Court File No. CV-23-00696017-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF LOYALTYONE, CO.

(the "**Applicant**")

BOOK OF AUTHORITIES OF THE APPLICANT
(COMEBACK HEARING RETURNABLE MARCH 20, 2023)

March 17, 2023

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TO: SERVICE LIST

LIST OF AUTHORITES

Tab	Description
1.	*Acerus Pharmaceuticals Corporation, et al.*, (March 9, 2023), ONSC (Commercial List), Court File No. CV-23-00693595-00CL (SISP Approval and Extension to Stay of Proceedings)
2.	*Aralez Pharmaceuticals Inc. (Re)*, 2018 ONSC 6980 (CanLII)
3.	*9354-9186 Quebec inc. v. Callidus Capital Corp.*, 2020 SCC 10
4.	*Brainhunter Inc. (Re)* (2009), 62 C.B.R. (5th) 41, 2009 CanLII 72333 (ONSC)
5.	*Brainhunter Inc. (Re)*, 2010 ONSC 1035
6.	*Canwest Publishing Inc. / Publications Canwest Inc., Re*, 2010 ONSC 222
7.	*Carillion Canada Inc.*, 2022 ONSC 4617
8.	*CCM Master Qualified Fund Ltd. v. blutip Power Technologies Ltd.*, 2012 ONSC 1750
9.	*Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60
10.	*Danier Leather Inc., Re*, 2016 ONSC 1044
11.	*Flowr Corporation, et al.*, (October 28, 2022), ONSC (Commercial List), Court File No. CV-22-00688966-00CL (SISP Order)
12.	*Great Basin Gold Ltd., Re*, 2012 BCSC 1459
13.	*Green Growth Brands (Re)*, 2020 ONSC 3565
14.	*Jaguar Mining Inc., Re*, 2014 ONSC 494
15.	*Just Energy Corp., Re*, 2021 ONSC 1793
16.	*Just Energy Group Inc. et al.*, 2021 ONSC 7630
17.	*Just Energy Group Inc., et al (Re)*, (March 19, 2021), ONSC (Commercial List), Court File No. CV-21-00658423-00CL (ARIO)
18.	*Just Energy Group Inc. et al. (Re),* (August 18, 2022), ONSC (Commercial List), Court File No. CV-21-00658423-00CL (Endorsement)
19.	*Just Energy Group Inc., et al (Re)*, (August 18, 2022), ONSC (Commercial List), Court File No. CV-21-00658423-00CL (SISP Approval Order)
20.	*Montreal (City) v. Deloitte Restructuring Inc.*, 2021 SCC 53
21.	*Nortel Networks Corp. (Re)* (2009), 55 C.B.R. (5th) 229, 2009 CanLII 39492 (SC [Commercial List])
22.	*Ontario Securities Commission v. Bridging Finance Inc.*, 2021 ONSC 4347

23.	*PCAS Patient Care Automation Services Inc.*, 2012 ONSC 2840
24.	*Quest University Canada (Re)*, 2020 BCSC 1845
25.	*Sanjel Corporation (Re)*, (April 4, 2016), ABQB, Court File No. 1601-03143 (Initial Order)
26.	*Stelco Inc., Re* (2005), 75 O.R. (3d) 5, 2005 CarswellOnt 1188 (SC [Commercial List])
27.	*Stelco Inc., Re* (2005), 78 O.R. (3d) 254, 2005 CarswellOnt 6283 (CA)
28.	*Target Canada Co., Re*, 2015 ONSC 303
29.	*U.S. Steel Canada Inc., Re*, 2016 ONSC 7899

TAB 1

Court File No. CV-23-00693595-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

THE HONOURABLE	)	THURSDAY, THE 9TH DAY
	)	
JUSTICE CONWAY	)	OF MARCH, 2023

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

AND IN THE MATTER OF PLAN OF COMPROMISE OR ARRANGEMENT OF ACERUS PHARMACEUTICALS CORPORATION, ACERUS BIOPHARMA INC., ACERUS LABS INC. AND ACERUS PHARMACEUTICALS USA, LLC.

Applicants

ORDER

(SISP Approval and Extension to Stay of Proceedings)

THIS MOTION, made by Acerus Pharmaceuticals Corporation, Acerus Biopharma Inc., Acerus Labs Inc. and Acerus Pharmaceuticals USA, LLC (collectively, the "**Applicants**"), for an Order approving a sale and investment solicitation process was heard this day by judicial videoconference via Zoom.

ON READING the affidavit of Naveed Manzoor sworn March 2, 2023 (the "**Manzoor Affidavit**"), and the Exhibits thereto, the Second Report of Ernst & Young Inc. ("**EY**"), in its capacity as Court-appointed monitor of the Applicants (in such capacity, the "**Monitor**") dated March 7, 2023 (the "**Second Report**"), and on hearing the submissions of counsel for the Applicants, counsel for the Monitor, counsel for First Generation Capital Inc. ("**FGC**"), counsel for the FGC in its capacity as the DIP Lender, and such other parties as listed on the Counsel Slip, with no one else appearing although duly served as appears from the affidavits of service of Philip Yang, as filed,

SERVICE AND DEFINITIONS

1. **THIS COURT ORDERS** that the time for service of the Notice of Motion and the Motion Record is hereby abridged and validated so that this Motion is properly returnable today and hereby dispenses with further service thereof.

2. **THIS COURT ORDERS** that capitalized terms used in this Order and not otherwise defined herein shall have the meanings ascribed to them under the Sale and Investment Solicitation Process attached hereto as Schedule "A" (the "**SISP**").

APPROVAL OF THE SALE AND INVESTMENT SOLICITATION PROCESS

3. **THIS COURT ORDERS** that the Applicants and the Monitor are authorized to immediately commence the SISP to solicit interest in the opportunity for a sale of or investment in all or part of the Applicants' assets (which includes Noctiva, Natesto, Strendra (avanafil), Lidbree, Tefina, TriVair) and all other products of the Applicants and business operations.

4. **THIS COURT ORDERS** that the SISP (subject to any amendments thereto that may be made in accordance therewith and with this Order) is hereby approved and the Applicants, the Monitor and the Chief Restructuring Officer (the "**CRO**"), and their respective affiliates, partners, employees, advisors and agents (collectively, "**Assistants**") are hereby authorized and directed to take any and all actions as may be necessary or desirable to implement and carry out the SISP in accordance with its terms and this Order.

5. **THIS COURT ORDERS** that each of the Monitor, the CRO, the Applicants, and their respective Assistants shall have no liability with respect to any and all losses, claims, damages or liability, of any nature or kind, to any person in connection with or as a result of performing their duties under the SISP, except to the extent such losses, claims, damages or liabilities result from the gross negligence or wilful misconduct of the Monitor, the CRO or the Applicants, as applicable, as determined by this Court.

6. **THIS COURT ORDERS** that the Monitor or the Applicants may from time to time apply to this Court to amend, vary or supplement this Order or to seek directions with respect to the SISP.

7. **THIS COURT ORDERS** that, pursuant to section 3(c) of the Electronic Commerce Protection Regulations, Reg. 81000-2-175 (SOR/DORS), the Monitor and the Applicants are authorized and permitted to send, or cause or permit to be sent, commercial electronic messages

to an electronic address of prospective bidders or offerors and to their advisors, but only to the extent required to provide information with respect to the SISP in these proceedings.

PROTECTION OF PERSONAL INFORMATION

8. **THIS COURT ORDERS** that, pursuant to clause 7(3)(c) of the *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5, the Monitor and the Applicants are authorized and permitted to disclose personal information of identifiable individuals ("**Personal Information**") to prospective bidders or offerors and to their advisors, including human resources and payroll information, records pertaining to the Applicants' past and current employees, and information on specific customers, but only to the extent desired or required to negotiate or attempt to complete a transaction under the SISP. Each prospective bidder or offeror to whom any Personal Information is disclosed shall maintain and protect the privacy of such Personal Information with security safeguards appropriate to the sensitivity of the Personal Information and as may otherwise be required by applicable federal or provincial legislation. Each prospective bidder or offeror to whom any Personal Information is disclosed shall also limit the use of such Personal Information to its participation in the SISP, and if it does not complete a sale, shall return all such information to the Applicants, or in the alternative destroy all such information. The Successful Bidder(s) shall maintain and protect the privacy of such information and, upon closing of the transaction contemplated in the Successful Bid(s), shall be entitled to use the personal information provided to it that is related to the assets and/or business acquired pursuant to the sale in a manner which is in all material respects identical to the prior use of such information by the Applicants, and shall return all other personal information to the Applicants, or ensure that all other personal information is destroyed.

NO PROCEEDINGS AGAINST THE APPLICANTS OR THE PROPERTY

9. **THIS COURT ORDERS** that the Stay Period as referred to in the Amended and Restated Initial Order of Justice Osborne dated February 3, 2023 (the "**Amended and Restated Initial Order**") is extended, until and including May 19, 2023.

UNSEALING

10. **THIS COURT ORDERS** that paragraph 28 of the Initial Order of Justice Osborne dated January 26, 2023 (the "**Initial Order**") and paragraph 65 of Amended and Restated Initial Order are amended as follows:

Paragraph 28 of the Initial Order is hereby deleted.

Paragraph 65 of the Amended and Restated Initial Order is amended to state the following: "**THIS COURT ORDERS** that Confidential Appendix "C" to the First Report is hereby sealed pending further order of the Court, and shall not form part of the public record"

GENERAL

11. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States, to give effect to this Order and to assist the Applicants, the Monitor and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Applicants and to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Monitor in any foreign proceeding, or to assist the Applicants and the Monitor and their respective agents in carrying out the terms of this Order.

12. **THIS COURT ORDERS** that each of the Applicants and the Monitor be at liberty and are hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order.

Conway J.

Schedule “A”

SALE AND INVESTMENT SOLICITATION PROCESS

Introduction

1. On January 26, 2023, Acerus Pharmaceuticals Corporation ("**Acerus**") and certain of its subsidiaries (collectively, the "**Applicants**") were granted an initial order (as amended or amended and restated from time to time, the "**Initial Order**") under the *Companies' Creditors Arrangement Act* (the "**CCAA**" and the "**CCAA Proceedings**") by the Ontario Superior Court of Justice (Commercial List) (the "**Court**"). The Initial Order (which was amended and restated on February 3, 2023), among other things:

   (a) stayed all proceedings against the Applicants, their assets and their respective directors and officers;

   (b) appointed Ernst & Young Inc. as the monitor of the Applicants (in such capacity, the "**Monitor**");

   (c) authorized the Applicants to enter into a debtor-in-possession financing facility (the "**DIP Facility**") with First Generation Capital Inc. (the "**DIP Lender**") pursuant to the DIP facility loan agreement dated January 26, 2023 (the "**DIP Facility Loan Agreement**"), as well as the related charge in favour of the DIP Lender (the "**DIP Charge**") over all of the Applicants' present and future assets, property and undertakings of every nature and kind whatsoever, and wherever situate including all proceeds thereof to secure the amounts outstanding under or in connection with the DIP Facility; and

   (d) authorized the Applicants to pursue all avenues of sale or investment of their assets or business, in whole or in part, subject to prior approval of the Court before any material sale or refinancing.

2. Further to the Applicants' restructuring efforts, the Monitor will, with the assistance of its advisors and the Applicants and its chief restructuring officer, FAAN Advisors Group Inc. (the "**CRO**"), conduct the sale and investment solicitation process (the "**SISP**") described herein pursuant to a Court order dated March 9, 2023 (the "**SISP Order**"). The SISP is intended to solicit interest in an acquisition or refinancing of the business or a sale of the assets and/or the business of the Applicants by way of merger, reorganization, recapitalization, primary equity issuance or other similar transaction. The Monitor, in consultation with the Applicants, intend to provide all qualified interested parties with an opportunity to participate in the SISP.

Opportunity

3. The SISP is intended to solicit interest in the opportunity (the "**Opportunity**") for a sale of or investment in all or part of the Applicants' assets (the "**Property**", which includes Noctiva, Natesto, Strendra (avanafil), Lidbree, Tefina, TriVair and all other products of the Applicants (the "**Products**")) and business operations (the "**Business**").

4. Except to the extent otherwise set forth in a definitive sale or investment agreement with the Successful Bidder (as defined below), any sale of the Property or investment in the Business will be on an "as is, where is" basis and without surviving representations or warranties of any kind, nature, or description by the Monitor, the Applicants, or any of their

respective agents, advisors or estates, and, in the event of a sale, all of the right, title and interest of the Applicants in and to the Property to be acquired will be sold free and clear of all pledges, liens, security interests, encumbrances, financial and monetary claims charges, options and interests therein and thereon pursuant to Court order(s), to the extent that the Court deems it appropriate to grant such relief and except as otherwise provided in such Court order(s).

Role of the Monitor

5. The Monitor's responsibilities pursuant to the SISP include:

   (a) administering the SISP, in consultation with the Applicants;

   (b) consulting with the Applicants in connection with the bidding procedures included in this SISP and the closing of the transaction contemplated in the Successful Bid(s) (as defined below);

   (c) assisting the Applicants to facilitate information requests, including assisting the Applicants in preparing or modifying financial information to assist with the bidding procedures described in this SISP;

   (d) reporting to the Court in connection with the SISP, including the bidding process described in this SISP, and the closing of the transaction contemplated in the Successful Bid(s);

   (e) conducting an Auction (as defined below), if necessary, in accordance with the Auction procedures contemplated herein; and

   (f) assisting the Applicants with the closing of the transaction contemplated in the Successful Bid(s).

6. In consultation with the Applicants, the Monitor may seek Court approval of an amendment to the SISP or may seek the Court's directions in respect of the SISP.

Timeline

7. The following table sets out the key milestones under the SISP:

Milestone	Deadline
Deadline to publish notice of SISP, deliver Teaser Letter and NDA to Known Potential Bidders, and set up electronic data room	Five (5) days following issuance of the SISP Order March 14, 2023
Bid Deadline	Fifty (50) days following issuance of the SISP Order April 28, 2023

Monitor to notify each Bidder in writing as to whether its Bid constitutes a Qualified Bid	Within 5 business days following Bid Deadline No later than May 5, 2023
Monitor to notify each Qualified Bidder on whether an Auction will take place	Two (2) business days prior to the commencement of the Auction No later than May 5, 2023
Auction Date (if required)	Sixty-one (61) days following issuance of the SISP Order May 9, 2023
Hearing of the Sale Approval Motion	No later than seventy-one (71) days following issuance of the SISP Order, subject to the availability of the Court No later than May 19, 2023

8. Subject to any order of the Court, the dates set out in the SISP, including the Bid Deadline and Auction Date, may be amended or extended by the Monitor, in consultation with the Applicants.[1]

Solicitation of Interest: Notice of the SISP

9. As soon as reasonably practicable, but, in any event, by no later than five (5) days from the SISP Order:

   (a) the Monitor, in consultation with the Applicants, will prepare a list of potential bidders, including (i) parties that have approached the Applicants or the Monitor indicating an interest in the Opportunity, (ii) local and international strategic and financial parties who the Monitor, in consultation with the Applicants, believe may be interested in purchasing all or part of the Business or Property or investing in the Applicants pursuant to the SISP, and (iii) parties that showed an interest in the Applicants and/or their assets by way of the previous, out-of-court strategic review process, in each case whether or not such party has submitted a letter of intent or similar document (collectively, the "**Known Potential Bidders**");

   (b) the Monitor will cause a notice of the SISP (and such other relevant information that the Monitor, in consultation with the Applicants, considers appropriate) (the "**Notice**") to be published in The Globe and Mail (National Edition), and any other

[1] The term Applicants as referred to in paragraphs 8 to 40 shall be read to include the Chief Restructuring Officer, Naveed Z. Manzoor, on behalf of FAAN Advisors.

newspaper or journal as the Monitor, in consultation with the Applicants, considers appropriate, if any;

(c) the Monitor will cause a press release to be issued with Canada Newswire or comparable newswire entity setting out the information contained in the Notice and such other relevant information that the Monitor, in consultation with the Applicants, considers appropriate; and

(d) the Monitor, in consultation with the Applicants, will prepare: (i) a process summary (the "**Teaser Letter**") describing the Opportunity, outlining the process under the SISP and inviting recipients of the Teaser Letter to express their interest pursuant to the SISP; and (ii) a non-disclosure agreement in form and substance satisfactory to the Monitor and Applicants and their respective counsel which shall inure to the benefit of any purchaser of the Business or Property or any part thereof (an "**NDA**").

10. The Monitor will cause the Teaser Letter and NDA to be sent to each Known Potential Bidder by no later than five (5) days from the SISP Order and to any other party who requests a copy of the Teaser Letter and NDA or who is identified to the Monitor as a potential bidder as soon as reasonably practicable after such request or identification, as applicable.

Potential Bidders and Due Diligence Materials

11. Any party who wishes to participate in the SISP (a "**Potential Bidder**") must provide to the Monitor (i) an NDA executed by it, (ii) a letter setting forth the identity of the Potential Bidder, the contact information for such Potential Bidder and full disclosure of the direct and indirect principals of the Potential Bidder, and (iii) any other information that the Monitor may reasonably request. The Monitor, in its discretion, may accept an NDA executed by a Potential Bidder during the previous, out-of-court strategic review process in satisfaction of the requirement set out in (i).

12. The Monitor, in consultation with the Applicants, subject to competitive and other business considerations, afford each Potential Bidder who has satisfied the conditions set out in paragraph 11 above such access to due diligence material and information relating to the Applicants, the Property and the Business as the Monitor in consultation with the Applicants deems appropriate. Due diligence may include access to an electronic data room containing information about the Applicants, the Property and the Business, and may also include management presentations, and other matters which a Potential Bidder may reasonably request and as to which the Monitor, in its judgment and in consultation with the Applicants, may agree. The Monitor will designate a representative or representatives to coordinate all reasonable requests for additional information and due diligence access from Potential Bidders and the manner in which such requests must be communicated. Neither the Monitor nor the Applicants will be obligated to furnish any information relating to the Applicants, the Property or Business to any person other than as is expressly provided for in the SISP. Furthermore and for the avoidance of doubt, selected due diligence materials may be withheld from certain Potential Bidders if the Monitor and the Applicants, determine such information to represent proprietary or sensitive competitive information / disclosure could impair the Applicants or their Business or the integrity of the SISP. None of the Monitor, the Applicants, or any of their respective agents, advisors or estates shall be held responsible for, and none of them will bear any liability with respect

to, any information obtained by any person in connection with a sale of the Property or Business or investment in the Applicants.

13. Without limiting the generality of any term or condition of any NDA between the Applicants, on the one hand, and any Potential Bidder or Bidder (as defined below), on the other, unless otherwise agreed by the Monitor and Applicants or ordered by the Court, no Potential Bidder or Bidder shall be permitted to have any discussions with (a) any counterparty to any contract with the Applicants (or any of them), any secured creditor of the Applicants, any current or former director, manager, shareholder, officer (other than the CRO), member or employee of the Applicants (or any of them), other than in the normal course of business and wholly unrelated to the Applicants, the potential transaction, the confidential information, the SISP or the CCAA Proceedings, and (b) any other Potential Bidder or Bidder regarding the SISP or any bids submitted or contemplated to be submitted pursuant thereto. Notwithstanding the foregoing, where any such communications are agreed to with the Monitor's consent, such discussions shall be made in the presence of the Monitor. For greater certainty at no time shall such secured creditors (including in the capacity as a director of the Applicants) be entitled to communicate or discuss with one another or with any other Potential Bidder or Bidder regarding the SISP or any bids submitted or contemplated to be submitted pursuant thereto.

14. Potential Bidders and Bidders must rely solely on their own independent review, investigation and/or inspection of all information and of the Property and Business in connection with their participation in the SISP and any transaction they enter into with the Applicants (or any of them).

Formal Binding Offers

15. Potential Bidders that wish to make a formal offer to purchase, or make an investment in, the Applicants or their Property or Business, or any part thereof (a "**Bidder**") shall submit a binding offer (a "**Bid**") that complies with all of the following requirements to the Monitor at the address specified in Schedule "1" hereto (including by e-mail), which Bid shall be delivered by such Bidder by no later than 5:00 p.m. (Toronto Time) on fifty (50) days following issuance of the SISP Order or such later date as may be communicated by the Monitor to Potential Bidders via a Bid Deadline Letter (as defined below) (the "**Bid Deadline**"):

(a) the Bid must be a binding offer to:

(i) acquire all, substantially all or a portion of the Property or the shares of the Applicants pursuant to a reverse vesting order (a "**Sale Proposal**"); and/or

(ii) make an investment in, restructure, reorganize or refinance the Business or the Applicants (an "**Investment Proposal**");

(b) the Bid must include a duly authorized and executed definitive transaction document;

(c) the definitive transaction document in respect of a Sale Proposal or Investment Proposal shall include, among other things:

(i) that the Bid is not conditioned upon (A) the outcome of unperformed due diligence by the Bidder, or (B) obtaining financing, but may be conditioned upon the Applicants receiving the required approvals or amendments relating to the licences required to operate the business, and/or transfer of the Products, if necessary;

(ii) any and all conditions and approvals required to complete the closing of the transaction; and

(iii) all terms in respect of such Sale Proposal or Investment Proposal, as applicable;

(d) the Bid (either individually or in combination with other bids that make up one Bid) shall be an offer to purchase or make an investment in some or all of the Applicants or their Property or Business and shall be consistent with the necessary terms and conditions established by the Monitor and the Applicants and communicated to Bidders;

(e) the Bid must include a letter stating that the Bidder's offer is irrevocable until approval of the Successful Bid(s) by the Court, provided that if such Bidder is selected as the Successful Bidder, its offer shall remain irrevocable until the closing of the transaction contemplated by such Bid;

(f) the Bid must include written evidence of a firm, irrevocable commitment for financing or other evidence of the Bidder's ability to consummate the proposed transaction that will allow the Monitor and Applicants to make a determination as to the Bidder's financial and other capabilities to consummate the proposed transaction;

(g) the Bid must include written evidence, in form and substance satisfactory to the Monitor and Applicants, of authorization and approval from the Bidder's board of directors (or comparable governing body) with respect to the submission, execution and delivery of such Bid, and identification of any anticipated shareholder, regulatory or other approvals outstanding, and the anticipated process and time frame and any anticipated impediments for obtaining such approvals;

(h) the Bid must not include any request for or entitlement to any break or termination fee, expense reimbursement or similar type of payment;

(i) the Bid must fully disclose the identity of each entity that will be entering into the transaction or the financing thereof, or that is otherwise participating in or benefiting from such Bid;

(j) without limiting the foregoing, a Sale Proposal Bid must include:

(i) the purchase price in Canadian dollars and a description of any non-cash consideration, including any future royalty payments or other deferred payment, details of any liabilities to be assumed by the Bidder and key assumptions supporting the valuation;

(A) if the purchase price involves a royalty, earn-out or other deferred payment, the Sale Proposal shall include a specific indication of the Bidder's proposal and/or commitments for and relating to obtaining necessary regulatory approvals and the Bidder's commercialization strategy, manufacturing capabilities, proposed sale milestones and minimum sale amounts, budget and/or commitment for capital expenditures, direct marketing and sales initiatives and support and proposed product positioning within the Potential Bidder's current product portfolio;

(ii) a description of the Property that is expected to be subject to the transaction and any of the Property expected to be excluded;

(iii) a specific indication of the financial capability of the Bidder and the expected structure and financing of the transaction;

(iv) a description of those liabilities and obligations (including operating liabilities) which the Bidder intends to assume and which such liabilities and obligations it does not intend to assume; and

(v) a commitment by the Bidder to provide a non-refundable deposit in the amount of not less than 10% of the purchase price offered upon the Bidder being selected as the Successful Bidder;

(k) without limiting the foregoing, an Investment Proposal Bid must include:

(i) a description of how the Bidder proposes to structure the proposed investment, restructuring, recapitalization, refinancing or reorganization, and a description of any non-cash consideration;

(ii) the aggregate amount of the equity and/or debt investment to be made in the Business or the Applicants in Canadian dollars;

(iii) the underlying assumptions regarding the pro forma capital structure;

(iv) a specific indication of the sources of capital for the Bidder and the structure and financing of the transaction;

(v) a description of those liabilities and obligations (including operating liabilities) which the Bidder intends to assume and which liabilities and obligations it does not intend to assume; and

(vi) a commitment by the Bidder to provide a non-refundable deposit in the amount of not less than 10% of the total new investment contemplated in the Bid upon the Bidder being selected as the Successful Bidder;

(l) the Bid must include acknowledgements and representations of the Bidder that the Bidder:

(i) has, to its satisfaction, had an opportunity to conduct any and all due diligence regarding the Property, the Business and the Applicants prior to making its Bid;

(ii) it has relied solely upon its own independent review, investigation and/or inspection of any documents and/or the Property in making its Bid; and

(iii) it did not rely upon any written or oral statements, representations, warranties, or guarantees whatsoever, whether express, implied, statutory or otherwise, regarding the Business, the Property, or the Applicants, or the completeness of any information provided in connection therewith, except as may be expressly stated in the definitive transaction agreement(s) signed by the Applicants;

(m) the Bid must contain such other information as may be reasonably requested by the Monitor in consultation with the Applicants;

(n) the Bid must be received by the Bid Deadline;

(o) the Bid must contemplate closing the transaction set out therein on or before May 31, 2023.

16. Following the Bid Deadline, the Monitor, and the Applicants will assess the Bids received. The Applicants, in consultation with the Monitor, may designate the most competitive Bids that comply with the requirements set out herein to be "**Qualified Bids**". The Applicants and the Monitor shall be under no obligation to designate the highest or otherwise best Bid, or any Bid, as a Qualified Bid. Only Bidders whose Bids have been designated as Qualified Bids shall be eligible to participate in the Auction and/or become the Successful Bidder(s).

17. The Monitor, in consultation with the Applicants, may waive strict compliance with any one or more of the requirements set out herein and deem such non-compliant Bids to be a Qualified Bid.

18. The Monitor may, in consultation with the Applicants, may aggregate separate Bids from unaffiliated Bidders to create one Qualified Bid.

19. The Monitor and the Applicants shall be entitled to discuss and negotiate the Bid and form of any Sale Proposal or Investment Proposal prior to the Bid Deadline for purposes of amending or clarifying the terms and form thereof.

20. The Monitor shall cause each Bidder to be notified in writing as to whether its Bid constituted a Qualified Bid within five (5) business days of the Bid Deadline, or at such later time as the Monitor deems appropriate.

21. The Monitor, in consultation with the Applicants, may extend the Bid Deadline. Any such extension of the Bid Deadline shall be communicated to Potential Bidders by bid deadline extension letter (a "**Bid Deadline Letter**") from the Monitor delivered by email and posted on the Monitor's case website.

Evaluation of Competing Bids

22. Bids shall be evaluated based upon several factors including, without limitation: (i) the purchase price and the net value of the consideration provided by such Bid (with the value of any non-cash consideration being determined by the Applicants in their business judgment, in consultation with the Monitor), (ii) the identity, circumstances and ability of the Bidder to successfully complete such transactions, (iii) the proposed transaction documents, (iv) factors affecting the speed, certainty and value of the transaction, (v) the assets and liabilities included or excluded from the Bid, (vi) any related restructuring costs, (vii) the manufacturing capabilities of the Bidder and (viii) the likelihood and timing of consummating such transaction, each as determined by the Applicants in their business judgment, in consultation with the Monitor.

23. At any stage of the SISP, the Monitor, in consultation with the Applicants, may ascribe monetary values to non-monetary terms in any Bid, Qualified Bid, Initial Bid, or Overbids for the purposes of assessing and/or valuing such bids, including without limitation, the value to be ascribed to any liabilities or contracts to be assumed or not assumed.

24. If the Monitor receives one or more Bids that are designated as Qualified Bids (the "**Qualified Bidders**"), the Applicants, in consultation with the Monitor, may:

    (a) select one or more of such Qualified Bids as the successful bid (the "**Successful Bid(s)**", and the Qualified Bidder(s) making such bid, the "**Successful Bidder(s)**"), with or without negotiation of Qualified Bids with Qualified Bidders; and/or

    (b) direct such Qualified Bidders to participate in an Auction to be conducted and administered by the Monitor, with the assistance of its advisors and the Applicants, in accordance with the terms of this SISP (the "**Auction**").

Auction

25. Following the evaluation of the Qualified Bid(s), the Applicants, in consultation with the Monitor must determine whether the Auction will be held not less than two (2) business days prior to the commencement of the Auction. The Monitor shall notify and provide instructions to participate in the Auction to each Qualified Bidder not less than two (2) business days prior to the commencement of the Auction.

26. Only Qualified Bidders shall be eligible to participate in the Auction. No later than 5:00 p.m. (Toronto time) on the business day prior to the Auction, each Qualified Bidder must inform the Monitor whether it intends to participate in the Auction. The Monitor will promptly thereafter inform in writing, or cause to be informed in writing, each Qualified Bidder who has expressed its intent to participate in the Auction (the "**Auction Participants**") of the identity of all other Qualified Bidders that have indicated their intent to participate in the Auction.

Auction Procedure

27. The Auction shall be governed by the following procedures:

(a) **Participation at the Auction.** Only the Applicants, the Auction Participants, the Monitor and each of their respective advisors will be entitled to attend the Auction, and only the Auction Participants will be entitled to make any subsequent Overbids (as defined below) at the Auction. The Monitor shall provide all Auction Participants with the details of the Initial Bid (as defined below) by 5:00 p.m. (Toronto Time) two (2) business day before the Auction Date;

(b) **No Collusion.** Each Auction Participant shall be required to confirm on the record at the Auction that: (i) it has not engaged in any collusion with respect to the Auction and the SISP; and (ii) its bid and each subsequent Overbid is a good-faith *bona fide* offer, which, if accepted by the Applicants on the record of the Auction forms a binding agreement between the parties, and that the Auction Participant intends to consummate the proposed transaction if selected as the Successful Bidder;

(c) **Minimum Overbid.** The Auction shall begin with the Qualified Bid that represents the highest or otherwise best Qualified Bid as determined by the Applicants, in consultation with, and with the approval of, the Monitor (the "**Initial Bid**"), and any bid made at the Auction by a Auction Participant subsequent to the Monitor's announcement of the Initial Bid (each, an "**Overbid**"), must proceed in minimum additional increments of $100,000.00, or as otherwise declared by the Monitor during the Auction with the approval of the Applicants;

(d) **Bidding Disclosure.** The Auction shall be conducted such that all Overbids will be made and received in one group video-conference, on an open basis, and all Auction Participants will be entitled to be present for all bidding with the understanding that the true identity of each Auction Participant will be fully disclosed to all other Auction Participants and that all material terms of each subsequent bid will be fully disclosed to all other Auction Participants throughout the entire Auction; provided, however, that the Monitor, in its discretion, may establish separate video conference rooms to permit interim, technical, or clarifying discussions between the Monitor and individual Auction Participants with the understanding that all formal Overbids will be delivered in one group video conference, on an open basis;

(e) **Bidding Conclusion.** The Auction shall continue in one or more rounds and will conclude after each Auction Participant has had and refused the opportunity to submit an Overbid with full knowledge of the then-existing highest Qualified Bid(s) or Overbid(s)s, at which time the Monitor will declare the Auction to be concluded;

(f) **No Post-Auction Bids.** No Overbids will be considered for any purpose after the Monitor has declared the Auction to be concluded; and

(g) **Auction Procedures.** The Monitor, in consultation with the Applicants, shall be at liberty to modify or to set additional procedural rules for the Auction as it sees fit.

28. During the Auction, the Applicants, in consultation with, and with the approval of, the Monitor, will:

(a) review Qualified Bids and Overbids, as the case may be, considering the factors set out in paragraph 22, among others; and

(b) identify the highest or otherwise best Qualified Bid or Overbid received at any given time during the Auction, with the highest or otherwise best such bid or bids at the conclusion of the Auction being the Successful Bid(s), and the Qualified Bidder(s) making such bid the Successful Bidder(s).

Deposits

29. Any deposit made by the Successful Bidder(s) pursuant to this SISP shall be held by the Monitor in a single interest bearing account designated solely for such purpose and such deposit shall be dealt with in accordance with the definitive documents for the transactions contemplated by the Successful Bid(s).

Sale Approval Motion Hearing

30. The Successful Bidder(s) shall complete and execute all agreements, contracts, instruments or other documents evidencing and containing the terms and conditions upon which the Successful Bid(s) was made within two (2) business days of the Successful Bid(s) being selected as such, unless extended by the Monitor, in consultation with the Applicants.

31. At the hearing of the motion to approve any transaction with the Successful Bidder(s) (the "**Sale Approval Motion**"), the Applicants shall seek, among other things, approval from the Court to consummate the Successful Bid(s). All the Qualified Bids other than the Successful Bid(s), if any, shall be deemed to be rejected by the Applicants on and as of the date of approval of the Successful Bid(s) by the Court.

Consultation with the Secured Lenders

32. The Monitor, in consultation with the Applicants, may, as it deems appropriate, consult with secured creditors of the Applicants throughout the SISP upon such assurances as to confidentiality as the Monitor may require. To the extent any secured creditor is or is related to a Potential Bidder, the Monitor and Applicants shall not provide such secured lender with information that might create an unfair advantage or jeopardize the integrity of the SISP unless such secured creditor irrevocably confirms in writing to the Monitor that it shall not submit or participate directly or indirectly in the submission of a Bid. Except as set forth in this paragraph, nothing in this SISP shall prohibit a secured creditor of the Applicants (i) from participating as a Bidder in the SISP, or (ii) committing to bid its secured debt, including a credit bid of all outstanding indebtedness under any DIP loan facility (inclusive of interest and all amounts payable under any DIP loan agreement to and including the date of closing of a definitive transaction) in the SISP.

Confidentiality and Access to Information

33. Unless expressly provided for herein, participants and prospective participants in the SISP shall not be permitted to receive any information that is not made generally available to all participants relating to the number or identity of Potential Bidders, Bidders, Qualified Bidders, or Successful Bidder(s), or the details of any bids submitted or the details of any confidential discussions or correspondence between the Applicants, the Monitor and such

other Potential Bidders, Bidders, Qualified Bidders, or Successful Bidder(s) in connection with the SISP, except to the extent that the Applicants (in consultation with, and with the approval of, the Monitor and with the consent of the applicable bidders) are seeking to combine separate Bids to form a Qualified Bid.

34. All discussions regarding Bids should be directed through the Monitor. Under no circumstances should the management of the Applicants be contacted directly without the prior consent of the Monitor. Any such unauthorized contact or communication could result in exclusion of the Potential Bidder or Bidder or Qualified Bidder, as applicable, from the SISP.

Supervision of the SISP

35. The Monitor shall oversee and conduct the SISP, in all respects, and, without limitation to that supervisory role, the Monitor will participate in the SISP in the manner set out in this SISP, the SISP Order, the Initial Order and any other orders of the Court, and is entitled to receive all information in relation to the SISP. In the event that there is disagreement as to the interpretation or application of the SISP, the Court will have the jurisdiction to hear and resolve such dispute.

36. This SISP does not, and will not be interpreted to create any contractual or other legal relationship between the Applicants, or the Monitor and any Potential Bidder, Bidder, Qualified Bidder, Successful Bidder or any other party, other than as specifically set forth in a definitive agreement that may be entered into with the Applicants.

37. Without limiting the generality of preceding paragraph, the Monitor shall not have any liability whatsoever to any person or party, including, without limitation, any Potential Bidder, Bidder, Qualified Bidder, Successful Bidder, the Applicants, or any other creditor or other stakeholder of the Applicants, for any act or omission related to the process contemplated by this SISP. By submitting a Bid, each Bidder shall be deemed to have agreed that it has no claim against the Monitor for any reason whatsoever.

38. Participants in the SISP are responsible for all costs, expenses and liabilities incurred by them in connection with the submission of any Bid, due diligence activities, the Auction and any further negotiations or other actions whether or not they lead to the consummation of a transaction.

39. The Applicants, with the approval of the Monitor, shall have the right to modify the SISP (including, without limitation, pursuant to any Bid Deadline Letter) if, in their reasonable business judgment, such modification will enhance the process or better achieve the objectives of the SISP; provided that the service list in these CCAA Proceedings shall be advised of any substantive modification to the procedures set forth herein.

40. Notwithstanding anything to the contrary in this SISP, the Applicants, in consultation with, and with the approval of, the Monitor, may attempt to negotiate a stalking horse bid (a "**Stalking Horse Bid**") prior to the Bid Deadline to provide certainty for the Applicants during the SISP. If the Applicants, in consultation with, and with the approval of, the Monitor, accept a Stalking Horse Bid, such Stalking Horse Bid shall be subject to approval by the Court and the Applicants shall bring a motion before the Court on notice to the service list in these CCAA Proceedings seeking the approval of the Stalking Horse Bid,

together with approval of necessary amendments to the SISP. All Potential Bidders shall be promptly informed of any Court approval of a Stalking Horse Bid and any related amendments to the SISP.

Schedule "1"

Address of Monitor

To the Monitor:

Ernst and Young Inc.
EY Tower, 100 Adelaide Street West
PO Box 1
Toronto, ON M5H 0B3

Attention: Alex Morrison, Michael Hayes and Allen Yao

Email: alex.f.morrison@parthenon.ey.com

michael.hayes@parthenon.ey.com

allen.yao@parthenon.ey.com

Electronically issued / Délivré par voie électronique : 09-Mar-2023
Toronto Superior Court of Justice / Cour supérieure de justice

Court File No. CV-23-00693595-00CL

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

AND IN THE MATTER OF PLAN OF COMPROMISE OR ARRANGEMENT OF ACERUS PHARMACEUTICALS CORPORATION, ACERUS BIOPHARMA INC., ACERUS LABS INC. AND ACERUS PHARMACEUTICALS USA, LLC.

Applicants

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

PROCEEDING COMMENCED AT TORONTO

ORDER
(SISP APPROVAL AND EXTENSION TO STAY OF PROCEEDINGS)

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Lawyers for the Applicants

TAB 11

Court File No. CV-22-00688966-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE MR.	**)**	FRIDAY, THE 28TH
	)	
JUSTICE CAVANAGH	**)**	DAY OF OCTOBER, 2022

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF THE FLOWR CORPORATION, THE FLOWR CANADA HOLDINGS ULC, THE FLOWR GROUP (OKANAGAN) INC., AND TERRACE GLOBAL INC. (collectively, the "**Applicants**")

SISP ORDER

THIS MOTION, made by the Applicants seeking, among other relief, an Order (i) approving the sale and investment solicitation process (the "**SISP**") attached hereto as Schedule "A"; and (ii) authorizing and directing the Monitor to conduct the SISP was heard this day by way of judicial conference via Zoom at Toronto, Ontario in accordance with the changes to the operations of the Commercial List.

ON READING the affidavit of Darren Karasiuk sworn October 20, 2022 and the Exhibits thereto (the "**Karasiuk Affidavit**"), the pre-filing report of Ernst & Young Inc., in its capacity as proposed monitor of the Applicants (the "**Monitor**"), dated October 20, 2022 (the "**Pre-Filing Report**"), and the First Report of the Monitor dated October 27, 2022 (the "**First Report**"), and on hearing the submissions of counsel for the Applicants, counsel for the Monitor and counsel for the DIP Lender, no one appearing for any other party although duly served as

appears from the affidavits of service of Alina Stoica dated October 20, 2022 and October 26, 2022, filed,

DEFINED TERMS

1. **THIS COURT ORDERS** that capitalized terms used in this Order and not otherwise defined herein shall have the meaning ascribed to them under the SISP as the case may be.

SERVICE

2. **THIS COURT ORDERS** that the time for service of the Notice of Motion and Motion Record is abridged and validated such that this Motion is properly returnable today, and further service of the Notice of Motion and the Motion Record is hereby dispensed with.

APPROVAL OF SALE AND INVESTMENT SOLICITATION PROCESS

3. **THIS COURT ORDERS** that the SISP (subject to such amendments as may be agreed to by the Monitor, the Applicants and the DIP Lender in accordance with the terms of the SISP) be and are hereby approved.

4. **THIS COURT ORDERS** that the Monitor is authorized and directed to take such steps as it deems necessary or advisable to carry out and perform its obligations under the SISP.

5. **THIS COURT ORDERS** that the Monitor and its respective affiliates, partners, employees, representatives and agents shall have no liability with respect to any and all losses, claims, damages or liabilities, of any nature or kind, to any person in connection with or as a result of the SISP, except to the extent such losses, claims, damages or liabilities result from the gross negligence or willful misconduct of the Monitor in performing its obligations under the SISP as determined by this Court.

6. **THIS COURT ORDERS** that the Monitor and the Applicants and their respective counsel be and are hereby authorized but not obligated, to serve or distribute this SISP Order, any other materials, orders, communication, correspondence or other information as may be necessary or desirable in connection with the SISP to any Person (as defined in the Initial Order dated October 20. 2022, as amended and restated) or interested party that the Monitor or the Applicants considers appropriate. For greater certainty, any such distribution, communication or correspondence shall be deemed to be in satisfaction of a legal or juridical obligation, and notice requirements within the meaning of clause 3(c) of the Electronic Commerce Protection Regulations, Reg. 81000-2-175 (SOR/DORS).

7. **THIS COURT ORDERS** that, pursuant to clause 7(3)(c) of the Canada *Personal Information Protection and Electronic Documents Act*, the Monitor and the Applicants are hereby authorized and permitted to disclose and transfer to each potential bidder (the "**Bidders**") and to their advisors, if requested by such Bidders, personal information of identifiable individuals, including, without limitation, all human resources and payroll information in the Applicants'records pertaining to its past and current employees, but only to the extent desirable or required to negotiate or attempt to complete a sale of the Property ("**Sale**") or investment in the Business ("**Investment**"). Each Bidder to whom such personal information is disclosed shall maintain and protect the privacy of such information and limit the use of such information to its evaluation of the Sale or Investment, and if it does not complete a Sale or Investment, shall return all such information to the Monitor and the Applicants, or in the alternative destroy all such information. The Successful Bidder(s) shall maintain and protect the privacy of such information and, upon closing of the transaction contemplated in the Successful Bid(s), shall be entitled to use the personal information provided to it that is related to the Property of Business

acquired pursuant to the Sale or invested in pursuant to the Investment in a manner which is in all material respects identical to the prior use of such information by the Applicants, and shall return all other personal information to the Monitor and the Applicants, or ensure that all other personal information is destroyed.

GENERAL

8. **THIS COURT ORDERS** that the Applicants or the Monitor may from time to time apply to this Court for advice and directions in the discharge of their powers and duties hereunder.

9. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada, the United States or elsewhere, to give effect to this Order and to assist the Applicants, the Monitor and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Applicants and to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Monitor in any foreign proceeding, or to assist the Applicants and the Monitor and their respective agents in carrying out the terms of this Order.

10. **THIS COURT ORDERS** that each of the Applicants and the Monitor be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order, and that the Monitor is authorized and empowered to act as a representative

in respect of the within proceedings for the purpose of having these proceedings recognized in a jurisdiction outside Canada.

11. **THIS COURT ORDERS** that this Order is effective from the date that it is made and is enforceable without any need for entry and filing.

_____

SCHEDULE "A"
SALE AND INVESTMENT SOLICITATION PROCESS

Sale and Investment Solicitation Process

Introduction

1. On October 20, 2022, The Flowr Corporation ("**Flowr**") and certain of its subsidiaries (collectively, the "**Applicants**") were granted an initial order (as amended or amended and restated from time to time, the "**Initial Order**") under the *Companies' Creditors Arrangement Act* (the "**CCAA**" and the "**CCAA Proceedings**") by the Ontario Superior Court of Justice (the "**Court**"). The Initial Order (which was amended and restated on **[October 28, 2022]**), among other things:

   (a) stayed all proceedings against the Applicants, their assets and their respective directors and officers;

   (b) appointed Ernst & Young Inc. as the monitor of the Applicants (in such capacity, the "**Monitor**");

   (c) authorized the Applicants to enter into a debtor-in-possession financing facility (the "**DIP Facility**") with 1000343100 Ontario Inc. ("**DIP Lender**") pursuant to a Commitment Letter dated October 20, 2022 (the "**DIP Commitment Letter**"), as well as the related charge in favour of the DIP Lender (the "**DIP Charge**") over all of the Applicants' present and future assets, property and undertakings of every nature and kind whatsoever, and wherever situate including all proceeds thereof to secure the amounts outstanding under or in connection with the DIP Facility; and

   (d) authorized the Applicants to pursue all avenues of sale or investment of their assets or business, in whole or in part, subject to prior approval of the Court before any material sale or refinancing.

2. Further to the Applicants' restructuring efforts and the terms of the DIP Facility, the Monitor will conduct the sale and investment solicitation process (the "**SISP**") described herein, with the assistance of the Applicants, and pursuant to a Court order dated **[October 28, 2022]** (the "**SISP Order**"). The SISP is intended to solicit interest in an acquisition or refinancing of the business or a sale of the assets and/or the business of the Applicants by way of merger, reorganization, recapitalization, primary equity issuance or other similar transaction. The Applicants intend to provide all qualified interested parties with an opportunity to participate in the SISP.

3. In accordance with the terms of the DIP Facility, the DIP Lender has the exclusive option to submit a Stalking Horse Agreement (when referring to the bid, the "**Stalking Horse Bid**" and in referring to the DIP Lender, as purchaser, the "**Stalking Horse Bidder**") in order to provide certainty in the marketplace for the Applicants. Where the Stalking Horse Bidder submits its Stalking Horse Bid, the Monitor or the Applicants shall bring a motion before the Court seeking the approval of the Stalking Horse Bid. In the event the Stalking Horse Bid is approved by the Court, the Stalking Horse Bid shall automatically be considered as a Qualified Bid (as defined herein) for the purposes of the Auction (as defined herein).

Opportunity

4. The SISP is intended to solicit interest in, and opportunities for, a sale of, or investment in, all or part of the Applicants' assets and business operations (the "**Opportunity**"). The Opportunity may include one or more of a restructuring, recapitalization or other form or reorganization of the business and affairs of the Applicants as a going concern or a sale of all, substantially all or one or more components of the Applicants' assets (the "**Property**") and business operations (the "**Business**") as a going concern or otherwise.

5. Except to the extent otherwise set forth in a definitive sale or investment agreement with a successful bidder, any sale of the Property or investment in the Business will be on an "as is, where is" basis and without surviving representations or warranties of any kind, nature, or description by the Monitor, the Applicants, or any of their respective agents, advisors or estates, and, in the event of a sale, all of the right, title and interest of the Applicants in and to the Property to be acquired will be sold free and clear of all pledges, liens, security interests, encumbrances, claims, charges, options, and interests therein and thereon pursuant to Court orders, to the extent that the Court deems it appropriate to grant such relief and except as otherwise provided in such Court orders.

Timeline

6. The following table sets out the key milestones under the SISP:

Milestone	Deadline
Deadline to publish notice of SISP and deliver Teaser Letter and NDA to Known Potential Bidders	November 7, 2022
Bid Deadline	November 25, 2022
Auction Date	December 1, 2022
Hearing of the Sale Approval Motion (as defined below)	No later than December 16, 2022, subject to the availability of the Court

7. Subject to any order of the Court, the dates set out in the SISP may be extended by the Monitor with the consent and approval of the Applicants and after consultation with the DIP Lender.

Solicitation of Interest: Notice of the SISP

8. As soon as reasonably practicable, but in any event by no later than November 7, 2022:

   (a) the Monitor, in consultation with the Applicants, will prepare a list of potential bidders, including (i) parties that have approached the Applicants or the Monitor

indicating an interest in the Opportunity, and (ii) local and international strategic and financial parties who the Applicants, in consultation with the Monitor, believe may be interested in purchasing all or part of the Business and Property or investing in the Applicants pursuant to the SISP, in each case whether or not such party has submitted a letter of intent or similar document (collectively, "**Known Potential Bidders**");

(b) the Monitor will arrange for a notice of the SISP (and such other relevant information which the Monitor, in consultation with the Applicants, considers appropriate) (the "**Notice**") to be published in The Globe and Mail (National Edition), and any other newspaper or journal as the Applicants, in consultation with the Monitor, consider appropriate, if any;

(c) the Monitor will issue a press release with Canada Newswire or comparable newswire entity setting out the information contained in the Notice and such other relevant information which the Monitor, in consultation with the Applicants, consider appropriate, designating dissemination in Canada; and

(d) the Monitor, in consultation with the Applicants, will prepare: (i) a process summary (the "**Teaser Letter**") describing the Opportunity, outlining the process under the SISP and inviting recipients of the Teaser Letter to express their interest pursuant to the SISP; and (ii) a non-disclosure agreement in form and substance satisfactory to the Applicants and the Monitor, and their respective counsel, and substantially in the form of the NDA executed by the DIP Lender (an "**NDA**").

9. The Monitor will send the Teaser Letter and NDA to each Known Potential Bidder by no later than November 7, 2022 and to any other party who requests a copy of the Teaser Letter and NDA or who is identified to the Applicants or the Monitor as a potential bidder as soon as reasonably practicable after such request or identification, as applicable.

Potential Bidders and Due Diligence Materials

10. Any party who wishes to participate in the SISP (a "**Potential Bidder**"), other than the Stalking Horse Bidder, must provide to the Applicants and the Monitor an NDA executed by it, and which shall inure to the benefit of any purchaser of the Business or Property, or any portion thereof, and a letter setting forth the identity of the Potential Bidder, the contact information for such Potential Bidder and full disclosure of the direct and indirect principals of the Potential Bidder.

11. The Monitor, in consultation with the Applicants, shall in their reasonable business judgment and subject to competitive and other business considerations, afford each Potential Bidder who has signed and delivered a NDA to the Monitor and provided information as to their financial wherewithal to close a transaction such access to due diligence material and information relating to the Property and Business as the Applicants or the Monitor deem appropriate. Due diligence shall include access to an electronic data room containing information about the Applicants and the Business, and may also include management presentations, on-site inspections, and other matters which a

Potential Bidder may reasonably request and as to which the Applicants, in their reasonable business judgment and after consulting with the Monitor, may agree. The Monitor will designate a representative to coordinate all reasonable requests for additional information and due diligence access from Potential Bidders and the manner in which such requests must be communicated. Neither the Applicants nor the Monitor will be obligated to furnish any information relating to the Property or Business to any person other than to Potential Bidders. Furthermore and for the avoidance of doubt, selected due diligence materials may be withheld from certain Potential Bidders if the Applicants, in consultation with and with the approval of the Monitor, determine such information to represent proprietary or sensitive competitive information. Neither the Applicants nor the Monitor is responsible for, and will bear no liability with respect to, any information obtained by any party in connection with the Sale of the Property and the Business.

12. Potential Bidders must rely solely on their own independent review, investigation and/or inspection of all information and of the Property and Business in connection with their participation in the SISP and any transaction they enter into with the Applicants.

Formal Binding Offers

13. Potential Bidders that wish to make a formal offer to purchase or make an investment in the Applicants or their Property or Business (a "**Bidder**") shall submit a binding offer (a "**Bid**") that complies with all of the following requirements to the Monitor at the address specified in Schedule "1" hereto (including by e-mail), so as to be received by them not later than **5:00 PM (Eastern Time) on November 25, 2022** or as may be modified in the Bid process letter that may be circulate by the Monitor to Potential Bidders, with the approval of the Applicants and in consultation with the DIP Lender (the "**Bid Deadline**"):

    (a) the Bid must be either a binding offer to:

        (i) acquire all, substantially all or a portion of the Property (a "**Sale Proposal**"); and/or

        (ii) make an investment in, restructure, reorganize or refinance the Business or the Applicants (an "**Investment Proposal**");

    (b) the Bid (either individually or in combination with other bids that make up one bid) is an offer to purchase or make an investment in some or all of the Applicants or their Property or Business and is consistent with any necessary terms and conditions established by the Applicants and the Monitor and communicated to Bidders;

    (c) the Bid includes a letter stating that the Bidder's offer is irrevocable until the selection of the Successful Bidder (as defined below), provided that if such Bidder is selected as the Successful Bidder, its offer shall remain irrevocable until the closing of the transaction with the Successful Bidder;

(d) the Bid includes duly authorized and executed transaction agreements, including the purchase price, investment amount and any other key economic terms expressed in Canadian dollars (the "**Purchase Price**"), together with all exhibits and schedules thereto;

(e) the Bid includes written evidence of a firm, irrevocable commitment for financing or other evidence of ability to consummate the proposed transaction, that will allow the Applicants and the Monitor to make a determination as to the Bidder's financial and other capabilities to consummate the proposed transaction;

(f) the Bid is not conditioned on (i) the outcome of unperformed due diligence by the Bidder, or (ii) obtaining financing, but may be conditioned upon the Applicants receiving the required approvals or amendments relating to the licences required to operate the business, if necessary;

(g) the Bid fully discloses the identity of each entity that will be entering into the transaction or the financing, or that is otherwise participating or benefiting from such bid;

(h) for a Sale Proposal, the Bid includes:

(i) the purchase price in Canadian dollars and a description of any non-cash consideration, including details of any liabilities to be assumed by the Bidder and key assumptions supporting the valuation;

(ii) a description of the Property that is expected to be subject to the transaction and any of the Property expected to be excluded;

(iii) a specific indication of the financial capability of the Bidder and the expected structure and financing of the transaction;

(iv) a description of the conditions and approvals required to complete the closing of the transaction;

(v) a description of those liabilities and obligations (including operating liabilities) which the Bidder intends to assume and which such liabilities and obligations it does not intend to assume;

(vi) any other terms or conditions of the Sale Proposal that the Bidder believes are material to the transaction; and

(vii) a commitment by the Bidder to provide a non-refundable deposit in the amount of not less than 10% of the Purchase Price offered upon the Bidder being selected as the Successful Bidder;

(i) for an Investment Proposal, the Bid includes:

(i) a description of how the Bidder proposes to structure the proposed investment, restructuring, recapitalization, refinancing or reorganization, and a description of any non-cash consideration;

(ii) the aggregate amount of the equity and/or debt investment to be made in the Business or the Applicants in Canadian dollars;

(iii) the underlying assumptions regarding the pro forma capital structure;

(iv) a specific indication of the sources of capital for the Bidder and the structure and financing of the transaction;

(v) a description of the conditions and approvals required for to complete the closing of the transaction;

(vi) a description of those liabilities and obligations (including operating liabilities) which the Bidder intends to assume and which such liabilities and obligations it does not intend to assume;

(vii) any other terms or conditions of the Investment Proposal; and

(viii) a commitment by the Bidder to provide a non-refundable deposit in the amount of not less than 10% of the total new investment contemplated in the bid upon the Bidder being selected as the Successful Bidder;

(j) the Bid includes acknowledgements and representations of the Bidder that the Bidder:

(i) has had an opportunity to conduct any and all due diligence regarding the Property, the Business and the Applicants prior to making its offer;

(ii) it has relied solely upon its own independent review, investigation and/or inspection of any documents and/or the Property in making its bid; and

(iii) it did not rely upon any written or oral statements, representations, warranties, or guarantees whatsoever, whether express, implied, statutory or otherwise, regarding the Business, the Property, or the Applicants or the completeness of any information provided in connection therewith, except as expressly stated in the definitive transaction agreement(s) signed by the Applicants;

(k) the Bid is received by the Bid Deadline;

(l) the Bid includes confirmation that, if the Bid is the Successful Bid and the Flowr Group has cash requirements in excess of the amounts available to them under the DIP Facility to get to a closing of the transaction then the Bidder will advance funds to the Flowr Group to allow them to fund their cash requirements by way of

non-revolving facility in a manner that does not impair the priority of the DIP Facility or otherwise is satisfactory to the DIP Lender; and

(m) the Bid contemplates closing the transaction set out therein on or before January 31, 2023.

14. Following the Bid Deadline, the Applicants and the Monitor will assess the Bids received. The Monitor, in consultation with the Applicants, and with the approval of the Applicants, will designate the most competitive bids that comply with the foregoing requirements to be "**Qualified Bids**". No Bids received shall be deemed not to be Qualified Bids without the approval of the Monitor. Only Bidders whose bids have been designed as Qualified Bids are eligible to become the Successful Bidder(s).

15. In the event that a Stalking Horse Agreement is approved by the Court, the Monitor may only designate a Bid as a Qualified Bid where the proposed purchase price is equal to or greater than that contained in any Stalking Horse Bid, and includes a cash purchase price in an amount equal to or greater than the Stalking Horse Bid, *plus* the amount of any break fee *plus* $50,000.

16. The Monitor, in consultation with the Applicants and with the approval of the Applicants, may waive strict compliance with any one or more of the requirements specified above and deem such non-compliant Bids to be a Qualified Bid; provided, however, that the Monitor shall not waive compliance with paragraph 14 above without the consent of the DIP Lender.

17. The Monitor shall notify each Bidder in writing as to whether its Bid constituted a Qualified Bid within two (2) business days of the Bid Deadline, or at such later time as the Monitor deems appropriate.

18. In the event that there is not a Stalking Horse Bid, if the Monitor, in consultation with the Applicants, are not satisfied with the number or terms of the Qualified Bids, the Monitor may, in consultation with the Applicants and with the approval of the Applicants, extend the Bid Deadline, or the Monitor may seek Court approval of an amendment to the SISP, in each case after consultation with the DIP Lender.

19. The Monitor may, in consultation with the Applicants and with the approval of the Applicants, aggregate separate Bids from unaffiliated Bidders to create one Qualified Bid.

Evaluation of Competing Bids

20. A Qualified Bid will be evaluated based upon several factors including, without limitation: (i) the Purchase Price and the net value provided by such bid, (ii) the identity, circumstances and ability of the Bidder to successfully complete such transactions, (iii) the proposed transaction documents, (iv) factors affecting the speed, certainty and value of the transaction, (v) the assets included or excluded from the bid, (vi) any related

restructuring costs, and (vii) the likelihood and timing of consummating such transaction, each as determined by the Applicants and the Monitor.

Auction

21. If the Monitor receives at least one additional Qualified Bid where there is a court approved Stalking Horse Bid, or two Qualified Bids where there is no court approved Stalking Horse Bid, the Monitor will conduct and administer an Auction in accordance with the terms of this SISP (the "**Auction**"). Instructions to participate in the Auction, which will take place via video conferencing, will be provided to Qualified Parties (as defined below) not less than 24 hours prior to the Auction.

22. Only parties that provided a Qualified Bid by the Bid Deadline, as confirmed by the Monitor, including the Stalking Horse Bid, if any (collectively, the "**Qualified Parties**"), shall be eligible to participate in the Auction. No later than 5:00 p.m. Eastern Daylight Time on the day prior to the Auction, each Qualified Party must inform the Monitor whether it intends to participate in the Auction. The Monitor will promptly thereafter inform in writing each Qualified Party who has expressed its intent to participate in the Auction of the identity of all other Qualified Parties that have indicated their intent to participate in the Auction. If no Qualified Party provides such expression of intent, the Stalking Horse Bidder, if any, shall be the Successful Bid (as defined below).

Auction Procedure

23. The Auction shall be governed by the following procedures:

    (a) **Participation at the Auction.** Only the Applicants, the Qualified Parties, the Monitor and each of their respective advisors will be entitled to attend the Auction, and only the Qualified Parties will be entitled to make any subsequent Overbids (as defined below) at the Auction. The Monitor shall provide all Qualified Bidders with the details of the lead bid by 5:00 PM (Eastern Time) two (2) Business Days after the Bid Deadline;

    (b) **No Collusion.** Each Qualified Party participating at the Auction shall be required to confirm on the record at the Auction that: (i) it has not engaged in any collusion with respect to the Auction and the bid process; and (ii) its bid is a good-faith *bona fide* offer and it intends to consummate the proposed transaction if selected as the Successful Bid;

    (c) **Minimum Overbid.** The Auction shall begin with the Qualified Bid that represents the highest or otherwise best Qualified Bid as determined by the Monitor, in consultation with the Applicants (the "**Initial Bid**"), and any bid made at the Auction by a Qualified Party subsequent to the Monitors announcement of the Initial Bid (each, an "**Overbid**"), must proceed in minimum additional cash increments of $100,000;

    (d) **Bidding Disclosure.** The Auction shall be conducted such that all bids will be made and received in one group video-conference, on an open basis, and all

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

(e) **Bidding Conclusion.** The Auction shall continue in one or more rounds and will conclude after each participating Qualified Party has had the opportunity to submit one or more additional bids with full knowledge and written confirmation of the then-existing highest bid(s); and

(f) **No Post-Auction Bids.** No bids will be considered for any purpose after the Auction has concluded.

(g) **Auction Procedures.** The Monitor shall be at liberty to set additional procedural rules as the Auction as it sees fit.

Selection of Successful Bid

24. Before the conclusion of the Auction, the Monitor, in consultation with the Applicants, will:

(a) review each Qualified Bid, considering the factors set out in paragraph 13 and, among others things:

(i) the amount of consideration being offered, and, if applicable, the proposed form, composition and allocation of same;

(ii) the value of any assumption of liabilities or waiver of liabilities not otherwise accounted for in paragraph 26(a)(i);

(iii) the likelihood of the Qualified Party's ability to close a transaction by January 31, 2023, after completion of the Auction and timing thereof (including factors such as the transaction structure and execution risk, including conditions to, timing of, and certainty of closing; termination provisions; availability of financing and financial wherewithal to meet all commitments and required governmental or other approvals); the likelihood of the Court's approval of the Successful Bid; the net benefit to the Applicants; and

(iv) any other factors the Applicants may, consistent with its fiduciary duties, reasonably deem relevant; and

(b) identify the highest or otherwise best bid received at the Auction (the "**Successful Bid**" and the Qualified Party making such bid, the "**Successful Party**").

25. The Successful Party shall complete and execute all agreements, contracts, instruments or other documents evidencing and containing the terms and conditions upon which the Successful Bid was made within one business day of the Successful Bid being selected as such, unless extended by the Monitor, in consultation with and Approval from the Applicants, subject to the milestones set forth in paragraph 6.

Sale Approval Motion Hearing

26. At the hearing of the motion to approve any transaction with a Successful Party (the "**Sale Approval Motion**"), the Monitor or the Applicants shall seek, among other things, approval from the Court to consummate any Successful Bid. All the Qualified Bids other than the Successful Bid, if any, shall be deemed to be rejected by the Monitor and the Applicants on and as of the date of approval of the Successful Bid by the Court.

Confidentiality and Access to Information

27. All discussions regarding a Sale Proposal, Investment Proposal, or Bid should be directed through the Monitor. Under no circumstances should the management of the Applicants be contacted directly without the prior consent of the Monitor. Any such unauthorized contact or communication could result in exclusion of the interested party from the SISP process.

28. Participants and prospective participants in the SISP shall not be permitted to receive any information that is not made generally available to all participants relating to the number or identity of Potential Bidders, Bidders, Qualified Bids, the details of any bids submitted or the details of any confidential discussions or correspondence between the Applicants, the Monitor and such other bidders or Potential Bidders in connection with the SISP, except to the extent the Applicants, with the approval of the Monitor and consent of the applicable participants, are seeking to combine separate bids from Potential Bidders or Bidders.

Supervision of the SISP

29. The Monitor shall oversee and conduct the SISP, in all respects, and, without limitation to that supervisory role, the Monitor will participate in the SISP in the manner set out in this SISP Procedure, the SISP Order, the Initial Order and any other orders of the Court, and is entitled to receive all information in relation to the SISP.

30. This SISP does not, and will not be interpreted to create any contractual or other legal relationship between the Applicants or the Monitor and any Potential Bidder, any Bidder or any other party, other than as specifically set forth in a definitive agreement that may be entered into with the Applicants.

31. Without limiting the preceding paragraph, the Monitor shall not have any liability whatsoever to any person or party, including without limitation any Potential Bidder, Bidder, the Successful Bidder, the Applicants, the DIP Lender or any other creditor or other stakeholder of the Applicants, for any act or omission related to the process contemplated by this SISP Procedure, except to the extent such act or omission is the

result from gross negligence or wilful misconduct of the Monitor. By submitting a bid, each Bidder, or Successful Bidder shall be deemed to have agreed that it has no claim against the Monitor for any reason whatsoever, except to the extent that such claim is the result of gross negligence or wilful misconduct of the Monitor.

32. Participants in the SISP are responsible for all costs, expenses and liabilities incurred by them in connection with the submission of any Bid, due diligence activities, the Auction and any further negotiations or other actions whether or not they lead to the consummation of a transaction.

33. Without limiting in any way the intent and effect of the applicable provisions of the DIP Facility in respect of the SISP, the Applicants and the Monitor shall have the right to modify the SISP (including, without limitation, pursuant to the Bid process letter) with the prior written approval of the Applicants and consultation with the DIP Lender if, in their reasonable business judgment, such modification will enhance the process or better achieve the objectives of the SISP; provided that the Service List in these CCAA proceedings shall be advised of any substantive modification to the procedures set forth herein.

Schedule "1"

Address of Monitor

To the Monitor:

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IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c.C-36 AS AMENDED
AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF THE FLOWR CORPORATION, THE FLOWR CANADA HOLDINGS ULC, THE FLOWR GROUP (OKANAGAN) INC., AND TERRACE GLOBAL INC. (collectively, the "**Applicants**")

Court File No.: CV-22-00688966-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE - COMMERCIAL LIST

Proceeding commenced at Toronto

SISP ORDER
(DATED OCTOBER 28, 2022)

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Lawyers for the Applicants

TAB 26

2005 CarswellOnt 1188
Ontario Court of Appeal

Stelco Inc., Re

2005 CarswellOnt 1188, [2005] O.J. No. 1171, 138 A.C.W.S. (3d) 222, 196 O.A.C. 142, 253 D.L.R. (4th) 109, 2 B.L.R. (4th) 238, 75 O.R. (3d) 5, 9 C.B.R. (5th) 135

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

And In the Matter of a proposed plan of compromise or arrangement with respect to Stelco Inc. and the other Applicants listed in Schedule "A"

Application under the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended

Goudge, Feldman, Blair JJ.A.

Heard: March 18, 2005
Judgment: March 31, 2005
Docket: CA M32289

Proceedings: reversed *Stelco Inc., Re* ((2005)), 2005 CarswellOnt 742, [2005] O.J. No. 729, 7 C.B.R. (5th) 307 ((Ont. S.C.J. [Commercial List])); reversed *Stelco Inc., Re* ((2005)), 2005 CarswellOnt 743, [2005] O.J. No. 730, 7 C.B.R. (5th) 310 ((Ont. S.C.J. [Commercial List])); additional reasons to *Stelco Inc., Re* ((2005)), 2005 CarswellOnt 742, [2005] O.J. No. 729, 7 C.B.R. (5th) 307 ((Ont. S.C.J. [Commercial List]))

Counsel: Jeffrey S. Leon, Richard B. Swan for Appellants, Michael Woollcombe, Roland Keiper
Kenneth T. Rosenberg, Robert A. Centa for Respondent, United Steelworkers of America
Murray Gold, Andrew J. Hatnay for Respondent, Retired Salaried Beneficiaries of Stelco Inc., CHT Steel Company Inc., Stelpipe Ltd., Stelwire Ltd., Welland Pipe Ltd.
Michael C.P. McCreary, Carrie L. Clynick for USWA Locals 5328, 8782
John R. Varley for Active Salaried Employee Representative
Michael Barrack for Stelco Inc.
Peter Griffin for Board of Directors of Stelco Inc.
K. Mahar for Monitor
David R. Byers (Agent) for CIT Business Credit, DIP Lender

***Blair J.A.*:**

Part I — Introduction

1 Stelco Inc. and four of its wholly owned subsidiaries obtained protection from their creditors under the *Companies' Creditors Arrangement Act* [1] on January 29, 2004. Since that time, the Stelco Group has been engaged in a high profile, and sometimes controversial, process of economic restructuring. Since October 2004, the restructuring has revolved around a court-approved capital raising process which, by February 2005, had generated a number of competitive bids for the Stelco Group.

2 Farley J., an experienced judge of the Superior Court Commercial List in Toronto, has been supervising the CCAA process from the outset.

3 The appellants, Michael Woollcombe and Roland Keiper, are associated with two companies — Clearwater Capital Management Inc., and Equilibrium Capital Management Inc. — which, respectively, hold approximately 20% of the outstanding

publicly traded common shares of Stelco. Most of these shares have been acquired while the CCAA process has been ongoing, and Messrs. Woollcombe and Keiper have made it clear publicly that they believe there is good shareholder value in Stelco in spite of the restructuring. The reason they are able to take this position is that there has been a solid turn around in worldwide steel markets, as a result of which Stelco, although remaining in insolvency protection, is earning annual operating profits.

4 The Stelco board of directors ("the Board") has been depleted as a result of resignations, and in January of this year Messrs. Woollcombe and Keiper expressed an interest in being appointed to the Board. They were supported in this request by other shareholders who, together with Clearwater and Equilibrium, represent about 40% of the Stelco common shareholders. On February 18, 2005, the Board appointed the appellants directors. In announcing the appointments publicly, Stelco said in a press release:

> After careful consideration, and given potential recoveries at the end of the company's restructuring process, the Board responded favourably to the requests by making the appointments announced today.
>
> Richard Drouin, Chairman of Stelco's Board of Directors, said: "I'm pleased to welcome Roland Keiper and Michael Woollcombe to the Board. Their experience and their perspective will assist the Board as it strives to serve the best interests of all our stakeholders. We look forward to their positive contribution."

5 On the same day, the Board began its consideration of the various competing bids that had been received through the capital raising process.

6 The appointments of the appellants to the Board incensed the employee stakeholders of Stelco ("the Employees"), represented by the respondent Retired Salaried Beneficiaries of Stelco and the respondent United Steelworkers of America ("USWA"). Outstanding pension liabilities to current and retired employees are said to be Stelco's largest long-term liability — exceeding several billion dollars. The Employees perceive they do not have the same, or very much, economic leverage in what has sometimes been referred to as 'the bare knuckled arena' of the restructuring process. At the same time, they are amongst the most financially vulnerable stakeholders in the piece. They see the appointments of Messrs. Woollcombe and Keiper to the Board as a threat to their well being in the restructuring process, because the appointments provide the appellants, and the shareholders they represent, with direct access to sensitive information relating to the competing bids to which other stakeholders (including themselves) are not privy.

7 The Employees fear that the participation of the two major shareholder representatives will tilt the bid process in favour of maximizing shareholder value at the expense of bids that might be more favourable to the interests of the Employees. They sought and obtained an order from Farley J. removing Messrs. Woollcombe and Keiper from their short-lived position of directors, essentially on the basis of that apprehension.

8 The Employees argue that there is a reasonable apprehension the appellants would not be able to act in the best interests of the corporation — as opposed to their own best interests as shareholders — in considering the bids. They say this is so because of prior public statements by the appellants about enhancing shareholder value in Stelco, because of the appellants' linkage to such a large shareholder group, because of their earlier failed bid in the restructuring, and because of their opposition to a capital proposal made in the proceeding by Deutsche Bank (known as "the Stalking Horse Bid"). They submit further that the appointments have poisoned the atmosphere of the restructuring process, and that the Board made the appointments under threat of facing a potential shareholders' meeting where the members of the Board would be replaced en masse.

9 On the other hand, Messrs. Woollcombe and Keiper seek to set aside the order of Farley J. on the grounds that (a) he did not have the jurisdiction to make the order under the provisions of the CCAA, (b) even if he did have jurisdiction, the reasonable apprehension of bias test applied by the motion judge has no application to the removal of directors, (c) the motion judge erred in interfering with the exercise by the Board of its business judgment in filling the vacancies on the Board, and (d) the facts do not meet any test that would justify the removal of directors by a court in any event.

10 For the reasons that follow, I would grant leave to appeal, allow the appeal, and order the reinstatement of the applicants to the Board.

Part II — Additional Facts

11 Before the initial CCAA order on January 29, 2004, the shareholders of Stelco had last met at their annual general meeting on April 29, 2003. At that meeting they elected eleven directors to the Board. By the date of the initial order, three of those directors had resigned, and on November 30, 2004, a fourth did as well, leaving the company with only seven directors.

12 Stelco's articles provide for the Board to be made up of a minimum of ten and a maximum of twenty directors. Consequently, after the last resignation, the company's corporate governance committee began to take steps to search for new directors. They had not succeeded in finding any prior to the approach by the appellants in January 2005.

13 Messrs. Woollcombe and Keiper had been accumulating shares in Stelco and had been participating in the CCAA proceedings for some time before their request to be appointed to the Board, through their companies, Clearwater and Equilibrium. Clearwater and Equilibrium are privately held, Ontario-based, investment management firms. Mr. Keiper is the president of Equilibrium and associated with Clearwater. Mr. Woollcombe is a consultant to Clearwater. The motion judge found that they "come as a package".

14 In October 2004, Stelco sought court approval of its proposed method of raising capital. On October 19, 2004, Farley J. issued what has been referred to as the Initial Capital Process Order. This order set out a process by which Stelco, under the direction of the Board, would solicit bids, discuss the bids with stakeholders, evaluate the bids, and report on the bids to the court.

15 On November 9, 2004, Clearwater and Equilibrium announced they had formed an investor group and had made a capital proposal to Stelco. The proposal involved the raising of $125 million through a rights offering. Mr. Keiper stated at the time that he believed "the value of Stelco's equity would have the opportunity to increase substantially if Stelco emerged from CCAA while minimizing dilution of its shareholders." The Clearwater proposal was not accepted.

16 A few days later, on November 14, 2004, Stelco approved the Stalking Horse Bid. Clearwater and Equilibrium opposed the Deutsche Bank proposal. Mr. Keiper criticized it for not providing sufficient value to existing shareholders. However, on November 29, 2004, Farley J. approved the Stalking Horse Bid and amended the Initial Capital Process Order accordingly. The order set out the various channels of communication between Stelco, the monitor, potential bidders and the stakeholders. It provided that members of the Board were to see the details of the different bids before the Board selected one or more of the offers.

17 Subsequently, over a period of two and a half months, the shareholding position of Clearwater and Equilibrium increased from approximately 5% as at November 19, to 14.9% as at January 25, 2005, and finally to approximately 20% on a fully diluted basis as at January 31, 2005. On January 25, Clearwater and Equilibrium announced that they had reached an understanding jointly to pursue efforts to maximize shareholder value at Stelco. A press release stated:

> Such efforts will include seeking to ensure that the interests of Stelco's equity holders are appropriately protected by its board of directors and, ultimately, that Stelco's equity holders have an appropriate say, by vote or otherwise, in determining the future course of Stelco.

18 On February 1, 2005, Messrs. Keiper and Woollcombe and others representatives of Clearwater and Equilibrium, met with Mr. Drouin and other Board members to discuss their views of Stelco and a fair outcome for all stakeholders in the proceedings. Mr. Keiper made a detailed presentation, as Mr. Drouin testified, "encouraging the Board to examine how Stelco might improve its value through enhanced disclosure and other steps". Mr. Keiper expressed confidence that "there was value to the equity of Stelco", and added that he had backed this view up by investing millions of dollars of his own money in Stelco shares. At that meeting, Clearwater and Equilibrium requested that Messrs. Woollcombe and Keiper be added to the Board and to Stelco's restructuring committee. In this respect, they were supported by other shareholders holding about another 20% of the company's common shares.

19 At paragraphs 17 and 18 of his affidavit, Mr. Drouin, summarized his appraisal of the situation:

17. It was my assessment that each of Mr. Keiper and Mr. Woollcombe had personal qualities which would allow them to make a significant contribution to the Board in terms of their backgrounds and their knowledge of the steel industry generally and Stelco in particular. In addition I was aware that their appointment to the Board was supported by approximately 40% of the shareholders. In the event that these shareholders successfully requisitioned a shareholders meeting they were in a position to determine the composition of the entire Board.

18. I considered it essential that there be continuity of the Board through the CCAA process. I formed the view that the combination of existing Board members and these additional members would provide Stelco with the most appropriate board composition in the circumstances. The other members of the Board also shared my views.

20 In order to ensure that the appellants understood their duties as potential Board members and, particularly that "they would no longer be able to consider only the interests of shareholders alone but would have fiduciary responsibilities as a Board member to the corporation as a whole", Mr. Drouin and others held several further meetings with Mr. Woollcombe and Mr. Keiper. These discussions "included areas of independence, standards, fiduciary duties, the role of the Board Restructuring Committee and confidentiality matters". Mr. Woollcombe and Mr. Keiper gave their assurances that they fully understood the nature and extent of their prospective duties, and would abide by them. In addition, they agreed and confirmed that:

a) Mr. Woollcombe would no longer be an advisor to Clearwater and Equilibrium with respect to Stelco;

b) Clearwater and Equilibrium would no longer be represented by counsel in the CCAA proceedings; and

c) Clearwater and Equilibrium then had no involvement in, and would have no future involvement, in any bid for Stelco.

21 On the basis of the foregoing — and satisfied "that Messrs. Keiper and Woollcombe would make a positive contribution to the various issues before the Board both in [the] restructuring and the ongoing operation of the business" — the Board made the appointments on February 18, 2005.

22 Seven days later, the motion judge found it "appropriate, just, necessary and reasonable to declare" those appointments "to be of no force and effect" and to remove Messrs. Woollcombe and Keiper from the Board. He did so not on the basis of any actual conduct on the part of the appellants as directors of Stelco but because there was some risk of anticipated conduct in the future. The gist of the motion judge's rationale is found in the following passage from his reasons (at para. 23):

In these particular circumstances and aside from the Board feeling coerced into the appointments for the sake of continuing stability, I am not of the view that it would be appropriate to wait and see if there was any explicit action on behalf of K and W while conducting themselves as Board members which would demonstrate that they had not lived up to their obligations to be "neutral". They may well conduct themselves beyond reproach. But if they did not, the fallout would be very detrimental to Stelco and its ability to successfully emerge. What would happen to the bids in such a dogfight? I fear that it would be trying to put Humpty Dumpty back together again. The same situation would prevail even if K and W conducted themselves beyond reproach but with the Board continuing to be concerned that they not do anything seemingly offensive to the bloc. The risk to the process and to Stelco in its emergence is simply too great to risk the wait and see approach.

Part III — Leave to Appeal

23 Because of the "real time" dynamic of this restructuring project, Laskin J.A. granted an order on March 4, 2005, expediting the appellants' motion for leave to appeal, directing that it be heard orally and, if leave be granted, directing that the appeal be heard at the same time. The leave motion and the appeal were argued together, by order of the panel, on March 18, 2005.

24 This court has said that it will only sparingly grant leave to appeal in the context of a CCAA proceeding and will only do so where there are "serious and arguable grounds that are of real and significant interest to the parties": *Country Style Food Services*

Inc., Re (2002), 158 O.A.C. 30, [2002] O.J. No. 1377 (Ont. C.A. [In Chambers]), at para. 15. This criterion is determined in accordance with a four-pronged test, namely,

a) whether the point on appeal is of significance to the practice;

b) whether the point is of significance to the action;

c) whether the appeal is *prima facie* meritorious or frivolous;

d) whether the appeal will unduly hinder the progress of the action.

25 Counsel agree that (d) above is not relevant to this proceeding, given the expedited nature of the hearing. In my view, the tests set out in (a) - (c) are met in the circumstances, and as such, leave should be granted. The issue of the court's jurisdiction to intervene in corporate governance issues during a CCAA restructuring, and the scope of its discretion in doing so, are questions of considerable importance to the practice and on which there is little appellate jurisprudence. While Messrs. Woollcombe and Keiper are pursuing their remedies in their own right, and the company and its directors did not take an active role in the proceedings in this court, the Board and the company did stand by their decision to appoint the new directors at the hearing before the motion judge and in this court, and the question of who is to be involved in the Board's decision making process continues to be of importance to the CCAA proceedings. From the reasons that follow it will be evident that in my view the appeal has merit.

26 Leave to appeal is therefore granted.

Part IV — The Appeal

The Positions of the Parties

27 The appellants submit that,

a) in exercising its discretion under the CCAA, the court is not exercising its "inherent jurisdiction" as a superior court;

b) there is no jurisdiction under the CCAA to remove duly elected or appointed directors, notwithstanding the broad discretion provided by s. 11 of that Act; and that,

c) even if there is jurisdiction, the motion judge erred:

(i) by relying upon the administrative law test for reasonable apprehension of bias in determining that the directors should be removed;

(ii) by rejecting the application of the "business judgment" rule to the unanimous decision of the Board to appoint two new directors; and,

(iii) by concluding that Clearwater and Equilibrium, the shareholders with whom the appellants are associated, were focussed solely on a short-term investment horizon, without any evidence to that effect, and therefore concluding that there was a tangible risk that the appellants would not be neutral and act in the best interests of Stelco and all stakeholders in carrying out their duties as directors.

28 The respondents' arguments are rooted in fairness and process. They say, first, that the appointment of the appellants as directors has poisoned the atmosphere of the CCAA proceedings and, secondly, that it threatens to undermine the even-handedness and integrity of the capital raising process, thus jeopardizing the ability of the court at the end of the day to approve any compromise or arrangement emerging from that process. The respondents contend that Farley J. had jurisdiction to ensure the integrity of the CCAA process, including the capital raising process Stelco had asked him to approve, and that this court should not interfere with his decision that it was necessary to remove Messrs. Woollcombe and Keiper from the Board in order to

ensure the integrity of that process. A judge exercising a supervisory function during a CCAA proceeding is owed considerable deference: *Algoma Steel Inc., Re* (2001), 25 C.B.R. (4th) 194 (Ont. C.A.), at para. 8.

29 The crux of the respondents' concern is well-articulated in the following excerpt from paragraph 72 of the factum of the Retired Salaried Beneficiaries:

> The appointments of Keiper and Woollcombe violated every tenet of fairness in the restructuring process that is supposed to lead to a plan of arrangement. One stakeholder group — particular investment funds that have acquired Stelco shares during the CCAA itself — have been provided with privileged access to the capital raising process, and voting seats on the Corporation's Board of Directors and Restructuring Committee. No other stakeholder has been treated in remotely the same way. To the contrary, the salaried retirees have been completely excluded from the capital raising process and have no say whatsoever in the Corporation's decision-making process.

30 The respondents submit that fairness, and the perception of fairness, underpin the CCAA process, and depend upon effective judicial supervision: see *Olympia & York Developments Ltd. v. Royal Trust Co.* (1993), 12 O.R. (3d) 500 (Ont. Gen. Div.); *Ivaco Inc., Re* (2004), 3 C.B.R. (5th) 33 (Ont. S.C.J. [Commercial List]), at para.15-16. The motion judge reasonably decided to remove the appellants as directors in the circumstances, they say, and this court should not interfere.

Jurisdiction

31 The motion judge concluded that he had the power to rescind the appointments of the two directors on the basis of his "inherent jurisdiction" and "the discretion given to the court pursuant to the *CCAA*". He was not asked to, nor did he attempt to rest his jurisdiction on other statutory powers imported into the CCAA.

32 The CCAA is remedial legislation and is to be given a liberal interpretation to facilitate its objectives: *Babcock & Wilcox Canada Ltd., Re*, [2000] O.J. No. 786 (Ont. S.C.J. [Commercial List]), at para. 11. See also, *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 4 C.B.R. (3d) 311 (B.C. C.A.), at p. 320; *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]). Courts have adopted this approach in the past to rely on inherent jurisdiction, or alternatively on the broad jurisdiction under s. 11 of the CCAA, as the source of judicial power in a CCAA proceeding to "fill in the gaps" or to "put flesh on the bones" of that Act: see *Dylex Ltd., Re* (1995), 31 C.B.R. (3d) 106 (Ont. Gen. Div. [Commercial List]), *Royal Oak Mines Inc., Re* (1999), 7 C.B.R. (4th) 293 (Ont. Gen. Div. [Commercial List]); and *Westar Mining Ltd., Re* (1992), 70 B.C.L.R. (2d) 6 (B.C. S.C.).

33 It is not necessary, for purposes of this appeal, to determine whether inherent jurisdiction is excluded for all supervisory purposes under the CCAA, by reason of the existence of the statutory discretionary regime provided in that Act. In my opinion, however, the better view is that in carrying out his or her supervisory functions under the legislation, the judge is not exercising inherent jurisdiction but rather the statutory discretion provided by s. 11 of the CCAA and supplemented by other statutory powers that may be imported into the exercise of the s. 11 discretion from other statutes through s. 20 of the CCAA.

Inherent Jurisdiction

34 Inherent jurisdiction is a power derived "from the very nature of the court as a superior court of law", permitting the court "to maintain its authority and to prevent its process being obstructed and abused". It embodies the authority of the judiciary to control its own process and the lawyers and other officials connected with the court and its process, in order "to uphold, to protect and to fulfill the judicial function of administering justice according to law in a regular, orderly and effective manner". See I.H. Jacob, "The Inherent Jurisdiction of the Court" (1970) 23 Current Legal Problems 27-28. In Halsbury's Laws of England, 4 th ed. (London: Lexis-Nexis UK, 1973 -) vol. 37, at para. 14, the concept is described as follows:

> In sum, it may be said that the inherent jurisdiction of the court is a virile and viable doctrine, and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particularly to ensure the observation of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them.

35 In spite of the expansive nature of this power, inherent jurisdiction does not operate where Parliament or the Legislature has acted. As Farley J. noted in *Royal Oak Mines Inc.*, *supra*, inherent jurisdiction is "not limitless; if the legislative body has not left a functional gap or vacuum, then inherent jurisdiction should not be brought into play" (para. 4). See also, *Baxter Student Housing Ltd. v. College Housing Co-operative Ltd.* (1975), [1976] 2 S.C.R. 475 (S.C.C.) at 480; *Richtree Inc., Re*, [2005] O.J. No. 251 (Ont. S.C.J. [Commercial List]).

36 In the CCAA context, Parliament has provided a statutory framework to extend protection to a company while it holds its creditors at bay and attempts to negotiate a compromised plan of arrangement that will enable it to emerge and continue as a viable economic entity, thus benefiting society and the company in the long run, along with the company's creditors, shareholders, employees and other stakeholders. The s. 11 discretion is the engine that drives this broad and flexible statutory scheme, and that for the most part supplants the need to resort to inherent jurisdiction. In that regard, I agree with the comment of Newbury J.A. in *Skeena Cellulose Inc., Re*, [2003] B.C.J. No. 1335, 43 C.B.R. (4th) 187 (B.C. C.A.) at para. 46, that:

> . . . the court is not exercising a power that arises from its nature as a superior court of law, but is exercising the discretion given to it by the CCAA. . . . This is the discretion, given by s. 11, to stay proceedings against the debtor corporation and the discretion, given by s. 6, to approve a plan which appears to be reasonable and fair, to be in accord with the requirements and objects of the statute, and to make possible the continuation of the corporation as a viable entity. It is these considerations the courts have been concerned with in the cases discussed above, [2] rather than the integrity of their own process.

37 As Jacob observes, in his article "The Inherent Jurisdiction of the Court", *supra*, at p. 25:

> The inherent jurisdiction of the court is a concept which must be distinguished from the exercise of judicial discretion. These two concepts resemble each other, particularly in their operation, and they often appear to overlap, and are therefore sometimes confused the one with the other. There is nevertheless a vital juridical distinction between jurisdiction and discretion, which must always be observed.

38 I do not mean to suggest that inherent jurisdiction can never apply in a CCAA context. The court retains the ability to control its own process, should the need arise. There is a distinction, however — difficult as it may be to draw — between the *court's* process with respect to the restructuring, on the one hand, and the course of action involving the negotiations and corporate actions accompanying them, which are the *company's* process, on the other hand. The court simply supervises the latter process through its ability to stay, restrain or prohibit proceedings against the company during the plan negotiation period "on such terms as it may impose". [3] Hence the better view is that a judge is generally exercising the court's statutory discretion under s. 11 of the Act when supervising a CCAA proceeding. The order in this case could not be founded on inherent jurisdiction because it is designed to supervise the company's process, not the court's process.

The Section 11 Discretion

39 This appeal involves the scope of a supervisory judge's discretion under s. 11 of the CCAA, in the context of corporate governance decisions made during the course of the plan negotiating and approval process and, in particular, whether that discretion extends to the removal of directors in that environment. In my view, the s. 11 discretion — in spite of its considerable breadth and flexibility — does not permit the exercise of such a power in and of itself. There may be situations where a judge in a CCAA proceeding would be justified in ordering the removal of directors pursuant to the oppression remedy provisions found in s. 241 of the CBCA, and imported into the exercise of the s. 11 discretion through s. 20 of the CCAA. However, this was not argued in the present case, and the facts before the court would not justify the removal of Messrs. Woollcombe and Keiper on oppression remedy grounds.

40 The pertinent portions of s. 11 of the CCAA provide as follows:

> **Powers of court**

11. (1) Notwithstanding anything in the *Bankruptcy* and Insolvency Act or the Winding-up Act, where an application is made under this Act in respect of a company, the court, on the application of any person interested in the matter, may, subject to this Act, on notice to any other person or without notice as it may see fit, make an order under this section.

Initial application court orders

(3) A court may, on an initial application in respect of a company, make an order on such terms as it may impose, effective for such period as the court deems necessary not exceeding thirty days.

> (a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1);
>
> (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
>
> (c) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.

Other than initial application court orders

(4) A court may, on an application in respect of a company other than an initial application, make an order on such terms as it may impose.

> (a) staying, until otherwise ordered by the court, for such period as the court deems necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1);
>
> (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
>
> (c) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.

Burden of proof on application

(6) The court shall not make an order under subsection (3) or (4) unless

> (a) the applicant satisfies the court that circumstances exist that make such an order appropriate; and
>
> (b) in the case of an order under subsection (4), the applicant also satisfied the court that the applicant has acted, and is acting, in good faith and with due diligence.

41 The rule of statutory interpretation that has now been accepted by the Supreme Court of Canada, in such cases as *R. v. Sharpe*, [2001] 1 S.C.R. 45 (S.C.C.), at para. 33, and *Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 S.C.R. 27 (S.C.C.), at para. 21 is articulated in E.A. Driedger, *The Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983) as follows:

> Today, there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

See also Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Toronto: Butterworths, 2002) at page 262.

42 The interpretation of s. 11 advanced above is true to these principles. It is consistent with the purpose and scheme of the CCAA, as articulated in para. 38 above, and with the fact that corporate governance matters are dealt with in other statutes. In addition, it honours the historical reluctance of courts to intervene in such matters, or to second-guess the business decisions made by directors and officers in the course of managing the business and affairs of the corporation.

43 Mr. Leon and Mr. Swan argue that matters relating to the removal of directors do not fall within the court's discretion under s. 11 because they fall outside of the parameters of the court's role in the restructuring process, in contrast to the company's role in the restructuring process. The court's role is defined by the "on such terms as may be imposed" jurisdiction under subparagraphs 11(3)(a)-(c) and 11(4)(a)-(c) of the CCAA to stay, or restrain, or prohibit proceedings against the company during the "breathing space" period for negotiations and a plan. I agree.

44 What the court does under s. 11 is to establish the boundaries of the playing field and act as a referee in the process. The company's role in the restructuring, and that of its stakeholders, is to work out a plan or compromise that a sufficient percentage of creditors will accept and the court will approve and sanction. The corporate activities that take place in the course of the workout are governed by the legislation and legal principles that normally apply to such activities. In the course of acting as referee, the court has great leeway, as Farley J. observed in *Lehndorff General Partner Ltd.*, *supra*, at para 5, "to make order[s] so as to effectively maintain the status quo in respect of an insolvent company while it attempts to gain the approval of its creditors for the proposed compromise or arrangement which will be to the benefit of both the company and its creditors". But the s. 11 discretion is not open-ended and unfettered. Its exercise must be guided by the scheme and object of the Act and by the legal principles that govern corporate law issues. Moreover, the court is not entitled to usurp the role of the directors and management in conducting what are in substance *the company's* restructuring efforts.

45 With these principles in mind, I turn to an analysis of the various factors underlying the interpretation of the s. 11 discretion.

46 I start with the proposition that at common law directors could not be removed from office during the term for which they were elected or appointed: *London Finance Corp. v. Banking Service Corp.* (1922), 23 O.W.N. 138 (Ont. H.C.); *Stephenson v. Vokes* (1896), 27 O.R. 691 (Ont. H.C.). The authority to remove must therefore be found in statute law.

47 In Canada, the CBCA and its provincial equivalents govern the election, appointment and removal of directors, as well as providing for their duties and responsibilities. Shareholders elect directors, but the directors may fill vacancies that occur on the board of directors pending a further shareholders meeting: CBCA, ss. 106(3) and 111.[4] The specific power *to remove* directors is vested in the shareholders by s. 109(1) of the CBCA. However, s. 241 empowers the court — where it finds that oppression as therein defined exists — to "make any interim or final order it thinks fit", including (s. 241(3)(e)) "an order appointing directors in place of or in addition to all or any of the directors then in office". This power has been utilized to remove directors, but in very rare cases, and only in circumstances where there has been actual conduct rising to the level of misconduct required to trigger oppression remedy relief: see, for example, *Catalyst Fund General Partner I Inc. v. Hollinger Inc.*, [2004] O.J. No. 4722 (Ont. S.C.J.).

48 There is therefore a statutory scheme under the CBCA (and similar provincial corporate legislation) providing for the election, appointment, *and removal* of directors. Where another applicable statute confers jurisdiction with respect to a matter, a broad and undefined discretion provided in one statute cannot be used to supplant or override the other applicable statute. There is no legislative "gap" to fill. See *Baxter Student Housing Ltd. v. College Housing Co-operative Ltd.*, *supra*, at p. 480; *Royal Oak Mines Inc. (Re)*, *supra*; and *Richtree Inc. (Re)*, *supra*.

49 At paragraph 7 of his reasons, the motion judge said:

> The board is charged with the standard duty of "manage[ing], [*sic*] or supervising the management, of the business and affairs of the corporation": s. 102(1) CBCA. *Ordinarily the Court will not interfere with the composition of the board of directors. However, if there is good and sufficient valid reason to do so, then the Court must not hesitate to do so to correct a problem*. The directors should not be required to constantly look over their shoulders for this would be the sure recipe

for board paralysis which would be so detrimental to a restructuring process; thus interested parties should only initiate a motion where it is reasonably obvious that there is a problem, actual or poised to become actual.

[emphasis added]

50 Respectfully, I see no authority in s. 11 of the CCAA for the court to interfere with the composition of a board of directors on such a basis.

51 Court removal of directors is an exceptional remedy, and one that is rarely exercised in corporate law. This reluctance is rooted in the historical unwillingness of courts to interfere with the internal management of corporate affairs and in the court's well-established deference to decisions made by directors and officers in the exercise of their business judgment when managing the business and affairs of the corporation. These factors also bolster the view that where the CCAA is silent on the issue, the court should not read into the s. 11 discretion an extraordinary power — which the courts are disinclined to exercise in any event — except to the extent that that power may be introduced through the application of other legislation, and on the same principles that apply to the application of the provisions of the other legislation.

The Oppression Remedy Gateway

52 The fact that s. 11 does not itself provide the authority for a CCAA judge to order the removal of directors does not mean that the supervising judge is powerless to make such an order, however. Section 20 of the CCAA offers a gateway to the oppression remedy and other provisions of the CBCA and similar provincial statutes. Section 20 states:

The provisions of this Act may be applied together with the provisions of any Act of Parliament or of the legislature of any province that authorizes or makes provision for the sanction of compromises or arrangements between a company and its shareholders or any class of them.

53 The CBCA is legislation that "makes provision for the sanction of compromises or arrangements between a company and its shareholders or any class of them". Accordingly, the powers of a judge under s. 11 of the CCAA may be applied together with the provisions of the CBCA, including the oppression remedy provisions of that statute. I do not read s. 20 as limiting the application of outside legislation to the provisions of such legislation dealing specifically with the sanctioning of compromises and arrangements between the company and its shareholders. The grammatical structure of s. 20 mandates a broader interpretation and the oppression remedy is, therefore, available to a supervising judge in appropriate circumstances.

54 I do not accept the respondents' argument that the motion judge had the authority to order the removal of the appellants by virtue of the power contained in s. 145(2)(b) of the CBCA to make an order "declaring the result of the disputed election or appointment" of directors. In my view, s. 145 relates to the procedures underlying disputed elections or appointments, and not to disputes over the composition of the board of directors itself. Here, it is conceded that the appointment of Messrs. Woollcombe and Keiper as directors complied with all relevant statutory requirements. Farley J. quite properly did not seek to base his jurisdiction on any such authority.

The Level of Conduct Required

55 Colin Campbell J. recently invoked the oppression remedy to remove directors, without appointing anyone in their place, in *Catalyst Fund General Partner I Inc. v. Hollinger Inc.*, *supra* The bar is high. In reviewing the applicable law, C. Campbell J. said (para. 68):

Director removal is *an extraordinary remedy* and certainly should be *imposed most sparingly*. As a starting point, I accept the basic proposition set out in Peterson, "Shareholder Remedies in Canada" [5] :

SS. 18.172 *Removing and appointing directors to the board is an extreme form of judicial intervention*. The board of directors is elected by the shareholders, vested with the power to manage the corporation, and appoints the officers of the company who undertake to conduct the day-to-day affairs of the corporation. [Footnote omitted.] It is clear that

> the board of directors has control over policymaking and management of the corporation. *By tampering with a board, a court directly affects the management of the corporation*. If a reasonable balance between protection of corporate stakeholders and the freedom of management to conduct the affairs of the business in an efficient manner is desired, altering the board of directors should be *a measure of last resort*. The order could be suitable where the continuing presence of the incumbent directors is harmful to both the company and the interests of corporate stakeholders, and where the appointment of a new director or directors would remedy the oppressive conduct without a receiver or receiver-manager.
>
> [emphasis added]

56 C. Campbell J. found that the continued involvement of the Ravelston directors in the *Hollinger* situation would "significantly impede" the interests of the public shareholders and that those directors were "motivated by putting their interests first, not those of the company" (paras. 82-83). The evidence in this case is far from reaching any such benchmark, however, and the record would not support a finding of oppression, even if one had been sought.

57 Everyone accepts that there is no evidence the appellants have conducted themselves, as directors — in which capacity they participated over two days in the bid consideration exercise — in anything but a neutral fashion, having regard to the best interests of Stelco and all of the stakeholders. The motion judge acknowledged that the appellants "may well conduct themselves beyond reproach". However, he simply decided there was a risk — a reasonable apprehension — that Messrs. Woollcombe and Keiper would not live up to their obligations to be neutral in the future.

58 The risk or apprehension appears to have been founded essentially on three things: (1) the earlier public statements made by Mr. Keiper about "maximizing shareholder value"; (2) the conduct of Clearwater and Equilibrium in criticizing and opposing the Stalking Horse Bid; and (3) the motion judge's opinion that Clearwater and Equilibrium — the shareholders represented by the appellants on the Board — had a "vision" that "usually does not encompass any significant concern for the long-term competitiveness and viability of an emerging corporation", as a result of which the appellants would approach their directors' duties looking to liquidate their shares on the basis of a "short-term hold" rather than with the best interests of Stelco in mind. The motion judge transposed these concerns into anticipated predisposed conduct on the part of the appellants as directors, despite their apparent understanding of their duties as directors and their assurances that they would act in the best interests of Stelco. He therefore concluded that "the risk to the process and to Stelco in its emergence [was] simply too great to risk the wait and see approach".

59 Directors have obligations under s. 122(1) of the CBCA (a) to act honestly and in good faith with a view to the best interest of the corporation (the "statutory fiduciary duty" obligation), and (b) to exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances (the "duty of care" obligation). They are also subject to control under the oppression remedy provisions of s. 241. The general nature of these duties does not change when the company approaches, or finds itself in, insolvency: *People's Department Stores Ltd. (1992) Inc., Re*, [2004] S.C.J. No. 64 (S.C.C.) at paras. 42-49.

60 In *Peoples* the Supreme Court noted that "the interests of the corporation are not to be confused with the interests of the creditors or those of any other stakeholders" (para. 43), but also accepted "as an accurate statement of the law that in determining whether [directors] are acting with a view to the best interests of the corporation it may be legitimate, given all the circumstances of a given case, for the board of directors to consider, *inter alia*, the interests of shareholders, employees, suppliers, creditors, consumers, governments and the environment" (para. 42). Importantly as well — in the context of "the shifting interest and incentives of shareholders and creditors" — the court stated (para. 47):

> In resolving these competing interests, it is incumbent upon the directors to act honestly and in good faith with a view to the best interests of the corporation. In using their skills for the benefit of the corporation when it is in troubled waters financially, the directors must be careful to attempt to act in its best interests by creating a "better" corporation, and not to favour the interests of any one group of stakeholders.

61 In determining whether directors have fallen foul of those obligations, however, more than some risk of anticipated misconduct is required before the court can impose the extraordinary remedy of removing a director from his or her duly elected or appointed office. Although the motion judge concluded that there was a risk of harm to the Stelco process if Messrs Woollcombe and Keiper remained as directors, he did not assess the level of that risk. The record does not support a finding that there was a sufficient risk of sufficient misconduct to warrant a conclusion of oppression. The motion judge was not asked to make such a finding, and he did not do so.

62 The respondents argue that this court should not interfere with the decision of the motion judge on grounds of deference. They point out that the motion judge has been case-managing the restructuring of Stelco under the CCAA for over fourteen months and is intimately familiar with the circumstances of Stelco as it seeks to restructure itself and emerge from court protection.

63 There is no question that the decisions of judges acting in a supervisory role under the CCAA, and particularly those of experienced commercial list judges, are entitled to great deference: see *Algoma Steel Inc. v. Union Gas Ltd.* (2003), 63 O.R. (3d) 78 (Ont. C.A.) at para. 16. The discretion must be exercised judicially and in accordance with the principles governing its operation. Here, respectfully, the motion judge misconstrued his authority, and made an order that he was not empowered to make in the circumstances.

64 The appellants argued that the motion judge made a number of findings without any evidence to support them. Given my decision with respect to jurisdiction, it is not necessary for me to address that issue.

The Business Judgment Rule

65 The appellants argue as well that the motion judge erred in failing to defer to the unanimous decision of the Stelco directors in deciding to appoint them to the Stelco Board. It is well-established that judges supervising restructuring proceedings — and courts in general — will be very hesitant to second-guess the business decisions of directors and management. As the Supreme Court of Canada said in *Peoples*, *supra*, at para. 67:

> Courts are ill-suited and should be reluctant to second-guess the application of business expertise to the considerations that are involved in corporate decision making . . .

66 In *Brant Investments Ltd. v. KeepRite Inc.* (1991), 3 O.R. (3d) 289 (Ont. C.A.) at 320, this court adopted the following statement by the trial judge, Anderson J.:

> Business decisions, honestly made, should not be subjected to microscopic examination. There should be no interference simply because a decision is unpopular with the minority. [6]

67 McKinlay J.A then went on to say:

> There can be no doubt that on an application under s. 234 [7] the trial judge is required to consider the nature of the impugned acts and the method in which they were carried out. That does not meant that the trial judge should substitute his own business judgment for that of managers, directors, or a committee such as the one involved in assessing this transaction. Indeed, it would generally be impossible for him to do so, regardless of the amount of evidence before him. He is dealing with the matter at a different time and place; it is unlikely that he will have the background knowledge and expertise of the individuals involved; he could have little or no knowledge of the background and skills of the persons who would be carrying out any proposed plan; and it is unlikely that he would have any knowledge of the specialized market in which the corporation operated. In short, he does not know enough to make the business decision required.

68 Although a judge supervising a CCAA proceeding develops a certain "feel" for the corporate dynamics and a certain sense of direction for the restructuring, this caution is worth keeping in mind. See also *Skeena Cellulose Inc., Re*, *supra*, *Sammi Atlas Inc., Re* (1998), 3 C.B.R. (4th) 171 (Ont. Gen. Div. [Commercial List]); *Olympia & York Developments Ltd. (Re)*, *supra*;

Alberta-Pacific Terminals Ltd., Re (1991), 8 C.B.R. (3d) 99 (B.C. S.C.). The court is not catapulted into the shoes of the board of directors, or into the seat of the chair of the board, when acting in its supervisory role in the restructuring.

69 Here, the motion judge was alive to the "business judgment" dimension in the situation he faced. He distinguished the application of the rule from the circumstances, however, stating at para. 18 of his reasons:

> With respect I do not see the present situation as involving the "management of the business and affairs of the corporation", but rather as a quasi-constitutional aspect of the corporation entrusted albeit to the Board pursuant to s. 111(1) of the CBCA. I agree that where a board is actually engaged in the business of a judgment situation, the board should be given appropriate deference. However, to the contrary in this situation, I do not see it as a situation calling for (as asserted) more deference, but rather considerably less than that. With regard to this decision of the Board having impact upon the capital raising process, as I conclude it would, then similarly deference ought not to be given.

70 I do not see the distinction between the directors' role in "the management of the business and affairs of the corporation" (CBCA, s. 102) — which describes the directors' overall responsibilities — and their role with respect to a "quasi-constitutional aspect of the corporation" (i.e. in filling out the composition of the board of directors in the event of a vacancy). The "affairs" of the corporation are defined in s. 1 of the CBCA as meaning "the relationships among a corporation, it affiliates and the shareholders, directors and officers of such bodies corporate but does not include the business carried on by such bodies corporate". Corporate governance decisions relate directly to such relationships and are at the heart of the Board's business decision-making role regarding the corporation's business *and* affairs. The dynamics of such decisions, and the intricate balancing of competing interests and other corporate-related factors that goes into making them, are no more within the purview of the court's knowledge and expertise than other business decisions, and they deserve the same deferential approach. Respectfully, the motion judge erred in declining to give effect to the business judgment rule in the circumstances of this case.

71 This is not to say that the conduct of the Board in appointing the appellants as directors may never come under review by the supervising judge. The court must ultimately approve and sanction the plan of compromise or arrangement as finally negotiated and accepted by the company and its creditors and stakeholders. The plan must be found to be fair and reasonable before it can be sanctioned. If the Board's decision to appoint the appellants has somehow so tainted the capital raising process that those criteria are not met, any eventual plan that is put forward will fail.

72 The respondents submit that it makes no sense for the court to have jurisdiction to declare the process flawed only after the process has run its course. Such an approach to the restructuring process would be inefficient and a waste of resources. While there is some merit in this argument, the court cannot grant itself jurisdiction where it does not exist. Moreover, there are a plethora of checks and balances in the negotiating process itself that moderate the risk of the process becoming irretrievably tainted in this fashion — not the least of which is the restraining effect of the prospect of such a consequence. I do not think that this argument can prevail. In addition, the court at all times retains its broad and flexible supervisory jurisdiction — a jurisdiction which feeds the creativity that makes the CCAA work so well — in order to address fairness and process concerns along the way. This case relates only to the court's exceptional power to order the removal of directors.

The Reasonable Apprehension of Bias Analogy

73 In exercising what he saw as his discretion to remove the appellants as directors, the motion judge thought it would be useful to "borrow the concept of reasonable apprehension of bias . . .with suitable adjustments for the nature of the decision making involved" (para. 8). He stressed that "there was absolutely no allegation against [Mr. Woollcombe and Mr. Keiper] of any actual 'bias' or its equivalent" (para. 8). He acknowledged that neither was alleged to have done anything wrong since their appointments as directors, and that at the time of their appointments the appellants had confirmed to the Board that they understood and would abide by their duties and responsibilities as directors, including the responsibility to act in the best interests of the corporation and not in their own interests as shareholders. In the end, however, he concluded that because of their prior public statements that they intended to "pursue efforts to maximize shareholder value at Stelco", and because of the nature of their business and the way in which they had been accumulating their shareholding position during the restructuring, and

because of their linkage to 40% of the common shareholders, there was a risk that the appellants would not conduct themselves in a neutral fashion in the best interests of the corporation as directors.

74 In my view, the administrative law notion of apprehension of bias is foreign to the principles that govern the election, appointment and removal of directors, and to corporate governance considerations in general. Apprehension of bias is a concept that ordinarily applies to those who preside over judicial or quasi-judicial decision-making bodies, such as courts, administrative tribunals or arbitration boards. Its application is inapposite in the business decision-making context of corporate law. There is nothing in the CBCA or other corporate legislation that envisages the screening of directors in advance for their ability to act neutrally, in the best interests of the corporation, as a prerequisite for appointment.

75 Instead, the conduct of directors is governed by their common law and statutory obligations to act honestly and in good faith with a view to the best interests of the corporation, and to exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances (CBCA, s. 122(1)(a) and (b)). The directors also have fiduciary obligations to the corporation, and they are liable to oppression remedy proceedings in appropriate circumstances. These remedies are available to aggrieved complainants — including the respondents in this case — but they depend for their applicability on the director having engaged in conduct justifying the imposition of a remedy.

76 If the respondents are correct, and reasonable apprehension that directors may not act neutrally because they are aligned with a particular group of shareholders or stakeholders is sufficient for removal, all nominee directors in Canadian corporations, and all management directors, would automatically be disqualified from serving. No one suggests this should be the case. Moreover, as Iacobucci J. noted in *Blair v. Consolidated Enfield Corp.*, [1995] 4 S.C.R. 5 (S.C.C.) at para. 35, "persons are assumed to act in good faith unless proven otherwise". With respect, the motion judge approached the circumstances before him from exactly the opposite direction. It is commonplace in corporate/commercial affairs that there are connections between directors and various stakeholders and that conflicts will exist from time to time. Even where there are conflicts of interest, however, directors are not removed from the board of directors; they are simply obliged to disclose the conflict and, in appropriate cases, to abstain from voting. The issue to be determined is not whether there is a connection between a director and other shareholders or stakeholders, but rather whether there has been some conduct on the part of the director that will justify the imposition of a corrective sanction. An apprehension of bias approach does not fit this sort of analysis.

Part V — Disposition

77 For the foregoing reasons, then, I am satisfied that the motion judge erred in declaring the appointment of Messrs. Woollcombe and Keiper as directors of Stelco of no force and effect.

78 I would grant leave to appeal, allow the appeal and set aside the order of Farley J. dated February 25, 2005.

79 Counsel have agreed that there shall be no costs of the appeal.

***Goudge J.A.*:**

I agree.

***Feldman J.A.*:**

I agree.

Appeal allowed.

Footnotes

1 R.S.C. 1985, c. C-36, as amended.

2 The reference is to the decisions in *Dyle, Royal Oak Mines, and Westar*, cited above.

3 See paragraph 43, *infra*, where I elaborate on this distinction.

4 It is the latter authority that the directors of Stelco exercised when appointing the appellants to the Stelco Board.

5 Dennis H. Peterson, Shareholder Remedies in Canada (Markham: LexisNexis — Butterworths — Looseleaf Service, 1989) at 18-47.

6 Or, I would add, unpopular with other stakeholders.

7 Now s. 241.

TAB 27

2005 CarswellOnt 6283
Ontario Court of Appeal

Stelco Inc., Re

2005 CarswellOnt 6283, [2005] O.J. No. 4733, 143 A.C.W.S. (3d) 419, 15 C.B.R. (5th) 288, 204 O.A.C. 216, 78 O.R. (3d) 254

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

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT WITH RESPECT TO STELCO INC. AND THE OTHER APPLICANTS LISTED IN SCHEDULE "A"

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

Laskin, Rosenberg, LaForme JJ.A.

Heard: November 2, 2005
Judgment: November 4, 2005
Docket: CA M33099, C44332

Proceedings: affirming *Stelco Inc., Re* (2005), 2005 CarswellOnt 5023 (Ont. S.C.J. [Commercial List])

Counsel: Robert W. Staley, Alan P. Gardner for Appellants, Informal Committee of Senior Debentureholders
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Michael C.P. McCreary, David P. Jacobs for Respondents, USW Locals 8782 and 5328
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Aubrey E. Kauffman for Respondents, Tricap Management Ltd.
Ben Zarnett, Gale Rubenstein for Respondents, Province of Ontario
Murray Gold for Respondents, Salaried Retirees
Kenneth T. Rosenberg for Respondents, USW International
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George Glezos for Respondents, AGF Management Ltd.

***Rosenberg J.A.*:**

1 This appeal is another chapter in the continuing attempt by Stelco Inc. and four of its wholly-owned subsidiaries to emerge from protection from their creditors under the *Companies' Creditors Arrangement* Act, R.S.C. 1985, c. C-36. The appellant, an Informal Committee of Senior Debenture Holders who are Stelco's largest creditor, applies for leave to appeal under s. 13 of the *CCAA* and if leave be granted appeals three orders made by Farley J. on October 4, 2005 in the *CCAA* proceedings. These orders authorize Stelco to enter into agreements with two of its stakeholders and a finance provider. The appellant submits that the motions judge had no jurisdiction to make these orders and that the effect of these orders is to distort or skew the *CCAA* process. A group of Stelco's equity holders support the submissions of the appellant. The various other players with a stake in the restructuring and the court-appointed Monitor support the orders made by the motions judge.

2 Given the urgency of the matter it is only possible to give relatively brief reasons for my conclusion that while leave to appeal should be granted, the appeal should be dismissed.

The Facts

3 Stelco Inc. and the four wholly-owned subsidiaries obtained protection from their creditors under the *CCAA* on January 29, 1994. Thus, the *CCAA* process has been going on for over twenty months, longer than anyone expected. Farley J. has been managing the process throughout. The initial order made under s. 11***o***f the *CCAA* gives Stelco sole and exclusive authority to propose and file a plan of arrangement with its creditors. To date, attempts to restructure have been unsuccessful. In particular, a plan put forward by the Senior Debt Holders failed.

4 While there have no doubt been many obstacles to a successful restructuring, the paramount problem appears to be that stakeholders, the Ontario government and Stelco's unions, who do not have a formal veto (*i.e.* they do not have a right to vote to approve any plan of arrangement and reorganization) have what the parties have referred to as a functional veto. It is unnecessary to set out the reasons for these functional vetoes. Suffice it to say, as did the Monitor in its Thirty-Eighth Report, that each of these stakeholders is "capable of exercising sufficient leverage against Stelco and other stakeholders such that no restructuring could be completed without that stakeholder's support".

5 In an attempt to successfully emerge from *CCAA* protection with a plan of arrangement, the Stelco board of directors has negotiated with two of these stakeholders and with a finance provider and has reached three agreements: an agreement with the provincial government (the Ontario Agreement), an agreement with The United Steelworkers International and Local 8782 (the USW Agreement), and an agreement with Tricap Management Limited (the Tricap Agreement). Those agreements are intrinsic to the success of the Plan of Arrangement that Stelco proposes. However, the debt holders including this appellant have the ultimate veto. They alone will vote on whether to approve Stelco's Plan. The vote of the affected debt holders is scheduled for November 15, 2005.

6 The three agreements have terms to which the appellant objects. For example, the Tricap Agreement contemplates a break fee of up to $10.75 million depending on the circumstances. Tricap will be entitled to a break fee if the Plan fails to obtain the requisite approvals or if Tricap terminates its obligations to provide financing as a result of the Plan being amended without Tricap's approval. Half of the break fee becomes payable if the Plan is voted down by the creditors. Another example is found in the Ontario Agreement, which provides that the order sanctioning the Final Plan shall name the members of Stelco's board of directors and such members must be acceptable to the province. Consistent with the Order of March 30, 2005 and as required by the terms of the agreements themselves, Stelco sought court authorization to enter into the three agreements. We were told that, in any event, it is common practice to seek court approval of agreements of this importance. The appellant submits that the motions judge had no jurisdiction to make these orders.

7 There are a number of other facts that form part of the context for understanding the issues raised by this appeal. First, on July 18, 2005, the motions judge extended the stay of proceedings until September 9, 2005 and warned the stakeholders that this was a "real and functional deadline". While that date has been extended because Stelco was making progress in its talks with the stakeholders, the urgency of the situation cannot be underestimated. Something will have to happen to either break the impasse or terminate the *CCAA* process.

8 Second, on October 4, 2005, the motions judge made several orders, not just the orders to authorize Stelco to enter into the three agreements to which the appellant objects. In particular, the motions judge extended the stay to December and made an order convening the creditors meeting on November 15th to approve the Stelco Plan. The appellant does not object to the orders extending the stay or convening the meeting to vote on the Plan.

9 Third, the appellant has not sought permission to prepare and file its own plan of arrangement. At present, the Stelco Board's Plan is the only plan on the table and as the motions judge observed, "one must realistically appreciate that a rival financing

arrangement at this stage, starting from essentially a standing start, would take considerable time for due diligence and there is no assurance that the conditions will be any less onerous than those extracted by Tricap".

10 Fourth, in his orders authorizing Stelco to enter into these agreements, the motions judge made it clear that these authorizations, "are not a sanction of the terms of the plan ... and do not prohibit Stelco from continuing discussions in respect of the Plan with the Affected Creditors".

11 Fifth, the independent Monitor has reviewed the Agreements and the Plan and supports Stelco's position.

12 Finally, and importantly, the Senior Debenture Holders that make up the appellant have said unequivocally that they will not approve the Plan. The motions judge recognized this in his reasons:

> The Bondholder group has indicated that it is firmly opposed to the plan as presently constituted. That group also notes that more than half of the creditors by $ value have advised the Monitor that they are opposed to the plan as presently constituted. ... The present plan may be adjusted (with the blessing of others concerned) to the extent that it, in a revised form, is palatable to the creditors (assuming that they do not have a massive change of heart as to the presently proposed plan).

Leave to Appeal

13 The parties agree on the test for granting leave to appeal under s. 13 of the *CCAA*. The moving party must show the following:

> (a) the point on appeal is of significance to the practice;
>
> (b) the point is of significance to the action;
>
> (c) the appeal is *prima facie* meritorious; and
>
> (d) the appeal will not unduly hinder the progress of the action.

14 In my view, the appellant has met this test. The point raised is a novel and important one. It concerns the jurisdiction of the supervising judge to make orders that do not merely preserve the *status quo* but authorize key elements of the proposed plan of arrangement. The point is of obvious significance in this action. If the motions judge's approvals were to be set aside, it is doubtful that the Plan could proceed. On the other hand, the appellant submits that the orders have created a coercive and unfair environment and that the Plan is doomed to fail. It was therefore wrong to authorize Stelco to enter into agreements, especially the Tricap Agreement, that could further deplete the estate. The appeal is *prima facie* meritorious. The matter appears to be one of first impression. It certainly cannot be said that the appeal is frivolous. Finally, the appeal will not unduly hinder the progress of the action. Because of the speed with which this court is able to deal with the case, the appeal will not unduly interfere with the continuing negotiations prior to the November 15th meeting.

15 For these reasons, I would grant leave to appeal.

Analysis

Jurisdiction generally

16 The thrust of the appellant's submissions is that while the judge supervising a *CCAA* process has jurisdiction to make orders that preserve the *status quo*, the judge has no jurisdiction to make an order that, in effect, entrenches elements of the proposed Plan. Rather, the approval of the Plan is a matter solely for the business judgement of the creditors. The appellant submits that the orders made by the motions judge are not authorized by the statute or under the court's inherent jurisdiction and are in fact inconsistent with the scheme and objects of the *CCAA*. They submit that the orders made in this case have the effect of substituting the court's judgment for that of the debt holders who, under s. 6, have exclusive jurisdiction to approve

the plan. Under s. 6, it is only after a majority in number representing two-thirds in value of the creditors vote to approve the plan that the court has a role in deciding whether to sanction the plan.

17 Underlying this argument is a concern on the part of the creditors that the orders are coercive, designed to force the creditors to approve a plan, a plan in which they have had no input and of which they disapprove.

18 In my view, the motions judge had jurisdiction to make the orders he did authorizing Stelco to enter into the agreements. Section 11 of the *CCAA* provides a broad jurisdiction to impose terms and conditions on the granting of the stay. In my view, s. 11(4) includes the power to vary the stay and allow the company to enter into agreements to facilitate the restructuring, provided that the creditors have the final decision under s. 6 whether or not to approve the Plan. The court's jurisdiction is not limited to preserving the *status quo*. The point of the *CCAA* process is not simply to preserve the *status quo* but to facilitate restructuring so that the company can successfully emerge from the process. This point was made by Gibbs J.A. in *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 4 C.B.R. (3d) 311 (B.C. C.A.) at para. 10:

> The purpose of the C.C.A.A. is to facilitate the making of a compromise or arrangement between an insolvent debtor company and its creditors to the end that the company is able to continue in business. It is available to any company incorporated in Canada with assets or business activities in Canada that is not a bank, a railway company, a telegraph company, an insurance company, a trust company, or a loan company. When a company has recourse to the C.C.A.A. the court is called upon to play a kind of supervisory role to preserve the status quo *and to move the process along to the point where a compromise or arrangement is approved or it is evident that the attempt is doomed to failure*. Obviously time is critical. Equally obviously, if the attempt at compromise or arrangement is to have any prospect of success there must be a means of holding the creditors at bay, hence the powers vested in the court under s. 11. [Emphasis added.]

19 In my view, provided the orders do not usurp the right of the creditors to decide whether to approve the Plan the motions judge had the necessary jurisdiction to make them. The orders made in this case do not usurp the s. 6 rights of the creditors and do not unduly interfere with the business judgement of the creditors. The orders move the process along to the point where the creditors are free to exercise their rights at the creditors' meeting.

20 The argument that the orders are coercive and therefore unreasonably interfere with the rights of the creditors turns largely on the potential $10.75 million break fee that may become payable to Tricap. However, the motions judge has found as a fact that the break fee is reasonable. As counsel for Ontario points out, this necessarily entails a finding that the break fee is not coercive even if it could to some extent deplete Stelco's assets.

21 Further, the motions judge both in his reasons and in his orders made it clear that he was not purporting to sanction the Plan. As he said in his reasons, "I wish to be absolutely clear that I am not ruling on or considering in any way the fairness of the plan as presented". The creditors will have the ultimate say on November 15th whether this plan will be approved.

Doomed to fail

22 The appellant submits that the motions judge had no jurisdiction to approve orders that would facilitate a Plan that is doomed to fail. The authorities indicate that a court should not approve a process that will lead to a plan that is doomed to fail. The appellant says that it has made it as clear as possible that it does not accept the proposed Plan and will vote against it. In *Inducon Development Corp., Re* (1991), 8 C.B.R. (3d) 306 (Ont. Gen. Div.), at 310 Farley J. said that, "It is of course, ... fruitless to proceed with a plan that is doomed to failure at a further stage."

23 However, it is important to take into account the dynamics of the situation. In fact, it is the appellant's position that nothing will happen until a vote on a Plan is imminent or a proposal from Stelco is voted down; only then will Stelco enter into realistic negotiations with its creditors. It is apparent that the motions judge is of the view that the Plan is not doomed to fail; he would not have approved steps to continue the process if he thought it was. As Austin J. said in *Bargain Harold's Discount Ltd. v. Paribas Bank of Canada* (1992), 7 O.R. (3d) 362 (Ont. Gen. Div.), at 369:

> The jurisprudence is clear that if it is obvious that no plan will be found acceptable to the required percentages of creditors, then the application should be refused. *The fact that Paribas, the Royal Bank and K Mart now say there is no plan that they would approve, does not put an end to the inquiry*. All affected constituencies must be considered, including secured, preferred and unsecured creditors, employees, landlords, shareholders, and the public generally.... [Emphasis added.]

24 It must be a matter of judgment for the supervising judge to determine whether the Plan is doomed to fail. This Plan is supported by the other stakeholders and the independent Monitor. It is a product of the business judgment of the Stelco board as a way out of the *CCAA* process. It was open to the motions judge to conclude that the plan was not doomed to fail and that the process should continue. Despite its opposition to the Plan, the appellant's position inherently concedes the possibility of success, otherwise these creditors would have opposed the extension of the stay, opposed the order setting a date for approval of the plan and sought to terminate the *CCAA* proceedings.

25 The motions judge said this in his reasons:

> It seems to me that Stelco as an ongoing enterprise is getting a little shop worn/shopped worn. It would not be helpful to once again start a new general process to find the ideal situation [sic solution?]; rather the urgency of the situation requires that a reasonable solution be found.

He went on to state that in the month before the vote there "will be considerable discussion and negotiation as to the plan which will in fact be put to the vote" and that the present Plan may be adjusted. He urged the stakeholders and Stelco to "deal with this question in a positive way" and that "it is better to move forward than backwards, especially where progress is required". It is obvious that the motions judge has brought his judgment to bear and decided that the Plan or some version of it is not doomed to fail. I can see no basis for second-guessing the motions judge on that issue.

26 I should comment on a submission made by the appellant that no deference should be paid to the business judgment of the Stelco board. The appellant submits that the board is entitled to deference for most of the decisions made in the day-to-day operations during the *CCAA* process except whether a restructuring should proceed or a plan of arrangement should proceed. The appellant submits that those latter decisions are solely the prerogative of the creditors by reason of s. 6. While there is no question that the ultimate decision is for the creditors, the board of directors plays an important role in the restructuring process. Blair J.A. made this clear in an earlier appeal to this court concerning Stelco reported at (2005), 75 O.R. (3d) 5 (Ont. C.A.) at para. 44:

> What the court does under s. 11 is to establish the boundaries of the playing field and act as a referee in the process. *The company's role in the restructuring*, and that of its stakeholders, is to work out a plan or compromise that a sufficient percentage of creditors will accept and the court will approve and sanction. The corporate activities that take place in the course of the workout are governed by the legislation and legal principles that normally apply to such activities. In the course of acting as referee, the court has great leeway, as Farley J. observed in *Lehndorff, supr*a, at para. 5, "to make order[s] so as to effectively maintain the *status quo* in respect of an insolvent company while it attempts to gain the approval of its creditors for the proposed compromise or arrangement which will be to the benefit of both the company and its creditors". But the s. 11 discretion is not open-ended and unfettered. Its exercise must be guided by the scheme and object of the Act and by the legal principles that govern corporate law issues. *Moreover, the court is not entitled to usurp the role of the directors and management in conducting what are in substance the company's restructuring efforts*. [Emphasis added.]

27 The approvals given by the motions judge in this case are consistent with these principles. Those orders allow the company's restructuring efforts to move forward.

28 The position of the appellant also fails to give any weight to the broad range of interests in play in a *CCAA* process. Again to quote Blair J.A. in the earlier Stelco case at para. 36:

> In the *CCAA* context, Parliament has provided a statutory framework to extend protection to a company while it holds its creditors at bay and attempts to negotiate a compromised plan of arrangement that will enable it to emerge and continue

> as a viable economic entity, *thus benefiting society and the company in the long run, along with the company's creditors, shareholders, employees and other stakeholders*. The s. 11 discretion is the engine that drives this broad and flexible statutory scheme, and that for the most part supplants the need to resort to inherent jurisdiction. [Emphasis added.]

29 For these reasons, I would not give effect to the submissions of the appellant.

Submissions of the equity holders

30 The equity holders support the position of the appellant. They point out that the Stelco *CCAA* situation is somewhat unique. While Stelco entered the process in dire straits, since then almost unprecedented worldwide prices for steel have boosted Stelco's fortunes. In an endorsement of February 28, 2005 [2005 CarswellOnt 743 (Ont. S.C.J. [Commercial List])], the motions judge recognized this unusual state of affairs:

> In most restructurings, on emergence the original shareholder equity, if it has not been legally "evaporated" because the insolvent corporations was so for under water, is very substantially diminished. For example, the old shares may be converted into new emergent shares at a rate of 100 to 1; 1,000 to 1; or even 12,000 to 1. ... Stelco is one of those rare situations in which a change of external circumstances ... may result in the original equity having a more substantial "recovery" on emergence than outline above.

31 The equity holders point out that while an earlier plan would have allowed the shareholders to benefit from the continued and anticipated growth in the Stelco equity, the present plan does not include any provision for the existing shareholders. I agree with counsel for Stelco that these arguments are premature. They raise issues for the supervising judge if and when he is called upon to exercise his discretion under s. 6 to sanction the Plan of arrangement.

Disposition

32 Accordingly, I would dismiss the appeal. On behalf of the court, I wish to thank all counsel for their very helpful written and oral submissions that made it possible to deal with this appeal expeditiously.

***Laskin J.A.*:**

I agree.

***LaForme J.A.*:**

I agree.

Appeal dismissed.

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF LOYALTYONE, CO.

Court File No.: CV-23-00696017-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

PROCEEDING COMMENCED AT TORONTO

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