to their liability under the law, in their capacity as director, for the payment of the obligations of the debtor company.

[52] Courts also have the authority under the broad jurisdiction granted under sections 11 and 11.02 of the CCAA to grant a stay of proceedings in favour of third parties that are not themselves applicants in a CCAA proceeding, including recourses seeking the enforcement of a personal surety against a director.[4]

[53] Mr. Amram submits that he is essential to the operations of the Applicants and to the success of these restructuring proceedings. He will be called upon to work tirelessly over the coming days and weeks and it is essential that this take place without any distraction. Thus, he asks that all claims against him be stayed including personal claims that are unrelated to the Applicants.

[54] While at first glance sympathetic, this argument cannot be accepted on its own. If it were, any principal shareholder, director or key employee of the debtor would be justified to seek protection from his or her creditors during the restructuring as long as he or she could establish that they are a key protagonist in the process. This would entail a

3 Subsection 9(1) of the CCAA.
4 *Great Basin Gold Ltd. (Re)*, 2015 BCSC 1199, para. 32.

significant expansion of current practice. In fact, the Applicants were not able to provide any precedent for the issuance of an unrestricted stay to protect key players in a CCAA proceeding from lawsuits related to personal debts.

[55] In most cases where stays were issued to protect directors, the stayed claims related to statutory claims covered by subsection 11.03(1) of the CCAA or personal guarantees of company debts.[5] As such the stayed claims had a minimal rational connection to the operation of the debtor's business. As Justice Kimmel observes, in such cases, the stay is "consistent with the single-proceeding model that favours the resolution of claims within a CCAA process and avoids the inefficiencies and chaos that could otherwise result from uncoordinated attempts at recovery".[6]

[56] When a extension of the stay is sought, it falls upon the applicant to demonstrate that the potential claim "would hinder or complicate the restructuring process" and that ordering the stay "is necessary to advance the policy objectives underlying the CCAA, to further the efforts to achieve the remedial purpose of the CCAA, or that not ordering such a stay would interfere with an orderly restructuring".[7]

[57] In determining whether to extend a stay of proceedings to non-applicant third parties, including directors, the following non-exhaustive list of factors have been considered by the Courts:

57.1. the business and operations of the third party was significantly intertwined and integrated with those of the debtor company;

57.2. extending the stay to the third party would help maintain stability and value during the CCAA process;

57.3. not extending the stay to the third party would have a negative impact on the debtor company's ability to restructure, potentially jeopardizing the success of the restructuring and the continuance of the debtor company.

57.4. if the debtor company is prevented from concluding a successful restructuring with its creditors, the economic harm would be far-reaching and significant.

57.5. failure of the restructuring would be even more harmful to customers, suppliers, landlords and other counterparties whose rights would otherwise be stayed under the third party stay;

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5 *Pride Group Holdings Inc.*, 2024 ONSC 1830, paras. 33 to 35; *McEwan Enterprises Inc.*, 2021 ONSC 6453, para. 19; *Magasin Laura (PV) inc./Laura's Shoppe (PV) Inc. (Arrangement relatif à)*, 2015 QCCS 4716 at paras. 50-53.

6 *Balboa Inc. et al. (Re)*, Court File No. CV-24-00713254 cited in *2675970 Ontario Inc.*, 2024 ONSC 6174, para. 30.

7 *Magasin Laura (PV) inc./Laura's Shoppe (PV) Inc. (Arrangement relatif à)*, *supra*, para. 52-53.

57.6. if the restructuring proceedings are successful, the debtor company will continue to operate for the benefit of all of its stakeholders, and its stakeholders will retain all of its remedies in the event of future breaches by the debtor company or breaches that are not related to the released claims; and

57.7. the balance of convenience favours extending the stay to the third party.[8]

[58] Mr. Amram is the sole director, shareholder and founder of the ELNA Group. As a result of these roles, he gave personal guarantees on loans extended to the ELNA Group.

[59] Mr. Avram also entered into personal loan agreements. In his testimony he indicates that 100% of the proceeds of these loans were invested in ELNA. However, the loans in question were not specifically identified.

[60] Mr. Amram's alleges that his personal wealth is intimately tied to the value of the ELNA Group. He alleges that he is unable to independently satisfy his personal obligations until the restructuring efforts can be fully implemented.

[61] Mr. Amram is unable to file for personal bankruptcy at this time as this would prevent him from acting as a director of a CBCA governed corporation (s. 105(11) CBCA). As he is the sole director of the Applicants it is important that he remain in place throughout these proceedings, and his inability to act would impair the restructuring efforts.

[62] This may be true but nonetheless, an overall and over encompassing stay of all claims against Mr. Amram is not supported by the evidence nor warranted at this time. Very little evidence has been provided as to Mr. Amram's personal assets, his income, or other sources of revenue. Thus, it is difficult to determine if the stay is even necessary.

[63] Furthermore, no specific evidence has been advanced to buttress the statement that all personal loan proceeds were reinvested in ELNA Group. In any event, such personal loans were not identified.

[64] For the time being, the Court will issue a Stay of proceedings against Mr. Amram but this extended stay will be limited to the following claims:

64.1. Statutory claims against him as a director pursuant to subsection 11.03(1) of the CCAA;

64.2. Personal guarantees granted on debts to the Applicants;

64.3. Personal loans whose proceeds were wholly reinvested in the Applicants.

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8 *McEwan Enterprises Inc.*, *supra*, note 5, para. 43.

[65] The stay will be valid until the Comeback Hearing. If the Applicants wish to maintain the stay they will have to demonstrate that it is required.

2. The Monitor

[66] The appointment of RCI, a licensed insolvency trustee, to act as Monitor under the provisions of the CCAA is appropriate. Mr. Benoît Fontaine has recognised expertise in this field.

[67] Raymond Chabot Grant Thornton LLP ("**RCGT**"), an affiliated company of the Monitor, has been analyzing the financials of the ELNA Group at the request of NBC since May 2023. In October 2024, RCGT was mandated to analyze the financials of M-Health. Appointing RCI would be efficient and save both time and money both of which are of the essence here.

[68] A separate team of RCI has acted as court-appointed monitor in the CCAA proceedings of the Brunswick Health Group (Superior Court no 500-11-062636-234), as part of which 15529301 Canada inc., a company ultimately held by Laurent Amram, has purchased a group of medical clinics. Further to this transaction, the assets of the Brunswick Health Group remain encumbered in favour of RCGT in its capacity as monitor in Brunswick Health Group CCAA, as *fondé de pouvoir* for the existing secured creditors in said file, namely TD Bank and BDC.

[69] RCGT (and now RCI) has put in place confidentiality and conflict measures between the teams working on the Brunswick Health Group CCAA matter and the ELNA Group and current CCAA matter.

[70] A separate team of McCarthy Tétrault LLP is acting as counsel for RCI as monitor in the Brunswick Health Group CCAA matter. McCarthy Tétrault LLP has also put in place confidentiality and conflict measures between the teams working on the Brunswick Health Group CCAA matter and the current CCAA matter.

[71] In addition, another separate team of McCarthy Tétrault LLP is acting as counsel for Fiera as secured creditor of certain entities of the ELNA group, including La Cité Médicale. McCarthy Tétrault LLP has put in place confidentiality and conflict measures between the teams working for Fiera as secured creditor of certain entities of the ELNA Group and the current CCAA matter.

[72] All conflicts or potential conflicts have been disclosed to the ELNA Group, NBC and Fiera who are all satisfied of the measures above.

[73] The Brunswick entities are not Applicants under the present CCAA proceedings.

[74] None of the restrictions provided by subsection 11.7(2) of the CCAA are applicable to the Monitor.

[75] The granting of the Monitor's powers is appropriate to help the Applicants achieve their restructuring objectives.

3. The SISP

[76] Thirdly, it is proposed that the Monitor be authorized to continue the SISP process.

[77] While the Initial SISP included a broad canvass of the market, The Monitor believes it is appropriate to expand the list of potential interested parties to include additional strategic and financial players, in order to provide the best possible outcome for all stakeholders.

[78] The Applicants ask that the Court approve the SISP bidding procedures ("**SISP Guidelines**").[9] These are in line with those used in other recent comparable insolvency proceedings.

[79] The SISP Guidelines contemplate a two-phase bidding process and timeline which was agreed to by the Applicants, and the Monitor, in compliance with the terms and conditions of the DIP Term Sheet.

[80] The Court believes that the SISP Approval Order is appropriate in the circumstances.

[81] The Applicants are insolvent and they are unable to indefinitely continue operations in their current state. They must restructure to preserve their business.

[82] The monetization of certain of the Applicants' assets will maximize value for stakeholders by allowing the business to continue as a going concern.

[83] The proposed SISP Guidelines outline the terms and procedures for a fair and efficient sale process.

[84] The Monitor is of the view that the SISP Approval Order and SISP Guidelines are reasonable and appropriate in the circumstances.

[85] Given the liquidity constraints, it is essential that the SISP Guidelines be approved as soon as possible in order to initiate the revised SISP forthwith.

4. Debtor In Possession ("DIP") Financing and DIP Charge

[86] Applicants require interim financing to provide the stability required to continue their operations, while pursuing their restructuring efforts under these CCAA proceedings, including the revised SISP and Equity Raise Process.

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9 Exhibit P-6.

[87] NBC has agreed to continue to support the Applicants through their restructuring efforts by providing Applicants with a DIP facility (the "**DIP Facility**") in accordance with the related term sheet (the "**DIP Term Sheet**").[10]

[88] The DIP Facility includes the following commercial terms:

88.1. Facility size: $5,000,000

88.2. February 12, 2025

[89] Applicants propose that the DIP Facility be secured by a Court-ordered charge (the "**DIP Charge**") on all of the present and future assets, property and undertakings of the Applicants up to a maximum amount of $1,200,000 in the Initial Order, to be increased to in the ARIO. The DIP Charge will have priority over all other security interests, hypothecs, charges and liens, except the Administration Charge, and the MRP Charge (as these terms are defined below).

[90] Interim financing may be approved even if it potentially prejudices some creditors, as long as the prejudice is outweighed by the benefit to all stakeholders.[11]

[91] NBC has indicated that the DIP Charge is a key condition of the DIP Term Sheet, and that it is not prepared to provide interim financing to the Applicants without the DIP Charge.

[92] The terms of the DIP Facility are reasonable and akin to what is generally available on the market.

[93] No other alternative facility has been obtained at this time that would allow continuity of operations in the near term.

[94] The Monitor supports the proposed DIP Facility and the DIP Charge.

[95] The Court finds that the DIP Facility and DIP charge are necessary to allow the Applicants to continue operating their business throughout the restructuring process.

5. <u>Medicentres Doctors Retention Program</u>

[96] There is currently an aggregate amount of approximately $3.6 million owing to the Medicentres' doctors for services rendered up to date. Part of this is money owed by the government and will be paid to the doctors upon reception.

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10 Exhibit P-7.

11 *AbitibiBowater inc. (Arrangement relatif à)*, 2009 QCCS 6453 at para 16.

[97] The DIP Facility is not sufficient to cover these amounts. To secure the ongoing support of the doctors, the Applicants, with the consent of NBC, are seeking approval of a Medicentres doctor's retention program ("**MRP**") for an amount of up to $3,000,000.

[98] The MRP was developed by the Applicants, with the consent of the Monitor, to facilitate and encourage the continued participation of the Medicentres doctors, who are necessary to continue operating the Medicentres clinics throughout these proceedings, maintain patient care, and preserve value for all stakeholders.

[99] Therefore, with a view to securing this ongoing support, management prepared a doctor retention program pursuant to which Medicentres (i) will pay the $2.0 million pre-filing amount upon collection of the accounts receivable related thereto, (ii) will pay for all post-filing services immediately upon collection of the accounts receivable related thereto, and (iii) seek the approval of a charge on all of the present and future assets, property and undertakings of Medicentres as part of the Application (the "**MRP Charge**"), in order to secure the $1.6 million pre-filing amount that remains unpaid and any and all unpaid post-filing amounts.

[100] The Applicants consider that the approval of the MRP and the MRP Charge are essential to the success of their restructuring efforts. The Applicants are hopeful that the MRP and the MRP Charge will help secure the ongoing support of the Medicentres doctors.

[101] There are three overarching considerations applicable on an application to approve a retention or incentive program in an insolvency proceeding, being:

101.1. arm's length safeguards;

101.2. necessity; and

101.3. reasonableness of design.[12]

[102] Factors to be considered include:

102.1. whether the Monitor supports the program agreement and charge, to which great weight is attributed;

102.2. whether the beneficiaries of the program are likely to consider other employment opportunities if the program and associated charge are not approved;

102.3. whether the continued employment of the beneficiaries of the program is important for the stability of the business and to enhance the effectiveness

[12] *Mountain Equipment Co-Operative (Re)*, 2020 BCSC 1586, para. 69; *Aralez Pharmaceuticals Inc. (Re)*, 2018 ONSC 6980 at para. 30.

of any marketing process;

102.4. the beneficiaries' history with and knowledge of the debtor company;

102.5. whether a replacement could be found in a timely manner should the beneficiary elect to terminate his or her employment with the debtor company;

102.6. whether the program agreement and charge were approved by the debtor company's board of directors, including any independent directors, as the business judgment of the board should not be ignored;

102.7. whether the program agreement and charge are supported or consented to by secured creditors of the debtor; and

102.8. whether the payments under the program are payable upon the completion of the restructuring process.[13]

[103] The MRP and MRP Charge are appropriate in the present circumtsnaces.

[104] The doctors' cooperation is crucial to continue operating the Medicentres clinics throughout these proceedings, maintain patient care, and preserve value for all stakeholders.

[105] The beneficiaries of the MRP possess specialized knowledge and expertise that cannot be easily replicated or replaced.

[106] Doctors are vital to maintaining the stability of the business and avoiding any disruptions that could affect the SISP.

[107] Payments under the MRP are tied to either the termination of the present CCAA proceedings through the implementation of a plan of arrangement or compromise in respect of Medicentres or the closing of a single, or multiple transaction(s) for substantially all of the Medicentres' assets, property and undertakings.

[108] The quantum of the MRP is appropriate in the circumstances and the MRP is supported by the main creditors and the Monitor.

[109] The Court approves it.

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[13] *Just Energy Group Inc. et al.*, 2021 ONSC 7630, para. 7; Mountain Equipment Co-Operative (Re), supra, 12, para. 68; *Aralez Pharmaceuticals Inc. (Re), supra,* note 12, para 29; *Walter Energy Canada Holdings, Inc.*, 2016 BCSC 107 at para 59.

6. Engagement of the Chief Financial Officer

[110] The Applicants wish to engage Crowe BGK LLP (Mr. Patrick Ifergan) to act in a role akin to that of a chief financial officer of the ELNA Group (the "**CFO**").

[111] Mr. Ifergan acted as Chief Financial Officer of the ELNA Group between June 2023 and August 2024, when he joined Crowe BGK LLP as a partner.

[112] Since joining Crowe BGK LLP, Mr. Ifergan has continued to act as the de facto Chief Financial Officer of the ELNA Group in accordance with a consulting agreement entered into between the ELNA Group and Crowe BGK LLP.

[113] This agreement was recently amended (the "**CFO Agreement**").[14] The CFO Agreement contemplates that (i) it be ratified and approved by the Court in the circumstances where insolvency proceedings are initiated in respect of Applicants, and (ii) obligations owed to the CFO by the ELNA Group be secured by a charge.

[114] It is contemplated that the Administration Charge (discussed below) shall notably enure to the benefit of the CFO with respect to the payment of his services.

[115] The services of the CFO are considered essential to a successful and timely restructuring of the Applicants' business, as the CFO has an intimate knowledge of the Applicants' affairs and has been providing them extensive support.

[116] The Monitor supports the CFO Agreement and the inclusion of the CFO's remuneration in the Administrative Charge.

7. D&O Charge

[117] Mr. Amram is the sole director of the ELNA Group. His participation is essential to the viability of the restructuring efforts, especially in the context of the SISP.

[118] The Applicants maintain directors' and officers' liability insurance in respect of Medicentres, but there is no insurance coverage for any other Applicant entities.

[119] Moreover, the current amount of coverage provided by the Medicentres Director and Officer's insurance may not be sufficient to protect Mr. Amram from potential claims.

[120] The Applicants therefore request a Court ordered charge ("**D&O Charge**") in the amount of $725,000 as part of the Initial Order, to take rank after the Administration Charge (as defined below), the MRP Charge, and the DIP Charge.

[121] The D&O Charge is intended to allow Mr. Amram to focus his efforts on these restructuring proceedings, for the benefit of all stakeholders.

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[14] Exhibit P-8.

[122] The D&O Charge has been calculated according to usual practice and is supported by the Monitor.

8. Administration Charge and Ranking of Charges

[123] The support of the Monitor, its counsel, the CFO, and the Applicant's counsel (collectively, the "**Professionals**") is essential to ELNA Group's restructuring.

[124] The Professionals have requested that their respective fees and disbursements be secured by a Court Charge in an initial aggregate amount of $750,000 to cover the work done to prepare the present proceedings and the work required until the Comeback Hearing in connection with the Applicants ("**Administration Charge**", together with the DIP Charge, the MRP Charge, and the D&O Charge the "**CCAA Charges**").

[125] The Professionals ask that their respective fees and disbursements be secured by an administration charge, ranking ahead of the claims of all secured and unsecured creditors, and have indicated that the granting of an administration charge is essential to their support throughout the proceedings.

[126] The Administration Charge will be secured by a charge on all of the Applicants present and future assets, property and undertakings ranking ahead of all Applicants' other secured and unsecured creditors.

[127] The Applicants request that this Court grant the following super-priority charges in the following order of priority:

127.1. The Administration Charge;

127.2. The MRP Charge (only on the Medicentres assets, property and undertakings);

127.3. The DIP Charge; and

127.4. The D&O Charge.

[128] The Initial Order provides that the CCAA Charges will not rank ahead of any statutory deemed trusts in favour of the Crown in right of Canada or of any province.

[129] The Monitor is supportive of the Administration Charge, and the ranking of the court ordered super-priority charges.

9. Critical Suppliers and Key Expenses

[130] During the course of the CCAA proceedings, the Applicants intend to make payments for post-filing goods and services supplied in the ordinary course.

[131] Given that certain critical suppliers are located abroad or may be highly dependent on continuous payment from the Applicants in order to ensure uninterrupted business operations during the CCAA proceedings, the Applicants are proposing that they be authorized, with the consent of the Monitor, to make certain payments, including payments owing in arrears, to certain third parties that are critical to the Applicants business and ongoing operations.

[132] The Applicants therefore seek to be authorized to pay, with the consent of the Monitor, or the Court, any pre-filing unpaid claims of third parties it deems critical, up to an initial aggregate amount of $300,000.

10. Intercompany Transactions

[133] In the ordinary course of their business operations, certain of the Applicants enter into transactions with each other, including without limitation (a) intercompany funding transactions, (b) purchase and sale transactions for goods or services in the ordinary course of the business, (c) allocation and payments of costs, expenses and other amounts for the benefit of the Applicants, including, without limitation, debt repayments and interest costs, head office, shared services and restructuring costs (collectively, "**Intercompany Transactions**").

[134] Norea has indicated that it intends to oppose intercompany transactions that involve M-Health as it fears that its security will be affected.

[135] For the time being the Applicants only ask that Intercompany Transactions among the Applicants continue on terms consistent with existing arrangements, subject to such changes or to such governing principles, policies or procedures as the Monitor may require.

[136] The Monitor has indicated that he does not foresee such changes prior to the Comeback Hearing. The matter can be dealt with then.

11. Sealing of Confidential Documents

[137] The Applicants seek an order declaring that Exhibit P-7 and Schedule C of the Monitor's Pre-filing Report, be strictly kept confidential and filed under seal considering that they contains commercially sensitive information regarding the business and assets of the Applicants, which disclosure risks impacting the SISP and Equity Raise Process.

[138] Applicants' creditors will have access to this information upon the execution of a confidentiality agreement or undertaking.

12. Execution Notwithstanding Appeal

[139] Given the urgency and severity of the circumstances confronting the Applicants, it is appropriate that the execution of the orders sought herein be granted notwithstanding appeal.

CONCLUSION

[140] The Initial Order is in the interest of the stakeholders including, first and foremost, the patients that who rely on ELNA Group's services.

[141] The Initial Order is granted subject to modifications related to the stay of proceedings in favour of Mr. Amram.

FOR THESE REASONS, THE COURT:

[142] **ISSUES** an Initial Order submitted by the parties this day and attached to the present judgment;

[143] **ISSUES** the SISP Approval Order submitted by the parties this day and attached to the present judgment;

[144] **THE WHOLE** without costs.

MARTIN F. SHEEHAN, J.S.C.

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Hearing date: December 11, 2024