2024 **Hfx No. 538745**

SUPREME COURT OF NOVA SCOTIA

BETWEEN:

IN THE MATTER OF THE *COMPANIES CREDITORS ARRANGEMENT ACT,* RSC 1985, C C-36, AS AMENDED (THE "**CCAA**")

AND IN THE MATTER OF AN APPLICATION OF BLUE LOBSTER CAPITAL LIMITED, 3284906 NOVA SCOTIA LIMITED, 3343533 NOVA SCOTIA LIMITED AND 4318682 NOVA SCOTIA LIMITED (COLLECTIVELY, THE "**APPLICANTS**")

BRIEF OF AUTHORITIES

July 3, 2025

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LIST OF AUTHORITIES

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1. *9354-9186 Québec inc. v. Callidus Capital Corp*., 2020 SCC 10

2. *Rose-Isli Corp. v. Frame-Tech Structures Ltd.*, 2023 ONSC 832

3. *BCIMC Construction Fund Corporation et al. v. The Clover on Yonge Inc.*, 2020 ONSC 3659

4. *Peakhill Capital Inc. v. 1000093910 Ontario Inc*., 2024 ONCA 558

5. *Rose-Isli Corp v Smith*, 2023 ONCA 548

6. *Xquisite Capital Corp. v. Crystal Farms Limited, et al.*, 2023 ONSC 6080

7. *Terrace Bay Pulp Inc., Re*, 2012 ONSC 4247

8. *Harbour Grace Ocean Enterprises Ltd., Re*, 2024 NLSC 47

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*

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

INDEXED AS: 9354-9186 QUÉBEC INC. *v.* CALLIDUS CAPITAL CORP.

2020 SCC 10

File No.: 38594.

Hearing and judgment: January 23, 2020.

Reasons delivered: May 8, 2020.

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

RÉPERTORIÉ : 9354-9186 QUÉBEC INC. *c.* CALLIDUS CAPITAL CORP.

2020 CSC 10

N° du greffe : 38594.

Audition et jugement : 23 janvier 2020.

Motifs déposés : 8 mai 2020.

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

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

EN APPEL DE LA COUR D'APPEL DU QUÉBEC

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.

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.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Cases Cited

By Wagner C.J. and Moldaver J.

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

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

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

Jurisprudence

Citée par le juge en chef Wagner et le juge Moldaver

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The reasons for judgment of the Court were delivered by

THE CHIEF JUSTICE AND MOLDAVER J.—

I. Overview

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

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

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

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

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

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

Version française des motifs de jugement de la Cour rendus par

LE JUGE EN CHEF ET LE JUGE MOLDAVER —

I. Aperçu

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

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

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

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

II. Facts

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

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

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

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

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

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

II. Les faits

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. *The Initial Competing Plans of Arrangement*

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

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

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

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

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

B. *Les premiers plans d'arrangement concurrents*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. Decisions Below

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

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

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

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

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

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

III. Historique judiciaire

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

IV. Issues

[37] These appeals raise two issues:

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

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

V. Analysis

A. *Preliminary Considerations*

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

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

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

IV. Questions en litige

[37] Les pourvois soulèvent deux questions :

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

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

V. Analyse

A. *Considérations préliminaires*

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

(1) The Evolving Nature of *CCAA* Proceedings

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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) 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*

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

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

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

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

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

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

Good faith

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

Good faith — powers of court

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

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

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

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

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

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

Bonne foi

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

Bonne foi — pouvoirs du tribunal

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Related creditors

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

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

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

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

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

Créancier lié

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

General power of court

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

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

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

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

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

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

Pouvoir général du tribunal

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Interim financing

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

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

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

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

Financement temporaire

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

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

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

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

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

Priority — secured creditors

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

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

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

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

Priorité — créanciers garantis

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

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

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

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

Factors to be considered

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

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

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

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

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

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

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

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

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

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

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

Facteurs à prendre en considération

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

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

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

c) la question de savoir si ses dirigeants ont la confiance de ses créanciers les plus importants;

d) la question de savoir si le prêt favorisera la conclusion d'une transaction ou d'un arrangement viable à l'égard de la compagnie;

e) la nature et la valeur des biens de la compagnie;

f) la question de savoir si la charge ou sûreté causera un préjudice sérieux à l'un ou l'autre des créanciers de la compagnie;

g) le rapport du contrôleur visé à l'alinéa 23(1)b).

(*LACC*, par. 11.2(4))

[91] Avant l'entrée en vigueur en 2009 des dispositions susmentionnées, les tribunaux utilisaient le pouvoir discrétionnaire général que confère l'art. 11 pour autoriser le financement temporaire

(*Century Services*, at para. 62). Section 11.2 largely codifies the approaches those courts have taken (Wood, at p. 388; McElcheran, at p. 301). As a result, where appropriate, guidance may be drawn from the pre-codification interim financing jurisprudence.

[92] As with other measures available under the *CCAA*, interim financing is a flexible tool that may take different forms or attract different considerations in each case. Below, we explain that third party litigation funding may, in appropriate cases, be one such form.

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

[93] Third party litigation funding generally involves "a third party, otherwise unconnected to the litigation, agree[ing] to pay some or all of a party's litigation costs, in exchange for a portion of that party's recovery in damages or costs" (R. K. Agarwal and D. Fenton, "Beyond Access to Justice: Litigation Funding Agreements Outside the Class Actions Context" (2017), 59 *Can. Bus. L.J.* 65, at p. 65). Third party litigation funding can take various forms. A common model involves the litigation funder agreeing to pay a plaintiff's disbursements and indemnify the plaintiff in the event of an adverse cost award in exchange for a share of the proceeds of any successful litigation or settlement (see *Dugal v. Manulife Financial Corp.*, 2011 ONSC 1785, 105 O.R. (3d) 364; *Bayens*).

[94] Outside of the *CCAA* context, the approval of third party litigation funding agreements has been somewhat controversial. Part of that controversy arises from the potential of these agreements to offend the common law doctrines of champerty and

et la constitution des charges super prioritaires s'y rattachant (*Century Services*, par. 62). L'article 11.2 codifie en grande partie les approches adoptées par ces tribunaux (Wood, p. 388; McElcheran, p. 301). En conséquence, il est possible, le cas échéant, de s'inspirer de la jurisprudence relative au financement temporaire antérieure à la codification.

[92] Comme c'est le cas pour les autres mesures susceptibles d'être prises sous le régime de la *LACC*, le financement temporaire est un outil souple qui peut revêtir différentes formes ou faire intervenir différentes considérations dans chaque cas. Comme nous l'expliquerons plus loin, le financement d'un litige par un tiers peut, dans les cas qui s'y prêtent, constituer l'une de ces formes.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(Houlden, Morawetz and Sarra, at §33)

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

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

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

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

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

(Houlden, Morawetz et Sarra, §33)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[106] While the supervising judge did not canvass each of the factors set out in s. 11.2(4) of the *CCAA* individually before reaching his conclusion, this was not itself an error. A review of the supervising judge's reasons as a whole, combined with a recognition of his manifest experience with Bluberi's *CCAA* proceedings, leads us to conclude that the factors listed in s. 11.2(4) concern matters that could not have escaped his attention and due consideration. It bears repeating that, at the time of his decision, the supervising judge had been seized of these proceedings for well over two years and had the benefit of the Monitor's assistance. With respect to each of the s. 11.2(4) factors, we note that:

- the judge's supervisory role would have made him aware of the potential length of Bluberi's *CCAA* proceedings and the extent of creditor support for Bluberi's management (s. 11.2(4)(a) and (c)), though we observe that these factors

financement temporaire. Se fondant sur les principes applicables à l'approbation d'accords semblables dans le contexte des recours collectifs (par. 74, citant *Bayens*, par. 41; *Hayes*, par. 4), le juge surveillant a estimé que l'AFL était juste et raisonnable. Plus particulièrement, il a examiné soigneusement les conditions selon lesquelles les avocats de Bentham et de Bluberi seraient payés si le litige était couronné de succès, les risques qu'ils prenaient en investissant dans le litige et l'étendue du contrôle qu'exercerait désormais Bentham sur le litige (par. 79 et 81). Le juge surveillant a également pris en compte les objectifs uniques des procédures fondées sur la *LACC* en établissant une distinction entre l'AFL et des accords apparemment semblables qui n'avaient pas été approuvés dans le contexte des recours collectifs (par. 81-82, établissant une distinction avec l'affaire *Houle*). Sa prise en compte de ces objectifs ressort également du fait qu'il s'est fondé sur *Crystallex*, qui, comme nous l'avons expliqué, portait sur l'approbation d'un financement temporaire dans des circonstances très semblables à celles en l'espèce (voir par. 67 et 71). Nous ne voyons aucune erreur de principe ni rien de déraisonnable dans cette approche.

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

- le rôle de surveillance du juge lui aurait permis de connaître la durée prévue des procédures intentées par Bluberi sous le régime de la *LACC* ainsi que la mesure dans laquelle les dirigeants de Bluberi bénéficiaient du soutien des créanciers

appear to be less significant than the others in the context of this particular case (see para. 96);

- the LFA itself explains "how the company's business and financial affairs are to be managed during the proceedings" (s. 11.2(4)(b));
- the supervising judge was of the view that the LFA would enhance the prospect of a viable plan, as he accepted (1) that Bluberi intended to submit a plan and (2) Bluberi's submission that approval of the LFA would assist it in finalizing a plan "with a view towards achieving maximum realization" of its assets (para. 68, citing 9354-9186 Québec inc. and 9354-9178 Québec inc.'s application, at para. 99; s. 11.2(4)(d));
- the supervising judge was apprised of the "nature and value" of Bluberi's property, which was clearly limited to the Retained Claims (s. 11.2(4)(e));
- the supervising judge implicitly concluded that the creditors would not be materially prejudiced by the Litigation Financing Charge, as he stated that "[c]onsidering the results of the vote [on the First Plan], and given the particular circumstances of this matter, the only potential recovery lies with the lawsuit that the Debtors will launch" (para. 91 (emphasis added); s. 11.2(4)(f)); and
- the supervising judge was also well aware of the Monitor's reports, and drew from the most recent report at various points in his reasons (see, e.g., paras. 64-65 and fn. 1; s. 11.2(4)(g)). It is worth noting that the Monitor supported approving the LFA as interim financing.

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

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

- l'AFL lui-même indique « la façon dont les affaires financières et autres de la compagnie seront gérées au cours de ces procédures » (al. 11.2(4)b));
- le juge surveillant était d'avis que l'AFL favoriserait la conclusion d'un plan viable, car il a accepté (1) le fait que Bluberi avait l'intention de présenter un plan et (2) l'argument de Bluberi selon lequel l'approbation de l'AFL l'aiderait à conclure un plan [TRADUCTION] « visant à atteindre une réalisation maximale » de ses éléments d'actif (par. 68, citant la demande de 9354-9186 Québec inc. et de 9354-9178 Québec inc., par. 99; al. 11.2(4)d));
- le juge surveillant était au courant de la « nature et [de] la valeur » des biens de Bluberi, qui se limitaient clairement aux réclamations retenues (al. 11.2(4)e));
- le juge surveillant a conclu implicitement que la charge relative au financement de litige ne causerait pas un préjudice sérieux aux créanciers, car il a affirmé que [TRADUCTION] « [c]ompte tenu du résultat du vote [sur le premier plan] et des circonstances particulières de la présente affaire, la seule possibilité de recouvrement réside dans l'action que vont intenter les débiteurs » (par. 91 (nous soulignons); al. 11.2(4)f));
- le juge surveillant était aussi bien au fait des rapports du contrôleur, et s'est appuyé sur le plus récent d'entre eux à divers endroits dans ses motifs (voir, p. ex., par. 64-65 et note 1; al. 11.2(4)g)). Il convient de souligner que le contrôleur appuyait l'approbation de l'AFL à titre de financement temporaire.

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

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

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.
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> . . . While the approval of the Tenor DIP Loan affected the Noteholders' leverage in negotiating a plan, and has made the negotiation of a plan more complex, it did not compromise the terms of their indebtedness or take away any of their legal rights. It is accordingly not an arrangement, and a creditor vote was not required. [paras. 82 and 93]

[113] We disagree with the Court of Appeal that *Crystallex* should be distinguished on the basis that it involved a single option for creditor recovery (i.e., the arbitration) while this case involves two (i.e., litigation of the Retained Claims and Callidus's New

l'existence de leurs droits d'avoir accès à la marmite une fois qu'elle est remplie, pas plus qu'on ne saurait dire qu'il s'agit d'une « transaction » à l'égard de leurs droits. Lorsque la « marmite d'or » aura été obtenue — c'est-à-dire dans l'éventualité d'une action ou d'un règlement — les sommes nettes seront distribuées aux créanciers. En l'espèce, si les réclamations retenues permettent de recouvrer des sommes qui dépassent le total des dettes de Bluberi, les créanciers seront payés en entier; si les sommes sont insuffisantes, un plan d'arrangement ou une transaction établira la façon dont les sommes seront distribuées. Bluberi s'est engagée à proposer un tel plan (voir les motifs du juge surveillant, par. 68, établissant une distinction avec *Cliffs Over Maple Bay Investments Ltd. c. Fisgard Capital Corp.*, 2008 BCCA 327, 296 D.L.R. (4th) 577).

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

> [TRADUCTION] Les faits de l'espèce sont inhabituels : la « marmite d'or » ne contient qu'un seul élément d'actif qui, s'il est réalisé, rapportera beaucoup plus que ce qui est nécessaire pour rembourser les créanciers. Le juge surveillant était le mieux placé pour établir un équilibre entre les intérêts de toutes les parties intéressées. J'estime que l'exercice par le juge surveillant de son pouvoir discrétionnaire d'approuver le prêt de DE Tenor était raisonnable et approprié, bien qu'il ait eu pour effet de limiter la position de négociation des créanciers.
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> . . . L'approbation du prêt de DE Tenor a certes amoindri l'influence que pouvaient exercer les détenteurs de billets lors de la négociation d'un plan, et rendu plus complexe la négociation d'un plan, mais ce prêt ne constituait pas une transaction visant les conditions de leurs dettes ni ne les privait de l'un de leurs droits reconnus par la loi. Il ne s'agit donc pas d'un arrangement, et un vote des créanciers n'était pas nécessaire. [par. 82 et 93]

[113] Nous ne souscrivons pas à l'opinion de la Cour d'appel selon laquelle il y a lieu d'établir une distinction avec *Crystallex* parce que, dans cette affaire, les créanciers disposaient d'un seul moyen de recouvrement (c.-à-d. l'arbitrage) tandis que, dans la

Plan). Given the supervising judge's conclusion that Callidus could not vote on the New Plan, that plan was not a viable alternative to the LFA. This left the LFA and litigation of the Retained Claims as the "only potential recovery" for Bluberi's creditors (supervising judge's reasons, at para. 91). Perhaps more significantly, even if there were multiple options for creditor recovery in either *Crystallex* or this case, the mere presence of those options would not necessarily have changed the character of the third party litigation funding agreements at issue or converted them into plans of arrangement. The question for the supervising judge in each case is whether the agreement before them ought to be approved as interim financing. While other options for creditor recovery may be relevant to that discretionary decision, they are not determinative.

[114] We add that the Litigation Financing Charge does not convert the LFA into a plan of arrangement by "subordinat[ing]" creditors' rights (C.A. reasons, at para. 90). We accept that this charge would have the effect of placing secured creditors like Callidus behind in priority to Bentham. However, this result is expressly provided for in s. 11.2 of the *CCAA*. This "subordination" does not convert statutorily authorized interim financing into a plan of arrangement. Accepting this interpretation would effectively extinguish the supervising judge's authority to approve these charges without a creditors' vote pursuant to s. 11.2(2).

[115] Third, we are of the view that the Court of Appeal was wrong to decide that the supervising judge should have submitted the LFA together with a plan to the creditors for their approval (para. 89). As we have indicated, whether to insist that a debtor package their third party litigation funding agreement

présente affaire, il y en a deux (c.-à-d. l'introduction d'une action à l'égard des réclamations retenues et le nouveau plan de Callidus). Étant donné que le juge surveillant avait conclu que Callidus ne pouvait pas voter sur le nouveau plan, ce plan ne constituait pas une solution de rechange viable à l'AFL. La [TRADUCTION] « seule possibilité de recouvrement » qui s'offrait aux créanciers de Bluberi résidait donc dans l'AFL et l'introduction d'une action à l'égard des réclamations retenues (motifs du juge surveillant, par. 91). Fait peut-être plus important, même si les créanciers avaient disposé de plusieurs moyens de recouvrement, tant dans l'affaire *Crystallex* que dans la présente affaire, la simple existence de ces moyens n'aurait pas nécessairement modifié la nature des accords de financement de litige par un tiers en cause ni n'aurait eu pour effet de les convertir en plans d'arrangement. La question que doit se poser le juge surveillant dans chaque affaire est de savoir si l'accord qui lui est soumis doit être approuvé à titre de financement temporaire. Certes, les autres moyens de recouvrement dont disposent les créanciers peuvent entrer en ligne de compte dans la prise de cette décision discrétionnaire, mais ils ne sont pas déterminants.

[114] Ajoutons que la charge relative au financement de litige ne convertit pas l'AFL en plan d'arrangement en [TRADUCTION] « subordonn[ant] » les droits des créanciers (motifs de la Cour d'appel, par. 90). Nous reconnaissons que cette charge aurait pour effet de placer les créanciers garantis comme Callidus derrière Bentham dans l'ordre de priorité, mais ce résultat est expressément prévu par l'art. 11.2 de la *LACC*. Cette « subordination » ne convertit pas le financement temporaire autorisé par la loi en plan d'arrangement. Retenir cette interprétation aurait pour effet d'annihiler le pouvoir du juge surveillant d'approuver ces charges sans un vote des créanciers en vertu du par. 11.2(2).

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

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

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

VI. Conclusion

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

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

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

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

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

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

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

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

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

VI. Conclusion

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

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

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

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

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

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

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

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

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

TAB 2

CITATION: Rose-Isli Corp. v. Frame-Tech Structures Ltd., 2023 ONSC 832
COURT FILE NO.: CV-22-00682959-00CL
DATE: 20230202

SUPERIOR COURT OF JUSTICE – ONTARIO

(COMMERCIAL LIST)

RE: ROSE-ISLI CORP., 2631214 ONTARIO INC., SEASIDE CORPORATION, and 2735440 ONTARIO INC., Applicants

AND:

FRAME-TECH STRUCTURES LTD., MICHAEL J. SMITH, FRANK SERVELLO, CAPITAL BUILD CONSTRUCTION MANAGEMENT CORP., and 2735447 ONTARIO INC., Respondents

BEFORE: Kimmel J.

COUNSEL: *See Counsel Slip (attached)*

HEARD: December 15, 2022, January 6, 2023 (with further written submissions provided on January 13, 2023) and January 26, 2023

ENDORSEMENT

(RECEIVER'S MOTION FOR AVO AND CROSS-MOTION TO REDEEM AND/OR APPROVAL OF CREDIT BID)

[1] The court appointed receiver, Ernst & Young Inc., (the "Receiver") of 2735447 Ontario Inc. (the "Company") brings this motion for an approval and vesting order ("AVO") and an order for ancillary relief. This proceeding has a unique procedural history that has resulted in several court attendances and interim endorsements.

[2] The circumstances are unusual because of the dealings between 2735440 Ontario Inc. ("273 Ontario") and the Receiver, as well as the different interests that 273 Ontario has in the Property (defined below). 273 Ontario is both a second mortgagee that wants to be paid and a joint venture participant in the Rosehill Project that was to be developed on the Property. The Receiver was appointed upon 273 Ontario's application under the oppression remedy, s. 248 of the *Business Corporations Act*, R.S.O. 1990, c. B-16.

[3] This is the court's final decision on the Receiver's motion. It is also the final decision on 273 Ontario's cross-motion to redeem the Property or, in the alternative, for an order approving its credit bid in the court ordered sales process.[1]

[4] For the reasons that follow, the Receiver's motion is granted and the cross-motion is dismissed.

Prior Court Orders

[5] Ernst & Young Inc. was appointed as the Receiver and manager over all the assets, undertakings and properties of the Company by order dated July 8, 2022 (the "Appointment Order"). This included the real property municipally described as 177, 185 and 197 Woodbridge Avenue, Vaughan, Ontario, and all proceeds thereof (the "Property"). These are the lands upon which the proposed "Rosehill Project" was to be constructed.

[6] The Receiver's powers under paragraph 3 of the Appointment Order include:

> (j) [T]o market any or all of the Property, including advertising and soliciting offers in respect of the Property or any part or parts thereof and negotiating such terms and conditions of sale as the Receiver in its discretion may deem appropriate, and without limiting the generality of the foregoing, to take into account any offers to purchase the Lands or other assets of the Company that have been received and/or accepted to date as part of the sales process described in the Grossi Affidavit;
>
> (k) [W]ith the approval of this Court, to sell, convey, transfer, lease or assign the Property or any part or parts thereof out of the ordinary course of business; provided, however, that in each such case notice under subsection 63(4) of the *Ontario Personal Property Security Act*, or section 31 of the Ontario *Mortgages Act*, as the case may be, shall not be required;

[7] The Appointment Order contemplates that the Receiver may seek court approval to convey, transfer or sell the Property and seek vesting or other orders as may be needed to convey the Property to a purchaser free and clear of any liens, encumbrances or other instruments affecting it.

[8] The prescribed responsibilities and powers of the Receiver under the Appointment Order are similar to those prescribed in insolvency situations when a receiver is appointed under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3. However, the Appointment Order was not

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[1] It was noted that, as a practical matter, the latest version of 273 Ontario's credit bid would form the basis for the implementation of the right of redemption if that relief were to be granted.

predicated upon any finding that the Company was insolvent. It was made in the context of the within oppression remedy application commenced by 273 Ontario and others as a result of a breakdown in the relationship between the joint venture participants in the Rosehill Project.

[9] While the Company has not been declared insolvent, the Receiver suggests that it may now be. In any event, that issue is not before the court.

[10] When the Receiver was appointed, there appeared to be a consensus that the Property would be sold. While a credit bid from 273 Ontario was not ruled out, it declined to make a stalking horse bid.

[11] The Receiver developed a sale and marketing process in consultation with, among others, 273 Ontario. Although not required in light of the powers granted to it under the Appointment Order, the Receiver sought, and was granted, an order approving its proposed sale and marketing process. No party opposed the requested order and it was granted on September 12, 2022 (the "Sale Process Order"). The Sale Process Order authorized and directed the Receiver to commence the Sale Process (described in the Receiver's First Report) for the purpose of soliciting interest in and opportunities for a sale of the Property.

[12] The approved Sale Process was to proceed on an estimated timeline of 60 days and included the following: the retention of a listing broker, the establishment of a data room, the preparation of a confidential information memorandum, form of confidentiality agreement, teaser for prospective purchasers, the broker contacting potentially interested parties, a bid deadline of approximately 45-50 days for submissions by interested parties of a binding, irrevocable and unconditional asset purchase agreement (the "Binding APA") that was to comply with specified requirements (including a ten percent deposit, proof of financing and a closing date within five days of court approval, among other things) and the eventual selection of a successful bidder.

[13] The Receiver had the authority to extend the Sale Process timeline, acting reasonably, with a view to securing a fair and reasonable bid for the Property. The Receiver also had the authority to extend the bid deadline or cancel the Sale Process.

[14] Under the Sale Process, the successful bid and transaction would require court approval to transfer of the Property free and clear of all liens and claims, subject to any permitted encumbrances, pursuant to an approval and vesting order.

[15] The Sale Process allowed that "[i]f the Receiver receives one or more Binding APAs, it may, in the Receiver's sole discretion, negotiate with such bidders with a view to improving the bids received."

[16] The Sale Process required the Receiver to consider and review each Binding APA based on several factors, including:

> Items such as the proposed purchase price and the net value provided by such bid, the claims likely to be created by such bid in relation to other bids, the counterparties to such transactions, the proposed transaction documents, other

> factors affecting the speed and certainty of the closing of the transaction, the value of the transaction, any related transaction costs, the likelihood and timing of consummating such transactions, and such other matters as the Receiver may determine.

[17] The bid deadline was November 25, 2022.

The Motions

[18] The procedural history is somewhat lengthy but provides important context. It was detailed in the court's January 18, 2023 endorsement and is repeated, with necessary additions and amendments, for ease of reference herein. Capitalized terms not defined herein shall have the meaning ascribed to them in the Receiver's Reports filed in connection with these motions: the Second Report filed December 11, 2022, the First Supplement to the Second Report filed December, 19, 2022 ("Supplementary Report"), and the Second Supplement to the Second Report Filed January 25, 2023 ("Second Supplementary Report").

[19] The Receiver seeks an AVO, *inter alia*:

a. approving the agreement of purchase and sale dated December 9, 2022 (the "APS") between the Receiver and ORA Acquisitions Inc. ("Ora" or the "Purchaser") for the purchase and sale of the assets, undertakings and properties of the Company (the "Purchased Assets"), including but not limited to the Property, and authorizing the Receiver to complete the transaction contemplated therein (the "Transaction");
b. vesting the Purchased Assets in the Purchaser upon the closing of the Transaction, free and clear of all security interests, liens and the like, whether secured or unsecured; and
c. ordering that immediately after the delivery of the Receiver's certificate confirming the closing of the Transaction, each of the Unit Purchaser Agreements (as defined hereinafter) shall be deemed to have been terminated by the Receiver and any rights or claims thereunder or relating thereto are not continuing obligations effective against the Property or binding on the Purchaser.

[20] The Receiver is also asking the court to grant an ancillary order (the "Ancillary Order") for, *inter alia*, the approval of: (i) the Receiver's actions and activities and statement of receipts and disbursements described in its Second Report, (ii) the creation of appropriate reserves for the fees of the Receiver and its counsel, future anticipated receivership expenses and a reserve for Registered Lien Claims (defined hereinafter), (iii) proposed distributions that would satisfy the first mortgage charge in favour of Trez Capital Limited Partnership ("Trez")[2] and the Receiver's

[2] After the court's endorsement of January 18, 2023, and just prior to the re-attendance of the parties on January 26, 2023, the Trez first mortgage was paid out and assigned to Toronto Capital. Toronto Capital is now the first ranking

Borrowings Charge (as defined in the Appointment Order), and (iv) a limited sealing order in respect of certain identified confidential exhibits to the Receiver's Second Report dated December 11, 2022.

[21] The Receiver's motion was originally returnable on December 22, 2022. It was adjourned to January 6, 2023 at the request of 273 Ontario. 273 Ontario, as a secured creditor of the Company, a joint venture participant and a bidder for the purchase of the Property, wanted the opportunity to make submissions on a more fulsome record regarding, among other things, the factors set out in *Royal Bank of Canada v. Soundair Corp.*, (1991), 4 O.R. (3d) 1 (C.A.). *Soundair* sets out the legal framework for the court to determine whether to approve the APS and Transaction.

[22] At the January 6, 2023 return date, 273 Ontario also brought its own cross-motion for an order permitting it to redeem the Property upon payment of the amounts found owing in priority to its second mortgage and asked the court to schedule a motion to disallow the Registered Lien Claims. Alternatively, 273 Ontario's cross-motion seeks an order approving its bid submitted on December 9, 2022 and supplemented on December 12, 2022 (the "Credit Bid").

[23] During the January 6, 2023 hearing, the court raised a question about the aspect of the relief sought by the Receiver that would deem the condominium unit purchase agreements (the "Unit Purchaser Agreements") to be terminated upon the closing of the Transaction. The Unit Purchaser Agreements were entered into by the Company prior to the receivership with purchasers of pre-sale residential and commercial condominium units (the "Unit Purchasers").

[24] Specifically, the court asked for the authority upon which the Receiver asserted that the interests of the Unit Purchasers are not affected by the requested order. The Receiver said (for example, in paragraph 94 of its Second Report) that this was predicated upon these Unit Purchasers having no interest in (or any claim to) the Property. This was also the basis upon which the Receiver determined that the Unit Purchasers did not need to be served with the Receiver's motion. The Receiver argued that the legal rights of the Unit Purchasers are protected by its proposal that deposits paid pursuant to the Unit Purchaser Agreements, and held by the law firm Schneider Ruggiero Spencer Milburn LLP, will be returned if the Unit Purchaser Agreements are terminated after the closing of the Transaction.

[25] At the court's request, further written submissions (reflecting inputs from both the Receiver and 273 Ontario) on this point were provided to the court on January 13, 2023.

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creditor on the Project. Unlike Trez, it supports the position of 273 Ontario and the redemption right that 273 Ontario seeks to exercise. However, the court assumes that, if the AVO is granted and the Transaction with Ora is approved, Toronto Capital, now standing in the position of Trez, will want to receive the same proposed distributions that the Receiver had sought the court's approval to make to Trez to satisfy the first mortgage charge. That should be clarified before the final draft of the AVO is provided to the court to be signed.

[26] By an endorsement dated January 18, 2023, the court reluctantly further adjourned the Receiver's motion and 273 Ontario's cross-motion, for, among others, the following reasons:

a. There may have been a misunderstanding between the Receiver and 273 Ontario about the importance and timeliness of the request by 273 Ontario for the Receiver to determine the validity of 273 Ontario's security and confirm the accepted amount of the 273 Ontario Loan and to determine the Registered Lien Claims. 273 Ontario considered both requests to be essential to its ability to exercise its right of redemption and/or make a Credit bid and to determine its essential conditions and structure. Once received, the prospect of an alternative transaction emerged (under the 273 Ontario Credit Bid or by virtue of the exercise of a right of redemption, if permitted) that does not terminate or disclaim the Unit Purchaser Agreements, albeit proposing to treat other stakeholders, such as the Registered Lien Claimants, less favourably than under the Transaction. The full implications of this have not been canvassed.

b. Thus far, 273 Ontario's position on the cross-motion had been that its Credit Bid (or terms of redemption) will not include sufficient cash to establish a reserve for the Registered Lien Claims pending their final adjudication or resolution. Under these circumstances, the court would like to be satisfied that both Registered Lien Claimants are on notice of that position and have been given the opportunity to address the court on that issue in light of the cross-motion.

c. While it may be reasonable to infer what the Registered Lien Claimants would prefer (to have a reserve established to protect their Registered Lien Claims until they have been determined), the court will not presume to know what the Unit Purchasers might say or what outcome they might prefer (particularly in light of the falling real estate market).

d. There is a strong argument in favour of the Receiver's position that the Unit Purchasers have no interest in the Property and no right to any remedy other than the return of their deposits. However, this is not an absolute or guaranteed outcome. Cases on this point indicate that prejudice to those purchasers can be a relevant consideration. Even if their legal rights are determined by the Unit Purchaser Agreements, there are stakeholders whose interests (which can extend beyond strict legal rights) may also be relevant when the court decides whether to allow 273 Ontario to redeem the Property or to grant the requested AVO and Ancillary Order.

e. Given that the termination of the Unit Purchaser Agreements is an explicit condition of the APS and sought as part of the AVO, and in the particular circumstances of this case, the Unit Purchasers should have been given notice of the Receiver's motion and the opportunity to respond to it. They may not oppose, or, their opposition may not be successful; however, they should be given the opportunity to be heard.

f. The court would also prefer to be fully informed about whether the Receiver has valid contractual grounds upon which to terminate the Unit Purchase Agreements that it relies upon.

g. Not every situation involving a deemed termination or approval of disclaimer of purchase agreements in pre-sale condominium projects in receivership will necessarily require notifying purchasers. Each case must be considered on its own facts. As noted, the legal rights of these purchasers may be limited, even if their interests are not necessarily limited to their strict legal rights.

h. Prejudice (if it can be established) is also a relevant consideration. It is not just the prejudice to the Unit Purchasers, but also to the Registered Lien Claimants and to the Purchaser, that must be considered and balanced (along with the interests of the secured creditors and any other creditors that the court is typically concerned with on these types of approval motions).

i. The Receiver will need to determine the most efficient way to put the Unit Purchasers (and perhaps the Registered Lien Claimants) on notice of the next return date and to set out a process for their positions, if any, to be coherently and efficiently put before the court.

j. Pending the input of the Unit Purchasers, if any, the satisfaction of the condition of the APS that the Unit Purchaser Agreements be terminated or disclaimed remains uncertain.

[27] In the court's January 18, 2023 endorsement, the court cautioned that the Unit Purchaser's positions would not be the only, or determinative, factor. It was noted that when the matter returned to court on January 26, 2023, the determination of the two remaining substantive issues: a) the purported exercise of 273 Ontario's right to redeem, and b) the approval of the APS, Transaction and proposed AVO, will involve, among other things, the court's consideration of the interests of, and prejudice to, all of the different stakeholders whose rights and interests are impacted differently by the different potential outcomes: see *Kruger v. Wild Goose Vintners Inc*., 2021 BCSC 1406, at para. 74; *BCIMC Construction Fund Corporation et al. v. The Clover on Yonge Inc.*, 2020 ONSC 3659, at para. 47; *Royal Bank of Canada*; *Ravelston Corp. Re*. (2005), 24 C.B.R. (5th) 256 (Ont. C.A.), at para. 40.

[28] The court foreshadowed in the January 18, 2023 endorsement that the ultimate consideration, involving the balancing of interests and alleged prejudices, may still favour approval of the APS, Transaction and AVO. That is in fact what has been decided.

Factual Background

[29] Much of the factual background was reviewed in the court's January 18, 2023 endorsement. Relevant portions, not addressed elsewhere in this endorsement, are recapped below in this section for ease of reference.[3]

The Project, Existing Mortgages and Sales Efforts Around the Time of the Appointment Order and Sale Process Order

[30] The Purchased Assets and the Property were part of the Rosehill Project, a joint venture between the applicants and the respondents for the development of a proposed six-story mixed use residential and commercial development. The Rosehill Project is anticipated to comprise of approximately 80 condominium units. The Company is the entity through which the joint venture was developing the Rosehill Project and is the registered owner of the Property. As at the date of the Appointment Order, 60 residential suites and one commercial unit had been pre-sold.

[31] Trez (an arm's length third party lender) provided mortgage financing to the Company, secured by a first charge on the Property that initially went into default and then matured in August and September of 2022.

[32] 273 Ontario provided mortgage financing to the Company secured by a second charge on the Property.

[33] Prior to the Appointment Order, the Company had begun marketing the Rosehill Project for sale. After the Appointment Order, the Receiver's efforts to re-engage with a pre-appointment prospective purchaser were unsuccessful.

[34] Before the court approved the Sale Process, the Receiver and 273 Ontario discussed the possibility of 273 Ontario being a stalking horse bidder or assuming the Trez first mortgage loan. 273 Ontario did not pursue either option at that time. The Sale Process did not foreclose the possibility of 273 Ontario making a bid.

The Registered Lien Claims

[35] The Receiver's First Report filed in connection with its motion to approve the Sale Process identified a construction lien registered by Capital Build on title to the Property for over $2 million (the "Capital Build Lien"). When the Sale Process was approved, the Receiver had not completed an analysis to validate the work performed to support the Capital Build Lien or its priority.

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[3] Counsel for 273 Ontario pointed out at the January 26, 2023 hearing (and counsel for the Receiver did not disagree) certain inaccuracies contained in the court's January 18, 2023 endorsement regarding the timing of registration of the Registered Lien Claims which are corrected herein.

[36] In addition to the Capital Build Lien, another lien is registered on title to the Property by an architect (the "KNYMH Lien"). The KNYMH Lien and the Capital Build Lien comprise the "Registered Lien Claims" and "Registered Lien Claimants" as the case may be.

[37] 273 Ontario indicated to the Receiver that it challenged the legitimacy of the Registered Lien Claims and its priority over 273 Ontario's second mortgage. 273 Ontario wanted the Receiver to determine the validity of the Registered Lien Claims before it made its bid.

[38] In October 2022, 273 Ontario made a specific request of the Receiver to review and determine the validity of the Registered Lien Claims. The Receiver reviewed the supporting documents for the Capital Build Lien and concluded that it was insufficient. The Receiver has advised that it intends to bring a motion for court approval to disallow that claim. The Receiver also reviewed the KNYMH Lien Claim, but allowed it. The Receiver understands that parties interested in the Registered Lien Claims may dispute the Receiver's determinations of their respective validity and priority. Moreover, it is expected that the court will eventually have to adjudicate their validity, amount and priority.

The 273 Security and Loan Amount

[39] On October 14, 2022, counsel for 273 Ontario requested that the Receiver review 273 Ontario's security based on the supporting documentation 273 Ontario had provided. On or around November 15, 2022, counsel for 273 Ontario asked the Receiver to confirm whether 273 Ontario's security was valid and enforceable. On November 18, 2022, counsel for the Receiver confirmed with counsel for 273 Ontario that its security was valid and enforceable, and that the Receiver accepted $6,389,204 as owing to 273 Ontario, assuming a payout as of December 31, 2022.

[40] On November 21, 2022, counsel for 273 Ontario wrote to the Receiver objecting to that amount. 273 Ontario claimed that it was owed $7,047,395.23, which included, among other things, interest to the July 16, 2023 maturity date of its loan (the "273 Ontario Loan").

The Bidding Process

a) <u>The 273 Ontario Bid</u>

[41] The Receiver advised counsel for 273 Ontario that any Credit bid made by 273 Ontario must provide cash in the amount of the Registered Liens Claims. That cash was to be set aside until the final determination of the validity and priority of the Registered Lien Claims, or the settlement thereof.

[42] 273 Ontario had concerns about submitting a Binding APA containing a Credit bid by the bid deadline given that: a) the Registered Lien Claims, which 273 Ontario did not believe were legitimate, had not been determined and 273 Ontario was not certain it could raise sufficient financing to satisfy both the Trez mortgage as well as the Registered Lien Claimants; and b) there was a discrepancy between the calculations of the Receiver and 273 Ontario as to the amount outstanding of the 273 Ontario Loan and that could be applied to the Credit bid.

[43] Counsel for 273 Ontario asked that the Receiver take no steps to "declare a winning bid or disregard [his] client's bid" until the hearing of a proposed motion to extend the bid deadline, proposed to be scheduled on November 29, 2022. Counsel for the Receiver advised counsel for 273 Ontario that the Receiver had discretion to extend the November 25, 2022 bid deadline if necessary.

[44] Regardless of what may, or may not, have transpired in the lead up to the November 25, 2022 bid deadline, counsel for the Receiver worked with counsel for 273 Ontario to attempt to address 273 Ontario's concerns thereafter. This included a suggestion that 273 Ontario submit a Credit bid which: (i) was conditional on the Registered Lien Claims being resolved to its satisfaction, and (ii) provided for a Credit bid of 273 Ontario's debt of not less than a specified amount. Counsel for the Receiver advised counsel for 273 Ontario that the Receiver would consider any written offer made by 273 Ontario by the bid deadline, and that no motion was necessary to extend the bid deadline.

[45] 273 Ontario submitted a non-binding letter of intent on the bid deadline. Even though it did not satisfy the requirements for bids under the Sale Process (nor was it accompanied by a commitment for firm irrevocable financing or a deposit), the Receiver received and considered its terms and continued discussions with 273 Ontario thereafter.

[46] By December 2, 2022, the amount in dispute between the Receiver's alleged amount owed under the 273 Ontario Loan, and 273 Ontario's alleged amount owed, was about $700,000. The Receiver advised 273 Ontario that it would accept, for the sole purpose of 273 Ontario's Credit bid, 273 Ontario's claim that $7,047,395.23 was owed under the 273 Ontario Loan.

b) Ora and other Bids

[47] Ora and two other bidders submitted bids compliant with the requirements under the Sale Process on the bid deadline of November 25, 2022. The Receiver negotiated with Ora with respect to various terms of its bid. The result was that the Ora submitted an unconditional, all cash, Binding APA on December 7, 2022 (the "Ora Binding APA"), a requirement of which is that all Unit Purchaser Agreements and the unit deposits received thereunder be excluded from the Purchased Assets (as defined in the Ora Binding APA).

c) Request for Binding APA from 273 Ontario

[48] After receiving the unconditional, executed Ora Binding APA on December 7, 2022, the Receiver asked 273 Ontario to submit a Binding APA with proof of financing and a deposit by December 9, 2022.

[49] On Friday December 9, 2022, 273 Ontario submitted its Credit Bid. The bid was conditional on financing (but accompanied by a commitment letter) and was submitted with an unconditional Binding APA that the Receiver could accept.

d) The Receiver's Decision

[50] The Receiver evaluated the Credit Bid and determined that it had significant risk around both the certainty of closing and 273 Ontario's ability to pay the cash component of the purchase price that was dependent on financing, which was itself contingent.

[51] The Receiver thereafter decided to accept the Ora Binding APA, as it contained fewer conditions, carried less closing risk and had a greater certainty of recovery for creditors generally. The Receiver considers the Ora Binding APA to represent the best executable offer received in the Sale Process. The Receiver accepted the Ora Binding APA on December 10, 2022.[4]

[52] On Monday, December 12, 2022, 273 Ontario supplemented its Credit Bid with financing commitments sufficient to pay certain priority payables, including the Trez Loan and the Receiver's Borrowing Charge, but not the Registered Lien Claims. Rather, the Credit Bid contains a closing condition that requires the Registered Lien Claims to be withdrawn or declared by the court to be invalid or dismissed. The Credit Bid does not require the termination or vesting out of the Unit Purchaser Agreements.

[53] After accepting the Ora Binding APA, the Receiver received and considered some additional material and terms presented by 273 Ontario. The Receiver attempted to facilitate a settlement between Ora and 273 Ontario that involved 273 Ontario paying a break fee to Ora. There appeared to be a settlement but 273 subsequently advised that it was not prepared to proceed with that settlement in advance of the initial return date of the Receiver's motion on December 15, 2022. This led to the request by 273 Ontario for an adjournment so that it could bring its cross-motion and make further submissions in opposition to the Receiver's motion (that procedural history is discussed above).

The APS

[54] The APS (comprised of the Ora Binding APA accepted by the Receiver) requires that title to the Property be vested in the Purchaser free and clear of the Unit Purchaser Agreements. As such, the proposed AVO vests out the Unit Purchaser Agreements.

[55] The net sale proceeds under the APS are expected to repay the first mortgage in full, and, subject to the final determination of the Registered Lien Claims, part of the 273 Ontario mortgage.

[56] Since the Property is to be transferred free and clear of all encumbrances and the Registered Lien Claims have not been finally determined, the Receiver seeks approval to hold

[4] There was some discrepancy in the evidence about the date on which the Ora Binding APA was accepted, but it was confirmed during the January 26, 2023 hearing to have been accepted on December 10, 2022.

back the following amounts comprising a proposed reserve for Registered Lien Claims (the "Reserve") until the Registered Lien Claims have been finally determined or resolved:

a. Until such time that the KNYMH Lien is resolved, the Receiver proposes to hold a cash reserve of $259,211 from the net sale proceeds of the proposed Transaction, being the full amount of the KNYMH Lien, pending further order of the court.

b. Until such time as the validity and priority of the Capital Build Lien has been resolved, the Receiver proposes to hold a cash reserve of $2,000,665 from the net sale proceeds of the proposed Transaction, being the full amount of the Capital Build Lien, pending further order of the court.

[57] Ora has permitted its ten percent deposit to be held in a non-interest bearing account pending the court's determination of these motions. It has also kept liquid cash available so that it can close (with payment of its all cash purchase price) within five days of any court approval of the Transaction.

The Assignment of the Trez First Mortgage Position

[58] Trez gave notice of default under its first mortgage in August 2022. The mortgage loan matured and became due and payable in September 2022. The net proceeds from the Transaction are projected to exceed the amounts owing to Trez. As noted above, the AVO contemplates paying out this first mortgage in full.

[59] 273 Ontario advised the court that, since the hearing on January 6, 2023, it continued to work with its financier, Toronto Capital Corp. ("Toronto Capital"), towards redeeming the Property. To that end, Toronto Capital and Trez entered into a Loan Sale Agreement (and ancillary agreements) whereby Trez assigned the first mortgage charge to Toronto Capital (the "Toronto Capital Assignment").

[60] Pursuant to the Toronto Capital Assignment, Trez was paid out in full on the first mortgage and Toronto Capital became the first priority secured creditor. This transaction closed, and the security was transferred from Trez to Toronto Capital on the morning of January 26, 2023, just prior to the hearing.

[61] Toronto Capital opposes the sale to Ora, among other things. As such, both the first-ranking (Toronto Capital) and second-ranking (273 Ontario) secured creditors now oppose the sale to Ora, and support either (i) the completion of the redemption of the Property by effecting a transfer of the Property to 273 Ontario; or (ii) the approval of the Credit Bid to effect a sale of the Property to 273 Ontario, both with the assumption of Toronto Capital's interest such that it is preserved.

[62] 273 Ontario has advised that it incurred financing fees of approximately $235,000 to arrange for the Toronto Capital Assignment, plus legal costs. These expenses are in addition to the amounts it has already spent funding the receivership and these proceedings.

Issues to be Decided

[63] The issues to be determined on the Receiver's motion and 273 Ontario's cross-motion were outlined in the January 18, 2023 endorsement to be as follows:

a. Are there stakeholders who should have been served with the motions:
   i. The Unit Purchasers?
   ii. The Registered Lien Claimants?
b. Does 273 Ontario have the right to redeem the Property?
c. Should the Transaction and the APS be approved and the proposed AVO be granted?
d. Should the Ancillary Order be granted?

Analysis

Preliminary Issues Regarding Service and Notice, and Updated Positions Regarding the Unit Purchasers and Registered Lien Claimants

[64] The service issues were addressed in the January 18, 2023 endorsement. The Receiver's Second Supplement to the Second Report provided the following updates and information arising out of that endorsement:

a. The Receiver made efforts to contact the Unit Purchasers and their counsel of record to notify them of the motions and provide them with the link to access the court materials by email and phone. They were invited to respond to the Receiver if they wished to put their positions before the court.

b. Some Unit Purchasers contacted the Receiver and all who expressed a desire to attend the January 26, 2023 hearing were provided with the video link.

c. A number of Unit Purchasers attended the hearing (approximately 30), and three requested and were given the opportunity to address the court.

d. As at January 24, 2023, of the 62 residential and commercial Unit Purchasers contacted by the Receiver, 32 indicated that they would prefer their Unit Purchaser Agreements be terminated, 9 indicated they would prefer their Unit Purchaser Agreements be maintained, and 21 did not respond, or responded without indicating a preference.

e. The Registered Lien Claimants are represented by counsel on the Service List and both were served prior to the motion dates on December 22, 2022 and January 6, 2023. Capital Build's Bankruptcy Trustee, and the Trustee's counsel, were also served with the motion materials. KNYMH's counsel attended the January 26, 2023 hearing.

f. The Receiver does not rely on the contractual provisions of the Unit Purchaser Agreements to terminate those contracts. The Receiver relies on the powers granted

> to it under paragraph 3(c) of the Appointment Order "to manage, operate, and carry on the business of the Company, including the powers to enter into any agreements, incur any obligations in the ordinary course of business, cease to carry on all or any part of the business, or cease to perform any contracts of the Company", as well as the court's inherent jurisdiction as the basis for terminating the contracts and returning deposits to the Unit Purchasers.

[65] At the January 26, 2023 hearing, some Unit Purchasers expressed the view that they would like to receive their deposits back and to have their Unit Purchaser Agreements terminated, having lost faith in the Rosehill Project coming to fruition. Others indicated that they would like to see the Rosehill Project built and to proceed with their purchase. One purchaser in particular (who also provided a statutory declaration) emphasized the attractive location, its proximity to amenities and services for seniors in the area and the enhancements to their unit to accommodate their particular needs. This purchaser expressed concerns about retirement plans and the detriment to purchasers and the community over the loss of the Rosehill Project.

[66] In its submission to the court on January 26, 2023, 273 Ontario advised that if it is permitted to redeem or has its Credit Bid approved, it will provide the Unit Purchasers with 30 days to advise whether they wish to have their units put back into the pool of units to be sold by 273 Ontario going forward, and if such sales are achieved (without loss) then 273 Ontario will cancel their contracts without cost or penalty to them. 273 Ontario is prepared to have any court order approving the redemption or acceptance of its Credit Bid incorporate such a provision into the order.

[67] 273 Ontario also indicated that it is prepared to have any court order approving the redemption or acceptance of its Credit Bid contain the following mechanisms to preserve the rights of the Registered Lien Claimants pending the determination of their rights by the court as follows:

> 273 is prepared to bond off 10 percent of the respective amount of the Capital Build and KNYMH Liens. Alternatively, in the event the Court approves the 273 Credit Bid or permits 273 to redeem the Property, the resulting order can provide that KNYMH's and Capital Build's rights under the Liens are preserved in the Property to the extent they are found to be in priority to the 273 mortgage following the closing of the transaction.

[68] Counsel for KNYMH indicated at the hearing that as long as its rights under s. 44(1) of the *Construction Act*, R.S.O. 1990, c. C.30 are preserved, and its lien is terminated on the basis of the payment of appropriate funds into court (the entire amount of the lien plus 25 percent for costs), or alternatively, its lien is preserved in the Property until such time as any process for the determination of the Registered Lien Claims has run its course, it takes no position on the motions.

Does 273 Ontario Have the Right to Redeem the Property and Should the Court Permit it to do so?

The Right to Redeem

[69] 273 Ontario argues that s. 2 of the *Mortgages Act*, R.S.O. 1990, c. M.40 guarantees a secured creditor's right to redeem. According to 273 Ontario, "[i]t permits the mortgagor or any 'encumbrancer', such as 273 [Ontario] as [a] secured creditor, to 'assign the mortgage debt and convey the mortgaged property' to any person."

[70] Section 2(1) of the *Mortgages Act* entitles the mortgagor to require the mortgagee to assign the mortgage debt and convey the property as the mortgagor directs. The mortgagee is bound to assign and convey accordingly. Section 2(2) of the Act allows that right to be enforced by each encumbrancer. A requisition of an encumbrancer prevails over that of the mortgagor.

[71] The right to redeem is a right of a debtor, upon payment of a debt, to recovery the property pledged to a creditor as security for payment of a debt: see *Wild Goose*, at para. 69.

[72] In this case, 273 Ontario seeks to convey the Property to itself (and would have sought to assign the first mortgage debt to its financier, Toronto Capital, but that has now preemptively occurred).

[73] Neither the Receiver nor Ora appear to disagree with 273 Ontario's theoretical right to redeem the Property as the second mortgagee. While this typically arises in foreclosure or court ordered sales (under, for example, r. 64 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194), 273 Ontario's request to redeem it is not opposed on the basis that no such right could ever arise in the context of a court ordered sale process in a receivership.

[74] Rather, what the Receiver and Ora oppose is the timing of 273 Ontario's purported exercise of this right. They maintain that the court should not exercise its discretion to allow a creditor to exercise a right of redemption after a court-ordered Sale Process is in place and a bid has been accepted. Particularly in this case, a Sale Process that the creditor (273 Ontario) was consulted about and did not oppose when it was approved by the court.

Should 273 Ontario be Permitted to Redeem the Property?

[75] The Receiver relies on *B&M Handelman Investments Limited v. Mass Properties Inc.* (2009), 55 C.B.R. (5th) 271 (Ont. S.C.) to argue that 273 Ontario should not be permitted to exercise its right of redemption at this stage in the proceedings.

[76] In *B&M Handelman*, the court relied on the wording of the order authorizing the receiver to sell the subject property to preclude an automatic right to redeem. The court noted that in each case where the Receiver took steps to market the Property and to sell it in the ordinary course of business with the approval of the court, "it was exclusively authorized and empowered to do so, to the exclusion of all other persons including debtors and without interference from

any other person": *B&M Handelman*, at para. 21. It was "[i]n the face of these provisions", that the court precluded an automatic right to redeem.[5]

[77] The Receiver argues that the Appointment Order and Sale Process Order in this case should be read as containing similar language that precludes a right of redemption. I have not found similarly prescriptive language in the court orders in this case.

[78] Of more direct concern in this case is the impact that allowing 273 Ontario to exercise its right of redemption would have on the integrity of the court approved Sales Process. The policy considerations that weighed heavily on the court in *B&M Handelman*, at para. 22 are of equal concern in this case:

> A mockery would be made of the practice and procedures relating to receivership sales if redemption were permitted at this stage of the proceedings. A receiver would spend time and money securing an agreement of purchase and sale that was, as is common place, subject to Court approval, and for the benefit of all stakeholders, only for there to be a redemption by a mortgagee at the last minute. This could act as a potential chill on securing the best offer and be to the overall detriment of stakeholders.

[79] These policy considerations are discussed in many of the cases decided after the case that 273 Ontario relies upon most heavily, *Bank of Montreal v. Hester Creek Estate Winery Ltd.*, 2004 BCSC 724, 2004 B.C.L.R. (4th) 149. They do not appear to have factored in the court's decision in *Hester*, in which the court was unequivocal on the use of a redemption in a sales process:

> [t]he integrity of the court process is not compromised by allowing a debtor or its trustee in bankruptcy to redeem the mortgaged property on the eve of an application to approve a sale of the property. Whenever there is a court-ordered sale process, it is always implicit that the conduct of the sale is subject to the debtor being able to pay off the secured creditor before a sale is approved by the court.

[80] The policy considerations inform the analysis in the cases decided after *Hester*, starting with *B&M Handelman*. Most recently, in *Wild Goose* at para. 74, the court noted that "[i]n a case in which a debtor seeks to redeem security after a sale has been negotiated by a receiver before a sale has been approved, consideration of the purchaser's interest and the efficacy and the integrity of the process by which an offer was obtained *may* favour approval of the sale" (emphasis added).

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[5] As a result of *B&M Handelman*, the court in *Wild Goose*, at para. 67 expressly reserved in the court order Wild Goose's right to redeem "that might otherwise be lost on the reasoning in [*B&M Handelman*]."

[81] While the court in *Wild Goose*, at para. 78 distinguishes *Hester* on the basis that all the secured creditors were protected by the redemption in *Hester*, the decision on whether to allow a redemption in *Wild Goose* still appears to have turned on the integrity of the sales process. At para. 80 the court notes, "[i]n my view, protecting the integrity of the sales process contemplated by the sale solicitation order outweighs Wild Goose's claim that it should be entitled to redeem the petitioner's security in the circumstances of the case."

[82] What emerges from these more recent cases is that the integrity of a court approved sale process is an important consideration. If a sale process is found to be sound, it should not be permitted to be interfered with by a later attempt to redeem. Further support for this approach can be found in the court's reasoning in *BDC v. Marlwood Golf & Country Club*, 2015 ONSC 3909, 27 C.B.R. (6th) 166, at para. 27: "[i]n this case, the sales process was properly run. Redemption of its mortgage by Marlwood in these circumstances would interfere with the integrity of that process."

[83] The court engages in a balancing analysis of the right to redeem against the impact on the integrity of the court approved receivership process: see *BCIMC Construction Fund Corporation et al. v. The Clover on Yonge Inc.*, 2020 ONSC 3659, at para. 41. The importance of the timing of the process in relation to the purported exercise of the right to redeem is emphasized at para. 36:

> In [*B&M*] *Handelman*, the Receiver had already run a bid process, had selected a purchaser and was moving to approve the purchase. Different considerations arise at that late a stage. Allowing debtors to redeem property on the sale approval motion would discourage potential purchasers from submitting bids in the first place and threaten the utility of the receivership process more generally.

The Balancing of Interests

[84] The rights enunciated in *Hester* and relied upon by 273 Ontario must be balanced with the integrity of the court approved sale process. That in turn requires a consideration of whether that sale process was carried out in a procedurally fair manner, with a view towards achieving the best (and not an improvident) price, and with regard to the interests of all stakeholders. That consideration is part of the analysis that the court must engage in under the *Soundair* principles when deciding whether to approve the Transaction and grant an AVO, discussed in the next section of this endorsement.

[85] The potential for prejudice to the different stakeholders is another consideration that is to be factored into the balancing exercise undertaken by the court in determining whether to permit the exercise of a right to redeem: see *Wild Goose*, at para. 74; *BCIMC*, at para. 47.

[86] The stakeholder interests identified in this case include:

a. The interest of 273 Ontario, a joint venture and the fulcrum creditor, in acquiring the Property to try to preserve its debt and equity in the Rosehill Project (and avoid the losses that it will suffer if the Transaction is approved), as manifested by the relief

sought in its cross-motion for the court's approval of its request to redeem or its Credit Bid.

b. The interest of the Receiver, in its capacity as the court appointed officer that sought the Sale Process Order and carried out the Sale Process, to protect the integrity of the court approved Sale Process.

c. The Purchaser is also invested in the integrity of the Sale Process, having participated in it in good faith. It also has a financial interest not only in the acquisition of the Property at the price agreed to under the Ora Binding APA, but in the lost opportunity costs by allowing its deposit to be held in a non-interest bearing account since November 25, 2022 and by maintaining sufficient liquidity to close the all-cash Transaction within five days of any court approval. While it engaged with the Receiver knowing that the Sale Process could be terminated by the Receiver, that never happened.

d. The priority interests of the first mortgagee (previously Trez and now Toronto Capital) and the Registered Lien Claimants are now protected under both the Ora Transaction and the redemption/Credit Bid scenario, so they have no prejudice to be considered. Any prejudice to Toronto Capital in respect of its plans to finance 273 Ontario has been created after the Receiver accepted the Ora Binding APA and is not a relevant consideration.

e. The Unit Purchasers whose Unit Purchase Agreements will be terminated (and deposits returned) under the proposed Transaction, if approved. They have now been given notice and have not come forward with a strong voice of opposition to the termination of those agreements by the court.[6] Of those who have expressed a view, more prefer this than oppose it, and more still were silent on the point. The number and substance of the opposition is underwhelming, given how far away the Rosehill Project is from completion.[7]

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[6] The purpose of requiring that the Unit Purchasers be given notice of the relief sought was so that they were made aware and given the opportunity to make submissions about whether the court could or should make the requested order deeming the Unit Purchaser Agreements to have been terminated. .

[7] After the Unit Purchaser feedback was received and reported, 273 Ontario argued that only the interests of those who want to continue with their Unit Purchase Agreements should be considered. This was said to be logical because the court is being asked to allow the Receiver to break those agreements, whereas the Unit Purchasers in favour of that happening do not have a right themselves to break their agreements. That takes too narrow a view of the Unit Purchasers' interests. They all have an interest in what happens to their Unit Purchase Agreements as a consequence of the Transaction that the court is being asked to approve, even if they do not have the right to break, or specifically enforce, their agreements because of the terms of the Appointment Order.

f. Any other remaining unsecured creditors are unlikely to recover under either scenario and are not being directly impacted beyond the non-recovery of their debt.

[87] The court recognizes that all stakeholder interests may not be equal: "[a]lthough the interests of the debtor and purchaser are also relevant, on a sale of assets, the receiver's primary concern is to protect the interests of the debtor's creditors": *Skyepharma PLC. v. Hyal Pharmaceutical Corp*. (1999), 12 C.B.R. (4th) 87 (Ont. S.C.), at para. 6.

[88] The other stakeholder interests in this case are either neutral or militate in favour of preserving the integrity of the Sale Process, which is what is stacked up against 273 Ontario's interests as a secured creditor and joint venture participant that will not fully recover its debt, investment or costs of the receivership if the Transaction is approved and is completed.

[89] While the situation in this case is distinguishable from most of the decided cases in that it is a secured fulcrum creditor, rather than the debtor company in default, seeking to redeem, that does not diminish the importance of the integrity of the court approved Sale Process.

[90] The normal course would be for the Credit Bid to be made at the outset of the Sale Process as the stalking horse bid. However, 273 Ontario was not willing or able to put forward a bid at the outset of the process. Asking the court to consider an improved Credit Bid (as of January 26, 2023) that may now be executable more than a month after the extended bid deadline under the Sale Process (and almost two months after the original bid deadline) undermines the integrity of the Sale Process.

[91] Similarly, 273 Ontario only sought to redeem at the end of the court approved Sale Process that it was consulted on and participated in, after it became apparent that it was not able to make a competitive bid by the time of the extended bid deadline it was given of December 9, 2022. Allowing this right to be exercised at that late stage also undermines the Sale Process. If 273 Ontario had wanted to reserve its right to redeem to the end of the Sale Process, that is something that should have been expressly addressed at the time the Sale Process Order was made.

[92] To be clear, it is not, as was suggested by 273 Ontario, the mere fact that the Receiver decided to accept the Ora Binding APA on December 10, 2023 that the court is looking at when considering whether the right to redeem is available. It is the fact that there was a court approved Sale Process that 273 Ontario was consulted about, did not oppose and participated in and only sought to override by a redemption when it was unable to make a competitive bid.

[93] The existence of the APS (accepted Ora Binding APA) was always subject to court approval. If not approved, or if the court was not prepared to order the deemed termination of the Unit Purchase Agreements (with the result that the condition of the APS would have failed unless waived by both the Receiver and Ora) then 273 Ontario might have been permitted to step in with its redemption or Credit Bid. But that has not transpired.

[94] The court has the jurisdiction to approve the deemed termination of the Unit Purchaser Agreements. The proposed treatment of the Unit Purchasers upon said termination is consistent

with their contractual remedies for a breach of their agreements. No compelling reason has been presented not to approve this, if it is otherwise determined that the *Soundair* principles are satisfied (discussed in the next section).

[95] The weighing of the interests (and prejudice) of all stakeholders is also an integral part of the consideration of the *Soundair* principles. If the Receiver is found to have carried out the court approved Sale Process in a manner consistent with the *Soundair* principles, the balance will favour protecting the integrity of the Sale Process over 273 Ontario's right of redemption.

Should the Transaction and APS be Approved and the Proposed AVO Granted?

[96] The proposed sale to Ora must be demonstrated to meet the sale approval test from *Soundair*. To do so, the Receiver must demonstrate that:

a. sufficient effort was made to obtain the best price and that the receiver has not acted improvidently;

b. it has considered the interests of all stakeholders;

c. the process under which offers were obtained and the sale agreement was arrived at was consistent with commercial efficacy and integrity; and

d. there has not been any unfairness in the working out of the process.

a) The Receiver's Efforts and Actions Were Provident

[97] According to the Court of Appeal in *Soundair*,

> [W]hen a receiver's sale is before the court for confirmation the only issues are the propriety of the conduct of the receiver and whether it acted providently. The function of the court at that stage is not to step in and do the receiver's work or change the sale strategy adopted by the receiver. Creditors who asked the court to appoint a receiver to dispose of assets should not be allowed to take over control of the process by the simple expedient of supporting another purchaser if they do not agree with the sale made by the receiver. That would take away all respect for the process of sale by a court-appointed receiver.
>
> …
>
> When deciding whether a receiver had acted providently, the court should examine the conduct of the receiver in light of the information the receiver had when it agreed to accept an offer. In this case, the court should look at the receiver's conduct in the light of the information it had when it made its decision on March 8, 1991. The court should be very cautious before deciding that the receiver's conduct was improvident based upon information which has come to light after it made its decision.

[98] The Receiver consulted with stakeholders, including 273 Ontario, in developing the Sale Process, which was followed. The confidential exhibits filed indicate a range of bid prices with differing conditions. Even the pre-Sale Process bid was conditional on due diligence and was withdrawn. Aside from that one withdrawn pre-Sale Process bid, the Ora Binding APA reflects a purchase price within the range of other all cash bids received and within the (low end of the) range of estimates of value from three independent brokers.

[99] If there was a subsequent bid that demonstrates that Ora's price was improvidently low, that might be a relevant *ex post facto* consideration, but there is no comparable bid in this case. What we have is just a willingness on the part of 273 Ontario, a second mortgagee and investor who stands to lose a lot under the Ora Transaction to take on the risk and burden of the first mortgage, the Registered Lien Claims (to the extent they are ultimately determined to be valid and payable) and other expenses that will rank ahead of the second mortgage. 273 Ontario argues that its bid is almost 50 percent higher than the Ora Binding APA purchase price. However, that is not a reasonable comparison as the 273 Ontario Credit Bid is not a market bid that reflects any independent value assessment to which the court could compare the Ora bid. It is more appropriately characterized as the by-product of the value of the registered security on the Property.

[100] Some of the other criticisms of 273 Ontario about the Receiver's conduct and actions are addressed under the third category of *Soundair* (process related) considerations, although there may be some overlap between the first and third categories.

[101] For purposes of this first part of the analysis, the Ora Binding APA has not been demonstrated to be improvident.

b) Consideration of Stakeholder Interests

[102] Under the second consideration, I agree with 273 Ontario that the court should be primarily concerned with the interests of creditors. It is secondarily concerned with the process considerations and the interests of other stakeholders: see *Soundair*, citing *Crown Trust Co. et al. v. Rosenberg et al*. (1986), 60 O.R. (2d) 87 (H.C.).

[103] The fact that the secured creditor (273 Ontario now effectively operating from the first and second secured positions) supports its own bid is not surprising or a particularly weighty factor. However, as was observed in the concurring opinion in the Court of Appeal's decision in *Soundair*,

> I should like to add that where there is a small number of creditors who are the only parties with a real interest in the proceeds of the sale (i.e., where it is clear that the highest price attainable would result in recovery so low that no other creditors, shareholders, guarantors, etc., could possibly benefit therefrom), the wishes of the interested creditors should be very seriously considered by the receiver.

[104] The court understands that 273 Ontario stands to lose a great deal if the Transaction and the Ora Binding APA are approved. There can be no doubt that the interests of the creditors are an important consideration and that the opinion of the creditors as to which offer ought to be accepted is something to be taken into account. However, that should not be at the expense of the integrity of the Sale Process.

[105] 273 Ontario's desire to have the opportunity to make a Credit Bid was facilitated by the Receiver in the accommodations it afforded to 273 Ontario up to December 9, 2022. The Receiver went to great lengths to accommodate 273 Ontario, but 273 Ontario was not able to put together a firm unconditional bid by December 9, 2022, when it was told it had to.

[106] At that time, the Receiver also had to consider the interests of Trez (the first priority secured creditor) and make a business judgment about whether to proceed with the Ora Binding APA or 273 Ontario's Credit Bid after it was received on December 9, 2022. That decision was made with regard to the factors that were outlined in the court approved Sale Process, including the relative closing and execution risks associated with each.

[107] 273 Ontario complains that the Receiver rushed to accept the Ora Binding APA on December 10, 2022 rather than continuing to engage with a view to receiving an unconditional Credit Bid from 273 Ontario, after it threatened to exercise its right to redeem the Property. However, by December 10, 2022, the Receiver was in the position of having to accept the Ora Binding APA or risk losing the Transaction. The Ora Binding APA was the only available closable deal at the time that had a certain outcome of full recovery for the first secured creditor, Trez. This is owing to the fact that 273 Ontario did not have firm financing to satisfy the first priority secured loan, whether by redemption or through a Credit Bid.

[108] The Receiver, in its discretion, determined that there was a risk of losing the Ora Binding APA and that is what led to the decision to accept it after evaluating the two options available. The Receiver's judgment at the time, for which no grounds have been suggested as warranting a lack of deference, was that Ora could walk from the Transaction if the Receiver did not sign back the Ora Binding APA. The Receiver was worried about the terms and conditions of the Credit Bid and its conditional financing at the time.[8] The Receiver's business judgment about the potential loss of the Ora Binding APA, weighed against the inability of 273 Ontario to come forward with a firm Credit Bid, is not something that the court should second guess.

[109] As was observed in the earlier discussion about balancing stakeholder interests, in this case it largely comes down to a balancing of the integrity of the Sale Process against 273 Ontario's interests. The following passage from *Soundair* is instructive:

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[8] 273 Ontario suggested that the Receiver should have known, or could have asked and been told, that the financing would be waived by the lender, despite what the commitment letter said. If that was the case, that was something 273 Ontario could have conveyed to the Receiver, but did not do so.

> The process is very important. It should be carefully protected so that the ability of court-appointed receivers to negotiate the best price possible is strengthened and supported.

[110] The integrity of the Sale Process is not just about the fact that the Ora Binding APA had been accepted, for reasons indicated earlier.

[111] The record is clear that consideration was given to all stakeholders' interests. The Purchaser's interests were not given more or undue weight over the interests of secured creditors. If anything, it was the interests of Trez, the first secured lender at the time, that the Receiver was, justifiably, concerned about if the Transaction was lost. The second secured lender's interests were not disregarded, ignored or given unfair consideration; they just did not tip the balance in the ultimate decision by the Receiver to accept the Binding Ora APA.

[112] Similarly, the interests of the Unit Purchasers, whose agreements the court is being asked to deem to have been terminated, were considered. It was determined that they were being treated in accordance with their contractual rights upon any breach or termination of the Unit Purchase Agreements by the Company. Although their contractual remedies upon termination are not being compromised (they are getting their deposits back as they would be entitled to on any breach), a minority of them, when given the opportunity, expressed disappointment that their expectation of purchasing a completed unit in the Rosehill Project will not be met. The majority appear to be content with the preservation of their contractual remedies upon termination or breach and the return of their deposits, a reasonable expectation that will be met if the Transaction is approved.

[113] In the end, what is important is that all relevant stakeholder interests were considered and balanced by the Receiver, including those of 273 Ontario. I am satisfied that they were.

c) <u>The Commercial Efficacy and Integrity of the Sale Process</u>

[114] 273 Ontario has criticized the manner in which the Receiver reached out to some prospective bidders (and failed to follow-up directly with one of the known pre-Sale Process bidders), as well as the fact that an outdated draft non-reliance appraisal report was not in the data room. The Receiver has explained its actions with reference to these criticisms in a manner that satisfies the court. They do not diminish the integrity of the Sale Process that the Receiver followed.

[115] 273 Ontario also criticizes the Receiver for running a "fire sale" because it was mentioned in its materials for the Sale Process that the Rosehill Project had "fallen into receivership," thereby suggesting there was an insolvency situation. Having considered all the evidence about the implementation of the Sale Process, I do not consider this to be a fair characterization of the Receiver's conduct during the Sale Process. Nor was it improper for the fact that the Rosehill Project was in receivership to have been mentioned; the Receiver has to identify itself as such when engaging with prospective purchasers.

[116] It has not been suggested that the court approved Sale Process itself lacked commercial efficacy or integrity. Nor has it been demonstrated that the Receiver failed to follow that process. I am satisfied that the process under which bids were obtained and the APS was arrived at was consistent with commercial efficacy and integrity.

d) No Unfairness in the Working out of the Process

[117] The Receiver engaged with 273 Ontario and made efforts to take its interest in making a bid into account. Even after it missed the bid deadline, 273 Ontario's offer letter was received and considered and 273 Ontario was encouraged and given time to compile a bid.

[118] Further, the Receiver treated 273 Ontario fairly in receiving and considering the bid it eventually made, which was not accompanied by proof of financing and was no accompanied by a Binding APA. Whereas the Receiver could have rejected this for non-compliance, it did not do so.

[119] 273 Ontario complains that it was "jammed" because of the Receiver's delay in confirming the validity, enforceability and amount owing under the 273 Ontario Loan and in dealing with the Registered Lien Claims, both of which 273 Ontario maintains impacted its ability to submit a Binding APA. The Receiver maintains that it responded in a timely manner to requests from 273 Ontario about these matters. It even eventually agreed to allow 273 Ontario's second mortgage claim to be valued at the full amount 273 Ontario submitted, and not at the lesser amount that the Receiver had valued it at for other purposes.

[120] 273 Ontario also complains that the Receiver first invited it to make its Credit Bid conditional upon the resolution of the Registered Lien Claims to 273 Ontario's satisfaction and then gave as one of its reasons for preferring the Ora Binding APA that 273 Ontario's Credit Bid was conditional upon the Registered Lien Claims being withdrawn or found to be invalid. The suggestion that a bid could be made conditional upon a satisfactory resolution of these claims does not mean that this condition would not be factored into the evaluation of the bid, it just meant that the requirement that the bid be unconditional for it to even be considered was being waived (as an accommodation to 273 Ontario, something that the Receiver did not have to do).

[121] It is suggested that the Receiver should have started to validate 273 Ontario's mortgage security in July 2022, and that its delay until its final confirmation of the amount on December 3, 2022 was unreasonable. The Receiver has explained the normal course approach to validating a security. Moreover, the record demonstrates a timely response to 273 Ontario's request that it do so when made in October 2022, including allowance for a higher amount than what the Receiver considered appropriate for the purposes of the Credit Bid that it permitted 273 Ontario to make after the bid deadline had already passed.

[122] Similar criticisms are made about the Receiver's failure to prioritize the evaluation of the Capital Build Lien (which 273 Ontario had maintained was fraudulent from the outset). Yet, when asked to prioritize this, the Receiver did so and made the decision to seek approval from the court to disallow it. The timing of 273 Ontario's requests for the security review (and subsequent request for confirmation of the accepted amount of the 273 Loan) and for the

determination of the Registered Lien Claims have been addressed earlier in this endorsement. 273 Ontario suggests that, because it was funding the receivership, its requests should have been given priority by the Receiver. The Receiver's duties are to the court and all stakeholders. But it did prioritize issues when they were raised by 273 Ontario, so these complaints are unfounded both legally and factually.

[123] If 273 Ontario had wanted its mortgage security validated and the Registered Lien Claims dealt with before the bid deadline under the Sale Process, it could have asked that this be done at the time of the court's approval of the Sale Process Order. It did not do so. Now it suggests that the Receiver was remiss in not appreciating how important this was to 273 Ontario's participation in the Sale Process. I do not accept that to be a valid criticism of the Receiver.

[124] At worst, there appears to have been a misunderstanding between the Receiver and 273 Ontario about whether the Receiver was working on evaluating 273 Ontario's security and the Registered Lien Claims prior to the specific requests from 273 Ontario that it do so commencing in October 2022. The Receiver addressed these points during the Sale Process when it was asked to do so in October 2022. The real issue is that 273 Ontario did not agree with, and was perhaps surprised by, the Receiver's assessments once received. The court does not accept the assertion by 273 Ontario that the Receiver did not address these matters in a timely and diligent manner. Even if 273 Ontario had thought, or hoped, they were being addressed earlier, that possible misunderstanding does not rise to the level of a failing on the Receiver's part.

[125] 273 Ontario argues that, but for the Receiver's artificial and aggressive deadlines, and its failure to address the two issues 273 Ontario requested it to take care of well before the bid deadline, the Toronto Capital funding commitment would have been provided to the Receiver before the bid deadline and its bid would not have suffered from the identified execution risks. I have difficulty with the position that this delay was the Receiver's fault. The deadlines were prescribed under the Sale Process. It is not lost on the court that 273 Ontario was engaged in a Sale Process that was primarily directed to prospective third-party purchasers. It declined to put in a stalking horse bid in advance of the Sale Process Order and then had to scramble when it decided to do so once the Sale Process was underway.

[126] 273 Ontario, at some point in the process, became concerned about the value of the bids that might materialize and began to work on its Credit Bid. 273 Ontario then found itself scrambling to find financing for a Credit Bid and was not able to do so even by the extended deadline of December 9, 2022. I am not persuaded that this was a function of any unfairness in the Sale Process that the Receiver followed, or its conduct in dealing with requests from 273 Ontario to review its security and determine the Registered Lien Claims.

[127] 273 Ontario then complains that after it submitted its Credit Bid, it was rejected out of hand without any further negotiation after the Receiver rushed to accept the Ora Binding APA. 273 Ontario complains that the Receiver did not contact it to invite it to remove conditions before accepting the Ora Binding APA. 273 Ontario suggests that this was done for Ora between November 25 and December 6. In fact, it was done for both Ora and 273 Ontario before the December 9, 2022 deadline. Suggestions were made in an effort to assist 273 Ontario in putting

in its Credit Bid despite the challenges it was facing. 273 Ontario did not raise concerns about conditions on its financing with the Receiver before submitting its Credit Bid on December 9, 2022.

[128] The Receiver extended an accommodation to 273 Ontario by allowing it to continue in the Sale Process after the November 25, 2022 Bid Deadline and to work forward from its offer letter to its Credit Bid on the same time line as it afforded to Ora to move forward from its initial Bid to the Binding Ora APA that was submitted on December 7, 2022, and then 273 Ontario was given two days after that to submit its Credit Bid. 273 Ontario was not treated unfairly in this process. Ora and 273 Ontario were both afforded opportunities to improve their bids after November 25, 2022 and were treated equitably during that period.

[129] Events that occurred after the Ora Binding APS was accepted on December 10, 2022 are of marginal relevance, unless they shed light upon matters that were known or ought to have been known at the relevant time. In the category of marginal relevance would be the assignment of the Trez first priority mortgage to Toronto Capital that has alleviated some of the execution risk associated with the 273 Ontario Credit Bid that the Receiver had identified when it decided to accept the Ora Binding APA. The fact that almost two months later, 273 Ontario was able to get financing in place to take out the first secured mortgage does not diminish the legitimacy of the Receiver's concerns about the relatively more significant execution risk associated with the Credit Bid when it was considering which bid was in the best interests of the stakeholders of the Company on December 10, 2022.

[130] Lastly, I do not find there to have been anything unfair about the Receiver's efforts to facilitate a commercial resolution between 273 Ontario and Ora after the Ora Binding APA had been accepted and 273 Ontario was able to obtain financing. No one tried to hold 273 Ontario to that resolution, even though it agreed to it and later indicated that it had felt pressured to enter into it and was not prepared to follow through with it.

[131] The fact that the terms and limitations on the 273 Credit Bid ultimately submitted were less favourable in the Receiver's assessment than other bids does not mean it was not properly considered. I find that 273 Ontario was treated fairly by the Receiver in the working out of the Sale Process.

e) Approval of the APS, Transaction and AVO

[132] Accordingly, the *Soundair* principles having been satisfied, the APS and Transaction are approved and the AVO is granted.

Should the Ancillary Order be Granted?

[133] Counsel for 273 Ontario suggested that the requested ancillary relief should be delayed, regardless of the outcome of the decision on the AVO because there are concerns about fees that 273 Ontario has not had time to address. However, the Receiver is not seeking approval of its fees under the Ancillary Order. The relief it is seeking is related to the AVO.

[134] If the *Soundair* requirements are found to have been met and the Receiver's conduct in carrying out the Sale Process is not impugned, it should not be open to further challenge. The Receiver's actions and activities during the relevant period should be approved. The approval of the statement of receipts and disbursements is simply a recognition of what amounts were received and paid. It is not an approval of any amounts that may have been paid to the Receiver and its counsel. The Receiver will still be required to seek those approvals in the normal course with the appropriate fee affidavits.

[135] In the meantime, establishing a reserve or holdback from the sale proceeds to satisfy the fees, in such amounts as may ultimately be approved, is a prudent and reasonable thing to do, particularly given the breakdown in the relationship between the Receiver and 273 Ontario.

[136] The proposed distributions, to the first mortgagee and on account of the Receiver's Borrowing Charge (for amounts borrowed and previously approved) appear to be reasonable. If the new first mortgagee, Toronto Capital, does not want to be paid out then that can be addressed in the context of the Ancillary Order being settled. I will hold off in signing it for now, but if it does want to be paid out, I would approve that distribution.

[137] Finally, the requested sealing order is appropriate.

[138] The requested partial sealing order is limited in its scope (only specifically identified confidential exhibits) and in time (until the Transaction is completed). It is necessary to protect commercially sensitive information that could negatively impact the Company and its stakeholders if this transaction is not completed and further efforts to sell the property must be undertaken.

[139] The proposed partial sealing order appropriately balances the open court principle and legitimate commercial requirements for confidentiality. It is necessary to avoid any interference with subsequent attempts to market and sell the property, and to avoid any prejudice that might be caused by publicly disclosing confidential and commercially-sensitive information prior to the completion of the now approved Ora Transaction.

[140] These salutary effects outweigh any deleterious effects, including the effects on the public interest in open and accessible court proceedings. I am satisfied that the limited nature

and scope of the proposed sealing order is appropriate and satisfies the *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 S.C.R. 522 requirements, as modified by the reformulation of the test in *Sherman Estate v. Donovan*, 2021 SCC 25, 458 D.L.R. (4th) 361, at para. 38.

[141] Granting this order is consistent with the court's practice of granting limited partial sealing orders in conjunction with approval and vesting orders.

[142] The Receiver is directed to ensure that the sealed confidential exhibits are provided to the court clerk at the filing office in an envelope with a copy of this endorsement and the signed order with the relevant provisions highlighted so that the confidential exhibits can be physically sealed. At the appropriate time, the Receiver shall also seek an unsealing order.

Costs and Final Disposition

[143] The Receiver's Motion for an AVO and Ancillary Order is granted on the terms indicated herein. 273 Ontario's cross-motion is dismissed.

[144] There was not sufficient time booked at any of the hearings to address the issue of costs. The parties should exchange cost outlines and try to reach an agreement on costs. If they are unable to do so they are directed to arrange a scheduling appointment before me so that an efficient procedure can be established for the costs of these motions to be determined.

[145] Before signing the proposed AVO and Ancillary Order, I wanted to give the parties the opportunity to consider if anything further needs to be changed in the forms that were originally submitted by the Receiver, given the passage of time and with the benefit of the court's endorsement. Updated forms of orders may be submitted to me for consideration (with blacklines to indicate changes made) by emailing them to my judicial assistant: lina.bunoza@ontario.ca

[146] The court recognizes that this decision will have significant implications for 273 Ontario and the Rosehill Project. However, after permitting the adjournments to allow for a full airing of the multitude of issues raised on the merits, this is the outcome that has been reached. I am appreciative of the efforts and helpful submissions provided by all counsel.

KIMMEL J.

Date: February 2, 2023

SUPERIOR COURT OF JUSTICE

COUNSEL SLIP

COURT FILE NO.: **CV-22-00682959-00CL** **HEARING DATE:** **26 JANUARY 2023**

NO. ON LIST: **3**

TITLE OF PROCEEDING: **ROSE-ISLI CORP. et al v. FRAME-TECH STRUCTURES LTD. et al**

BEFORE JUSTICE: **MADAM JUSTICE KIMMEL**

PARTICIPANT INFORMATION

For Plaintiff, Applicant, Moving Party, Crown:

Name of Person Appearing	Name of Party	Contact Info
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CARLOS SAYAO *(counsel)*		csayao@tyrllp.com

For Other:

Name of Person Appearing	Name of Party	Contact Info

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SEAN PIERCE *(counsel)*		spierce@agbllp.com
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CAMERON NEIL (counsel)	KNYMH lien claimant	neilc@simpsonwigle.com

In total there were approximately 38 observers and participants at the hearing, including the above named counsel and a number of individual purchasers. Three purchasers, *MARY RAPPULO, NICOLA LACANTORE*, and *VINCENZO PATERINO* addressed the court.

TAB 3

CITATION: BCIMC Construction Fund Corporation et al. v. The Clover on Yonge Inc. 2020 ONSC 3659
COURT FILE NO.: CV-20-00637301-00CL (Clover/Halo)
CV-20-00637297-00CL (Yorkville)
DATE: 20200615

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: BCIMC CONSTRUCTION FUND CORPORATION and BCIMC SPECIALTY FUND CORPORATION, Applicants

AND:

THE CLOVER ON YONGE INC., THE CLOVER ON YONGE LIMITED PARTNERSHIP, 480 YONGE STREET INC. and 480 YONGE STREET LIMITED PARTNERSHIP, Respondents

AND BETWEEN

BCIMC CONSTRUCTION FUND CORPORATION and OTERA CAPITAL INC., Applicants

AND

33 YORKVILLE RESIDENCES INC. and 33 YORKVILLE RESIDENCES LIMITED PARTNERSHIP, Respondents

BEFORE: Koehnen, J.

COUNSEL: *Geoff R. Hall, Heather Meredith and Alexander Steele* for the Receiver, PricewaterhouseCoopers Inc.

David Bish, Adam M. Slavens, Jeremy Opolsky, for the Applicants, BCMIC

Virginie Gauthier, for the Applicant Otera Capital Inc.

David Gruber for Concord Land Developments Limited

Steven Graff, Ian Aversa, Jeremy Nemers, for the Respondents

Jonathan Rosenstein for Aviva Insurance Company of Canada and Westmount Guarantee Services Inc.

Kenneth Kraft for certain Clover Purchasers

Dominique Michaud for a Group of Halo Unit Purchasers

Fred Tayar, Colby Linthwaite for OTB Capital Inc.

Ryan Hanna for 2379646 Ontario Inc.

Maria Konyukhova for PJD Developments

Christopher J. Henderson for City of Toronto

Haddon Murray for Tarion Warranty Corporation

Shara Roy, Sahar Talibi for Homelife New World Realty Inc., Paul Lam, Homelife Landmark Realty Inc., TradeWorld Realty Inc., Landpower Real Estate Ltd., Master's Choice Realty Inc., formerly known as Re/Max Master's Choice Realty Inc. and Michael Chen

Patricia Joseph for GFL Infrastructure Group Inc.

Ben Goodis for Quality Sterling Group

Rob Moubarak, Jonathan Frustaglio, Marissa Rebane for Strada Aggregates

Paul Guaragna for Global Precast Inc. and Affinity Aluminum Systems Ltd.

Nick Stanoulis for Stancorp Properties Inc.

HEARD: June 4, 2020

ENDORSEMENT

[1] At the request of BCIMC Construction Fund Corporation and BCIMC Specialty Fund Corporation (collectively "BCIMC" or the "Applicants") I assigned three large condominium construction projects in Toronto into receivership at the end of March 2020, the reasons for which are indexed at 2020 ONSC 1953. More precisely put, each project is owned by a single purpose, project specific general partner on behalf of a limited partnership. The general partner and the limited partnership of each of the three projects were assigned into receivership.

[2] The Receiver of those projects now brings a motion to approve a Sale and Investor Solicitation Process ("SISP") for each of the projects. For the reasons set out below, I grant the SISP for the Yorkville project as requested, decline to approve the SISP for the Clover project and approve the SISP for the Halo project as amended.

[3] I heard the motions on Thursday June 4, 2020, and released a dispositive order on Sunday June 7 with reasons to follow. I set out my reasons below.

The Yorkville Project

[4] The Yorkville project is located at 33 Yorkville Ave between Bay and Yonge Streets in Toronto. It was envisaged as two condominium towers, one 43 storeys, the other 69 storeys with 1,079 residential units. Excavation is well underway but no construction of the towers has begun.

[5] As of March 2, 2020, BCIMC had advanced $122,432,764.85 to the Yorkville Project under various loan facilities as well as $79,592,744.24 in letters of credit. In addition, a co-applicant in respect of Yorkville, Otera Capital, had also advanced funds to Yorkville.

[6] There are 918 purchasers of units in Yorkville who have paid a total of approximately $160 million in deposits.

[7] BCIMC has first ranking security. There are three other major secured creditors on the project. Aviva Insurance Company of Canada has second and fourth priority mortgages. KingSett Capital Inc. has third ranking mortgages. Construction liens have also been registered against the properties.

[8] Aviva, KingSett and a lawyer for a group of unitholders appeared on the motion. None opposed the relief sought. The debtor and titleholder of the Yorkville Project did not oppose the relief sought either. As a result, I granted the relief on June 4.

The Clover Project

[9] The relief sought with respect to Clover is more controversial.

[10] The Clover project is located at 595 Yonge St., north of Wellesley St. in Toronto. It comprises two towers; one 44 storeys, the other 18 storeys containing a total of 522 residential units. Clover is the most advanced of the three projects. Building is well underway with the higher floors now under construction.

[11] As of March 2, 2020, BCIMC had advanced over $143,000,000 on various loan facilities plus approximately $3,000,000 in letters of credit on Clover. In addition, BCIMC has advanced funding during the course of the receivership.

[12] BCIMC has both first and third ranking security against the Clover project.

[13] There are 499 purchasers of units in Clover who have paid a total of approximately $49 million in deposits.

[14] The proposed SISP in respect of Clover includes a stalking horse bid by a BCIMC fund other than the ones that have advanced money to date. The stalking horse bid includes a break fee of 1% and would take out all secured debt except that held by OTB Capital. The OTB Capital debt reflects a mortgage originally held by the developer, Cresford Group which it

assigned to OTB after Clover was placed into receivership. The stalking horse bid does not address other debts such as those of suppliers to the project.

[15] The Receiver's SISP proposal is supported by BCIMC, counsel for the unitholders and counsel for one potential bidder apart from the stalking horse bidder.

[16] The Receiver's proposal is opposed by Cresford, Concord Land Developments, OTB capital and at least one unsecured creditor. Opposition to the SISP is based on a proposal by Concord to pay out immediately the BCIMC debt, all of its costs and all of the receivership costs.

[17] The Receiver and those who support the SISP object to the Concord proposal on three grounds: (i) Concord has no standing; (ii) the proposal is too unclear; and (iii) the proposal improperly interferes with the receivership process.

(i) Concord's Standing

[18] Proponents of the SISP submit that Concord has no standing to pay out the BCIMC debt because it is a stranger to the receivership. If Concord wants to acquire Clover, it should participate in the SISP like any other potential bidder.

[19] While it was referred to as the "Concord Proposal" during the hearing, it is more properly the debtor's proposal. Concord is proposing to lend money to the debtor to enable the debtor to pay out BCIMC. It matters little whether the funds are coming from the debtor directly or from a party financing the debtor, like a bank or Concord. The point is that the debtor, through whatever means, is ready willing and able to pay out the entirety of the BCIMC debt.

[20] Before the hearing, Concord had sent me banking information that demonstrated its ability to pay out the debt immediately.

[21] During the course of the initial receivership application in March, I was advised that Concord and Cresford were about to enter into a transaction at any moment that would see Concord assume ownership of all of the shares of the Clover debtor. At that time, there was, however, no consummated transaction nor was Concord then prepared to pay out the BCIMC debt.

[22] To the extent Concord's status is an issue, it changed approximately 10 minutes into the hearing when I was advised that Concord had completed a transaction pursuant to which it had become the sole shareholder of Clover.

(ii) Lack of Clarity in the Concord Proposal

[23] The Receiver opposes the Concord proposal because it is not sufficiently clear.

[24] Concord says that after paying off the BCIMC debt, it would move to convert the receivership into a CCAA proceeding. In the course of the CCAA proceeding, Concord would

want to disclaim the unit purchasers' agreements and negotiate new agreements. Unit holders who did not want to renegotiate would recover their deposits in full.

[25] While a CCAA proceeding does pose some lack of clarity for the purchasers, any bidder in the SISP would also be looking to disclaim and renegotiate the unit purchase agreements. The Receiver submits that the SISP is likely to produce a better result for unit purchasers because it entails a competitive bidding process at the end of which the Receiver will select qualified bidders to participate in a further auction for the project. The Receiver says that the competitive nature of the bidding and auction process is likely to produce a better result for unit purchasers than would a two-party negotiation in a CCAA proceeding.

[26] Mr. Kraft acts for approximately 200 unit purchasers. He submits that the unitholders want to: have certainty, move forward and avoid further delay. In his view, the SISP currently offers more certainty than does a CCAA proceeding because the SISP is associated with tighter timelines. Mr. Kraft volunteers, however, that this might not be the case in a week from now if Concord is permitted to convert the receivership into a CCAA proceeding and moves promptly to renegotiate.

[27] The fact that the unitholders might obtain a better result in a competitive bidding and auction process is a fair one. There are however competing considerations to balance that potential benefit. By way of example, the bidding and auction process is likely to involve many moving parts. One readily foreseeable scenario is that the bids are relatively complex and that the process will not necessarily focus solely on the renegotiation of unitholder agreements. There are a significant number of other creditors involved who will need to be dealt with in the SISP. That would make choosing between bids potentially complex and would reduce the unitholders ability to negotiate. As noted, Concord envisages paying all creditors in full which may make renegotiation of purchase contracts a more central feature of the CCAA than it would be in the receivership.

[28] The unitholders have also expressed an interest in speed and certainty. The stalking horse bid would give the stalking horse bidder two years to decide whether it will complete the project as a condominium. If so, the stalking horse bidder will offer purchasers a discount of $100 per square foot from the market price at the time the units are resold as condominiums. While I appreciate that the stalking horse bid may not succeed (and indeed, if it works properly will not be the successful bid), the two years it contemplates nevertheless offers neither speed nor certainty. Having Concord assume carriage of the project can occur as soon Concord pays out the debt. A successful bidder under the SISP is not likely to assume carriage of the project before the middle or end of September at the earliest.

[29] Concord is one of Canada's largest and most experienced condominium developers and builders. It has developed over 150 condominium towers with over 39,000 units in Canada. It currently has more than 50 development projects at various stages of planning and development in Canada, the United States and the United Kingdom. If Concord is allowed to assume carriage of the project it will likely want to complete construction and sale of units as quickly as possible to avoid the cost of having large amounts of financing or capital locked up in the project.

[30] The duration of the CCAA proceeding is one over which the court has some influence. The court can also assist in ensuring a level playing field for the renegotiation of purchase agreements. By way of example, counsel for the unit purchasers has asked the Receiver to produce information it has about costs of construction. The Receiver has declined to produce that information because of confidentiality concerns. That makes good sense in the context of a bidding process. If there is no bidding process for Clover, the Receiver may be more willing to share its cost information with counsel for the unit holders or it may be more appropriate to order that it be shared. I underscore, however, that I have made no decision on that issue and have not even heard argument on it. The possibility of sharing that information does, however, offer an opportunity to create a more level playing field in the renegotiation of the purchase contracts.

[31] Mr. Hanna appeared for an unsecured creditor owed approximately $3.5 million. He supports the Concord proposal because Concord intends to pay all construction suppliers fully in the course of completing Clover. Other bids may not necessarily do that. The stalking horse bid does not.

(iii) Interference with the Receivership Process

[32] The Receiver submits that it would create a dangerous precedent to give a debtor a preferential right to redeem property well into a receivership. Mr. Hall submits that the purpose of a receivership is to have the Receiver take control of the entire process and that it would be inappropriate to permit others to do an "end run around" the receivership.

[33] The Receiver's submission is in part, reflected in a standard provision in receivership orders which is found in paragraph 11 of the Clover order. It provides:

> 11. THIS COURT ORDERS that **all rights and remedies** against the Debtors, or any of them, the Receiver, or **affecting the Property**, including, without limitation, licences and permits, **are hereby stayed and suspended except with the written consent of the Receiver or leave of this Court**, … (Emphasis added)

[34] On its face, the bolded language in paragraph 11 would appear to preclude the debtor's right to exercise its equity of redemption without leave of the court.

[35] The Receiver points to *B&M Handelman Investments Limited v. Mass Properties Inc.*, 2009 CanLII 37930, where Pepall J. (as she then was) dealt with language similar to paragraph 11 and held:

> In the face of these provisions, Ms. Singh does not have an automatic right to redeem. A mockery would be made of the practice and procedures relating to receivership sales if redemption were permitted at this stage of the proceedings. A Receiver would spend time and money securing an agreement of purchase and sale that was, as is common place, subject to Court approval, and for the benefit of all stakeholders, only for there to be a redemption by

> a mortgagee at the last minute. This could act as a potential chill on securing the best offer and be to the overall detriment of stakeholders.

BDC v. Marlwood Golf & Country Club, 2015 ONSC 3909 and *Home Trust Company v. 2122775 Ontario Inc.* , 2014 ONSC 1039 are to similar effect.

[36] The Receiver fairly volunteers that the issue arose in *Handelman* and the cases that follow it at a much later stage than it does with respect to Clover. In *Handelman*, the Receiver had already run a bid process, had selected a purchaser and was moving to approve the purchase. Different considerations arise at that late a stage. Allowing debtors to redeem property on the sale approval motion would discourage potential purchasers from submitting bids in the first place and threaten the utility of the receivership process more generally. Here the debtor is seeking to redeem before a SISP is approved.

[37] A competing consideration to the concerns raised in *Handelman*, is the debtor's right to exercise its equity of redemption, that is to say to pay out the debt and retain its property.

[38] Numerous courts have commented on the importance of the equity of redemption. The contemporary starting point of the analysis is the Supreme Court of Canada's decision in *Petranik v. Dale*, 1976 CanLII 34 (SCC), [1977] 2 S.C.R. 959 where Chief Justice Laskin held at p. 969:

> What emerges from the *DeBeck* case is a reassertion of the well-established proposition that the equitable right to redeem is more than a mere equity but is, indeed, an interest in the mortgaged land which is not lightly to be put aside and which is enforceable by courts of equity: see Falconbridge, *Law of Mortgages* (3rd. ed. 1942), pp. 50-53. I question, therefore, whether it can be put aside by a rule of practice that would preclude a Court from considering all the circumstances that may support a discretion to allow redemption, albeit on terms.

[39] Dickson J. (as he then was) echoed similar sentiments at page 995:

> I conclude by reiterating that an equity of redemption is an interest in land, which the mortgagor can convey, devise, settle, lease or mortgage like any other interest in land (Megarry and Wade, *The Law of Real Property* (3rd ed.) at p. 885, and Cheshire's *Modern Real Property* (10th ed.) at p. 568) and that equity has always jealously guarded the mortgagor's right to redeem.

[40] An owner's right to redeem remains a core principle of real estate law. See for example: *30724453 Nova Scotia Company v. 1623242 Ontario Inc*., 2015 ONSC 2105 paras. 75, 98 – 100; *Textron Financial Canada Limited v. Chetwynd Motels Ltd*., 2010 BCSC 477 paras. 58 – 74.

[41] How then should I balance these competing interests in this case and determine whether I should grant leave under paragraph 11 of the receivership order to allow the debtor to exercise its equity of redemption?

[42] Supporters of the Receiver's motion point to my findings about the debtor's misconduct in my reasons assigning the projects into receivership. They submit that a debtor who has misled its mortgagee should not be entitled to redeem.

[43] While I did make adverse findings against the debtor's conduct in those reasons, misconduct by a debtor gives rise to that degree of remedy necessary to correct the harm done by the misconduct. It does not necessarily mean that the debtor will be deprived of its property.

[44] While courts should be mindful of the clean hands principle when considering requests by the debtor in these circumstances, they should be equally mindful of a potentially underlying commercial reality: the possibility that the creditor may have an interest in structuring a receivership to allow it to acquire the property at an attractive price which would enable the creditor to make considerably more money by depriving the debtor of its property than the creditor would ever earn by way of interest under a mortgage.

[45] While I am not saying that this is occurring here, there are circumstances that give rise to the potential for it to occur. By way of example, although BCIMC stated on the receivership motion at it wanted nothing further to do with the project and just wanted its money back, it has put in a stalking horse bid on the Clover and Halo projects which would see it paid a break fee. The Receiver has acknowledged that the properties are well known to the most logical potential purchasers and that there is considerable interest in them. If there is considerable interest, one might ask whether a stalking horse bid is truly necessary. At the same time, the timelines in the SISP, 60 days to gather bids and conduct an auction, are those that one would see in usual times. These are not, however, usual times. The SISP arises in the midst of a worldwide pandemic which has seen many businesses, and particularly financial institutions, operating virtually. Most bank offices remain closed. Operating virtually makes it more time-consuming to conduct due diligence and obtain financing, especially given that financing for a project like this would likely be syndicated. BCIMC is unlikely, however, to require the same sort of time to conduct due diligence because it is already familiar with the project as its long-term financer. In addition, BCIMC, is a large government pension fund that does not require syndicated financing. It already has large pools of capital available for investment. These factors give BCIMC advantages over other bidders that translate into the potential to acquire the property in a receivership at an attractive price.

[46] In considering these factors, I am not saying that they are present here nor am I suggesting that it would be improper for BCIMC to try to acquire the property at an attractive price in the receivership. Those are commercial opportunities that BCIMC is fully entitled to pursue. I am simply saying that these factors are part of the equities to consider before depriving a debtor of title to its property in circumstances where it is ready willing and able to pay out the creditor entirely.

[47] The history of the proceedings and prejudice to different stakeholders are two further factors to consider when determining whether the debtor should have the right to redeem.

[48] With respect to the history of the proceedings, on the initial receivership application, the debtor proposed a CCAA proceeding. BCIMC opposed because it would end up remaining in the project longer than it wanted to. At the time, BCIMC indicated that it simply wanted its money back and wanted nothing more to do with the project: see the receivership reasons 2020 ONSC 1953 at para. 56. The debtor now proposes to give BCIMC its money back pretty much immediately.

[49] My reasons for assigning the project into receivership were driven in large part by the right of BCIMC to be repaid, the absence of any concrete proposal to do so and the unfairness of tying BCIMC to a debtor in whom it no longer had confidence: see for example paras. 64 – 69, 89, 91. The thrust of my reasons, and in particular of the paragraphs just referred, to was to leave open the possibility of the debtor resuming carriage of the projects by paying out BCIMC. The debtor is now able to do so unconditionally with respect to Clover.

[50] Has anything occurred since assigning Clover into receivership on March 27, 2020 that would make it unfair to any other stakeholder to permit the debtor to exercise its equity of redemption?

[51] BCIMC submits that it has funded the receivership and has spent time, money and energy into submitting a stalking horse bid.

[52] In the circumstances of this case, those factors do not outweigh the debtor's equity of redemption. In addition to paying out the original BCIMC debt, the debtor has offered to pay out the entire receivership debt, interest on the receivership debt, the costs of the receivership and the costs of BCIMC. This includes reasonable costs that BCIMC has incurred to prepare the stalking horse bid. I have made myself available for a speedy determination of what those costs should be in the event the parties disagree.

[53] Ms. Konyakhova appeared on behalf of PJD Developments, a potential bidder. She submits that Concord should not be given any privileges over other bidders who have waited patiently for the bidding process to occur. She underscores forcefully that bidding is the way to obtain the best offer.

[54] The concern that Concord receive no privileges over other bidders misconceives Concord's role. As noted earlier, Concord is not a bidder, it is the debtor's source of financing and is now the debtor's sole shareholder. While I can understand a potential bidder's frustration at being deprived of the opportunity to bid on a project, that is not enough to quash a debtor's right to redeem. There is no evidence before me that it would be prejudicial to receivership processes at large to allow the Clover debtor to redeem. I appreciate that the possibility of a pay out arose at the last moment but no one sought an adjournment to file evidence to respond to the proposed redemption.

[55] PJD had hoped to be able to bid on the property and has been denied that chance. That puts PJD and other potential bidders into a significantly less prejudicial position than if they had spent the time and money to submit a compliant bid only to lose out to another bidder in the competitive process.

[56] The parties most likely to suffer prejudice by allowing the debtor to redeem are the unit purchasers. They believe they can achieve a better result in the competitive bidding process of a SISP than they can in a CCAA proceeding. To my mind that, however, is not, the real question.

[57] There is no doubt that the debtor would have had the right to pay out BCIMC on the initial receivership application. Had it done so, the debtor would have had relatively free rein to bring a CCAA proceeding. In those circumstances it is unlikely that unit purchasers could have prevented a CCAA process by arguing that a receivership sale was preferable to CCAA. The unit purchasers have suffered no change of position since March 27 that would make the analysis any different today. To the extent they have, they can still raise those arguments if the debtor moves to convert the receivership into a CCAA proceeding.

[58] As a result of the foregoing, I decline to approve the SISP for Clover and order that the debtor should have the opportunity to pay out the BCIMC debt, the receivership debt, and interest on both within 72 hours of receiving a pay out statement in respect of those debts.

Halo Project

[59] The Halo project is located at 480 Yonge St. south of Wellesley St. in Toronto. Its plans call for a 39-storey tower with 413 residential units. Halo is in early stages of construction.

[60] As of March 2, 2020, BCIMC had advanced approximately $73,000,000 in financing and $1,500,000 in letters of credit to the Halo project.

[61] BCIMC has first and third-ranking charges/mortgages in respect of real property.

[62] There are 388 purchasers of units in Halo who have paid a total of approximately $43 million in deposits.

[63] The Receiver proposes a SISP for Halo that mirrors the proposal for Clover. Mr. Michaud appeared to make submissions on behalf of the 140 purchasers of Halo units who have retained him. They support the SISP.

[64] The debtor seeks a four-week adjournment of the Halo SISP motion to allow it to finalize financing. During the hearing, Concord offered to finance the receivership during the adjournment period if BCIMC declined to do so. Concord's financing would be on the same terms as that of BCIMC. If the debtor does not come up with financing during the four week adjournment, Concord and the debtor agree that the SISP should proceed as presented.

[65] I declined to grant the adjournment and authorized the SISP to proceed in respect of Halo.

[66] The distinguishing feature between Halo and Clover is that the debtor and Concord are not presently prepared to or able to pay out the BCIMC debt on Halo.

[67] The animating principle behind my reasons for assigning the projects into receivership was that BCIMC had advanced money, had been misled about the risk profile of the projects, had been misled, in part, about the use of funds, and, having been misled, should have the right to take control of the projects to protect its interests. That was subject to the debtor's right to pay out BCIMC in full if it were able to do so before any other party had relied on the receivership to an extent that would make it inequitable for the debtor to end the receivership by paying out BCIMC's debt.

[68] The debtor is still not in a position to pay out the debt on Halo. Concord clearly has the financial resources to do so but has chosen not to. This means that, for whatever reason, Concord prefers not to expose itself to the risk of the Halo in the present circumstances. Concord is fully entitled to make that choice. Concord is entirely at liberty to use or not use its assets for whatever purpose it wants.

[69] However, in the absence of assuming any of the risk, Concord is not in a position to direct the terms that govern the administration of Halo either through receivership or otherwise. Given that BCIMC continues to bear the risk of Halo, the process that it has chosen to manage that risk, the Receivership, should continue to govern.

[70] Nothing in the equities between the parties has changed with respect to the Halo project since it was assigned into receivership on March 27, 2020. BCIMC continues to hold a significant debt, indeed the debt is larger now than it was on March 27. For all the reasons that I articulated in my judgment with respect to the receivership order, BCIMC continues to have the right to enforce its debt as it sees fit. It has chosen to do so by way of receivership. Nothing has changed to make that inappropriate.

[71] The SISP does not preclude the debtor or Concord from participating in the project going forward. It can participate as a bidder as can any other party.

[72] The Clover and Halo bids were initially accompanied by a stalking horse bid by BCIMC with a break fee of 1%. During argument, the Receiver and BCIMC indicated that the stalking horse bid was a package deal, that is to say it was a bid on both projects or none. As counsel for BCIMC put it, Clover was the more desirable asset. If BCIMC could not maintain the stalking horse bid on Clover, it had no interest in continuing a standalone stalking horse bid on Halo. Given that the SISP on Clover will not proceed, the stalking horse bid on Halo has disappeared as a result of which I need not address the objections that certain parties raised about the break fee.

Communications

[73] The Receiver seeks to include a provision in the Halo order that precludes communications between bidders and other stakeholders without the Receiver's consent. I have declined to include such a provision in the Halo SISP.

[74] The unit purchasers represented at the hearing oppose the provision as do Concord and the debtor. They submit that a key component of any workout is the ability of stakeholders to reach agreements with each other. That is best achieved with unfettered communication.

[75] The Receiver justifies the request by submitting that it is important that the Receiver have visibility into conversations between stakeholders and that it is problematic if the Receiver is not aware of the contents of those communications. The Receiver provided no detail about why it was problematic for discussions to occur without the Receiver knowing about the contents or the fact of those discussions. The Receiver offered no authority in support of its position apart from stating that a similar provision had been included in an order of this court in another proceeding. In the absence of reasons for that order I cannot determine whether it was on consent, unopposed or whether the circumstances in that case made the order otherwise appropriate.

[76] Although the Yorkville order contains a restriction on communication, that provision was unopposed, including by counsel for the purchasers of Yorkville units.

Disposition

[77] For the reasons set out above, I dispose of the motions as follows:

(a) With respect to Yorkville, the SISP order is approved as requested.

(b) With respect to Clover:

(i) The debtor or anyone acting on its behalf shall have the right within 72 hours of receiving a statement of the amount owing, pay-out the BCIMC, debt, including receivership lending plus interest. (I have been advised that the debtor paid out the debt in full since the hearing but before these reasons were issued.)

(ii) In addition, the debtor will be liable for the applicants' costs including receivership costs. I assume it may take more than 72 hours for BCIMC and the receiver to present their costs breakdown to the debtor, as a result of which the costs need not be paid within 72 hours of receiving the statement of the amount owing on the debt. If there is a dispute about costs, I will resolve the dispute and determine the amount of costs payable. The debtor shall pay the applicants' costs within 72 hours of my determining the amount payable.

(iii) If the debtor pays the amounts set out in sub-paragraph (i) within 72 hours then the debtor may move to dissolve the receivership or for any other relief it seeks with respect to Clover.

(c) With respect to Halo:

(i) The SISP is approved but, given that BCIMC has advised that there will be no stalking horse bid on Halo if the debtor pays out the Clover debt, the Halo SISP will proceed without the stalking horse bid.

(ii) Communication amongst bidders and stakeholders (including unit purchasers) will not require the consent of or notice to the Receiver.

(iii) The disposition in the preceding paragraph may raise privacy or fairness issues with respect to communications with unit holders. By way of example, it might not be appropriate to allow bidders to contact unrepresented unitholders without having unitholders provide consent in advance. Similarly, it might not be fair to the bidding process to allow the debtor, who presumably has contact information for unitholders, to contact them while other bidders without contact information have no ability to contact unit holders. If there are concerns about the logistics of such communication, I will make myself available to resolve those during a case conference.

Koehnen, J.

Date: June 15, 2020

TAB 4

COURT OF APPEAL FOR ONTARIO

Peakhill Capital Inc. v. 1000093910 Ontario Inc., 2024 ONCA 558
DATE: 20240711
DOCKET: M55244 & M55245 (COA-23-CV-0671)

Brown J.A. (Motion Judge)

BETWEEN

Peakhill Capital Inc.

Applicant (Respondent/
Responding Party/Responding Party by way of cross-motion)

and

1000093910 Ontario Inc.

Respondent (Respondent/
Responding Party/Moving Party by way of cross-motion)

IN THE MATTER OF AN APPLICATION UNDER SUBSECTION 243(1) OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c. B-3, AS AMENDED, AND SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990, c. C.43 AS AMENDED

Kevin D. Sherkin and Mitchell Lightowler, for the appellant/moving party (M55244)/responding party by way of cross-motion (M55245) 2557904 Ontario Inc.

Gary M. Caplan and Aram Simovonian, for the respondent/responding party (M55244)/moving party by way of cross-motion (M55245) 1000093910 Ontario Inc.

Dominique Michaud, for the respondent/responding party/responding party by way of cross-motion Peakhill Capital Inc.

Richard B. Swan and Aiden Nelms, for the Receiver, KSV Restructuring Inc.

D.J. Miller, for Firm Capital Corporation

Laura Culleton, for the second mortgagee, Zaherali Visram

Jason Squire, for Ren/Tex Realty Inc. and ReMax Premier Inc.

Heard: July 10, 2024 by video conference

ENDORSEMENT

OVERVIEW

[1] Yesterday, I heard two motions in an appeal involving the receivership of 1000093910 Ontario Inc. (the "Debtor"), whose main asset is an industrial property in Vaughan, Ontario. At the end of yesterday's hearing, I made the following endorsement:

> Reserve my decision. Will release reasons tomorrow. Pursuant to *BIA* s. 195, orders of Sutherland J. dated July 4 and 9, 2024 are stayed until 5 p.m. tomorrow, July 11, 2024, or such further order of this court.

[2] The proximate events that have prompted this case conference were two orders made by Sutherland J. in this receivership on July 4 and 9, 2024 (the "Sutherland Orders"). Briefly stated, those orders declined to grant the approval and vesting order sought by the court-appointed receiver, KSV Restructuring Inc. (the "Receiver"), in its notice of motion dated May 31, 2024, and initially returnable June 12, 2024. In that notice of motion, the Receiver had sought orders:

(i) approving the agreement of purchase and sale between the moving party, 2557904 Ontario Inc. ("255") and the Receiver dated November

13, 2023 (the "Stalking Horse Agreement") to purchase the assets of the Debtor, as defined in that agreement;

(ii) vesting the purchased assets in 255;

(iii) distributing the sale proceeds to repay the full amount owing to the applicant first mortgagee, Peakhill Capital Inc. ("Peakhill"), and part of the amount owing to the second mortgagee, Zaherali Visram; and

(iv) related relief, including the discharge of the Receiver.

[3] Instead of approving the Receiver's recommended Stalking Horse Agreement, on July 4, 2024, Sutherland J. terminated that agreement and approved a transaction under which the Debtor would refinance the first mortgage using Firm Capital Corporation ("Firm Capital") as the main lender (the "Refinancing Transaction").

[4] Shortly after that order was made, on July 4, 2024, 255 filed a notice of appeal from the order of Sutherland J.

[5] That appeal prompted the Debtor to move to seek the inclusion of a term granting provisional enforcement of the July 4 order in the settled formal order, notwithstanding any appeal that 255 might take. Sutherland J. granted such relief by order dated July 9, 2024.

[6] 255's appeal seeks to set aside the Sutherland Orders and replace them with an approval and vesting order that enables the Receiver to complete the Stalking Horse Agreement transaction.

[7] These reasons explain the decision that I have made regarding both motions brought in the context of 255's appeal. My decision is as follows:

(i) I refer the following issues to a panel of this court for hearing and determination next Friday, July 19, 2024:

(a) whether the appellant, 255, has standing to appeal the July 4 and 9, 2024 Sutherland Orders;

(b) if 255 has standing, does it have an automatic right to appeal the Sutherland Orders pursuant to ss. 193(a)-(d) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*") or does it require leave to appeal pursuant to *BIA* s. 193(e)?

(c) If it requires leave, should leave to appeal be granted?

(d) Did the motion judge err in terminating the Stalking Horse Agreement between the Receiver and 255 and, instead, approving the Debtor's proposed Refinancing Transaction with Firm Capital?

(e) Did the motion judge err in varying his July 4 order, following the filing of a notice of appeal by 255, to include a provisional enforcement term that overrode the automatic stay on appeal provided by *BIA* s. 195?

(ii) I continue, until the panel's determination of those issues, my stay under *BIA* s. 195 of the provisional execution granted by Sutherland J. in his order dated July 9, 2024.

The motions

[8] As mentioned, 255 filed a notice of appeal dated July 4, 2024, from the order of Sutherland J. dated July 4, 2024, that permitted the Debtor to redeem the first mortgage on its Vaughan industrial property notwithstanding that the Receiver was seeking an approval and vesting order to convey the property to 255, the successful bidder in the court-approved sale process for the property. The order also terminated the Stalking Horse Agreement and put in place a mechanism by which to discharge the Receiver.

[9] On July 4, 2024, Sutherland J. released very brief reasons for his decision, paras. 3 to 5 of which state:

> 3. My disposition is that the [Debtor] be permitted to redeem the first mortgage to pay fully the amount owing on the first mortgage, the cost and fees of the Receiver which on Tuesday July 2 2024, the total amount was $23,450,000 which includes the sum of $250,000 to be paid into either Court or held in trust for the benefit of the prospective purchaser 23557904 Ontario Inc. per the Sale Agreement or Second Report.
>
> 4. I was also advised that the parties have a draft Order that has been approved to deal with the redemption of the first mortgage. That order, approved as to form and content by all parties, to be sent to me for my

> review and signature. The draft approved Order to be sent to my judicial assistant...
>
> 5. I anticipate releasing my reasons within the next few weeks.

[10] As of the date of yesterday's case conference, the motions judge had not yet released reasons for his July 4 order approving the Debtor's Refinancing Transaction. Consequently, as matters stand, for purposes of appellate review, no reasons explain why Sutherland J. rejected the Receiver's approval and vesting order motion and allowed the Debtor's cross-motion to redeem the first mortgage.

[11] After that order was made and the notice of appeal filed later on July 4, 2024, the Debtor moved before Sutherland J., requesting that his issued order include a term permitting provisional enforcement of the order, pursuant to *BIA* s. 195, notwithstanding 255's appeal. Sutherland J. granted such relief on July 9, 2024, issuing an order that dismissed the Receiver's approval and vesting order motion, terminated the Stalking Horse Agreement, approved the refinancing of the Debtor's indebtedness and its proposed Refinancing Transaction, and included the following para. 9:

> THIS COURT ORDERS that, having regard to the significant interest accruing: (i) on the existing mortgages to be repaid and refinanced through the Refinance Transaction; and (ii) the new mortgages for which funding has been committed to permit the Refinance Transaction to occur, the continuation of which would render this Court's approval of the Refinance Transaction moot if it was not capable of being immediately implemented, pursuant to section 195 of the *Bankruptcy and Insolvency*

> *Act* (Canada), the terms of this Order and the closing of the Refinance Transaction as defined herein shall be implemented forthwith notwithstanding any motion to vary, notice of appeal or notice of motion for leave to appeal that may be sought. For greater certainty, this Order is subject to provisional execution and if any of the provisions of this Order shall be stayed, modified, varied, amended, reversed or vacated in whole or in part (collectively, a " Variation"), such Variation shall not in any way impair, limit or lessen the protections, priorities, rights and remedies of the parties providing funding in connection with the Refinance Transaction and any advances made or obligations incurred prior to such Variation, and all parties shall be entitled to rely on this Order as issued, for all actions taken in connection with the Refinance Transaction. [Emphasis added].

[12] By reasons dated July 9, 2024, Sutherland J. explained why he granted provisional enforcement of his July 4 order. He wrote:

> [24] I agree with the respondent, the second mortgagee, the financial lender, the tenants and the guarantors, that the circumstances here are exceptional. The fact that the respondent has a cheque in hand to pay the applicant in full, the receiver in full, the amount for 255 is exceptional. No party has provided a case where the factual matrix that a cheque in hand has been provided to pay all required with a request for provisional execution.
>
> [25] Moreover, looking at the irreparable harm or prejudice, it is clear to me that there would be irreparable harm or prejudice to the applicant, respondent, second mortgagee, and guarantors if provisional execution is not granted. The financing would fall away. The applicant would incur further costs and interest which may or may not be paid. The applicant would have to wait longer for its money. The second mortgagee would have a loss. The respondent would lose the property. Existing tenants will have to find alternate premises. The guarantors would be liable for any deficiency with the applicant and the second mortgagee. If the respondent is permitted to

redeem, as accepted by this Court and that redemption can finalize before July 12, 2024, costs and interest would be limited and would come to an end. The applicant would be paid in full. The tenants would remain in the premises. The second mortgagee would not have a deficiency and the guarantors would not be subject to any deficiency on the first mortgage and without question, the second mortgage.

[26] In contrast, 255 would lose the purchase of the property. It would still have the Break Fee, costs and disbursements of $250,000 which it can claim as an agreed quantification for its costs and expenses in the Second Agreement. It also still has the outstanding proceeding with the realtor on the First Agreement. But again, it is not certain that the realtor would be successful in that proceeding and if it is successful, against whom.

[27] Having said this, I am cognizant that 255 has not delayed this proceeding. 255 is a prospective purchaser that followed the procedure of the bidding process. But it was not hidden that the closing of the purchase pursuant to the Second Agreement was always a risk that could not happen without approval of this Court. It is for this reason, I presume, why the Break Fee and amount for legal costs and disbursements was negotiated and included as a term in the Second Agreement.

[28] Taking all these circumstances into consideration, I conclude that the irreparable harm or prejudice that would be suffered by the respondent, the guarantors, the applicant and the second mortgagee if provisional execution is not granted outweighs any harm or prejudice that may be suffered by 255.

[29] The harm and prejudice to the parties other than 255 are real and immediate. The harm or prejudice to 255 on the realtor proceeding is not certain. The loss of the purchase of the property exists but there was no evidence before me that indicates any real costs or harm that 255 will suffer if the property is not sold to it, other than the amount agreed upon in the Second Agreement.

> [30] Accordingly, I conclude that in these circumstances the balancing favours and the general interest of justice favours the granting of provisional execution.
>
> [31] I therefore grant provisional execution in the draft order provided by the receiver that has been approved as to form and content by all interested parties except 255. Draft order signed by me this day.

[13] The issuance of the July 9 order prompted the request for an urgent case conference. Prior to the case conference, both 255 and the Debtor filed competing motions:

- 255's motion seeks an order from a single judge of this court: (i) advising whether it requires leave to appeal the Sutherland Orders; (ii) if it does, granting leave to appeal; and (iii) a stay of the Sutherland orders pending the hearing of its appeal;

- The Debtor's cross-motion seeks an order from a single judge of this court: (i) dismissing 255's motion and appeal on the basis that 255 lacks standing to bring the motion and appeal; or (ii) alternatively, an order that 255 requires leave to appeal and the denial of such leave.

[14] An email communication from the parties to the court before the case conference advised that 255 and the Debtor agreed that the case conference should address the following issues:

(a) to set a date for 255's motion to stay the order of Sutherland J. dated July 9, 2024 pending hearing of its appeal;

(b) to set a date for the Debtor's cross-motion seeking, in effect, to quash 255's appeal;

(c) if required, to set the dates for the hearing of 255's appeal; and

(d) an interim order, sought by 255, to preclude the enforcement of the Sutherland Orders pending the hearing of 255's motion.

[15] The urgency for the case conference has been prompted by two commercial realities:

(i) First, the Receiver took the position that it intended to close the redemption Refinancing Transaction by 4:00 p.m. on July 10, 2024, absent an order from the court;

(ii) Second, the Firm Capital commitment letter that the Debtor relies on as the main source of funds to redeem the first mortgage set July 12, 2024 as the date by which funds must be advanced "failing which this Commitment will be cancelled or extended at FCC's sole option."

HISTORY OF THE RECEIVERSHIP

The appointment of the Receiver

[16] The parties' motion requests must be understood in the context of this receivership, which started out on a consent basis but subsequently became highly litigious.

[17] The Debtor had executed a consent agreement with Peakhill to the appointment of a receiver over the Debtor and its property, including a commercial property located at 20 Regina Road, Vaughan. The Debtor was the landlord of the property, which was leased to non-arm's length tenants, which were in default of payment of rent.

[18] By the terms of the Debtor's consent, the appointment order would not become effective until the earlier of either the Debtor's breach of certain obligations, specified in the consent, or October 2, 2023. The terms of the consent included, *inter alia*, a provision that enabled the Debtor to pay the full amount owing under Peakhill's first mortgage on the property until September 29, 2023.

[19] The Debtor did not satisfy the terms of the consent agreement. Consequently, the appointment order became effective on October 2, 2023 and the Receiver assumed control over the property at that time.

[20] The appointment order authorized the Receiver to market and sell the property and to seek a vesting order to convey the property: paras. 3(k)-(m).

[21] However, it emerged that about a week prior to the granting of the appointment order, the Debtor had entered into an agreement to sell the property to 255, with a closing date of December 21, 2023 (the “Pre-Appointment APS”).

The Stalking Horse Agreement

[22] After its appointment became effective, the Receiver sought to amend the Pre-Appointment APS. 255 was not prepared to consent to the amendments sought by the Receiver. As a result, the Receiver entered into the November 13, 2023, Stalking Horse Agreement with 255. The purchase price under the Stalking Horse Agreement was less than the purchase price stated in the Pre-Appointment APS: 2024 ONCA 59, at paras. 8-11. Whereas the Debtor contended the proceeds from the Pre-Appointment APS would have satisfied in full, both the first and second mortgages and other creditors, the proceeds from the Stalking Horse Agreement would not have fully satisfied the Debtor’s obligations to the second mortgagee and certain other creditors.

The Sale Process order and the Debtor’s appeal

[23] By order dated December 20, 2023, Vallee J. granted a Sale Process Approval Order that approved a process to sell the property and approved the Stalking Horse Agreement. Late on the afternoon of December 19, 2023, the Debtor filed a cross-motion that sought to compel the Receiver to complete the

Pre-Appointment APS. Vallee J. refused to hear the Debtor's motion given its late timing and the Receiver's execution in November of the Stalking Horse Agreement.

[24] On December 29, 2023, the Debtor filed a notice of appeal from the December 20, 2023 order of Vallee J. The Debtor sought to set aside the order and, in its place, obtain an order from this court that allowed the Receiver or Debtor to enforce the terms of the Pre-Appointment APS.

[25] By reasons dated January 24, 2024, Simmons J.A., sitting as a motion judge, concluded that the Debtor had an automatic right to appeal the Sales Process Approval Order to this court and directed that its appeal be expedited: 2024 ONCA 59. Subsequently, Harvison Young J.A. granted 255 leave to intervene in the appeal.

[26] By Reasons for Decision dated April 9, 2024, this court dismissed the Debtor's appeal, concluding that Vallee J. had not made any error in principle in granting the December 20, 2023 order: 2024 ONCA 261. The court observed, at paras. 5 and 6:

> The motion judge moreover found that the cross-motion had little chance of success:
>
> > [The cross-motion] concerns a different real estate transaction entered into six days before the receivership order. The closing date is tomorrow. The receiver states that it could not close this transaction because of certain terms that it contains. Another agreement of purchase and sale entered

> into by the receiver and 2557004 Ontario Inc. dated November 13, 2023, referred to as the "stalking horse agreement", is now in play. The receiver's motion concerns this transaction. The purchaser states that it would refuse to close the earlier transaction, which it considers null and void.
>
> The appellant has not identified any error in the motion judge's findings, which are amply supported on the record. Indeed, 255 Ontario sought and obtained leave to intervene in this appeal to confirm that it had refused to consent to changes to the September APS required following the receivership order and that, in its view, "the deal is dead".

The results of the sale process

[27] The sale process did not result in the receipt of any qualified bids by the bid deadline of May 7, 2024. One non-qualifying bid was submitted, but for an amount ($19 million) substantially less than the purchase price in the Stalking Horse Agreement ($24.255 million). As a result, the Receiver determined that 255 was the successful bidder with its Stalking Horse Agreement and moved before the court for an approval and vesting order ("AVO").

The Receiver's motion for an approval and vesting order

[28] The Receiver's May 31, 2024, Second Report, filed in support of its motion for an AVO, advised that the Debtor had informed the Receiver that "it has a commitment letter to repay Peakhill and cover the costs of the receivership", as a result of which the Debtor intended to repay Peakhill and bring a motion to

discharge the Receiver. The Debtor had not done so by the time the Receiver filed its AVO motion.

[29] The Receiver's AVO motion was returnable on June 12, 2024. Late on the afternoon of June 10, the Debtor filed a cross-motion. The Debtor was joined in its motion by its principals, who had guaranteed the first and second mortgages, and by the non-arm's length tenants, owned by the Debtor's principals, which occupied the property. The cross-motion sought to stay the receivership, discharge the Receiver, and permit the Debtor time to complete the Refinancing Transaction with Firm Capital.

[30] In its notice of motion, the Debtor stated that it had "raised sufficient funds and is ready, willing and able to repay all relevant creditors and discharge the Receiver". It represented that it had arranged a new first mortgage with Firm Capital, for a net amount less than the amount outstanding under the Peakhill first mortgage and negotiated further funding with the second mortgagee.

[31] The Firm Capital commitment letter disclosed by the Debtor contains several conditions, including receipt of a satisfactory appraisal report confirming the Real Property has a value of at least $27 million. As noted, (i) the endorsement of Simmons J.A. stated that the Pre-Appointment APS had a purchase price of $31 million and the Stalking Horse Agreement set the minimum sale price at $24.255 million, and (ii) the Receiver's Second Report advised that the only bid received

was for $19 million. As well, closing of the financing is conditional on the Debtor confirming a pro forma net operating income of not less than $1.25 million.

[32] Although the Debtor's notice of motion did not expressly seek an order allowing it to redeem the first mortgage, the relief it sought effectively amounted to a request for an opportunity to redeem. Mr. Ravi Aurora, the Debtor's principal, deposed that he was seeking to "'redeem' the receivership".

[33] Mr. Aurora's affidavit in support of the Debtor's cross-motion did not contain a valuation of the property or information about the Debtor's pro forma net operating income.

[34] On the return of the Receiver's motion, Lavine J. adjourned it to June 14, 2024.

[35] On June 14, 2024, the court was advised that Peakhill supported the Receiver's motion, while the second mortgagee (who would extend further financing) supported the Debtor's cross-motion. The court adjourned the matter to June 28, and subsequently released reasons for the adjournment: 2024 ONSC 3566.

[36] An examination of Mr. Aurora was conducted before the return of the motions. On June 28, Sutherland J. further adjourned the motions to July 2, 2024. It appears that Mr. Aurora had not yet provided answers to the undertakings he

had given on his examination. Copies of the transcript of that examination and the undertaking responses were not included in the materials filed before me.

[37] On July 2, 2024, Sutherland J. heard the Receiver's AVO motion and the Debtor's cross-motion for redemption of the first mortgage. The motions judge released a brief endorsement simply stating that "Decision reserved". According to an affidavit filed by 255 in this court, it was on July 2 that "the Debtor confirmed that, as of July 2, 2024, it had received the financing to discharge the Receivership."

[38] At yesterday's case conference, the parties confirmed that the funds necessary to complete the refinancing transaction are being held in escrow and the Debtor now has access to the funds needed to close that transaction. Counsel for Firm Capital advised that her client was not prepared to extend the closing of the refinancing past July 12, 2024, due to its concern about mounting interest and other costs.

ANALYSIS

[39] The motions before me raise two sets of issues: (i) threshold procedural issues, specifically whether 255 has the standing to appeal the Sutherland Orders and, if it does, whether it has an automatic right of appeal or requires leave to appeal; and (ii) the issue of whether, pursuant to *BIA* s. 195, I should vary or cancel the provisional execution ordered by Sutherland J.

[40] I think the threshold procedural issues are best left to a panel to decide. The issue of whether 255 enjoys an automatic right of appeal or requires leave to appeal does not raise jurisdictional concerns; the jurisprudence of this court confirms that it is open to a single judge to grant such orders: *Cardillo v. Medcap Real Estate Holdings Inc.*, 2023 ONCA 852. However, the Debtor's request that I dismiss 255's appeal on the basis that 255 lacks standing to appeal strikes me as moving into territory that is the functional equivalent of asking a single judge to quash an appeal. Under Ontario's appellate review structure, such a request is best brought before a panel, not a single judge. Since a panel is available to hear those issues next week, on Friday, July 19, I see no need to wander onto jurisdictional thin ice.

[41] That said, I am satisfied that 255, as the successful bidder recommended by the Receiver for approval, has standing to request the interim relief sought in its motion pursuant to *BIA* s. 195: *Royal Bank of Canada v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (C.A.); *Winick v. 1305067 Ontario Limited* (2008), 41 C.B.R. (5th) 81 (ON Commercial List), at paras. 3 and 4.[1]

[42] The panel would also be able to hear the appeal on the merits. If 255 has the standing to appeal and enjoys a right of appeal or can persuade the panel to

[1] The principles discussed by this court in *Skyepharma PLC v. Hyal Pharmaceutical Corporation* (2000), 47 O.R. (3d) 234 (C.A.) were made in the context of a consideration of appeal rights for "final orders" under s. 6(1)(b) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, not the appeal rights set out in *BIA* s. 193 and, also, were confined to the position of a bidder who was unsuccessful in the sale process.

grant it leave, then a final determination of the contested issues in this receivership can be made through the panel hearing next week.

[43] This leads me to regard the main issue on these motions to be whether I should continue the *BIA* s. 195 variation or cancellation of the July 9 provisional execution order of Sutherland J. until the hearing date in a week's time. *BIA* s. 195 provides:

> Except to the extent that an order or judgment appealed from is subject to provisional execution notwithstanding any appeal therefrom, all proceedings under an order or judgment appealed from shall be stayed until the appeal is disposed of, but the Court of Appeal or a judge thereof may vary or cancel the stay or the order for provisional execution if it appears that the appeal is not being prosecuted diligently, or for such other reason as the Court of Appeal or a judge thereof may deem proper. [Emphasis added].

[44] I will proceed on the basis that the analysis applicable to a request to vary or cancel a provisional enforcement order contains elements similar to those that govern a request to cancel or lift a *BIA* s. 195 automatic stay. Accordingly, in the present case, 255 bears the burden of establishing compelling reasons to support a variation or cancellation of Sutherland J.'s July 9, 2024, provisional enforcement order. I summarized those elements in *Grillone (Re)*, 2023 ONCA 844, at para. 35:

> The *BIA* s. 195 jurisprudence identifies several factors courts should consider when dealing with a request to lift an automatic stay:

- The appellant's litigation conduct, including whether the appellant is diligently prosecuting the appeal;

- The merits of the appeal;

- The relative prejudice to the parties of cancelling the stay. This typically involves applying a variation of the tripartite test in *RJR-MacDonald Inc. v. Canada (Attorney General)*, 1994 CanLII 117 (SCC), [1994] 1 S.C.R. 311 applied on stay applications, specifically whether: (i) there is a serious issue to be appealed; (ii) the applicants would suffer irreparable harm if the stay is not lifted; and (iii) the applicants would suffer greater harm than the respondents if the stay is not lifted;

- However, while all or part of the tripartite test may be relevant, the discretion granted by *BIA* s. 195 is broader. Accordingly, a contextual approach is appropriate that considers all the facts of the case, not merely those that engage the tripartite test, and the interests of justice generally.

[45] I shall consider the evidence filed on this motion in light of those factors.

Lack of diligent prosecution

[46] This is not a factor in the present case.

The merits of the appeal

[47] As I read the parties' materials, the main issue raised by the appeal is whether the motions judge erred in terminating the Stalking Horse Agreement for which the Receiver sought an AVO, instead allowing the Debtor to redeem the first mortgage.

[48] Consideration of this factor is complicated by the motions judge's failure to deliver "real-time reasons" that explained why he granted his July 4 order. The absence of reasons might prompt the panel to review the July 4 order on a *de novo* basis: *Adams v. Adams*, 1996 CanLII 1006 (Ont. C.A.). Or, the panel might attempt to deduce the basis for the order from other materials in the record: *Reynolds v. Alcohol and Gaming (Registrar)*, 2019 ONCA 788, at para. 7.

[49] For example, in his June 20, 2024, reasons explaining why he had adjourned the Receiver's AVO motion, Sutherland J. relied on the statement of principles about a mortgagor's ability to redeem in the course of a receivership set out by the Superior Court of Justice in *Vector Financial Services v. 33 Hawarden Crescent*, 2024 ONSC 1635. However, *Vector Financial* did not mention the statement of principles set out the year before by this court in *Rose-Isli Corp. v. Smith*, 2023 ONCA 548 where, at paras. 9 and 10, a panel of this court stated:

> We see no error in the motions judge applying the following principles to guide her consideration of whether, in the specific circumstances, 273 Ontario should be granted leave to redeem:
>
> - In considering a request by an encumbrancer to redeem a mortgage on property in receivership, a court should consider the impact that allowing the encumbrancer to exercise its right of redemption would have on the integrity of a court-approved sales process;
>
> - Usually, if a court-approved sales process has been carried out in a manner consistent with the principles set out in *Royal Bank of Canada v.*

> *Soundair Corp*., (1991), 1991 CanLII 2727 (ON CA), 4 O.R. (3d) 1 (C.A.), a court should not permit a latter attempt to redeem to interfere with the completion of the sales process. In our view, the reason the *Soundair* principles apply to circumstances where an encumbrancer seeks to redeem a mortgage is that once the court's process has been invoked to supervise the sale of assets under receivership, the process must take into consideration all affected economic interests in the properties in question, not just those of one creditor; and
>
> - In dealing with the matter, a court should engage in a balancing analysis of the right to redeem against the impact on the integrity of the court-approved receivership process.
>
> We adopt the rationale for those guiding principles articulated in *B&M Handelman Investments Limited v. Mass Properties Inc.* (2009), 2009 CanLII 37930 (ON SC), 55 C.B.R. (5th) 271 (Ont. S.C.), where the court stated, at para. 22:
>
> A mockery would be made of the practice and procedures relating to receivership sales if redemption were permitted at this stage of the proceedings. A receiver would spend time and money securing an agreement of purchase and sale that was, as is common place, subject to Court approval, and for the benefit of all stakeholders, only for there to be a redemption by a mortgagee at the last minute. This could act as a potential chill on securing the best offer and be to the overall detriment of stakeholders.

[50] Neither the motions judge's June 14 adjournment reasons, nor his July 9 reasons settling the order, refer to this court's decision in *Rose-Isli*. Absent reasons to explain his July 4 order, one cannot discern whether the motions judge was aware of, let alone guided by, the principles stated by this court in *Rose-Isli*.

Whether a panel looking at the matter *de novo* through the lens of the *Rose-Isli* principles would reach the same result as the motions judge did on July 4 is an open question. I need not express a view on the matter, save to observe that this is an arguable ground of appeal raised by 255.

The relative prejudice to the parties of varying or staying the provisional enforcement order

[51] 255 contends it would suffer several kinds of prejudice should the provisional execution order not be varied. First, 255 argues that it played by the court-approved sale process rules, ended up as the successful bidder with its Stalking Horse Agreement, yet, at the last minute, was set to one side by the motions judge when he approved the Debtor's Refinancing Transaction. Second, 255's affiant, Mr. Anthony Marcucci, described in his affidavits aspects of the "considerable financial hardship" for 255 that would result from termination of the Stalking Horse Agreement. Finally, the Debtor is now taking the position that 255 would not be entitled to a $250,000 break fee, contemplated by s. 14.2 of the Stalking Horse Agreement, because the Receiver did not accept any other successful bid, which was the only condition circumstance entitling 255 to a break fee.

[52] The Debtor also contends that the termination of the Stalking Horse Agreement by the Sutherland Orders did not prejudice 255 because s. 16.3 of the Stalking Horse Agreement contemplated the possible termination of the

agreement. Termination was a risk built into the Stalking Horse Agreement so, argues the Debtor, 255 cannot suffer any prejudice from the motions judge's termination of that agreement. It strikes me that the strength of this argument ultimately will turn on an appellate decision as to whether the motions judge erred in terminating the Stalking Horse Agreement.

[53] On its part, the Debtor submits it would suffer significant prejudice should the provisional execution order be varied or stayed. It points to the July 12, 2024 closing date contained in the Firm Capital commitment letter, as well as Firm Capital's position that it will not extend the closing date, even though the language of the commitment letter would permit it to do so.

[54] I cannot base my analysis on speculation about how Firm Capital may or may not act over the next 36 hours. It made its position clear during the hearing of the motions. At the same time, Firm Capital did not file any evidence, and there was some suggestion at the case conference that Firm Capital refused to produce a representative for examination. I would merely observe that the Debtor consented to the appointment of the Receiver by the court and, in so doing, consented to the court's process for adjudicating its legal dispute with Peakhill. This court has been asked by one of the affected parties to perform an appellate review of the Sutherland Orders. The risk of such a request is a normal risk of our court process. In response to that request by an affected entity, this court is making available a panel to consider a number of issues raised by the litigants

approximately two weeks after it received notice of that request. As a practical matter, this court cannot act more quickly, and our appellate process (and fairness) does require considering the interests of all affected parties.

[55] I would make two further observations. First, there is a public policy dimension to the argument advanced by the Debtor and Firm Capital. The commitment letter was not put in place until well over a month after the deadline in the court-approved sales process. Permitting the July 9 provisional execution order to continue, thereby ensuring the closing of the Refinancing Transaction prior to next week's panel hearing, could give rise to a public policy risk: namely, some debtors might conclude that they could circumvent the requirements of a court-approved realization process by filing last-minute redemption requests on the return of receiver's AVO motions, even in cases where the debtor had consented to the court appointment of a receiver. That would not be a salutary development for court-supervised realization processes.

[56] Second, based on the record before me, it is difficult to understand, with any degree of precision, how the two scenarios – approval of the Stalking Horse Agreement and completion of the Debtor's Refinancing Transaction – differ in their financial effects:

(i) The Second Report of the Receiver pre-dates the Debtor's securing of the Firm Capital commitment letter and the Receiver has not filed any further report that compares the two scenarios;

(ii) In its Second Report, the Receiver reported that, at the date of the appointment order, the Debtor owed Peakhill approximately $20 million on the first mortgage and approximately $4 million on the second mortgage held by Zaherali Visram. The purchase price under the Stalking Horse Agreement is $24.255 million. The Receiver reported that, if the court approved the Stalking Horse Agreement transaction, Peakhill would be paid in full and a distribution would be made to Mr. Visram, but the Receiver did "not expect to have sufficient proceeds to repay Zaherali Visram in full."

(iii) In his June 10, 2024 affidavit Mr. Ravi Aurora deposed, at para. 8:

> By my arithmetic, the Debtor has about $23,070,000 available to it from the Refinance compared to approximately $22,775,000 which I estimate to be the amount of money necessary to pay Peakhill, the Receiver, and the Break Fee in the Stalking Horse APS. As such, I verily believe that the Debtor has raised sufficient funds and is ready, willing and able discharge the Receiver.

[57] Based on the record before me, it therefore would appear that the main financial effect of the two different scenarios would not be on the applicant senior secured creditor, Peakhill, or the Receiver. They would be paid in full. The main

effect would be felt by the second mortgagee who, according to the Receiver, would not receive payment in full from the proceeds of the Stalking Horse Agreement sale and apparently intends to protect its current loss exposure by advancing a further $3 million to the Debtors in the Refinancing Transaction. I say "apparently" because the second mortgagee did not file any evidence on the motions before Sutherland J. or on the motions before me. I cannot find a calculation of the second mortgagee's potential loss in the record before me (which makes it difficult to understand the potential exposure of the Debtor's principals on any guarantees). I would also note that the Receiver's First and Second Reports stated that the Debtor had informed it that there were no current financial statements for the company; as a result, the record indicates the Receiver did not have a statement of the company's indebtedness to the second mortgagee.

Interests of justice and conclusion

[58] In the present case, the absence of reasons from the motions judge explaining what led him to permit the Debtor to redeem the first mortgage after the Receiver had completed the court-approved sale process and was seeking an approval and vesting order raises the serious question on appeal as to whether the motions judge ignored or considered controlling appellate authority and principles. The jurisprudence required the motions judge to consider, as part of his balancing analysis, the impact of permitting the redemption of the first mortgage

on the integrity of the court-approved receivership process. It is unclear, on the record before me, whether he did.

[59] While varying, by staying, the July 9 provisional execution order to permit a panel of this court to consider that question may well prejudice the interests of the second mortgagee, and derivative interests of Debtor-related guarantors, in my view, the existence of integrity-of-process issues swings the balance in favour of granting 255's request to vary the July 9 provisional execution order by staying that order until the panel's hearing of the issues I have identified in para. 7 above next week, on Friday, July 19, 2024.

DISPOSITION

[60] Accordingly, for the reasons set out above, I dispose of the motions by 255 and the Debtor by:

(i) Referring to the panel on Friday, July 19, 2024, the issues identified in para. 7 above, including the merits of 255's appeal if the panel decides 255 is entitled to an appeal hearing;

(ii) Continuing, pursuant to *BIA* s. 195, the variation through a stay of the orders of Sutherland J. dated July 4 and 9, 2024, until the panel hearing on Friday, July 19, 2024 or further order of this court;

(iii) Setting the following timetable for the filing of materials for the panel's consideration:

(a) 255 shall file its appeal book and compendium, factum and authorities no later than 12 noon on Monday, July 15, 2024;

(b) The Debtor shall file its responding materials no later than 5 p.m. on Wednesday, July 17, 2024;

(c) The Receiver, Peakhill, Firm Capital, and the second mortgagee may file factums of no more than five pages in length no later than 12 noon on Thursday, July 18, 2024; and

(d) 1.5 hours is allocated for oral argument; the parties shall agree on a fair division of that time.

[61] The costs of the motions at the case conference are reserved to the panel next week.

"David Brown J.A."

TAB 5

COURT OF APPEAL FOR ONTARIO

CITATION: Rose-Isli Corp. v. Smith, 2023 ONCA 548
DATE: 20230821
DOCKET: COA-23-CV-0222

Hourigan, Brown and Monahan JJ.A.

BETWEEN

Rose-Isli Corp., 2631214 Ontario Inc., Seaside Corporation and 2735440 Ontario Inc.

Applicants
(Appellants)

and

Michael J. Smith, Frank Servello, 2735447 Ontario Inc., Capital Build Construction Management Corp. and Frame-Tech Structures Ltd.

Respondents
(Respondents)

Jason Wadden, Carlos Sayao and Theodore Milosevic, for the appellants

Mordy Mednick, for the respondents Frame-Tech Structures Ltd., Frank Servello, Capital Build Construction Management Corp. and 2735447 Ontario Inc.

Sharon Kour and Brendan Bissell, for the receiver Ernst & Young Inc.

Nathaniel Read-Ellis, for Ora Acquisitions Inc.

Heard: August 14, 2023

On appeal from the order of Justice Jessica Kimmel of the Superior Court of Justice, dated February 2, 2023, with reasons reported at 2023 ONSC 832.

REASONS FOR DECISION

[1] The appellants appeal the approval and vesting order issued by the motions judge that authorized the receiver, Ernst & Young Inc., to proceed with a sale of the property in receivership, as well as a related ancillary order.

[2] The appellants had sought the appointment of the Receiver over the property. One of the appellants, 2735440 Ontario Inc. ("273 Ontario"), held a second mortgage on the property. The order appointing the Receiver contemplated it would engage in a sales process for the property. The Receiver secured court approval for a sales process, conducted a sales process, and then sought court approval of the successful bid.

[3] At this point, the appellants opposed the proposed sale and, instead, sought an order that 273 Ontario could redeem the first mortgage or, alternatively, be recognized as a successful creditor bidder. The motions judge granted the Receiver's approval motion and dismissed the appellants' cross-motion for redemption. The appellants submit the motions judge erred in so doing.

[4] As an initial matter, it is worth recalling how the judge who granted the appointment order described the "lay of the land" at the time the appellants requested the appointment of a receiver over the property. At para. 11 of his reasons, *Rose-Isli Corp. v. Frame-Tech Structures Ltd.*, 2022 ONSC 4135, the appointment judge stated:

> It is common ground that the relationship between and among the parties has irrevocably broken down… Indeed, the fact that the relationship has broken down is reflected in the relief sought, one way or the other, by all parties today: they all agree that the Rosehill Project should be sold, and that the sale process should be undertaken by a court-appointed officer.

[5] The appellants submit the motions judge erred in dismissing their cross-motion because the second mortgagee, 273 Ontario, pursuant to s. 2 of the *Mortgages Act*, R.S.O. 1990, c. M.40, had an absolute right to redeem the first mortgage at any time, even where a court-approved sales process had been undertaken and the receiver was seeking court approval of a bid.

[6] We disagree.

[7] 273 Ontario, as one of the applicants for the appointment of a receiver, consented to the Appointment Order. Section 9 of the Appointment Order qualified any encumbrancer's right to redeem a mortgage on the properties under receivership. The section states that "all rights and remedies against the Company, the Receiver, or affecting the Property, are hereby stayed and suspended except with the written consent of the Receiver or leave of this Court." See also: *BCIMC Construction Fund Corporation et al. v. The Clover on Yonge Inc.*, 2020 ONSC 3659, at paras. 33 and 41.

[8] The motions judge recognized that the issue for determination was not whether 273 Ontario had a right to redeem but the more pragmatic issue of whether

it should be permitted to exercise that right once the court-approved sales process had run its course and the Receiver had entered into an agreement with the successful bidder: Reasons, at paras. 73-74. This properly framed the issue: the appellants had sought the appointment of the Receiver; the Receiver had undertaken the sales process approved by the court; and the Receiver had not been discharged. Accordingly, the ability of 273 Ontario to exercise a right of redemption had to take into account the reality that the property remained subject to an active receivership, which engaged interests beyond those of the second mortgagee.

[9] We see no error in the motions judge applying the following principles to guide her consideration of whether, in the specific circumstances, 273 Ontario should be granted leave to redeem:

- In considering a request by an encumbrancer to redeem a mortgage on property in receivership, a court should consider the impact that allowing the encumbrancer to exercise its right of redemption would have on the integrity of a court-approved sales process;
- Usually, if a court-approved sales process has been carried out in a manner consistent with the principles set out in *Royal Bank of Canada v. Soundair Corp.*, (1991), 4 O.R. (3d) 1 (C.A.), a court should not permit a latter attempt to redeem to interfere with the completion of the sales process. In our view,

the reason the *Soundair* principles apply to circumstances where an encumbrancer seeks to redeem a mortgage is that once the court's process has been invoked to supervise the sale of assets under receivership, the process must take into consideration all affected economic interests in the properties in question, not just those of one creditor; and

- In dealing with the matter, a court should engage in a balancing analysis of the right to redeem against the impact on the integrity of the court-approved receivership process.

[10] We adopt the rationale for those guiding principles articulated in *B&M Handelman Investments Limited v. Mass Properties Inc.* (2009), 55 C.B.R. (5th) 271 (Ont. S.C.), where the court stated, at para. 22:

> A mockery would be made of the practice and procedures relating to receivership sales if redemption were permitted at this stage of the proceedings. A receiver would spend time and money securing an agreement of purchase and sale that was, as is common place, subject to Court approval, and for the benefit of all stakeholders, only for there to be a redemption by a mortgagee at the last minute. This could act as a potential chill on securing the best offer and be to the overall detriment of stakeholders.

[11] We see no error in the motions judge's identification of the interests at play in the required balancing exercise: Reasons, at paras. 84-95.

[12] The appellants repeat before us the numerous complaints they made below about the lack of fairness in the sales process. The motions judge canvassed those

complaints in considerable detail and found no merit in any of them. Her conclusion that the conduct of the sales process met the *Soundair* criteria was reasonable and free of palpable and overriding error, anchored as it was in the specific evidence before her: Reasons, at paras. 97-131.

[13] Finally, we see no reversible error in the motions judge's conclusion that the balance favoured protecting the integrity of the sales process over 273 Ontario's request to redeem, including her treatment of the last-second assignment of the first mortgage to 273 Ontario's financier, Toronto Capital.

[14] The appeal is dismissed.

[15] The appellants shall pay the Receiver its costs of the appeal fixed in the amount of $35,000.00, inclusive of disbursements and applicable taxes.

"C.W. Hourigan J.A."
"David Brown J.A."
"P.J. Monahan J.A."

TAB 6

CITATION: Xquisite Capital Corp. v. Crystal Farms Limited, et al., 2023 ONSC 6080
COURT FILE NO.: CV-22-31327
DATE: 20231026

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
Xquisite Capital Corp. Applicant	
– and –	
Crystal Farms Limited, James Gerald Tatomir, Krystal Martens and Millie Ann Barberio Respondents	Mille Anne Barberio, Present in Person
– and –	
MNP Ltd., in its capacity as court-appointed receiver of Crystal Farms Limited	Tony Van Klink
	HEARD: October 17, 2023 **Decision Released:** October 19, 2023, with reasons to follow.

REASONS FOR DECISION

MACFARLANE J.

Introduction

[1] On October 19, 2023, I released the endorsement attached as Schedule "A" to these reasons, with reasons to follow. These are those reasons.

Factual Background

[2] The relevant facts are set forth in the Third Report to the Court (the "Third Report") submitted by MNP Ltd. (the "Receiver") in its capacity as court-appointed receiver of Crystal Farms Limited (the "Debtor"), and can be summarized briefly as follows:

a) The Debtor owned (legally and/or beneficially) several pieces of real property from which it operated its freight, logistics, and farming business managed by its principal, Millie Ann Barberio ("Ms. Barberio");

b) The Debtor became insolvent, and on November 30, 2022, an order was issued by the court appointing the Receiver (the "Appointment Order");

c) On March 28, 2023, the court approved a sale process for the real property of the Debtor and certain farm machinery/equipment (the "Sale Process Order");

d) On May 30, 2023, the court granted an approval and vesting order with respect to the sale of a piece of real property known as "Parcel 5" and a John Deere tractor (the "May 30 Order");

e) The Receiver completed the sale pursuant to the May 30 Order, and deposited net sale proceeds of $1,502,600 into its trust account;

f) The Receiver undertook various activities in relation to the administration of the Debtor's estate, including the marketing of two pieces of real property known as "Parcel 3" and "Parcel 4", pursuant to the sale process that had been approved in the Sale Process Order; and,

g) The Receiver received various offers during the course of the sale process and finally entered into agreements to sell Parcel 3 (agreement dated September 8, 2023) (the "Parcel 3 Transaction") and Parcel 4 (agreement dated August 4, 2023) (the "Parcel 4 Transaction") to Byrne Farms Ltd. ("Byrne Farmes") that were both conditional upon the Receiver applying for and receiving an approval and vesting order to complete each transaction, and were scheduled to close on October 27, 2023.

[3] Prior to entering into the agreements underlying the Parcel 3 Transaction and the Parcel 4 Transaction, the Receiver attempted to solicit offers for those lands from a public body which owns nearby lands. The Receiver was advised by that public body that it was not in a position to make an offer due to not having completed its mandatory procurement processes. Details of this and full details of all offers and negotiations were set out in the

Confidential Supplement to the Third Report dated October 11, 2023 (the "Confidential Supplement"), which was provided to me prior to the hearing and which is presently subject to a sealing order.

[4] The Receiver brought its motion returnable October 17, 2023, for approval and vesting orders with respect to the Parcel 3 Transaction and the Parcel 4 Transaction, and an ancillary order providing for approval of the Receiver's conduct and fees, and the fees of its counsel, as well as for sealing of the Confidential Supplement and distribution of proceeds once the Parcel 3 Transaction and Parcel 4 Transaction had closed. The Receiver had also advised that after the completion of the Parcel 3 Transaction and the Parcel 4 Transaction, the Debtor intended to make a Division 1 Proposal to its unsecured creditors. It was anticipated that after payment of the costs of the receivership, Canada Revenue Agency in respect of its deemed trust claim, and all secured creditors, there would be funds remaining in the hands of the Receiver that could be paid to a proposal trustee.

The Hearing of the Motion and the Second Confidential Supplement

[5] At the hearing on October 17, 2023, Rob Smith from the Receiver and his counsel, Tony Van Klink, were present, along with Ms. Barberio. Mr. Van Klink advised that late the previous afternoon, the third party that had expressed some interest in the properties had made offers to purchase both Parcel 3 and Parcel 4 (the "Third Party Offers"). The Third Party Offers offered prices that were respectively $20,000 and $50,000 more than the Parcel 3 Transaction and the Parcel 4 Transaction.

[6] The Receiver maintained its recommendation that the Parcel 3 Transaction and the Parcel 4 Transaction be approved. Ms. Barberio made submissions that the sale process should be reopened, and that perhaps an auction sale could be conducted.

[7] In light of the new information, I directed the Receiver to file a second confidential supplement (the "Second Confidential Supplement") as soon as possible to provide copies of the Third Party Offers and the Receiver's specific comments and recommendations that arose out of those offers, so that I could consider those in light of Ms. Barberio's submissions.

[8] I received and considered the Second Confidential Supplement dated October 17, 2023, and granted the approval and vesting orders (for the Parcel 3 Transaction and the Parcel 4 Transaction) and the ancillary order, subject only to a delay of the closing of the transactions to October 31, 2023.

[9] From the Third Report, it is obvious without consideration of the specific terms of the Parcel 3 Transaction and the Parcel 4 Transaction that the proceeds of the two sales amount to several million dollars. Based upon the funds held by the Receiver as set out in the Third Report ($1,757,067), and the payment of fees of the Receiver and its counsel and distributions to creditors sought to be approved (about $5 million), the net proceeds of the two sales must be in excess of $3 million. This can all be gleaned from the non-sealed documents filed by the Receiver.

[10] The Third Party Offers might amount to $70,000 more in sale proceeds (which is only 2.3% of $3 million), but the offers are also subject to many conditions that might never be fulfilled. Although the details of the Third Party Offers are subject to a sealing order for the time being, I have reviewed them and find that notwithstanding the slightly higher price in the Third Party Offers, the other conditions contained in them are significant, and the Parcel 3 Transaction and the Parcel 4 Transaction are in fact superior to the Third Party Offers.

[11] In the Third Report, the Receiver stated its opinion, from which it has not wavered:

> Parcel 3 and Parcel 4 were marketed in accordance with the Sale Process Order. It is the Receiver's view that both parcels have been properly exposed to the market and completing the Parcel 3 Transaction and the Parcel 4 Transaction will optimize the recovery from each parcel.[1]

Law and Analysis

[12] In two separate 2012 decisions of this court, Justices Morawetz[2] and D.M. Brown[3] (as they then were) had occasion to consider the sale approval recommendations of court officers in receivership proceedings when a late-delivered, potentially more favourable, offer had been received. Both of those decisions made extensive reference to the well-known principles arising from the Ontario Court of Appeal's decision in *Royal Bank of Canada v. Soundair Corp.*[4], which has long established the duties of a court when considering a reciever's request to approve the sale of an asset:

> A court must consider and determine (a) whether the receiver has made a sufficient effort to get the best price and has not acted

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[1] Third Report, clause 2.3.12
[2] *Terrace Bay Pulp Inc. (Re),* 2021 ONSC 4247 ("*Terrace Bay*")
[3] *Co-operative Housing Federation of Canada v. Bridlewood Co-operative Inc.*, 2012 ONSC 5936 ("*Bridlewood*")
[4] *Royal Bank of Canada v. Soundair Corp.*, (1991), 4 O.R. (3d) 1 (C.A.) ("*Soundair*")

> improvidently, (b) the interests of the parties, (c) the efficacy and integrity of the process by which offers were obtained, and (d) whether there had been unfairness in the working out of the process.[5]

[13] In *Terrace Bay*[6], the court was faced with an offer presented after a deadline for offers had passed, that appeared to be some $8 million more favourable than the offer for which the company and monitor were seeking approval. The court in *Bridlewood*[7] later summarized the approach taken by Morawetz J. as follows:

> [32] The approach this Court takes to the consideration of post-bid deadline offers was reviewed by Morawetz J. in *Re Terrace Bay Pulp Inc.* Although in that case the offers arose in the context of a sale in a *Companies' Creditors Arrangements Act* proceeding, the principles apply equally to a receiver's sale. In *Terrace Bay Pulp* the applicant corporation, with the concurrence of the Monitor, sought approval of an asset sale at an effective price of $27 million. After the expiry of the bid deadline, the company received an offer from another party for an effective price of $35 million.
>
> [33] In approving the recommended pre-deadline transaction, Morawetz J. re-iterated three basic points found in the jurisprudence. First, when determining the providence of a receiver's sale conduct, the court should examine the receiver's acts in light of the information it possessed when it agreed to accept an offer.
>
> [34] **Second, under *Soundair*, prices in post-deadline offers are relevant only to the extent they show that the price contained in the recommended offer "was so unreasonably low as to demonstrate that the receiver was improvident in accepting it".**
>
> [35] Third, if they do not tend to show that the receiver was improvident, then the post-deadline offers "should not be considered upon a motion to confirm a sale recommended by a court-appointed receiver". As Galligan J.A. stated in *Soundair*:
>
> > If they were, the process would be changed from a sale by a receiver, subject to court approval, into an auction conducted by the court at the time approval is sought. In my opinion, the latter course is unfair to the person who has entered *bona*

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[5] *Bridlewood*, *supra* note 3 at para 16
[6] *Supra*, note 2
[7] *Supra*, note 3

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

[36] Notwithstanding the $8 million difference in effective prices between the two bids in *Terrace Bay Pulp*, Morawetz J. concluded:

> In my view, based on the information available at the time the Purchaser's offer was accepted, including the risks associated with a Tangshan non-binding offer at that point in time, the consideration in the Transaction is not so unreasonably low so as to warrant the court entering into the Sales Process by considering competitive bids.
>
> …
>
> I have considered the situation facing the Monitor at the time that it accepted the offer of the Purchaser and I have also taken into account the terms of the Late Offer. Although it is higher than the Purchaser's offer, the increase is not such that I would consider the accepted Transaction to be improvident in the circumstances.[8] [Emphasis added]

[14] In both *Terrace Bay*[9] and *Bridlewood*[10], the court found that the transaction propounded by the court officer should be approved.

[15] In the present case, there is no suggestion that the Receiver has acted improvidently, and applying the *Soundair*[11] principles, I find specifically that:

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[8] *Ibid* at paras. 32-36
[9] *Supra*, note 2
[10] *Supra, note 3*
[11] *Supra, note 4*

1. The Receiver has made a sufficient effort to get the best price and has not acted improvidently;

2. The Parcel 3 Transaction and the Parcel 4 Transaction are in the best interests of all of the stakeholders;

3. The Receiver acted with efficiency and integrity in following the court-approved sale process to obtain the offers it received for both Parcel 3 and Parcel 4; and,

4. There has been no unfairness in the working out of the process.

[16] Ms. Barberio did not file any material in response to the Receiver's motion but did attend at the hearing and suggest that the fact that a Third Party Offer had been received indicated that a further competitive bid process, such as an auction, would be appropriate. This is specifically what Galligan J.A. warned against in *Soundair*, when he stated:

> What those cases show is that the prices in other offers have relevance only if they show that the price contained in the offer accepted by the receiver was so unreasonably low as to demonstrate that the receiver was improvident in accepting it. I am of the opinion, therefore, that if they do not tend to show that the receiver was improvident, they should not be considered upon a motion to confirm a sale recommended by a court-appointed receiver. If they were, the process would be changed from a sale by a receiver, subject to court approval, into an auction conducted by the court at the time approval is sought. In my opinion, the latter course is unfair to the person who has entered bona fide into an agreement with the receiver, can only lead to chaos, and must be discouraged.
>
> If, however, the subsequent offer is so substantially higher than the sale recommended by the receiver, then it may be that the receiver has not conducted the sale properly. In such circumstances, the court would be justified itself in entering into the sale process by considering competitive bids. However, I think that that process should be entered into only if the court is satisfied that the receiver has not properly conducted the sale which it has recommended to the court.[12]

[17] As may be seen from all of the case cited, this court places heavy reliance on appointed officers of the court, such as monitors and receivers, to use their judgment and expertise to

[12] *Ibid*

make recommendations in the context of insolvency processes. It is only in the clearest of cases and on the basis of sound evidence that the court should even consider diverging from the course recommended by a receiver, and in this case, the Third Party Offers do not amount to such evidence.

Motion granted.

Original Signed by "Justice J.R. Macfarlane"
J. Ross Macfarlane
Justice

Released: October 26, 2023

Court File Number
22-CV-31327

SCHEDULE 'A'

SUPERIOR COURT OF JUSTICE

245 WINDSOR AVENUE

WINDSOR, ONTARIO N9A 1J2

Endorsement Sheet

Date: 2023-10-19
Judge: Justice J. Ross Macfarlane

Applicant/ Plaintiff: XQUISITE CAPITAL CORP. ☐ Present

Counsel: ☐ Present

Respondent/ Defendant: CRYSTAL FARMS LIMTED (the "Debtor"), ET AL. (MILLIE ANN BARBERIO, X Present

Counsel: ☐ Present

Other Parties: MNP LIMITED, COURT-APPOINTED RECEIVER OF CRYSTAL FARMS LIMITED (the "Receiver") X Present

Counsel: Tony Van Klink X Present

☐ Order to go in accordance with the consent filed.
☐ The order is granted as requested or as modified below.
X Order to go as follows:

[1] This motion by the Receiver was heard on October 17, 2023. The Receiver was seeking, *inter alia*, orders approving the sale of two of the Debtor's real properties, which had been sold following a court-approved sale process.

[2] Literally on the eve of the hearing, a third party made conditional offers to purchase the real properties at a slightly higher price than the prices set out in the agreements for which approval was being sought. Ms. Barberio attended at the hearing on behalf of the Debtor, and sought to re-open the sale process, suggesting that there could be an auction.

[3] Notwithstanding the new conditional offers received, the Receiver continues to seek approval of the agreements already in place. At the

hearing, I reserved my decision and directed the Receiver to complete a new confidential supplement to its third report (the "Second Supplement"), to include copies of the new offers and the Receiver's comments and recommendations to the court in connection herewith. The Second Supplement is dated October 17, 2023, and I have received and reviewed it. The transactions are scheduled to close on October 27, 2023.

[4] For reasons to follow, I grant the orders sought by the Receiver, and direct that the transactions be completed no earlier than October 31, 2023, to allow for the appeal period in section 31(1) of the *Bankruptcy and Insolvency General Rules*, C.R.C., c. 368 as am., to pass. Counsel for the Receiver shall revise the three (3) draft orders to contain the date of this endorsement; to include the direction with respect to completion of the transactions in each of the approval and vesting orders; and to make reference to the Second Supplement, both in the recitals and in the sealing order sought. Approval of the form of the orders is dispensed with. Counsel for the Receiver shall provide a copy of this endorsement to the service list upon receipt, and forward the revised draft orders to the court to my attention for review and signature.

[5] I will provide reasons in due course, but should further directions be required, counsel may schedule a case conference with me through the Trial Coordinator's office.

Original Signed by "Justice J.R. Macfarlane"
J. Ross Macfarlane
Justice

CITATION: Xquisite Capital Corp. v. Crystal Farms Limited, et al., 2023 ONSC 6080
COURT FILE NO.: CV-22-31327
DATE: 20231026

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

Xquisite Capital Corp.

-and-

Crystal Farms Limited, James Gerald Tatomir, Krystal Martens and Millie Ann Barberio

-and-

MNP Ltd., in its capacity as court-appointed receiver of Crystal Farms Limited

REASONS FOR DECISION

Macfarlane J.

Released: October 26, 2023

TAB 7

CITATION: Terrace Bay Pulp Inc. (Re), 2012 ONSC 4247
COURT FILE NO.: CV-12-9566-00CL
DATE: 20120727

SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)

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

RE: **IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF TERRACE BAY PULP INC., Applicant**

BEFORE: **MORAWETZ J.**

COUNSEL: **Pamela Huff, Marc Flynn and Kristina Desimini, for the Applicant, Terrace Bay Pulp Inc.**

Alec Zimmerman and James Szumski, for Birchwood Trading, Inc.

M. Starnino, for the United Steelworkers

Alan Merksey, for Tangshan Sanyu Group Xingda Chemical Fiberco Limited

Alex Ilchenko, for Ernst & Young Inc, Monitor

Jacqueline L. Wall, for Her Majesty The Queen in Right of Ontario as represented by the Ministry of Northern Development and Mines

Janice Quigg, for Skyway Canada Ltd.

Fred Myers, for the Township of Terrace Bay

Peter Forestell, Q.C., for Aditya Birla Group and AV Terrace Bay Inc.

HEARD: **JULY 16, 2012**

ENDORSED: **JULY 19, 2012**

REASONS: **JULY 27, 2012**

ENDORSEMENT

[1] Terrace Bay Pulp Inc. (the "Applicant") brought this motion for, among other things, approval of the Sales Transaction (the "Transaction") contemplated by an asset purchase agreement dated as of July 5, 2012 (the "Purchase Agreement") between the Applicant, as seller, and AV Terrace Bay Inc., as purchaser (the "Purchaser").

[2] The Applicant also seeks authorization to take additional steps and to execute such additional documents as may be necessary to give effect to the Purchase Agreement.

[3] Further, the Applicant seeks a Vesting Order, approval of the Fifth Report of the Monitor dated June 12, 2012 and a declaration that the subdivision control provisions contained in the *Planning Act*, R.S.O. 1990, c. P.13 (the "*Planning Act*") do not apply to the vesting of title to the Real Property (as defined in the Purchase Agreement) in the Purchaser and that such vesting is not, for the purposes of s. 50(3) of the *Planning Act*, a conveyance by way of deed or transfer.

[4] Finally, the Applicant sought an amendment to the Initial Order to extend the Stay of Proceedings to October 31, 2012.

[5] Argument on this matter was heard on July 16, 2012. At the conclusion of argument, on an unopposed basis, I extended the Stay of Proceedings to October 31, 2012. This decision was made after a review of the record which, in my view, established that the Applicant has been and continues to work in good faith and with due diligence such that the requested extension was appropriate in the circumstances.

[6] On July 19, 2012, I released my decision approving the Transaction, with reasons to follow. These are the reasons.

[7] With respect to the motion to approve the Transaction, the Applicant's position was supported by the United Steelworkers and the Township of Terrace Bay. Counsel to Her Majesty The Queen in Right of Ontario, as Represented by the Ministry of Northern Development and Mines, consented to the Transaction and also supported the motion.

[8] The motion was opposed by Birchwood Trading, Inc. ("Birchwood") and by Tangshan Sanyu Group Xingda Chemical Fiberco Limited ("Tangshan").

[9] Counsel to the Applicant challenged the standing of Tangshan on the basis that it was "bitter bidder". Argument was heard on this issue and I reserved my decision, indicating that it would be addressed in this endorsement. For the purposes of the disposition of this motion, it is not necessary to address this issue.

[10] The Applicant seeks approval of the Transaction in which the Purchaser will purchase all or substantially all of the mill assets of the Applicant for a price of $2 million plus a $25 million concession from the Province of Ontario. The Monitor has recommended that this Transaction be approved.

[11] Birchwood submits that the Applicant and the Monitor have taken the position that a competing offer from Tangshan for a purchase price of $35 million should not be considered, notwithstanding that the Tangshan offer (i) is subject to terms and conditions which are as good or better than the Transaction; (ii) would provide dramatically greater recovery to the creditors of the Applicant, and (iii) offers significant benefits to other stakeholders, including the employees of the Applicant's mill.

[12] Birchwood is a creditor of the Applicant. It holds a beneficial interest in the Subordinated Secured Plan Notes (the "Notes") in the face amount of approximately $138,000 and is also the fourth largest trade creditor of the Applicant. If the Transaction is approved, Birchwood submits that it expects to receive less than 6% recovery on its holdings under the Notes and no recovery on its trade debt. In contrast, if the Tangshan offer were accepted, Birchwood expects that it would receive full recovery under the Notes, and that it may also receive a distribution with respect to its trade debt.

[13] Birchwood also submits that the Tangshan offer provides substantial benefits to the creditors and other stakeholders of the Applicant which would not be realized under the Transaction. These include:

(a) an increase in the purchase price for the mill assets, from an effective purchase price of $27 million to a cash purchase price of $35 million;

(b) the potential for the Province of Ontario to be repaid in full or, if the Province is prepared to offer the same debt forgiveness concession under the Tangshan offer that it is providing to the Purchaser, the potential to increase the "effective" purchase price of the Tangshan offer to $60 million;

(c) as a consequence of (a) and (b), additional proceeds available for distribution to creditors subordinate to the Province of Ontario of between $8 million and $33 million;

(d) employment of approximately 75 additional employees, plus the existing management of the mill;

(e) conversion of the mill into a dissolving pulp mill in 18 months, rather than 4 years, with a higher expected yield once the conversion is complete and a business plan which calls for the production of a more lucrative interim product during the conversion process.

[14] Counsel to Birchwood submits that the substantial increase in the consideration offered by the Tangshan offer, which is a binding offer with terms and conditions that are at least as favourable as the Transaction, is sufficient to call into question the integrity and efficacy of the Sales Process (defined below). Counsel suggests that the market for the mill assets was not sufficiently canvassed, and provides evidence to support a finding that the criteria for approval of the sale as set out in s. 36 (3) of the CCAA and *Royal Bank v. Soundair Corp.* (1991) 7 C.B.R. (3d) 1 (C.A.) has not been met.

[15] Birchwood requests an adjournment of the Applicant's request for approval of the Transaction, or a refusal to approve the Transaction and a varying of the Sales Process to allow the Tangshan offer to be considered and, if appropriate, accepted by the Applicant. Tangshan supports the position of Birchwood.

[16] For the following reasons, I decline Birchwood's request and grant approval of the Transaction.

FACTS

[17] The Applicant filed the affidavit of Wolfgang Gericke in support of this motion. In addition, there is considerable detail provided in the Sixth Report of the Monitor and in the Supplemental Sixth Report of the Monitor.

[18] On January 25, 2012, the Initial Order was granted in the CCAA proceedings. The Initial Order authorized the Applicant to conduct, with the assistance of the Monitor and in consultation with the Province of Ontario, a sales process to solicit offers for all or substantially all of the assets and properties of the Applicant used in connection with its pulp mill operations (the "Sales Process").

[19] The Applicant and the Monitor conducted a number of activities in furtherance of the Sales Process, as outlined in detail in the Sixth Report.

[20] The Monitor received 13 non-binding Letters of Intent by the initial deadline of February 15, 2012. All of the parties that submitted Letters of Intent were invited to do further due diligence and submit binding offers by the March 16, 2012 deadline provided for in the Sales Process Terms (the "Bid Deadline").

[21] The Monitor received eight binding offers by the Bid Deadline and, based on the analysis of the offers received, the Monitor and the Applicant, in consultation with the Province, determined that the offer of AV Terrace Bay Inc. was the best offer. The ultimate parent of the Purchaser is Aditya Birla Management Corporation Private Ltd. ("Aditya"), one of the largest conglomerates in India.

[22] After identifying the Purchaser's offer as the superior offer in the Sales Process, and after extensive negotiations, the Applicant entered into the Purchase Agreement; executed July 5, 2012 for an effective purchase price in excess of $27 million.

[23] Counsel to the Applicant submits that in assessing the various bids, the Applicant and the Monitor, in consultation with the Province, considered the following factors:

(a) the value of the consideration proposed in the Transaction;

(b) the level of due diligence required to be completed prior to closing;

(c) the conditions precedent to closing of a sale transaction;

(d) the impact on the Corporation of the Township of Terrace Bay (the "Township"), the community and other stakeholders;

(e) the bidder's intended use for the mill site including any future capital investment into the mill; and

(f) the ability to close the Transaction as soon as possible, given the company's limited cash flow.

[24] Four parties expressed an interest in Terrace Bay after the Bid Deadline.

[25] The unchallenged evidence is that the Monitor informed each of the late bidders that they could conduct due diligence, but their interest would only be entertained if the Applicant could not complete a Transaction with the parties that submitted their offers in accordance with the Sales Process Terms (*i.e.* prior to the Bid Deadline).

[26] The Monitor states in its Sixth Report that it reviewed materials submitted by each late bidder. Tangshan, as one of the late bidders, submitted a non-binding offer on July 5, 2012 (the "Late Offer"). The terms of the Late Offer were subject to change, and Tangshan required final approval from regulatory authorities in China before entering into a transaction.

[27] It is also unchallenged that, before submission of the Late Offer, the Monitor had advised Recovery Partners Ltd., which submitted the Late Offer on Tangshan's behalf, that the Bid Deadline passed months before and that the Applicant was far advanced in negotiating and settling a purchase agreement with a prospective purchaser who submitted an offer in accordance with the Sales Process Terms.

[28] As indicated above, the Applicant executed the Purchase Agreement on July 5, 2012.

[29] The Monitor received a second non-binding offer from Recovery Partners Ltd., on behalf of Tangshan, on July 10, 2012 and a binding offer on July 12, 2012 (the "July Tangshan Offer") for a purchase price of $35 million.

[30] In its Sixth Report, the Monitor stated that it was of the view that it is not appropriate to vary the Sales Process Terms or to recommend the July Tangshan Offer for a number of reasons:

(a) the Applicant, in consultation with the Province, had entered into a binding purchase agreement with the Purchaser, which does not permit termination by Terrace Bay to entertain a new offer;

(b) the fairness and integrity of the Sales Process is paramount to these proceedings and to alter the terms of the court-approved Sales Process Terms at this point would be unfair to the Purchaser and all of the other parties who participated in the Sales Process in compliance with the Sales Process Terms;

(c) the Sales Process terms have been widely known by all bidders and interested parties since the outset of the Sales Process in January 2012;

(d) the Sales Process Terms provide no bid protections for the potential Purchaser;

(e) the Purchaser had incurred, and continues to incur, significant expenses in negotiating and fulfilling conditions under the Purchase Agreement. The Applicant has advised the Monitor that there is a significant risk that the Purchaser would drop out of the Sales Process if there were an attempt to amend the Sales Process Terms to pursue an open auction at this stage;

(f) to consider any new bids might result in a delay in the timing of the sale of the assets of the mill which, in the view of the Monitor, poses a risk due to the Applicant's minimal cash position;

(g) the Province, with whom the Applicant is required to consult, and which has entered into an agreement with the Purchaser, supports the completion of the Transaction;

(h) the Purchaser has made progress satisfying the conditions to closing, including meeting with the Applicant's employees and negotiating collective bargaining agreements with the unions.

[31] As set out in the affidavit of Mr. Gericke, the Purchaser is an affiliate of Aditya, a Fortune 500 company that intends to make a significant investment to restart the mill by October 2012 and invest more than $250 million to convert the mill to produce dissolving grade pulp.

[32] The purchase price payable is the aggregate of: (i) $2 million, plus or minus adjustments on closing, and (ii) the amount of the assumed liabilities.

[33] The obligation of the Applicant to complete the Transaction is conditional upon, among other things, all amounts owing by the Applicant to the Province pursuant to a Loan agreement dated September 15, 2010 (the "Province Loan Agreement") being forgiven by the Province and all related security being discharged (the "Province Loan Forgiveness").

[34] The Province is the first secured creditor of the Applicant, and is owed in excess of $24 million. The Province Loan Forgiveness is an integral part of the Transaction.

[35] The Applicant submits that as the net sale proceeds, subject to any super-priority claims, flow to the Province in priority to other creditors upon completion, the effective consideration for the Transaction is in excess of $27 million, namely the cash portion of the purchase price plus the Province Loan Forgiveness, plus the value of the assumed liabilities.

[36] The Monitor recommends approval of the Transaction for the following reasons:

(a) the market was broadly canvassed by the Applicant, with the assistance of the Monitor;

(b) the Purchase Agreement will result in a cash purchase price of $2 million, and will see the forgiveness of amounts outstanding, plus accrued interest and costs, under the Province Loan Agreement;

(c) the Transaction contemplated by the Purchase Agreement will result in significant employment in the region, as well as a substantial capital investment;

(d) the Transaction will also see a major multi-national corporation acquiring the mill, which will greatly improve the stability of the mill operations;

(e) the Transaction involves the expected re-opening of the mill in October 2012 and the Applicant will be rehiring the employees of the mill;

(f) the Monitor is aware of the late bids, including the July Tangshan Offer and has consulted the company and the Province in relation to same. The Monitor maintains that the Sales Process was conducted in accordance with the Sales Process Terms and provided an adequate opportunity for interested parties to participate, conduct due diligence, and submit binding purchase agreements and deposits within court-approved deadlines; and

(g) several further factors have been considered by the Monitor including, without limitation: the importance of maintaining the fairness and integrity of the Sales Process in relation to all parties, including the Purchaser; the terms of the Purchase Agreement; the fact that it has taken many weeks to negotiate various issues, and; the importance of certainty in relation to closing and the closing date.

[37] In its Supplement to the Sixth Report, the Monitor commented on the efforts that were made to canvass international markets. This Supplemental Report was prepared after the Monitor reviewed the affidavit of Yu Hanjiang (the "Yu Affidavit"), filed by Birchwood. The Yu Affidavit raised issues with the efficacy of the Sales Process. The Monitor stated, in response, that it is satisfied that the Sales Process was properly conducted and that international markets were canvassed for prospective purchasers. Specifically, one of the channels used by the Monitor to market the assets was a program managed by the Ministry of Economic Development in Innovation ("MEDI") for the Province of Ontario which had established an "international business development representative program" ("IBDR"). The IBDR program operates a network of contacts and agents throughout the world, including China, to enable the MEDI to disseminate information about investment opportunities in Ontario to a worldwide investment audience. The Monitor further advised that IBDR representatives provided the Sales Process documents to a global network of agents for worldwide dissemination, including in China.

[38] The Monitor restated that it was satisfied that the Sales Process adequately canvassed the market, and continues to support the approval of the Transaction.

[39] The Monitor also provided in the Supplemental Report an update with respect to the position of the Purchaser.

[40] The Purchaser advised the Monitor that it has negotiated an agreement in principle with executives of the Terrace Bay union locals regarding the terms of revised collective bargaining agreements. The Purchaser further advised that it is confident that the revised collective bargaining agreements will be ratified. Ratification of the collective agreements will remove one of the last conditions to closing, exclusive of court approval. It is noted that s. 9.2(e) of the Purchase Agreement specifically provides that a condition precedent to performance by the Purchaser is that on or before July 24, 2012, the Purchaser shall have obtained a five (5) year extension of the existing collective bargaining agreements on terms acceptable to the Purchaser acting reasonably.

[41] The Purchaser has further advised the Monitor that it is critical to complete the Transaction by the end of July 2012 in order that the mill can be restarted by October, prior to the onset of winter, to avoid increased carrying costs.

[42] The Purchaser also advised the Monitor directly that, if the Sales Process and the Sales Process Terms were varied, it would terminate its interest in Terrace Bay.

LAW AND ANALYSIS

[43] Section 36 of the CCAA provides the authority to approve a sale transaction. Section 36(3) sets out a non-exhaustive list of factors for the court to consider in determining whether to approve a sale transaction. It provides as follows:

> 36(3) In deciding whether to grant the authorization, the court is to consider, among other things,
>
> (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
>
> (b) whether the Monitor approved the process leading to the proposed sale or disposition;
>
> (c) whether the Monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than the sale or disposition under a bankruptcy;
>
> (d) the extent to which the creditors were consulted;
>
> (e) the effects of the proposed sale or disposition on the creditors and other interested parties; and
>
> (f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

[44] I agree with the submission of counsel on behalf of the Applicant that the list of factors set out in s. 36(3) largely overlaps with the criteria established in *Royal Bank of Canada v.*

Soundair Corp. (1991), 4 O.R. (3d) 1 (C.A.) [*Soundair*]. *Soundair* summarized the factors the court should consider when assessing whether to approve a transaction to sell assets:

> (a) whether the court-appointed officer has made sufficient effort to get the best price and has not acted improvidently;
>
> (b) the interests of all parties;
>
> (c) the efficacy and integrity of the process by which offers are obtained; and
>
> (d) whether there has been unfairness in the working out of the process.

[45] In considering the first issue, namely, whether the court-appointed officer has made sufficient effort to get the best price and has not acted improvidently, it is important to note that Galligan J. A. in *Soundair* stated, at para. 21, as follows:

> When deciding whether a receiver has acted providently, the court should examine the conduct of the receiver in light of the information the receiver had when it agreed to accept an offer. In this case, the court should look at the receiver's conduct in the light of the information it had when it made its decision on March 8, 1991. The court should be very cautious before deciding that the receiver's conduct was improvident based upon information which has come to light after it made its decision. To do so, in my view, would derogate from the mandate to sell given to the receiver by the order of O'Brien J. I agree with and adopt what was said by Anderson J. in *Crown Trustco v. Rosenberg* (1986), 60 O.R. (2d) 87 at p. 112 [*Crown Trustco*]:
>
> > Its decision was made as a matter of business judgment on the elements then available to it. It is of the very essence of a receiver's function to make such judgments and in the making of them to act seriously and responsibly so as to be prepared to stand behind them.
> >
> > If the court were to reject the recommendation of the Receiver in any but the most exceptional circumstances, it would materially diminish and weaken the role and function of the Receiver both in the perception of receivers and in the perception of any others who might have occasion to deal with them. It would lead to the conclusion that the decision of the Receiver was of little weight and that the real decision was always made upon the motion for approval. That would be a consequence susceptible of immensely damaging results to the disposition of assets by court-appointed receivers.

[46] In this case, the offer was accepted on July 5, 2012. At that point in time, the offer from Tangshan was of a non-binding nature. The consideration proposed to be offered by Tangshan

appears to be in excess of the amount of the Purchaser's offer. The Tangshan offer is for $35 million, compared with the Purchaser's offer of $27 million.

[47] The record establishes that the Monitor did engage in an extensive marketing program. It took steps to ensure that the information was disseminated in international markets. The record also establishes that a number of parties expressed interest and a number of parties did put forth binding offers.

[48] Tangshan takes the position, through Birchwood, that it was not aware of the opportunity to participate in the Sales Process. This statement was not challenged. However, it seems to me that this cannot be the test that a court officer has to meet in order to establish that it has made sufficient effort to get the best price and has not acted improvidently. In my view, what can be reasonably expected of a court officer is that it undertake reasonable steps to ensure that the opportunity comes to the attention of prospective purchasers. In this respect, I accept that reasonable attempts were made through IBDR to market the opportunity in international markets, including China.

[49] I now turn to consider whether the Monitor acted providently in accepting the price contained in the Purchaser's offer.

[50] It is important to note that the offer was accepted after a period of negotiation and in consultation with the Province. The Monitor concluded that the Purchaser's offer "was the superior offer, and provided the best opportunity to position the mill, once restarted, as a viable going concern operation for the long term".

[51] Again, it is useful to review what the Court of Appeal stated in *Soundair*. After reviewing other cases, Galligan J.A. stated at 30 and 31:

> 30. What those cases show is that the prices in other offers have relevance only if they show that the price contained in the offer accepted by the receiver was so unreasonably low as to demonstrate that the receiver was improvident in accepting it. I am of the opinion, therefore, that if they do not tend to show that the receiver was improvident, they should not be considered upon a motion to confirm a sale recommended by a court-appointed receiver. If they were, the process would be changed from a sale by a receiver, subject to court approval, into an auction conducted by the court at the time approval is sought. In my opinion, the latter course is unfair to the person who has entered *bona fide* into an agreement with the receiver, can only lead to chaos, and must be discouraged.
>
> 31. If, however, the subsequent offer is so substantially higher than the sale recommended by the receiver, then it may be that the receiver has not conducted the sale properly. In such circumstances, the court would be justified itself in entering into the sale process by considering competitive bids. However, I think that that process should be entered into only if the court is satisfied that the receiver has not properly conducted the sale which it has recommended to the court.

[52] In my view, based on the information available at the time the Purchaser's offer was accepted, including the risks associated with a Tangshan non-binding offer at that point in time, the consideration in the Transaction is not so unreasonably low so as to warrant the court entering into the Sales Process by considering competitive bids.

[53] It is noteworthy that, even after a further review of the Tangshan proposal as commented on in the Supplemental Report, the Monitor continued to recommend that the Transaction be approved.

[54] I am satisfied that the Tangshan offer does not lead to an inference that the strategy employed by the Monitor was inadequate, unsuccessful, or improvident, nor that the price was unreasonable.

[55] I am also satisfied that the Receiver made a sufficient effort to get the best price, and did not act improvidently.

[56] The second point in the *Soundair* analysis is to consider the interests of all parties.

[57] On this issue, I am satisfied that, in arriving at the recommendation to seek approval of the Transaction, the Applicant and the Monitor considered the interests of all parties, including the Province, the impact on the Township and the employees.

[58] The third point from *Soundair* is the consideration of the efficacy and integrity of the process by which the offer was obtained.

[59] I have already commented on this issue in my review of the Sales Process. Again, it is useful to review the statements of Galligan J.A. in *Soundair*. At paragraph 46, he states:

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

[60] At paragraph 47, Galligan J.A. referenced the comments of Anderson J. in *Crown Trustco*, at p. 109:

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

[61] In my view, the process, having been properly conducted, should be respected in the circumstances of this case.

[62] The fourth point arising out of *Soundair* is to consider whether there was unfairness in the working out of the process.

[63] There have been no allegations that the Monitor proceeded in bad faith. Rather, the complaint is that the consideration in the offer by Tangshan is superior to that being offered by the Purchaser so as to call into question the integrity and efficacy of the Sales Process.

[64] I have already concluded that the actions of the Receiver in marketing the assets was reasonable in the circumstances. I have considered the situation facing the Monitor at the time that it accepted the offer of the Purchaser and I have also taken into account the terms of the Late Offer. Although it is higher than the Purchaser's offer, the increase is not such that I would consider the accepted Transaction to be improvident in the circumstances.

[65] In all respects, I am satisfied that there has been no unfairness in the working out of the process.

[66] In my opinion, the principles and guidelines set out forth in *Soundair* have been adhered to by the Applicant and the Monitor and, accordingly, it is appropriate that the Transaction be approved.

[67] In light of my conclusion, it is not necessary to consider the issue of whether Tangshan has standing. The arguments put forth by Tangshan were incorporated into the arguments put forth by Birchwood.

[68] I have concluded that the Approval and Vesting Order should be granted.

[69] I do wish to comment with respect to the request of the Applicant to obtain a declaration that the subdivision control provisions contained in the *Planning Act* do not apply to a vesting of title to real property in the Purchaser and that such vesting is not, for the purposes of s. 50(3) of the *Planning Act* a conveyance by way of deed or transfer.

[70] The Purchase Agreement contemplates the vesting of title in the Purchaser of the real property. Some of the real property abuts excluded real property (as defined in the Purchase Agreement), which excluded real property is subsequently to be realized for the benefit of stakeholders of Terrace Bay.

[71] The authorities cited, *Lama v. Coltsman* (1978) 20 O.R. (2d) 98 (CO.CT.) [*Lama*] and *724597 Ontario Inc. v. Merol Power Corp*., (2005) O.J. No. 4832 (S.C.J.) are helpful. In *Lama*, the court found that the vesting of land by court order does not constitute a "conveyance" by way of "deed or transfer" and, therefore, "a vesting order comes outside the purview of the *Planning Act*".

[72] For the purposes of this motion, I accept the reasoning of *Lama* and conclude that the granting of a vesting order is not, for the purposes of s. 50(3) of the *Planning Act*, a conveyance by way of deed or transfer. However, I do not think that it is necessary to comment on or to

issue a specific declaration that the subdivision control provisions contained in the *Planning Act* do not apply to the vesting of title.

[73] The Applicants also requested a sealing order. I have considered the *Sierra Club* principle and have determined that disclosure of the confidential information could be harmful to stakeholders such that it is both necessary and appropriate to grant the requested sealing order.

DISPOSITION

[74] In the result, the motion is granted subject to the adjustment with respect to aforementioned *Planning Act* declaration and an order shall issue approving the Transaction.

MORAWETZ J.

Date: July 27, 2012

TAB 8

IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
GENERAL DIVISION

Citation: *Harbour Grace Ocean Enterprises Ltd., Re CCAA*, 2024 NLSC 47
Date: March 21, 2024
Docket: 202301G5262

IN THE MATTER OF the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (*CCAA*)

AND IN THE MATTER OF an Application of Harbour Grace Ocean Enterprises Ltd. and Laurenceton Holdings Ltd. (Company)

Before: Justice Alexander MacDonald
Edited Transcript of Oral Reasons for Judgment

Place of Hearing:	St. John's, Newfoundland and Labrador
Date of Hearing:	February 8 and 9, 2024
Date of Oral Judgment:	February 12, 2024

Appearances:

Caitlin E. Fell and Brendan Bissell	Harbour Grace Ocean Enterprises Ltd. and Laurenceton Holdings Ltd.

John Taylor Hood Christopher Armstrong Michael McTaggart Deborah Yetman and Kristine Sinclair	PricewaterhouseCooper's Inc., the Monitor
Neil L. Jacobs, K.C. Phil Clarke and Liam Wilson	Business Development Bank of Canada
Joshua McElman KC	Bank of Montreal
Darren D. O'Keefe	Gray Enterprise Ltd.
George Kinsman	Ernst & Young
Sophie J. Dupré and David Lasaga	Minister of National Revenue
Deborah Hutchings	Total Insulation & Coatings Inc.
Sheri Pottie	Caterpillar Financial Services Ltd.

Authorities Cited:

CASES CONSIDERED: *Royal Bank of Canada v. Soundair Corporation* (1991), 4 O.R. (3d) 1, 83 D.L.R. (4th) 76 (C.A.); *Harte Gold Corp. (Re)*, 2022 ONSC 653; *9354-9186 Québec Inc. v. Callidus Capital Corporation*, 2020 SCC 10; *Terrance Bay Pulp Inc.* 2012 ONSC 4247; *Sherman Estate v. Donovan*, [2021] 2 S.C.R. 75; *Rambler Metals and Mining Limited, Re CCAA*, 2023 NLSC 134

STATUTES CONSIDERED: *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36; *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3

REASONS FOR JUDGMENT

MACDONALD J.

INTRODUCTION

[1] This Application represents a major step in the restructuring of the Harbour Grace Ocean Enterprises Ltd. (HGOE) shipyard in Harbour Grace, Newfoundland and Labrador. Harbour Grace Enterprises Limited, and an associated company Laurenceton Holdings Ltd. (Laurenceton), each own parts of the shipyard business. I will refer to them as the Company.

[2] The Company proposes to sell the business to Green Skiff Investments Inc. (Purchaser). It proposes to sell Laurenceton's real estate on 35 York Street in St. John's to another. It asks me under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (*CCAA*) to approve these sales by approving:

(a) an Asset Vesting Order (AVO) to allow for the sale of HGOE assets and certain liabilities to the Purchaser as set out in the Asset Purchase Agreement (APA);

(b) assignment of the Assumed Contracts to the Purchaser subject to the Purchaser's payment of all Cure Costs described in the AVO;

(c) an AVO to allow for the sale of 35 York Steet as set out in a February 4, 2024, Agreement of Purchase and Sale (York AVO);

(d) an extension of the Stay of Proceedings until February 29, 2024; and

(e) an order sealing Schedule 1 of the Affidavit of Paul Lannon, President of HGOE, filed February 5, 2024, Schedules A, B and C of the Monitor's Amended Third Report and Confidential Exhibit A to the Affidavit of Kevin English, President of Gray Enterprise Ltd. (Gray) filed on February

8, 2024, and the unredacted Agreement of Purchase and Sale for 35 York Street (Confidential Exhibits).

[3] The Company served the Monitor, PricewaterhouseCoopers Inc. (PwC), and all known creditors and shareholders with its application materials. Monitor's counsel provided notice to stakeholders previously registered for prior court applications. It also published its report accompanying this application on PwC's website.

[4] Gray Enterprise Ltd., a company owned by Kevin English, is the majority shareholder and a secured creditor of HGOE.

[5] No one opposes the York AVO. The Company, the Bank of Montreal (BMO), the Business Development Bank of Canada (BDC), and the Monitor all asked me to approve the AVO and extend the Stay Period. Gray asks me not to approve the AVO or the stay extension. No one else who appeared opposed the AVO or the extension of the Stay Period.

[6] The Company operates one of the largest marine vessel repair, refit, and construction businesses in Eastern Canada, from its shipyard facilities located in the town of Harbour Grace, Newfoundland and Labrador.[1]

[7] The Business, when it filed the Application for an Initial Order under the *CCAA*, employed about fifty-six workers but historically employed up to eighty-five.[2] The Company offers its small and medium-sized local fishing business customers a range of services.[3]

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[1] Affidavit of Paul Lannon sworn February 4, 2024 (Lannon AVO Affidavit) at Tab 2 of the Company's Interlocutory Application Record, para. 9.
[2] Lannon AVO Affidavit, para. 10.
[3] Lannon AVO Affidavit, para. 11.

[8] The Company also offers services in the maintaining and refitting of ferries, Coast Guard ships, icebreakers, response ships, and search-and-rescue vessels for Provincial and Federal Governments.[4]

[9] The Company faced financial challenges in 2022 due to a combination of factors including:

(a) reduced demand;

(b) unreliable supply chains;

(c) difficulties with collecting a receivable on a large barge contract; and

(d) shrinking profit margins due to inflation.

[10] These factors contributed to workflow disruptions and cashflow challenges.[5] By October 2023, the Company's cashflow developed into a liquidity crisis.[6] Secured creditors served the Company with intentions to enforce their security pursuant to s. 244 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3.[7] Gray did so on September 27, 2023; BMO on October 3, 2023; and BDC on October 17, 2023.

[11] On November 2, 2023, this Court granted the Company's application for an initial order under the *CCAA* (Initial Order) that granted a stay of proceedings until the comeback hearing on November 17, 2023 (Stay Period"), and authorized the

[4] Lannon AVO Affidavit, para. 11.
[5] Lannon AVO Affidavit, para. 12.
[6] Lannon AVO Affidavit, para. 13.
[7] Lannon AVO Affidavit, para. 13.

Company to borrow from Gray up to $255,000 under an interim financing facility (Gray DIP).[8]

[12] As a result of disputes between Gray and the Company, the Company obtained replacement interim financing from BMO in the principal amount of $1 million pursuant to the terms of a Debtor-in-Possession Financing Term Sheet dated November 15, 2023 (BMO DIP).[9]

[13] At the comeback hearing on November 17, 2023, this Court granted an Amended and Restated Initial Order (ARIO) that, among other things, extended the Stay Period to February 9, 2024, and approved the BMO DIP.[10] This Court also approved a sale and investment solicitation process for the Company's business and assets pursuant to an Order dated November 17, 2023 (SISP).[11]

[14] All secured creditors attended this hearing and had the opportunity to make arguments on both the SISP and the BMO DIP.

[15] The Monitor solicited bids from the public, reviewed all bids and, in consultation with the Company, BMO, and BDC decided that the Purchaser's offer, the Proposed Transaction, was the best and highest bid received in the SISP. The Company and the Monitor submit that:

(a) the consideration payable under the APA is the highest of any bid received in the SISP and is fair and reasonable; and

(b) the terms of the APA are typical of asset purchase transactions regularly approved in insolvency proceedings. Its terms are fair and reasonable in the circumstances.

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[8] Lannon AVO Affidavit, paras. 14-15.
[9] Lannon AVO Affidavit, para. 15.
[10] Lannon AVO Affidavit, para. 16.
[11] Lannon AVO Affidavit, para. 17.

[16] The Monitor says, and I find that the Proposed Transaction allows the Business to continue as a going concern. It is in the best interest of employees, customers, suppliers, the Harbour Grace community and the Newfoundland and Labrador economy.

[17] By approving the AVO, I approve the APA, which contains the commercial terms of the transaction. These include:

(a) Purchaser – Green Skiff Investments Inc., an arm's length party;[12]

(b) Purchased Assets – All the Company's right, title and interest, on an "as is, where is" basis, in the property, assets and undertakings of every kind and description, wheresoever situate, in respect of the Business.[13] The York Street property is not a Purchased Asset;

(c) Assumed Contracts and Obligations – The Purchaser will assume all rights and obligations under three equipment leases with Caterpillar Financial Services Limited, Meridian Onecap Credit Corp. and Vault Credit Corporation, as further described in the APA (Assumed Contracts). As a condition to such assignment, the Purchaser shall pay all Cure Costs under the Assumed Contracts, including among other things all amounts required to cure any monetary defaults under the Assumed Contracts;[14]

(d) Purchase Price and Deposit – the Company redacted the purchase price and deposit amounts from the copy of the APA publicly filed;[15]

(e) Employees – The Purchaser intends to offer employment to most if not all employees of the Company on terms and conditions substantially the same as prior to closing;[16]

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[12] Lannon AVO Affidavit, para. 29(a).
[13] Lannon AVO Affidavit, para. 29(b).
[14] Lannon AVO Affidavit, para. 29(c).
[15] Lannon AVO Affidavit, para. 29(d).

(f) Conditions of Closing – Conditions typical for insolvency proceedings, including the issuance of the AVO;[17] and

(g) Closing Date – No later than seven business days from the issuance of the AVO or such other date as mutually agreed between the parties and the Monitor.[18]

[18] By approving the York AVO, I approve the York Street property Agreement of Purchase and Sale. The relevant terms are:

(a) Purchaser–David and Samantha Curtis are arm's length parties;[19]

(b) Purchase Price and Deposit–the Monitor redacted the purchase price and deposit amounts from the publicly filed agreement;[20]

(c) Conditions of Closing–Conditions typical for real estate transactions; and

(d) Closing Date–on or before April 23, 2024, or such other date as mutually agreed between the parties.

[19] The Monitor tells me in its Amended Third Report, dated February 5, 2024, that the cost of the *CCAA* proceeding including payments due to municipalities and the CRA is about $1.477 million. The Company owes:

(a) to BDC about $1.688 million. The Company secured this debt by a first charge over land, buildings, and equipment and a second charge over the

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[16] Lannon AVO Affidavit, para. 29(e).
[17] Lannon AVO Affidavit, para. 29(f).
[18] Lannon AVO Affidavit, para. 29(g).
[19] Lannon AVO Affidavit, para. 29(a).
[20] Lannon AVO Affidavit, para. 29(d).

Company's accounts receivable and inventory. This amount is current as of October 17, 2023;

(b) to BMO about $3.473 million. The Company secured this debt by a first charge over the company's accounts receivable and inventory. It also has a first charge on the York Street property. This amount is current as of October 3, 2023;

(c) to Gray about $1.5644 million. The Company secured this debt by a second charge over land and the third charge over accounts receivable and inventory. This amount is current as of September 27, 2023; and

(d) CRA about $1.016 million with a yet undeterminable priority. I do not know how current this amount is. The Monitor also owes it about $32 thousand for source deductions made post-filing.

[20] This Application also requires me to consider the implications of:

(a) Gray's efforts to participate in the SISP from December 2023 to February 2, 2023 (Gray Bid Issues); and

(b) Gray submitting a bid on February 8, 2024, the first day of the hearing, to purchase the shipyard business (Gray Bid). I sealed the terms of this bid but the Company, the Monitor, and the other secured creditors have a copy.

[21] I will discuss the Gray Bid Issues and the Gray Bid later. Indeed, Gray says it agrees that I should approve the AVO if I do not need to consider the implications of the Gray Bid Issues and the Gray Bid.

ISSUES

[22] I will consider whether I should:

(a) approve the AVO and thereby the APA;

(b) assign the Assumed Contracts to the Purchaser subject to the Purchaser's payment of all Cure Costs;

(c) approve the York AVO and thereby the agreement of purchase and sale;

(d) extend the Stay Period until February 29, 2024; and

(e) seal the Confidential Exhibits.

[23] I hereby:

(a) approve the revised AVO provided to me by counsel at the end of the hearing;

(b) approve assignment of the Assumed Contracts to the Purchaser subject to the Purchaser's payment of all Cure Costs;

(c) approve the York AVO;

(d) extend the Stay until February 29, 2024; and

(e) seal the Confidential Exhibits.

DISCUSSION

[24] I will now explain why I made these decisions. I will first deal with whether I should approve the AVO.

Should I approve the AVO?

[25] The Monitor recommends that the Purchaser's bid is in the best interests of the creditors, and I should approve it. If I do not approve the AVO, the Monitor says it is unlikely that the combined value of the assets in a forced liquidation will create a larger payout.

[26] The proceeds of the sale will not allow the Monitor to repay BMO and BDC in full. It is too early to know how much the Monitor will repay CRA. Gray and unsecured creditors will receive nothing.

Background on an AVO

[27] A successful *CCAA* process sometimes results in a plan of arrangement that creditors approve. However, s. 36(1) of the *CCAA* says, "A debtor company in respect of which an order has been made under this Act may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court."

[28] Section 36 provides that shareholder approval is not necessary. Furthermore, it does not require creditor approval. Section 11 of the *CCAA* also gives me general authority. It provides, "[T]he court, on the application of any person interested in the matter, may … make any order that it considers appropriate in the circumstances."

[29] Thus, creditors need not approve a sale of assets outside the ordinary course of business. An AVO is such a transaction. No one disputes that I have authority to approve an AVO. Courts have often approved these types of transactions.

[30] An AVO involves a series of steps whereby the Purchaser acquires the assets of the debtor company free and clear of any encumbrances or claims other than those assumed by the Purchaser, as contemplated by s. 36(4) of the *CCAA*.

[31] The purchase price stands in place of the assets and is available to satisfy creditor claims in accordance with their pre-existing priority.

[32] Section 36 of the *CCAA* directs that I consider:

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

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

(c) whether the Monitor filed with the Court a report stating that the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;

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

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

(f) whether the consideration for the assets is reasonable and fair, considering their market value.

[33] I will also consider the guidance in *Royal Bank of Canada v. Soundair Corporation* (1991), 4 O.R. (3d) 1, 83 D.L.R. (4th) 76 (C.A.), a case for the approval of the sale of assets in an insolvency, and the additional factors referred to in paragraph 38 of *Harte Gold Corp. (Re),* 2022 ONSC 653. The *Soundair* principles are:

(a) whether the Monitor made sufficient effort to obtain the best price;

(b) that the debtor has not acted improvidently;

(c) that the interests of all parties;

(d) that the efficacy and integrity of the process by which the Monitor obtained offers; and

(e) whether there has been unfairness in the working out of the process.[21]

[34] I need not consider all of these factors. Each need not support the issuing of the AVO. I use them to assist me in exercising the broad discretion I have under the *CCAA.*

[35] Finally, I will bear in mind the direction of the Supreme Court of Canada in *9354-9186 Québec Inc. v. Callidus Capital Corporation*, 2020 SCC 10, at para. 49, when it said, "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*. … Additionally, the court must keep in mind three 'baseline considerations' which the applicant bears the burden of demonstrating:

(1) that the order sought is appropriate in the circumstances, and

[21] *Royal Bank of Canada*

(2) that the applicant has been acting in good faith and

(3) with due diligence."

Approval of this AVO

[36] The Monitor, with the assistance of the Company and in consultation with the BMO and BDC, performed the SISP in accordance with its terms.[22]

[37] The Purchaser proposes to affect the transaction by way of an AVO. The AVO approves the contents of the APA, which contains the details of the sale.

[38] The Purchaser agrees to pay the confidential purchase price. The Purchaser will acquire all of the assets of the Company as described in the APA. The Purchaser intends to initiate a process whereby it will hire the Company's employees.

[39] Thus, on closing, the Purchaser will own all of the Company's assets except for certain specified assets and liabilities.

[40] After or on closing, the Monitor will pay the BMO DIP and certain of the *CCAA* costs, which as of February 5, 2024, are about $ 1.477 million**.** It will later ask me for a distribution order.

[22] Lannon AVO Affidavit, para. 19.

[41] The Monitor obtained a security review from its counsel, which concluded that the secured creditors' security is valid, enforceable, and effective against a trustee in bankruptcy.

[42] The Monitor, the Company, BMO, and BDC say that these factors support me in granting the AVO. Gray agrees with this in the absence of the Gray Bid and the Gray Bid Issues. It says when I consider the implications of the Gray Bid and the Gray Bid Issues, I should refuse the AVO.

[43] Thus, I will first decide without considering the Gray Bid and Gray Bid Issues if I would grant the AVO. I will then decide if the Gray Bid and Gray Bid Issues change my conclusion.

[44] I find (without considering the Gray Bid and Gray Bid Issues), as follows:

(a) The Company has acted in good faith with due diligence. The Monitor is also of this opinion.

(b) The AVO produces an economic result at least as favourable as any other viable alternative. There are no other bids. I will consider the Gray Bid and Gray Bid Issues later.

(c) No stakeholder is worse off under the AVO than it would have been under any other viable alternative. If the AVO fails, it is likely the secured creditors will pursue receivership motions, and receivers will sell the Company assets at a liquidation sale.

(d) The AVO better preserves the value of the Company's assets than this liquidation alternative.

(e) No stakeholder is worse off under the AVO than it would have been under any other viable alternative. Simply stated, there is no other

alternative. A liquidation sale will hurt all creditors. I will consider the Gray Bid and Gray Bid Issues later.

(f) Furthermore, the transaction contemplates the sale to a new corporate entity. Thus, the Company's shareholders receive no recovery of their investment.

(g) The SISP is reasonable in the circumstances. The Monitor approved the SISP. The Monitor ran the SISP in a fair, open and transparent manner. The Monitor ran the process supported by the Company.

(h) The Monitor sufficiently canvassed the market. Third parties could participate in the sale process in a confidential manner. The SISP provided sufficient time for parties to express interest and evaluate the opportunity. The SISP was open to all parties.

(i) The process leading to the AVO was reasonable in the circumstances. The Monitor sought Court approval of the SISP. Creditors received notice of these applications. The Court allowed secured creditors the opportunity to provide input to the Court on these processes. The SISP is not innovative or unique.

[45] I find that, without considering the circumstances surrounding the Gray Bid Issues and the Gray Bid, the Monitor made sufficient effort to obtain the best price. There is no evidence that the Company acted improvidently. I agree with the Monitor and find that the purchase price is fair and reasonable.

[46] The Monitor says, and I agree that:

(a) the proposed sale would be more beneficial to the creditors than disposition under a bankruptcy;

(b) bankruptcy would jeopardize the possibility of future operations. A bankruptcy would destroy this form of a going-concern sale and thereby risk the sale or reduce the purchase price; and

(c) a bankruptcy would delay and jeopardize the sale. Before I can approve an AVO under a bankruptcy, the Company must be bankrupt, the creditors must have their meeting, the creditor must appoint inspectors, and they must approve the sale. I find that this transaction will provide a superior recovery for creditors than would a liquidation of the Company's assets in bankruptcy.

[47] The Monitor consulted with BMO and BDC, the principle secured creditors. It did not consult with Gray. The Company and the secured creditors including Gray all agree that the Monitor should not have consulted Gray because it was and still is a potential bidder under the SISP as I will discuss later. Article 21 of the SISP prohibits such consultation.

[48] The Monitor consulted with CRA generally but not on the details of the SISP. I have no evidence if it consulted with unsecured creditors. In this case, I find that any lack of consultation did not have a material effect on the other creditors' positions. They are to receive, and were always likely to receive, nothing in this *CCAA* proceeding.

[49] I find that the Monitor did make good-faith efforts to sell the assets to the public. Other than the Gray Bid, there were no other bids, arm's length or otherwise. Therefore, the Purchaser's bid is inherently superior.

[50] The Proposed Transaction has the prospect of renewed employment for the Company's employees. It has the prospect of providing ongoing business opportunities for suppliers of goods and services to the shipbuilding and repair business.

[51] The AVO will provide an expedient efficient transfer of the Company's intangibles. This would support a timely continuation of the shipbuilding and repair business. This will provide an opportunity for employees, stakeholders, and the unsecured creditors to engage with the new business. The Monitor says, and I agree that this will benefit the local community.

[52] Finally, and importantly, the Monitor supports the use of the AVO.

[53] The AVO will:

(a) provide for timely, efficient and impartial resolution of the Company's insolvency;

(b) preserve and maximize the value of the Company's assets;

(c) ensure a fair and equitable treatment of the claims against the Company;

(d) protect the public interest and have the potential to preserve employment and third-party suppliers and service providers; and

(e) balance the costs and benefits of the Company's restructuring.

[54] I now turn to whether the circumstances surrounding the Gray Bid Issues and the Grey Bid change any of these conclusions. I will first deal with the Grey Bid Issues.

The Circumstances Surrounding the Gray Bid Issues

[55] I find that the Gray Bid Issues do not change my conclusion that I should approve the AVO. I will now explain why.

[56] The implications of the Gray Bid Issues require me to discuss terms of the SISP. These are:

(a) The Monitor conducts the SISP with the assistance of the Company.[23] The Company will direct any discussions or enquiries about the SISP to the Monitor.[24]

(b) The SISP empowered the Monitor, with the assistance of the Company, to market the business and assets and solicit offers for a broad range of potential transactions including sale, refinancing, and recapitalization transactions. [25]

(c) The SISP authorized bids from "Insiders" (comprising past or present shareholders or directors of the Company) and credit bids from secured creditors, provided that the applicable secured creditor or Insider notified the Monitor in writing, by no later than December 1, 2023, of its intent to bid. [26]

(d) The Monitor would inform the "Consulted Parties," including Gray, BMO and BDC, of developments in the SISP, subject to the notification to the Monitor by December 1, 2023, that such party would not be

[23] Lannon AVO Affidavit, para. 18.
[24] Lannon AVO Affidavit, para. 18(a).
[25] Lannon AVO Affidavit, para. 18.
[26] Lannon AVO Affidavit, para. 18(d).

participating in the SISP.[27] As I discuss later, the Monitor did not consult Gray after it gave the notice to which I will refer.

(e) The bid deadline under the SISP was January 29, 2024 (Bid Deadline), subject to such extensions the Monitor considered appropriate.[28]

(f) The Monitor was to select the successful bid by January 31, 2024. The Monitor extended this deadline to February 2, 2024. No one takes issues with this extension.

(g) Upon receipt of bids and to maximize value, the SISP authorized the Monitor to negotiate with bidders. However, the Monitor did not have any obligation to negotiate identical terms with, or extend identical terms to, all bidders.[29]

[57] The Monitor, with the assistance of the Company, would assess all submitted bids and would select the best and highest bid received by the Bid Deadline based on criteria including:

(a) the consideration and net value provided by the proposed transaction;

(b) the ability of the bidder to successfully complete the proposed transaction;

(c) the proposed contractual terms;

(d) the effects of the proposed transaction on the Company's stakeholders;

(e) the assets included in the bid; and

[27] Lannon AVO Affidavit, para. 18(e).
[28] Lannon AVO Affidavit, para. 4.
[29] Lannon AVO Affidavit, para. 18(h).

(f) the proposed timing for closing.[30]

[58] Wayne Reid and Paul Lannon, as current management and therefore Insiders, informed the Monitor by the December 1st deadline they would not be participating in the SISP.[31]

[59] Neither Kevin English nor Gray submitted a declaration to the Monitor by December 1, 2023, that they would be submitting a bid in the SISP.[32] However when the Monitor followed up with Gray on December 2, 2023, it informed him that they might submit a bid.

[60] BMO and BDC, as secured creditors, informed the Monitor that they would not be participating in the SISP.[33] As a result, BMO and BDC were the only Consulted Parties under the SISP.[34]

[61] The SISP deals with the participation of a secured creditor like Gray. In particular:

(a) the preamble to Article 18 says, "Any party ... holding a valid, enforceable, and properly perfected security interest in the Company may … credit bid the amount of debt secured by such lien" as part of the bid under the SISP;

(b) Article 18(a) required Gray to inform the Monitor by December 1, 2023, that it might make a credit bid. It did not do so, but the Monitor allowed it to do so on December 2, 2023, as I described earlier; and

[30] Lannon AVO Affidavit, para. 18(j).
[31] Lannon AVO Affidavit, para. 20.
[32] Lannon AVO Affidavit, para. 21.
[33] Lannon AVO Affidavit, para. 20.
[34] Lannon AVO Affidavit, para. 23.

(c) Article 18(b) requires that any credit bid Gray submits must provide for the payment in full in cash on closing the amount owing to the DIP lenders, other charges granted under the Initial and Amended and Restated Orders, and full payment of any amounts due to secured creditors senior to Gray. In this case, these are BMO and BDC.

[62] After Gray told the Monitor that it might make a credit bid, under Article 21 of the SISP, the Monitor could not consult with Gray on the SISP process to prevent conflicts of interest and to protect the integrity of the SISP.

[63] In simple terms, any credit bid from a secured creditor must ensure the payout of creditors with priority claims to that bidder on the property the credit bidder wanted.

[64] A Gray credit bid must include an offer to pay the BMO and BDC debt. As of the fall of 2023 this was about $5.161 million together with interest and cost accrued since then (Senior Debt). This may be less if a bidder does not want all the assets secured by a secured creditors' security.

[65] Furthermore, it is unclear what portion of the CRA debt Gray would need to pay. The parties agree that this is not a simple calculation because of complex tax rules.

[66] Thus, a credit bidder was unlikely to know the exact liability it would incur if it committed to repay Senior Debt. Gray could have eliminated this uncertainty if it were to submit a bid without crediting its secured debt.

[67] As Gray was considering a credit bid, between early December 2023 and late January 2024, it and the Monitor discussed what was the "amount of debt secured by Gray's lien" as I referred to in Article 18 of the SISP. This is the credit portion of its potential bid.

[68] Beginning on November 3, 2023, the Monitor asked Gray to provide evidence for amounts advanced to Laurenceton in 2013 by HGOE and a non-party company, Blue Holdings Ltd.

[69] Gray says that Blue Holdings Ltd. assigned its interest in the shareholder loan to Gray, and that HGOE guaranteed or is otherwise liable for the shareholder's loan.

[70] The Monitor followed up on its request on November 6, 24, and 29, 2023, and December 6, 2023. It did so again on January 23, 2024, and told Gray it had in its possession:

(a) the shareholders agreement between Laurenceton, Gray and a related company, 69199 Newfoundland and Labrador Inc.;

(b) a demand debenture from Laurenceton to Gray;

(c) a $2 million demand debenture from HGOE to Gray;

(d) a priority agreement between HGOE, BMO and Gray;

(e) PPSA registration searches for the Company; and

(f) the Laurenceton 2013-2017 unaudited financial statements and the Gray 2014-2018 unaudited financial statements.

[71] The Monitor said it did not have:

(a) any loan or credit documentation pertaining to the shareholder loans;

(b) any documentation evidencing Blue Holdings Ltd.'s assignment of its interest in the shareholder loan to Gray; and

(c) any guarantee or other documentation that evidences HGOE's liability for the shareholder loan.

[72] Thus, the Monitor did not have any evidence of the underlying debt secured by the $2 million debenture. Gray and the Monitor exchanged correspondence about this issue from early December to the end of January 2024.

[73] This matter came to a head in January 25, 2024, when Gray's counsel told the Monitor, "Please be advised that if our client does decide to bid, it will likely be credit bidding the $2,000,000.00 it has in registered security." They did so despite admitting at the hearing that the Company owes Gray less than this.

[74] They continued, "If your client rejects our client's bid on the basis we have not "proven" our debt, in the absence of its own thorough investigation against the [Company's] corporate records, then you can expect our client will be bringing a suit against the Monitor for improvident sale practices."

[75] January 26, 2024, the Monitor responded and said, "We take it from your email ... that your client does not have any additional documentation to support its claim, including any document (such as a guarantee) that would evidence HGOE being liable for the shareholder loan."

[76] The Monitor continued, "As such, and based on the documentation available to us at present, the Monitor does not see a basis for your client to credit bid the shareholder loan in respect of HGOE's assets as it is not apparent that any indebtedness is owing by HGOE to your client in respect of the shareholder loan."

[77] The Monitor "urged" Gray to deliver any additional documentation or other evidence that would support its ability to credit bid.

[78] Importantly it added, "Your client is of course free to take a different position and deliver a credit bid and, to the extent it is ultimately relevant, the Court can determine whether your client is able to credit bid."

[79] Kevin English knew that under the SISP Order the Monitor could accept bids until January 29, 2024. The Monitor would select a successful bidder by January 31, 2024. The Monitor subsequently extended the successful bidder selection until February 2, 2024.

[80] As of the Bid Deadline, the Monitor received four bids. Kevin English or Gray did not bid. The Monitor informed all the bidders that it received competing bids. It offered bidders an opportunity to submit increased bids, should they wish to do so.[35] Only two bidders submitted revised and higher bids.[36]

[81] The Monitor informed the two remaining bidders that only two bids remained for consideration and to submit revised and higher bids should they wish to do so.[37] Only one bidder, the Purchaser, submitted a higher revised bid.[38]

[82] Kevin English says that Gray did not submit a bid prior to the bid deadline because:

(a) the Monitor prohibited it from submitting a bid;

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[35] Lannon AVO Affidavit, para. 23.
[36] Lannon AVO Affidavit, para. 23-24.
[37] Lannon AVO Affidavit, paras. 23-24.
[38] Lannon AVO Affidavit, para. 25.

(b) the Monitor had no right to require it to prove the amount of debt secured by its security. Furthermore, the Monitor and the Company could easily determine the debt the Company's owed to it because they had access to the Company's financial statements;

(c) if Gray did bid, the Monitor would contest the amount of its credit bid;

(d) as the credit portion of any Gray bid counts towards a calculation whether Gray would be the high bidder, the dispute with the Monitor about the credit portion created unacceptable bid risk; and

(e) the deposit required from Gray is prohibitive as it is based on both the cash and credit portion of the debt as Gray valued it.

[83] It says that because of these issues Gray then decided not to bid and decided to pursue "the intervention of this Court." It says that these issues support its contention that the Monitor did not act providently when it accepted the Proposed Transaction.

[84] I find the evidence does not show that the Monitor prohibited Gray from making a bid. This issue is about the amount of debt secured under Gray's $2 million demand debenture. No one provided me a copy of the debenture. However, debentures are collateral in the sense that they secure debt evidenced by other documents.

[85] It is difficult to fault the Monitor in these circumstances. The Monitor must evaluate a "credit" bid against the amount that the Company owes the bidder under its lien. The Monitor does not need to prove what the Company owes a secured creditor. It is Gray's obligation to do so (s. 20(b) of the *CCAA*).

[86] It surely is in Gray's interest to have the Monitor raise this issue before the bid deadline rather than after it. But even if it was not, Gray's obvious solution was to ether:

(a) make a cash bid;

(b) make a credit bid and challenge any Monitor ruling on the amount secured; or

(c) seek direction from the Court before the bid deadline.

[87] It did none of these things. It chose not to bid for the reasons Kevin English described in his Affidavit. His complaint about deposit costs is not the Monitor's fault or a flaw in the SISP. Deposit costs are a risk of the *CCAA* process known to all bidders.

[88] Gray did not seek, as Kevin English said, "the intervention" of this Court until his counsel wrote his letter to the Court on February 5, 2024.

[89] Kevin English said Gray did not take an application earlier because it wanted to ensure that the bid process closed so that it would not deter other potential bidders from participating in the SISP.[39] It also did not intervene because it was concerned that the Monitor would take an action against it for tortious interference if it became known that Gray was challenging the bids before the Monitor finalized them.

[90] I find it is more likely he did not intervene in the SISP because as he is both a secured creditor and a guarantor of the BMO debt, he had an interest in ensuring the highest bid possible from third parties.

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[39] Para 7

[91] Gray elected not to make a bid. Kevin English as a guarantor and ultimate shareholder elected not to make a bid. Gray or Kevin English did not ask the Monitor for an extension of the bid deadline. They did not ask the Monitor to consult them on whether they might make a bid like the Gray Bid.

[92] Gray instead says that the Monitor had an obligation to ask them if they intended to bid. There is no merit to this argument. Thus, the obvious conclusion is that Gray and Kevin English made a business decision not to bid, not because of any of the Monitor's actions.

[93] Kevin English also made other complaints. He said that:

(a) the Monitor did not consult it from January 2023 until the start of the hearing on the outcome of the SISP Process;

(b) neither the Monitor nor the Company sought Gray's input or approval on selecting the bid, nor did they ever disclose the financial terms of the bid. Gray only found out that there was a successful bidder when the Monitor announced it to HGOE staff on February 1, 2024;

(c) he learned through the media that the Purchaser was the successful bidder;

(d) that Lannon and Reid (Company officers) were heavily involved in selecting the successful bidder. This, it says, causes concern because both Lannon and Reid were restricted parties under the SISP;

(e) that although both Reid and Lannon are co-guarantors on the BMO and BDC debts, "to the best of [Kevin English's] knowledge, information, and belief, they have very limited personal financial means, and would not be able to satisfy any deficiency claims from BMO and BDC." The result, he says, is that BMO and BDC will seek any deficiency claim primarily against Kevin English and his assets;

(f) the Monitor, the Company, BMO, BDC, Lannon or Reid did not discuss with him how they intend to mitigate the impact of these potential deficiency claims; and

(g) the Monitor and the Company should have consulted with him before agreeing to the sale of the assets of the Company, as the sale has a direct impact on both he and Gray, more than any other party in these proceedings.

[94] I also reject these arguments. I find that:

(a) it would be inappropriate for the Monitor to have discussions with the potential bidder in the middle of the bid process. Gray conceded at the hearing that under Article 21 of the SISP, the Monitor need not consult him on any of these items especially since the Gray Bid shows that he still seeks to be the successful bidder. I will discuss whether I could order the Monitor to accept this bid later in this decision;

(b) the Monitor can consult with management of the Company. There is no evidence that the management of the Company is not at arm's length to the Purchaser;

(c) the Monitor has no obligation to consult with the Company shareholders; and

(d) the Monitor has no obligation to consult with guarantors of secured creditors. The Monitor acts for the benefit of the Company and its creditors, not for guarantors of the Company's debt. Furthermore, I have no evidence of the guarantors' solvency.

[95] Justice Morawitz, in *Terrance Bay Pulp Inc.* 2012 ONSC 4247, at para. 48, said, "In my view, what can be reasonably expected of a court officer is that it undertake reasonable steps to ensure that the opportunity comes to the attention of prospective purchasers." The Monitor complied with this requirement.

[96] I now turn to whether I have the authority to order that the Monitor accept the Gray Bid.

Should I order the Monitor to accept the Gray Bid?

[97] During the hearing Gray told the Court that the Gray Bid is open for acceptance by the Monitor. It verbally modified the Gray Bid to make any deposit it would submit non-refundable.

[98] Everyone agrees that the Monitor cannot accept the Gray Bid after it has accepted an offer within the SISP process. Everyone agrees I can order the Monitor to do so.

[99] The Monitor, the Company, BMO and BDC oppose this request. This is so even though secured creditors could benefit from Gray's potentially higher bid.

[100] I will not order that the Monitor accept the Gray Bid. I will now explain why.

[101] Justice Morawetz dealt with similar issues in *Terrance Bay*. The case arose in a SISP-type process when the monitor received eight binding offers. It sought approval to sell the assets of the Company to the successful bidder who bid $2 million in cash plus a $25-million concession from the province of Ontario. This was an effective purchase price of more than $27 million.

[102] After the completion of the bid process, a third party made a binding offer to purchase the same assets for $35 million.

[103] The monitor opposed the second offer even though it was more favourable to the estate because:

(a) the integrity of the sales process is paramount to the proceedings;

(b) acceptance would alter the terms of the court-approved sales process;

(c) the purchaser and all other parties who participated in the sales process would consider it unfair to the sales process;

(d) the terms of the sales process were widely known by all bidders and interested parties since the outset;

(e) the purchaser incurred and continued to incur significant expenses negotiating its purchase; and

(f) considering a new bid might result in delay to the timing of the sale of the assets.

[104] Justice Morawetz in *Terrance Bay* quoted extensively from the Ontario Court of Appeal decision in *Soundair*:

(a) in paragraph 45, he quoted paragraph 21 when it said, "When deciding whether a receiver has acted providently, the court should examine the conduct of the receiver *in light of the information the receiver had when it agreed to accept an offer;*" [emphasis mine]

(b) he continued, "the court should be very cautious before deciding that the receiver's conduct was improvident *based on information which has come to light after it made its decision;"* [emphasis mine]

(c) in paragraph 51, he quoted paragraph 30, when it said, "What … cases show is that the prices in other offers have relevance only if they show

that the price contained in the offer accepted by the receiver was so unreasonably low as to demonstrate that the receiver was improvident in accepting it;"

(d) the court of appeal continue at paragraph 31, "If, however, the subsequent offer is so substantially higher than the sale recommended by the receiver, then it may be that the receiver has not conducted the sale properly;"

(e) It continued, "In such circumstances, the court would be justified itself in entering into the sale process by considering competitive bids. However, I think that that process *should be entered into only if the court is satisfied that the receiver has not properly conducted the sale which it has recommended to the court*;" [emphasis mine]

(f) in paragraph 59 Justice Morawetz quoted paragraph 46, when it said, "It is my opinion that the court must exercise extreme caution before it interferes with the process adopted by a receiver to sell an unusual asset. It is important that prospective purchasers know that, if they are acting in good faith, bargain seriously with the receiver and entering into an agreement with it, a court will not likely interfere with the commercial judgment of the receiver to sell the asset to them;" and

(g) in paragraph 60 when he said, quoting the Ontario Court of Appeal in *Crown Trust Company v. Rosenberg* (1986), 39 D.L.R. (4th) 526, 60 O.R. (2d) 87 (S.C.H.C.J.), at paragraph 109, "The court ought not to sit on an appeal from a decision of the Receiver, reviewing in minute detail every element of the process by which the decision is reached."

[105] Thus, when I consider if I should order the Monitor to accept the Gray bid, I should:

(a) authorize the sale outside of the SISP only in the most extraordinary circumstances when I believe the Monitor did not act providently to obtain the best price;

(b) exercise extreme caution before I interfere with the SISP especially when the Court approves an agreement to sell an unusual asset like a shipyard; and

(c) not sit on an appeal and review in minute detail every element of the Monitor's actions during the SISP.

[106] Justice Blok in *Bank of Montreal v. Renuka Properties Inc.*, 2015 BCSC 2058, at para. 31(5), confirmed that in considering these issues I am to consider the interests of all parties, including the Purchaser.

[107] Thus, I will consider:

(a) if the Monitor properly conducted the SISP, which led to the Proposed Transaction;

(b) the Monitor's conduct considering the information the Monitor had when it agreed to accept the Purchaser's offer;

(c) if the Purchaser acted in good faith, bargained seriously and entered into an agreement with the Monitor; and

(d) if the price contained in the offer accepted by the Monitor is so unreasonably low as to demonstrate that the Monitor was improvident in accepting it. I should only enter the SISP process and consider the Gray Bid *if I am satisfied that the receiver has not properly conducted the sale which it has recommended to me*.

[108] Considering these factors, I find that:

(a) the Monitor did not know that Gray would make the Gray Bid and did not know the contents of that bid when it accepted the Purchaser's bid;

(b) the Monitor properly ran the SISP. I discussed the reasons why earlier in this decision. My conclusion does not change because of the circumstances surrounding the Gray Bid or the Gray Bid Issues;

(c) there is no evidence that the Purchaser is acting in bad faith. The negotiation process leading up to the accepted bid shows it bargained seriously; and

(d) the Monitor had already accepted the Purchaser's bid and had entered into a binding agreement before Gray submitted its bid.

[109] I will not enter into the SISP process and consider the Gray Bid because I will only do so if I am satisfied that the Monitor has not properly conducted the SISP that caused it to recommend it to me.

[110] Accordingly, the Gray Bid does not show that the offer accepted by the Monitor was so unreasonably low as to demonstrate that the Monitor was improvident in accepting it. This is not an extraordinary circumstance where I would allow a bid outside the SISP.

[111] However, if I had concluded this was such an extraordinary circumstance, the Gray Bid does not meet the definition of a "Qualified Bid" under the SISP.

[112] Under Article 24 of the SISP, a bidder must submit with its bid:

(a) an executed transaction agreement such as the APA;

(b) a non-refundable cash deposit; and

(c) written evidence of an irrevocable financing commitment or other evidence of an ability to complete the purchase.

[113] The Gray Bid does not provide any of these requirements. Notably Gray failed to include any financing particulars, even though Kevin English is concerned about his liability for secured creditor deficiencies as a guarantor of the Company's obligations.

[114] This Application deals with an issue essential to *CCAA* proceedings. Courts across the country authorize SISP orders in *CCAA* proceedings. A SISP establishes the process under which the public participate in insolvency proceedings. A SISP contains deadlines for parties to act. Courts make these orders after hearing from creditors in an open court process.

[115] The integrity of a SISP is fundamental to the proper operation of insolvency restructuring proceedings. Participants must believe that receivers, monitors and courts will treat them fairly.

Gray, an insider, a secured creditor, a shareholder, a former DIP lender and an active participant in this *CCAA*, asks that I find that the rules of the SISP do not apply to it. This I will not do. I now turn to whether I should assign the assumed contracts to the Purchaser as part of the AVO.

Should I Assign the Assumed Contracts to the Purchaser as Part of the AVO?

[116] I approve assignment of the Assumed Contracts to the Purchaser subject to the Purchaser's payment of all Cure Costs on or before closing.

[117] The APA contemplates that, subject to its terms, the Purchaser is to assume the Assumed Contracts. The Company served the counterparties to the Assumed

Contracts with the Company's application record.[40]

[118] Section 11.3 of the *CCAA* provides that I may grant an order assigning the rights and obligations of the Applicant to "any person who is specified by the court and agrees to the assignment," with certain exceptions.[41] I must consider three statutory factors:

(a) whether the Monitor approved the proposed assignment;

(b) whether the Purchaser would be able to perform the obligations assigned; and

(c) whether it would be appropriate to assign the rights and obligations to the Purchaser.

[119] I must also be satisfied that the Purchaser will remedy all monetary defaults in relation to the Assumed Contracts (other than those arising by reason only of the Company's insolvency, the commencement of proceedings under this *Act* or the Company's failure to perform a non-monetary obligation) on or before the closing of the sale.

[120] I find these assignments are appropriate. I find that:

(a) there was no opposition from the counterparties affected by these assignments;

(b) the principal of the Purchaser is a well-known businessperson with considerable marine interests in the marine industry;

[40] Lannon AVO Affidavit, para. 60.
[41] *CCAA*, s. 11.3.

(c) the assignments are consistent with the policy objectives underlying the *CCAA*, which include avoiding the social and economic losses resulting from liquidation of an insolvent company;

(d) the assignments are necessary for the business to continue as a going concern;

(e) the Company sells the Assumed Contracts to the Purchaser in the APA; and

(f) the AVO provides that the Purchaser will remedy all monetary defaults in relation to the assigned contracts, with certain exceptions, by paying all Cure Costs on closing.

[121] I now turn to whether I should approve the York AVO.

Should I approve the York AVO?

[122] I hereby approve the York AVO. The Monitor, the Company and all the secured creditors agree I should grant it.

[123] HGOE guaranteed Laurenceton obligations. The sale of 35 York Street will benefit the Company's creditors.

[124] The Monitor retained a realtor to sell the property on an MLS listing on December 5, 2023. The Agreement of Purchase and Sale is based on the terms of the Newfoundland and Labrador Association of Realtors standard form purchase and sale agreement. The purchasers are arm's length.

[125] I have already found that the Company has acted in good faith with due diligence. I also find:

(a) the York AVO produces an economic result at least as favourable as any other viable alternative. There are no other bids;

(b) no stakeholder is worse off under the York AVO than it would have been under any other viable alternative;

(c) the York AVO better preserves the value of the Company's assets than this liquidation alternative; and

(d) the Monitor, by hiring a realtor, sufficiently canvassed the market.

[126] I now turn to whether I should extend the Stay until February 29, 2024.

Should I **extend the Stay until February 29, 2024?**

[127] The ARIO provides for a Stay Period expiring at the end of February 9, 2024. The Company seek an extended Stay Period up to and including February 29, 2024, to close the Proposed Transaction.

[128] I hereby extend the stay until February 29, 2024. I find there is no prejudice that would result from the extension.

[129] The Company intends to return to Court within the extended Stay Period to bring a motion for, among other things, an order approving a distribution of the proceeds of the Proposed Transaction.

[130] I may grant the extension if:

(a) circumstances exist that make the order appropriate, and

(b) the Company has acted and is acting in good faith and with due diligence.[42]

[131] I find that:

(a) the extension will preserve the *status quo* and the value of the business for the time it takes to close the sale;[43] and

(b) closing the Proposed Transaction is in the interest of stakeholders.[44]

[132] The Company will continue to operate in the normal course during the extension.[45] This is important as the Purchaser intends to operate the shipyard as a going concern. Without the extended Stay Period, the SISP would come to an abrupt stop before the parties can close the sale.

[133] The Monitor says, and I agree that the Company has acted in good faith and with due diligence throughout these proceedings, including the SISP.[46] I now turn to whether I should seal the Confidential Exhibits.

Should I Seal the Confidential Exhibits?

[42] CCAA, s. 11.02.
[43] Lannon AVO Affidavit, para. 62.
[44] Lannon AVO Affidavit, para. 63.
[45] See *Rambler*, para. 86; and *Fluorspar*, para. 83. Lannon AVO Affidavit, para. 66.
[46] Lannon AVO Affidavit, paras. 48, 65.

[134] The Company also seeks to seal the Confidential Exhibits, until the earlier of:

(a) closing of the Proposed Transaction as evidenced by the filing of a Monitor's Certificate certifying this happened; or

(b) further order of the Court.[47]

[135] The Supreme Court of Newfoundland and Labrador is a court of inherent authority under which the Court may control its own processes and seal materials from the public record.[48]

[136] In *Sherman Estate v. Donovan*, [2021] 2 S.C.R. 75, the Supreme Court of Canada set out the considerations that guide the Court in deciding whether to grant a sealing order. Those are:

(a) whether court openness poses a serious risk to the important public interest;

(b) whether the order sought is necessary to prevent this serious risk to the identified interest because reasonable alternative measures will not prevent the risk; and

(c) whether, as a matter of proportionality, the benefits of the order outweigh its negative effects.[49]

[47] Lannon AVO Affidavit, para. 69.
[48] See *Sports Villas Resort, Inc. (Re)*, 2020 NLSC 109, at para. 7.
[49] *Sherman Estate*, at para. 38.

[137] Courts have often applied the *Sherman Estate* test in the insolvency context and authorized sealing orders over confidential or commercially sensitive documents to protect the interests of debtors.

[138] In *Rambler Metals and Mining Limited, Re CCAA*, 2023 NLSC 134, I granted a sealing order of the commercial terms of bids received in the SISP and the identities of SISP participants.[50]

[139] Sealing such evidence pending the closing of the sale is appropriate to safeguard the interest of stakeholders. It is critical if the sale fails to close for any reason. Sealing the evidence prevents serious risk to the integrity of the insolvency process. This process is an important public interest. No less onerous sealing order is suitable to prevent the risk.

[140] I have limited the effect of the sealing order. I have limited the redactions in the APA and the York Street property AVO to the purchase price and deposit amounts. I have also redacted the Gray Bid.

[141] I find the benefits of a sealing order outweigh any negative effects. I now turn to my ruling not to grant Gray's request to postpone the hearing.

[50] *Rambler*, paras. 114-119.

Gray's Postponement Request

[142] Gray asked me to postpone this hearing to the "next available date." Its counsel said they did not have time to prepare because:

(a) they did not receive the Monitor's Application Record and Amended Third Report until February 5, 2023;

(b) Kevin English was unable to return from Prince Edward Island in time to help him prepare; and

(c) they were in this Court before me on another *CCAA* matter on February 7, 2024.

[143] It says that for these reasons it was impossible for his client to file a response to the Monitor's Application.

[144] On February 8, 2024, before I ruled on the postponement, I allowed Gray to file an Affidavit from Kevin English. This Affidavit included the Gray Bid.

[145] Gray's counsel also wrote the Court on February 5, 2023, setting out its position on the approval of the AVO. In that letter they committed to filing further materials by February 6, 2023.

[146] After allowing parties to make arguments, I denied the postponement. I did so because:

(a) the evidence shows the amount of the credit portion of any Gray Bid was at issue with the Monitor from early December 2023 through January 31, 2024;

(b) the evidence for the credit bid dispute consisted of correspondence to which its counsel was a party;

(c) counsel was able to write a letter describing their client's position on February 5, 2024;

(d) Gray failed to meet its commitment to file more materials on February 6, 2024; and

(e) other parties prepared oral responses to counsel's February 5, 2024, letter in the same amount of time Gray had to respond to the Monitor's Application.

[147] Counsel know that, as the Supreme Court of Canada has said, the *CCAA* process is 'litigation on the fly.' Because of the costs and the tight timetable required to salvage insolvent businesses, parties must contend with short timetables. The Monitor followed the timetable set out in the SISP. All counsel were aware of this timetable.

[148] The SISP allowed the Monitor to take this Application during the week of February 5, 2024. The Stay expired on February 9, 2024. I scheduled the hearing on November 17, 2023. I heard the Monitor's Application as scheduled.

[149] Gray knew it was not the successful bidder because it did not submit one. Nothing material changed from January 29, 2024, until the date of the hearing.

[150] After hearing from counsel, I ruled that I had all the information I needed to decide this matter. I found that the parties had ample time to make their positions known to me. I now turn to costs.

COSTS

[151] The Company asked that I award it costs against Gray on a Column III basis. No one else asked for costs.

[152] I hereby order that Gray pay the Company's taxed counsel costs for two counsel, on a Column III basis, for one and a half days of the hearing. This order is for the Company's counsel fees only.

An uncontested hearing in a *CCAA* matter would usually take about half a day. This hearing took two days, including the time for this oral judgment.

NEXT HEARING

[153] I schedule a status hearing for 10:00 a.m. on February 28, 2024.

RELIEF ORDERED

[154] I hereby:

(a) approve the revised AVO provided to me by counsel at the end of the hearing;

(b) approve assignment of the Assumed Contracts to the Purchaser subject to the Purchaser's payment of all Cure Costs on or before closing;

(c) approve the York AVO;

(d) extend the Stay until February 29, 2024;

(e) seal the Confidential Exhibits; and

(f) order that Gray shall pay the Monitor the ordered costs.

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ALEXANDER MACDONALD
Justice