Court of Appeal File No. COA-24-CV-1328
Court File No. CV-23-00701672-00CL

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

CAMERON STEPHENS MORTGAGE CAPITAL LTD.

Applicant/
Respondent in Appeal

and

CONACHER KINGSTON HOLDINGS INC. AND 5004591 ONTARIO INC.

Respondents/
Respondents in Appeal

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March 24, 2025

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CITATION: 1117387 Ontario Inc. v. National Trust Company, 2010 ONCA 340
DATE: 20100510
DOCKET: C49609 and C50315

COURT OF APPEAL FOR ONTARIO

Moldaver, Juriansz and Epstein JJ.A.

BETWEEN

DOCKET: C49609

1117387 Ontario Inc. and Antonios (“Tony”) Ishac

Applicants (Appellants/
Respondents by way of cross-appeal)

and

National Trust Company

Respondent (Respondent/
Appellant by way of cross-appeal)

AND BETWEEN

DOCKET: C50315

National Trust Company

Applicant (Respondent/
Appellant by way of cross-appeal)

and

1117387 Ontario Inc. and Antonios (“Tony”) Ishac

Respondents (Appellants/
Respondents by way of cross-appeal)

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John P. O'Toole, for the respondent, National Trust Company

R. Aaron Rubinoff and Joël M. Dubois, for the respondent Deloitte & Touche Inc.

Heard: November 30, 2009

On appeal from the order of Justice W.J.L. Brennan of the Superior Court of Justice dated October 10, 2008.

EPSTEIN J.A.:

OVERVIEW

[1] In this action, the mortgagor and guarantor of the mortgage debt challenge the fairness of the conduct of the court-appointed receiver appointed by the mortgagee under the terms of the mortgage in relation to its actions pertaining to the mortgaged property.

[2] The appellant, 1117387 Ontario Inc. (the "company"), owns property (the "property") in Bells Corners, Ottawa. The property contains a 12,000 square foot building divided into two restaurant facilities. The appellant, Antonios Ishac, is the chief executive officer of the company. He personally guaranteed a portion of the first mortgage on the property given by the respondent, the National Trust Company.

[3] In 2001, contamination was discovered on the property. Petro-Canada, the owner of the adjoining land, admitted responsibility for the contamination. Ultimately the parties entered into an agreement (the "remediation agreement") under which Petro-Canada would pay for the remediation of the property and for other losses the company

suffered as a result of the contamination. The remediation did not proceed as planned and the company sued to enforce Petro-Canada's obligations under the remediation agreement and for damages.

[4] By this time, the mortgage had fallen into arrears and National Trust obtained a court order appointing Deloitte & Touche as receiver and manager. Eventually, the receiver was given authority over the claim against Petro-Canada and gave National Trust permission to try to resolve the matter directly with Petro-Canada. In September 2005, these two parties negotiated an agreement (the "settlement agreement") whereby the damage claim would be settled, the property sold to Petro-Canada, and the company's mortgage debt partially recovered and partially forgiven. The receiver issued a report recommending the sale and settlement and moved for court approval.

[5] The appellants appeal the motions judge's order of October 10, 2008, in which, among other things, he approved the report and thereby the sale of the property to, and the settlement of the damage claim with, Petro-Canada. The appellants' primary contentions are that the property will be sold for less than the "best price" that could have been obtained, and that the settlement is improvident because it would settle the company's claims for a fraction of its actual entitlement under the remediation agreement. The receiver cross-appeals that part of the order granting the appellants leave to commence an action against the receiver based on its handling of the sale and

settlement. National Trust adopts and supports the receiver's position in the appeal from the judicial approval of the sale and settlement.

[6] The appellants are clearly unhappy with how matters pertaining to the property have played out. However, the issues raised on appeal involve an analysis of the motions judge's findings of fact applied to well-established legal principles applicable to the exercise of his discretion. In my view, this analysis discloses no reviewable error on the part of the motions judge. Accordingly, I would dismiss the appeal. For the reasons set out in paras. 93 and 94, I would allow the cross-appeal.

[7] The appellants also move to introduce fresh evidence concerning events that took place during the period that the decision was under reserve by the motions judge. While, in the particular circumstances of this case, I would admit the fresh evidence, in my view, it does not assist the appellants.

FACTS

[8] The company purchased the property in 1995, in part with money borrowed from National Trust. The loan was secured by a first mortgage in the amount of $650,000, registered against the property. In 1997, additional funds were advanced for renovations and the mortgage was increased to $905,000. This work was necessary as deficiencies in the building and equipment were interfering with the company's ability to attract sufficient rental income to keep the mortgage in good standing.

[9] The mortgage fell into arrears in 1999 after the renovations were completed. As a result of these difficulties, National Trust exercised rights under the mortgage that allowed it to appoint an agent to collect and remit rents. At that time, the approximate principal balance of the mortgage was $884,000.

[10] In February 2001, National Trust served a notice of intention to enforce security. On October 30, 2001, the parties entered into a six-month forbearance agreement, crystallizing the obligations of the mortgagor and mortgagee as of that date. By agreement, for the purposes of the forbearance agreement, the debt was fixed at $1,095,909.89, with the mortgage maturing on April 30, 2002.

[11] The property had not been properly maintained and the company was having difficulty attracting sufficient rent to meet expenses. As a result, the company decided to sell the property. The company received a conditional offer of $1,450,000 with a closing date of February 1, 2002. The offer was conditional, in part, on a satisfactory environmental assessment. This assessment, completed in December 2001, demonstrated that the property was contaminated by petroleum hydrocarbons that had escaped from a neighbouring property owned by Petro-Canada. When the purchaser learned of the contamination, the sale was lost.

[12] For some time after the contamination was found, commercial tenants continued to lease the property. Under the terms of the forbearance agreement the company agreed to lease the property to Vox Lounge. In March 2002, Vox renewed its lease for five years

but only for part of the premises. In April 2002, the remainder of the building was leased to Dianne Dang, carrying on business as Buffet Place. Vox vacated in October 2003 and Ms. Dang, despite having been granted several reductions in rent, left in March 2004. Since then, the building has been empty and has fallen into disrepair.

[13] The parties agreed to arbitrate the company's claims arising from Petro-Canada's acceptance of responsibility for the contamination. On February 3, 2003, just prior to the arbitration, the parties entered into the remediation agreement, the terms of which are as follows:

> 1. [Petro-Canada] will proceed with the remediation action plan set out in its report at a time convenient to both [the company] and [Petro-Canada's] consultants, but in any event not later than June, 2003, for the commencement of such work;
>
> 2. All work and investigations will be carried out in a manner so as to minimize to the greatest extent possible any interference with [the company's] lands and the ongoing operations by its tenants thereon;
>
> 3. The remediation of [the company's] lands is to be at no cost whatsoever to [the company] and all reasonable costs incurred by [the company] in the context of, or as a result of, the clean-up will be paid by [Petro-Canada];
>
> 4. Where the remediation interferes with the ongoing tenant businesses such that the tenant is required to either vacate the premises or is justified in not paying full rental during such remediation operations, then [Petro-Canada] will reimburse [the company] for any reasonable loss of tenant revenue including all costs incurred in obtaining alternative tenants, if a tenant is lost as a result of ongoing remediation operations;

> 5. [Petro-Canada] will pay [the company's] reasonable consultant costs incurred by its consultants in supervising the remediation and testing to determine that appropriate remediation levels have been reached;
>
> 6. All work forces and equipment will be employed in such a manner and in such a way as to minimize the visual impact of the ongoing clean-up operation to the greatest extent possible.

[14] For the purposes of the arbitration, the parties agreed that the fair value of the property was $1,735,000 based on a compromise between appraisals prepared by the appellants' valuator, Ron Juteau, and the receiver's valuator, David Atlin.

[15] The arbitration continued on issues unresolved in the remediation agreement. On March 10, 2003, the arbitrator, the Honourable Mr. Rosenberg, awarded the company $208,200 to compensate for potential devaluation of the property due to stigma and $100,000 for future development costs. Petro-Canada paid the total award of $308,200 to the company.

[16] On June 19, 2003, Mackinnon J., on consent of all parties, appointed Deloitte & Touche as the receiver over all matters relating to the property except for Petro-Canada's remediation obligations. These were left to the company.

[17] In August 2003, because Petro-Canada had not started remediation in accordance with the agreed-upon schedule, the company sued Petro-Canada for breach of the remediation agreement. This claim was dismissed for want of prosecution and subsequently reinstated at the request of the appellants.

[18] Various disputes arose between the parties over the remediation and related issues. As a result, by order dated October 9, 2003, Morin J. transferred the claim against Petro-Canada to the receiver and ordered the company to pay the $308,200 it received from Petro-Canada to the receiver on the basis that this money formed part of National Trust's security. The company has not complied with that order.

[19] On November 6, 2003, the receiver listed the property for sale at a price of $1,380,000.

[20] The remediation finally started in December 2003. It was anticipated that the process would take approximately three months. Exterior remediation was completed in March 2004. However, contamination was discovered under the building, necessitating excavation through the floor of the building and underpinning of the structure. This interior excavation started in August 2004 but was delayed later in the month as a result of the Ministry of Labour's concern about work-safety conditions. Excavation resumed on September 20 but was again suspended a month later over a dispute about which Ministry of Environment guidelines applied.

[21] The clean-up came to a complete halt in December 2004. The principal dispute at that time involved whether the building had to be demolished to facilitate remediation or whether the structure could remain in place while remediation - more costly remediation - could be carried out.

[22] On December 8, 2004, the receiver wrote to Petro-Canada demanding that it complete the remediation work and pay the damages owed under the remediation agreement. The receiver sought payment of $488,000 in compensation for lost revenues, property taxes and insurance incurred as a result of the remediation delay. The receiver also took the position that damages for ongoing delay were accruing at $35,000 per month. Petro-Canada took the position that these claims were "completely unrealistic".

[23] On February 10, 2005, a meeting was held at Mr. Ishac's request. Representatives of National Trust and the receiver concluded that their differences with Mr. Ishac were too great to continue attempting to find a resolution acceptable to all parties. Beginning in February 2005, with the concurrence of the receiver, direct settlement discussions began between National Trust and Petro-Canada.

[24] By August 31, 2005, the outstanding amount owed under the mortgage was just over $2,000,000. In September 2005, the settlement agreement was reached between National Trust and Petro-Canada.

[25] The receiver provided three reports to the court; two within the first six months of the receivership. The third was provided on November 29, 2005. It was in this report that the receiver recommended the approval of the settlement agreement that contained the following terms:

1) Petro-Canada would purchase the property from National Trust for $1,187,500.

2) Petro-Canada would demolish the building and complete the remediation of the property in accordance with current Ministry of the Environment standards.

3) Petro-Canada would pay the receiver an additional $200,000 in full satisfaction of its claims for lost rent and delay costs in the remediation.

4) The remaining mortgage debt owed by the company and Mr. Ishac to National Trust, approximately $600,000, would be forgiven.

5) Petro-Canada would offer the property to the company or its nominee at fair market value once the remediation has been completed.[1]

[26] The report also states that the receiver will not seek to recover the $308,200 that Morin J. ordered the company to pay to the receiver.

[27] With the exception of the appellants, all parties supported the proposed settlement agreement. This state of affairs generated three motions before the motions judge. The appellants sought orders prohibiting the sale of the property, permitting the appellants to prosecute the action against Petro-Canada and for leave to commence an action against the receiver arising out of the administration of the receivership. As an alternative, the appellants sought an order replacing the receiver and instructing the new receiver to prosecute all claims of the appellants "with dispatch". National Trust brought a cross-motion to approve the settlement agreement. The receiver brought a cross-motion for the same relief and for approval of its third report.

[1] The forgiveness of the mortgage and the offer of the property to the company post-remediation (items 4. and 5.) were offered in exchange for the company's support of the settlement agreement upon presentation to court for approval.

THE REASONS OF THE MOTIONS JUDGE

[28] The motions judge approved the settlement agreement on the basis that the materials provided were sufficient to determine that the settlement was reasonable. He did not find it necessary to address the appellants' alternative request to replace the receiver.

[29] Specifically, the motions judge found that the value proposed by the respondents for Petro-Canada's purchase of the land was reasonable. There was substantial evidence before the court, expert and otherwise, concerning the value of the property at the relevant times. The motions judge expressed specific concerns about the evidence upon which the appellants relied. He ultimately concluded that he preferred the receiver's evidence that the property, *in a completely remediated state*, was properly valued between $600,000 and $1,200,000. Based on that finding, the motions judge held that the price Petro-Canada agreed to pay for the property actually exceeded its value.

[30] In terms of the other major contentious area, the claim against Petro-Canada for damages resulting from the contamination, there were two issues. First, the parties were divided over who should bear the responsibility for the loss of revenue and additional costs associated with the delay in the remediation work. Second, the appellants argued before the motions judge, as they did before this court, that the remediation agreement required Petro-Canada to remediate the property despite the difficulties arising from excavating beneath the floor of the building.

[31] With respect to delay, the motions judge noted that Petro-Canada, citing difficulties in obtaining access to the property and in obtaining permission to remove soil through the building floor, blamed the company and the receiver for the delays. The receiver blamed the company for interfering with both the commencement and the scope of the remediation work. The appellants blamed the receiver for generally failing to take all proper steps to protect their rights under the remediation agreement. The motions judge did not make a direct finding with regard to the ultimate cause of the delay.

[32] In terms of complexity of the remediation work, the discovery of contamination under the building gave rise to a dispute over how to deal with it. After reviewing the evidence and arguments on that issue, the motions judge concluded that the building was beyond financially reasonable repair and had to be demolished to effect remediation of the contamination that had migrated through much of the property.

[33] Against the background of the recommendations of the receiver in its third report, the parties' submissions, his findings, and the applicable law, the motions judge concluded that the process followed by the receiver in the complicated circumstances leading up to the request for approval of the sale and settlement was prudent and that the terms of sale and settlement recommended by the receiver were reasonable.

[34] Having approved the settlement agreement, the motions judge dismissed the appellants' motion for an order returning the claim against Petro-Canada to their control, and declared the claims to be extinguished by the settlement agreement.

[35] However, the motions judge did, somewhat curiously, grant the appellants leave to commence or continue proceedings against the receiver for "negligence or a failure to act with a fiduciary's due regard to the interests of a debtor" on the basis that if the allegations contained in Mr. Ishac's affidavits were proven, it would not be "perfectly clear that there was no foundation for the claim or the action is frivolous and vexatious". He made clear that he was "not deciding the merits of the owner's claims that the receiver failed to win all of the benefits the owner believes he could have won from Petro-Canada", despite his explicit finding that the "settlement is reasonable."

THE APPLICATION TO INTRODUCE FRESH EVIDENCE

[36] The proposed fresh evidence discloses the following.

[37] The motions were argued over a period of four days between November 21, 2006 and April 5, 2007, at which point, the motions judge took the matter under reserve. He released his decision on October 10, 2008.

[38] On May 28, 2008, counsel for the receiver unilaterally contacted the motions judge requesting that he expedite the release of his decision. On July 15, 2008, a meeting among counsel and the motions judge took place in the motions judge's chambers. Several months later, counsel for the receiver, again unilaterally, contacted the motions judge and the Regional Senior Justice in another attempt to expedite the release of the decision. Shortly thereafter, the reasons were released.

[39] At the meeting in his chambers, the motions judge indicated that he was not prepared to approve the settlement. Then, eighteen months following argument and three months following the chambers meeting, the motions judge released his decision in which he approved the recommended settlement and, at the same time, gave leave to the appellants to commence an action against the receiver.

[40] Counsel for the appellants submits that the proposed fresh evidence will demonstrate that the receiver brought pressure to bear upon the motions judge to release his decision. Relying on this court's decisions in *R. v. Rajaeefard* (1996), 27 O.R. (3d) 323, at 325, and in *Leader Media Productions Ltd. V. Sentinel Hill Alliance Atlantis Equicap Limited Partnership* (2008), 90 O. R. (3d) 561, at 571, counsel for the appellants argues that this evidence should be admitted as it demonstrates that the judicial process was fundamentally unfair and brings the administration of justice into disrepute.

[41] I agree with the appellants that in these circumstances the fresh evidence ought to be admitted. The authorities the appellants cite make it clear that where the proposed fresh evidence raises issues of the validity of the process of the hearing, the interests of justice require its admission. In such cases, the traditional criteria for the admission of fresh evidence, found in *R. v. Palmer*, [1980] 1 S.C.R. 759, do not apply. Here, the issues raised in the proposed fresh evidence implicate the integrity of the administration of justice.

ISSUES

[42] The issues raised in the appeal and cross-appeal can be grouped into the following two main categories:

> 1. Whether the motions judge erred in approving the sale of the property to Petro-Canada and the settlement of the company's claim for breach of the remediation agreement.
>
> 2. Whether, in the light of what is contained in the fresh evidence, the process involving the motions judge's decision was compromised.

STANDARD OF APPELLATE REVIEW OF ORDERS APPROVING RECEIVERS' REPORTS

[43] The principles to be applied in reviewing a sale or proposed sale by a court-appointed receiver are set out in this Court's decision in *HSBC Bank of Canada v. Deloitte & Touche* (2004), 71 O.R. (3d) 355. A court-appointed receiver has a fiduciary duty to act honestly and fairly on behalf of all who have an interest in the debtor's property. The receiver, as an officer of the court, is obliged to make full and fair disclosure to the court in all of its applications: *HSBC* at para. 26. The court should rely on the receiver's expertise in arriving at its recommendations and is entitled to assume that the receiver is acting properly unless the contrary is clearly shown.

[44] Particularly where, as in this case, the receiver is dealing with an "unusual or difficult asset", the court will only interfere in special circumstances: *HSBC* at para. 23. While the court must carefully scrutinize the procedure the receiver followed, it must be remembered that the receiver must act "with meticulous correctness, but not to a standard of perfection": *HSBC* at para. 26.

[45] Finally, I note that the orders appealed from are discretionary in nature. As in the case of all discretionary decisions, this court will only interfere where the judge has erred in law, seriously misapprehended the evidence, or exercised discretion based on irrelevant or erroneous considerations or failed to give any or sufficient weight to relevant considerations: *HSBC* at para. 22.

[46] In *Royal Bank v. Soundair Corp*. (1991), 4 O.R. (3d) 1 (C.A.), at p. 6, four factors are identified as considerations for the court in considering "whether a receiver who has sold a property acted properly". In my view, with appropriate modifications, the same factors can be applied in considering the providence of this settlement, where the values of both a property and a claim for damages are in issue:

> (a) Whether the receiver has made a sufficient effort to get the best price and has not acted improvidently;
>
> (b) The interests of all parties;
>
> (c) The efficacy and integrity of the process by which offers are obtained; and
>
> (d) Whether there has been unfairness in the sale process.

[47] Finally, at p. 7., *Soundair* affirmed the principle first stated in *Crown Trust v. Rosenberg* (1986), 60 O.R. (2d) 87 (H.C.J.), that a court "ought not sit as on appeal from the decision of the receiver, reviewing in minute detail every element of the process by which the decision is reached."

ANALYSIS

1. Whether the motion judge erred in approving the sale of the property to Petro-Canada and the settlement of the company's claim for breach of the remediation agreement.

A. The Receiver's Efforts to Obtain a Good Price

[48] I turn to the first *Soundair* factor, whether the receiver has made sufficient efforts to obtain the best price, both for the property and the claim against Petro-Canada. Counsel for the appellants submits that the settlement agreement substantially undervalues not only the property but also the company's claim arising out of Petro-Canada's breach of the remediation agreement. What the receiver should have done, say the appellants, is force Petro-Canada to honour its obligations under the remediation agreement, both in terms of the remediation itself and the compensation that it agreed to pay as a result of the contamination, and then sell the remediated property at fair market value. This course of action, according to the appellants, would have resulted in National Trust's recovering its mortgage debt, with leftover equity value for the appellants. The motions judge's approval of the settlement agreement as reasonable, according to the appellants, is unsupportable. Rather, they argue, the settlement agreement is improvident.

[49] I disagree. In my view, the motions judge's conclusion that the receiver met its obligations, both in terms of the value of both components of the proposed settlement and

in terms of the process by which it was arrived at, is amply supported by the application of the relevant legal principles to the motions judge's findings of fact.

[50] The law requires the receiver to pursue the debtor's rights. It is up to the receiver to carefully consider the available information and use its expertise to determine how to maximize the value of those rights. In relation to a cause of action, this responsibility can be met by settling the matter as long as the proposed compromise is commercially reasonable.

i. The sale of the property

[51] In terms of the proposed sale of the property, the appellants take issue with the fact that the motions judge approved the receiver's recommendation of a sale at a price, which assumed the land was remediated, but was determined when the property was in an unremediated state. They contend that the receiver should have sought specific performance of Petro-Canada's obligations to remediate the property, or damages in the alternative, and then sold the property for fair market value in a remediated state.

[52] I do not accept that argument.

[53] First, it is highly unlikely that the receiver would have been successful in obtaining an order against Petro-Canada for specific performance of its remediation obligations. As the considerations set out in *Semelhago v. Paramadevan*, [1996] 2 S.C.R. 415 at para. 14, demonstrate, the principles of specific performance are mainly related to the transfer of property (either personal or real) and even then only when the property is unique in

some way. As Estey J. wrote in *Asamera Oil Corp. v. Seal Oil & General Corp.*, [1979] 1 S.C.R. 633, at p. 668, "[b]efore a plaintiff can rely on a claim to specific performance…some fair, real and substantial justification for his claim to performance must be found." There was nothing unique about this property. Indeed, the only reason the company wanted it remediated was for the purpose of immediately selling it. There is no justification for forcing Petro-Canada to go to the expense of remediating the land, when the appellants' only interest is in the value of the land rather than the land itself.

[54] The alternative remedy for breach of contract is damages such that the affected party is put in a position as though the contract had been fulfilled. To establish these so-called "expectation damages", the appellants relied on an affidavit of Philip Augustine, an experienced civil litigator.

[55] Counsel for the appellants argues that the damage claim, (putting aside for the moment the claim for loss of rental income) is either $1,735,000, using the "reduction in value" method, or $3,980,468, using the "cost of performance" method. The "cost of performance" method of valuing damages from breach of contract, which Augustine takes to include the cost of destroying the building, remediating the property, and reconstructing the building, raises substantially the same issues as specific performance. I have already explained why this basis for damages is unavailable to the appellants. Since the purpose of damages is to recover value that the appellants would have obtained under the contract, and since it is known that they intended to sell the property in order to pay

their mortgage debt, the proper valuation method of damages is the "reduction in value" method. See Swan, A., *Canadian Contract Law*, 2nd ed., (Markham: LexisNexis Canada, 2009), at pp. 370 – 379.

[56] The question of the value of the land in a pristine state is critical for measuring the reduction in value of the property caused by the contamination. The appellants are wrong, however, to argue that the only way to determine this value is to remediate the land and try to sell it on the open market. The receiver utilized a commercially reasonable alternative method; it requested and received appraisals from several appraisers for the property, appraisals that assumed the property to be in an uncontaminated state. The motions judge approved this method as legitimate and I agree.

[57] So much for the method of determining value. As for the value itself, based on his preference of the receiver's evidence concerning the value of the property over that of the appellants, the motions judge found that the proposed sale price of $1,187,000 represented a fair value for the property. This finding is sound.

[58] The motions judge rejected the property value the appellants advanced through the Augustine affidavit – and properly so. The Augustine analysis in support of a "reduction in value" of $1,735,000 was deficient. Augustine accepted the 2003 Juteau valuation of the property notwithstanding its obvious flaws. The motions judge noted that Mr. Juteau acknowledged on cross-examination that he was "unaware of serious deficiencies in the premises and substantial rent reductions (and vacancies) resulting from them." The

valuation was therefore based on a capitalization of rental income that did not take into account existing rental arrears or the high turnover in tenants.

[59] I note that Mr. Augustine made no attempt to reconcile or otherwise address the receiver's expert and market evidence that supported the receiver's position that the property in a remediated state, at the time it recommended the comprehensive settlement, had a value of between $900,000 and $1,050,000. I refer to the receiver's four comprehensive market value appraisals, the listing price recommended by real estate agents and the results of the listing agent's attempts to sell the property.

[60] The appellants also argued that, by reason of its mismanagement, the receiver was responsible for the property's low value. This is not supported by the evidence. The evidence before the motions judge, including the appraisal reports, demonstrated that when the receiver was appointed in June 2003, it inherited a rundown property struggling to attract and maintain tenants willing to pay rent sufficient to cover operating costs.

[61] The appellants' position is not assisted by the tender of an offer to purchase the property for $1,320,000 that the company received in January 2006, after the receiver sought approval of the proposed sale and settlement. The offer, never delivered to the receiver, was unsigned and contained conditions unfavourable to the vendor concerning remediation and the nature of the tenants. As well, the receiver had no obligation to consider this offer, given its timing. Moreover, the offer does not show that the price the

receiver was recommending was so unreasonably low as to demonstrate that the receiver was acting improvidently in recommending it: see *Soundair*, at p. 9.

[62] I conclude that the motions judge's decision to approve the sale to Petro-Canada for $1,187,500, on the basis of the receiver's recommendation is unassailable. The receiver made appropriate efforts to obtain reliable information as to the value of the property. It secured an agreement with Petro-Canada based on this value that was provident and in fact advantageous to the creditors and the appellants. The fact that this agreement is with the polluter of the property, is, in my view, of no relevance.

ii. The acceptance of $200,000 in damages

[63] I will now turn to the settlement of the loss of rental income claim for $200,000.

[64] Counsel for the appellants forcefully argues that the $200,000 does not come close to adequate compensation for the loss of rent, asserted to be $838,000, based on $488,000[2] to December 2004, plus $35,000 per month after that to the date of Petro-Canada's acceptance of the offer.

[65] Once again, I would not agree with this argument. It completely ignores the weaknesses of the claim, and the risks and costs associated with pursuing it.

[66] The appellants approach the claim from the perspective that the receiver will be successful in demonstrating that the contamination was the sole cause of the loss of rental income. As previously indicated, the record demonstrates quite clearly that this is not the

[2] Adjusted for a mathematical error made by the appellants.

case. Before the further contamination was discovered in the spring of 2004, Vox Lounge had abandoned the property and was in arrears of rent in the amount of $70,000, and the Buffet Palace's rent arrears, part of which Mr. Ishac had forgiven due to its complaints about the state of the building, had reached $140,000.

[67] Further, the delay in the commencement of the remediation and the conflict over the reasons for that delay, added to the uncertainty over the amount that might be awarded against Petro-Canada. The receiver claimed loss of rent from October 2003 to December 2004 in the amount of $214,262 and carrying costs including property management fees, property taxes, property insurance, legal fees and the receiver's fees and utilities. However, Petro-Canada denied many of these claims on the basis that the appellants bore responsibility for some, if not all, of the delay in the commencement of the remediation work from May until November 2003.

[68] Then, there was further delay resulting from the dispute over how to remediate the soil under the building. The remediation agreement did not address who would be required to bear the burden of the loss of rental income caused by that delay.

[69] Finally, Petro-Canada not only resisted the claim for loss of rental income, but also indicated it was going to launch a counter-claim for the costs caused by the appellants' delay.

[70] The evidence available to the receiver about the claim for loss of rental income demonstrated that the amount of Petro-Canada's ultimate liability for damages was far

from certain. Furthermore, the receiver was well aware of the other costs associated with litigation of this complexity such as ongoing carrying costs and unrecoverable legal costs. The receiver did not know, therefore, the exact value of this claim. What it did know was that Petro-Canada and National Trust supported a comprehensive resolution of the mortgage debt, in addition to the $200,000 Petro-Canada agreed to pay. Petro-Canada had already paid $318,000 to the company for damages arising from the contamination of the property pursuant to the arbitration award, and the receiver agreed to leave that amount with the company.[3] National Trust had also agreed to forgive the remaining mortgage debt of $600,000 owed by the appellants to National Trust.

[71] Against this background the receiver made a realistic appraisal of value of the company's ancillary claims against Petro-Canada. It had to evaluate the risks and costs associated with litigation. This court must defer to the assessment and judgment of its independent receiver and to the exercise of discretion of the motions judge. In my view, the receiver's appraisal and the motions judge's review of the receiver's recommendations based on that appraisal are, in all of the circumstances, perfectly sound.

B. The Interests of All the Parties

[72] The next part of the *Soundair* test requires that the judge conduct an examination of the interests of all the parties.

[3] Given that the property would ultimately be sold to Petro-Canada on a pristine basis, the damages paid to the company for stigma and loss of future development costs were no longer warranted and could properly be considered additional consideration.

[73] The secured creditor, National Trust, supports the settlement. It does so with the knowledge that it will realize a significant shortfall. Petro-Canada also supports the settlement, and the interests of a party that has negotiated a settlement with a court-appointed receiver are very important: see *Soundair* at p. 12.

[74] It is only the appellants, the debtors, who opposed the proposal. They argue that the receiver's dereliction of duty has deprived them of equity they had in the property at the time of the receivership. They will recover nothing from this settlement.

[75] The appellants contend that the acceptance of the receiver's recommendations results in a loss to the company of approximately $400,000 in equity. They base their argument on an alleged offer to purchase the property for $1,500,000 submitted before the contamination was discovered.

[76] However, the offer is not in evidence and the respondent argues that it was far from certain. The reliable evidence that is in the record places the value of the property in an uncontaminated state between $900,000 and $1,200,000, roughly the amount of the mortgage debt at that time. In my view, the record does not support the appellants' position that the company had equity in the property at the time the contamination was discovered.

[77] Clearly, the receiver owes a duty to the appellants to treat them fairly. However, its primary task is to ensure that the highest value is received for the assets so as to maximise the return to the creditors: *Soundair* at p. 12. The duty of fairness also requires

that it maximize the return to the debtors, but such a return is not always commercially feasible. As Farley J. recognized in *Royal Bank v. Rose Park Wellesley Investments Ltd*., [1995] O.J. No. 147 (Ont. C.J. Gen. Div.), at para. 9, there will frequently be a point below which certain interested parties will be adversely affected by the receiver's decision. If the receiver's decision is otherwise reasonable, it is entitled to determine, in the words of Farley J. "where the cusp will lie".

[78] Here, the cusp lies at a place that is to no party's clear advantage; the amount satisfies neither the appellants nor National Trust. I further note that given that $2,016,466 was owing under the mortgage at the time the settlement was reached, the appellants would only stand to benefit if a purchaser could be found that was willing to pay almost twice the value of the property, or if Petro-Canada consented to pay out several times the amount it has indicated a willingness to pay in response to the damage claim for loss of rental income.

[79] The losses these parties will suffer are unfortunate but are the reality of the circumstances that plagued this property with these issues in this market. Also, it is important to bear in mind that no payments had been made under the mortgage since 2001. As time goes by, the receiver's costs constitute a priority charge on the property and therefore continue to reduce the amount available to pay National Trust and ultimately the appellants.[4] In this case, Petro-Canada was the only purchaser that would

[4] This court was informed, though it was not in evidence, that as of July 2009, the amount owing under the mortgage exceeded $3.1 million, including principal, interest, property taxes and other receivership expenses.

be reasonably expected to purchase the property in its current state as though it were pristine. Without the sale, it would have been impossible for National Trust otherwise to recover any significant portion of the debt. The value of the claims against Petro-Canada was, as I have explained, uncertain, and the receiver could not have relied solely upon them in the discharge of its duties. In considering the interests of those involved, and especially the receiver's primary duty to recover the mortgage debt from the appellants, the balance is clearly in favour of endorsing the settlement, and the motions judge considered these factors in making his ruling.

C. The Process Through Which the Sale and Settlement were Obtained

[80] I now turn to *Soundair* factors (c) and (d) - the efficacy and integrity of the process and the fairness in the implementation of the process. The motions judge was required to consider the integrity of the process by which the receiver determined the fair value of the sale and the settlement and the fairness in the working out of that process.

[81] The process under which the sale agreement is arrived at should be consistent with commercial efficiency and integrity. See *Selkirk (Re)* (1986), 58 C.B.R. (N.S.) 245, at p. 286.

[82] The appellants' complaint about the process appears to be that National Trust and Petro-Canada negotiated the price between them, essentially behind closed doors. However, the receiver gave National Trust and Petro-Canada permission to negotiate a sale, if one could be reached, only after it proved impossible to continue with the

appellants' involvement. The receiver's conduct until this point was open and transparent. It obtained various professional opinions as to the market value of the property independent of the contamination. These values were tested through the results of the listing and marketing initiatives. The appellants sought and obtained a meeting for the purposes of negotiating a settlement. They participated in that process until their demands threatened to interfere with any possibility that the negotiations would be successful. The receiver was entitled to make the determination that, as the motions judge put it, "[the respondents'] differences with Mr. Ishac were too great to continue attempting to find a resolution acceptable to all parties."

[83] The motions judge clearly put his mind to the difficulty the receiver faced in valuing the property including the costs of remediation to current standards and the law suit with all of its costs and risks. In the light of the evidence before him and due consideration to the uncertainties, the motions judge quite properly held that "the process [of arriving at the settlement] was reasonable and prudent".

2. Whether, in the light of what is contained in the fresh evidence, the process involving the motions judge's decision was compromised.

[84] Counsel for the appellants argues that the fresh evidence of events that took place while the matter was under reserve, together with the decision itself, give his clients a legitimate reason to doubt that they have been fairly treated within the context of the judicial process. The submission is based on the letters the receiver wrote to the motions judge asking about the status of the release of his reasons and on the decision itself in

relation to comments the motions judge is alleged to have made in the course of the in-chambers meeting. On the basis of the pressure brought to bear on the motions judge by the receiver and the contradictions in the motions judge's thinking between the meeting and the decision and within the decision itself, there is good reason to be concerned that the process was not fair.

[85] I disagree with this submission.

[86] Concerning the letters, I agree that it may have been preferable for the receiver to have consulted with counsel for the appellants before writing the two letters inquiring about the status of the release of the decision. However, I am not persuaded that these letters, which were purely of an administrative nature, are any cause for concern about the integrity of the judicial process. I also note that the appellants' stated concern about those letters in the context of this appeal was not brought to the attention of the motions judge.

[87] This takes me to the appellants' other argument that the fresh evidence demonstrates uncertainty in the motions judge's mind about whether to approve the receiver's recommendations. This uncertainty is demonstrated, they say, by the length of time the matter was under reserve, the comments the motions judge made during the in-chambers meeting and the contradiction in the decision itself of approving the receiver's recommendations and granting the appellants leave to commence an action against the receiver for breach of duty relating to its recommendations.

[88] First, as this court has said in *Dusk v. Malone* (2003), 167 O.A.C. 333, at para. 3, "a lengthy delay in…releasing reasons, without more, will not automatically amount to a denial of a fair trial. The fairness of a trial must be determined by the particular circumstances of each case so that generally some evidence of active prejudice must be shown."

[89] Second, the evidence of what was said at the meeting, namely the notes produced by lawyers who attended the meeting, is inconclusive in terms of what the motions judge said or was thinking. He may have indicated some ambivalence about his view of the case at the time. Regardless, he was entitled to go off and wrestle further with the decision. He was entitled to make up his mind after that meeting and prepare reasons that support his decision to approve the settlement.

[90] Despite approving the receiver's third report, the motions judge granted leave to the appellants to commence an action against the receiver on the basis that the receiver failed to perform its obligations in relation to the property, including recommending the sale and settlement. The appellants submit that granting leave to bring such an action cannot be reconciled with approving the receiver's third report. It therefore shows the motions judge's doubts about whether the receiver had acted properly in relation to the sale.

[91] The motions judge was very clear in his reasons that he did not think the receiver had acted improperly. He granted leave because "[h]owever difficult, [the appellants]

might succeed in demonstrating negligence…" He later reiterated that he was granting leave because it was not "perfectly clear that that there is no foundation for the claim or that the action is frivolous or vexatious." It would appear that this concern motivated the motions judge to grant leave to the appellants to take proceedings against the receiver, in the light of the possibility that the receiver may not have acted "with a fiduciary's due regard to the interests of the debtor". However, he obviously thought this was a long shot.

[92] In my view, the motions judge, in granting leave, applied the wrong test. Rather than applying the low threshold he did, he should have been satisfied that the appellants had established a strong *prima facie* case, before granting leave. The conduct that the appellants wish to impugn is exactly the same conduct approved by the motions judge: see *Bank of America Canada v. Willan Investments Ltd.* (1993), 23 C.B.R. (3d) 98. As Blair J. put it at paras. 9 - 10:

> In my opinion the "normal" test referred to above sets a threshold which is too low in cases where the activities of the Receiver, including the conduct sought to be impugned by the creditor seeking leave to proceed, have already been approved by the Court…Were it otherwise there would be little point in a receiver or receiver/manager seeking an Order approving its conduct and activities in the exercise of its duties as an officer of the Court. The very purpose of the granting of such an Order is to afford the receiver some measure of judicial protection. To say that that shield may be readily pierced unless the receiver can show that "it is perfectly clear" there is no foundation to the proposed claim, or that it is frivolous or vexatious, is to render such protection virtually meaningless

> in situations where the approved conduct and the conduct subject to the proposed attack are in substance the same.

[93] The motions judge thought that this case did not apply because the receiver's actions had not been the subject of previous court approval. He did not consider that he had just approved the receiver's actions in this very instance, and that the *Bank of America* rationale applies here as well. It is contradictory and provides meaningless protection to a receiver, to grant an order approving its recommendations and simultaneously granting leave to bring an action for negligence or breach of fiduciary duty in arriving at these recommendations.

[94] No matter which test the motions judge used, granting leave in these circumstances does not necessarily reflect an uncertainty in his mind regarding the receiver's recommendation of the overall appropriateness of the comprehensive settlement.

[95] Based on this analysis, there is nothing in the evidence that supports the conclusion that there was any unfairness in the judicial process.

CONCLUSION REGARDING THE APPEAL

[96] In the circumstances of this case and given the principles courts must apply when reviewing the receiver's recommendations, I can find no error on the part of the motions judge in the exercise of his discretion when granting the orders under appeal.

THE CROSS-APPEAL

[97] As discussed above, the motions judge used the wrong test in granting leave to commence an action against the receiver. For the reasons given there, I would allow the cross-appeal.

DISPOSITION

[98] For the foregoing reasons, I would dismiss the appeal from the order approving the receiver's third report approving the sale of the property and the settlement. I would allow the cross-appeal and set aside the order granting leave to sue the receiver.

[99] At the conclusion of the hearing, it was agreed that the parties would make submissions as to costs following the release of this decision. Failing agreement as to costs both of the appeal and the cross-appeal, submissions are to be made according to the following timetable. The receiver and National Trust may make written submissions, no longer than three pages, to be received by the senior legal officer, no later than May 17. The appellants will make their submissions, again, no longer than three pages, to be received no later than May 25. The receiver and National Trust may deliver a brief reply, no longer than two pages, to be received no later than May 28.

RELEASED:

"MAY 10 2010" "Gloria Epstein J.A."
"MJM" "I agree M. J. Moldaver J.A."
"I agree Russell Juriansz J.A."

Court File No. 05-CL-5864
Date: 20061006

ONTARIO
SUPERIOR COURT OF JUSTICE
(Commercial List)

IN THE MATTER OF AN APPLICATION UNDER: *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: 1587930 ONTARIO LIMITED and 2031903 ONTARIO LIMITED

BEFORE: C. CAMPBELL J.

HEARD: September 26, 2006 and October 3

COUNSEL: *Oreste Pasparakis,* for the Monitor
Arthur O. Jacques for Soorty & Cocov
Scott Bomhof, N. De Cicco for Sagecrest
Melvyn L. Somon, for unsecured creditor Cocov et al
Steven Graff, Stephanie Fraser for the Applicants
Brian Bellmore for Knob Hill Farms
F. Tayar for Sofon
Joseph Valius in person

E N D O R S E M E N T

[1] The matter before the Court has had a long and contentious process, being in effect the second insolvency of the asset known as the Constellation Hotel.

[2] What is specifically at issue are motions in respect of a plan of arrangement proposed by the Applicants in respect of the sale of the property and building of what was once an operating hotel.

[3] The Applicants' Plan is endorsed and supported by the Monitor and the proposed purchaser, which is in effect the only secured creditor by way of assignment to it of previous debt and outstanding mortgages and is as well the Debtor in Possession (DIP) lender with priority for its advances. The proposed purchaser, Sagecrest, is currently owed approximately $36 million.

[4] The Applicants' Plan is opposed by unsecured creditors, some of whom request the Court to approve a proposed offer by Al Soorty and Zoran Cocov to purchase the property at a price in excess of the offer of Sagecrest.

[5] When this matter was argued on September 26, the Court expressed concern with respect to the certainty of terms and firmness of the Soorty/Cocov offer, as counsel on their behalf requested up to 30 days to do due diligence, citing lack of cooperation on the part of Sagecrest and the Monitor to information considered vital to firming up their offer.

[6] The Court was left to render a decision on what can only be described as an uncertain state of the Soorty/Cocov offer.

[7] On Wednesday evening, September 27, the Court was provided with a letter from Mr. Jacques, counsel for Soorty/Cocov, which purported on its face to firm up an improved offer. The Court was asked to consider the confirmation of financing as part of its deliberation.

[8] A conference call was convened with counsel on September 28, at which time a direction was made that if there was to be consideration of the additional material, it should be made by way of a motion to introduce new evidence, returnable Tuesday, October 3 before the Court.

[9] The motion by Messrs Soorty and Cocov to consider the new evidence and order acceptance of their offer was supported by counsel on behalf of various unsecured creditors and by an alternative offeror, Safron, which was now aligned with Soorty/Cocov. It was opposed by the Applicant, the Monitor and Sagecrest, on the basis that the new material did not meet the test for new material.

[10] On the return of the motion on October 3, 2006 with respect to fresh evidence, the parties also made submissions to deal with the issue of what might happen should leave to introduce fresh evidence be granted.

[11] Counsel for the Monitor advised that in his view, the Court would have before it three options. The first option would be to accept the Sagecrest offer, either on the basis that the time was past for the introduction of further evidence or even with consideration of fresh evidence, the Sagecrest offer represented the most realistic return for all creditors under the Proposed Plan.

[12] The second option would be to accept the new evidence and accept, as urged by Messrs Soorty and Cocov, their offer on the basis that it represents a firm agreement to close by no later than November 3, 2006, with a certain return to Sagecrest of its outstanding debt and an enhanced recovery to the unsecured creditors.

[13] The third option would be to in effect re-open the opportunity to any party to put in a further offer on the understanding that the timeframe should be such that there would be a closing within 30 days to reduce the "burn" estimated to now exceed $500,000 per month.

[14] Not surprisingly, Sagecrest supported the first option with a request that a closing and vesting order be set immediately.

[15] Counsel for Sagecrest further submitted, in the event the first option was not accepted by the Court, that his client be given the opportunity to make a further offer if so advised. In support

of that position, Mr. Bomhof submitted that in effect, his client had put its "best foot forward," had made a firm offer that could be closed immediately and reduce further expense and should not be prejudiced if Messrs Soorty/Cocov were permitted to have their offer considered.

[16] Mr. Jacques urged that the Court should consider option 2, since his clients' offer was bona fide, was capable of completion within one month and did offer the best return to unsecured creditors. This option was supported by Mr. Tayor for Safron and by counsel for unsecured creditors in preference to option one.

[17] Counsel for the Monitor and for the Applicant continued to support option one on the basis that it provided certainty, both as to time and amount. Concern was expressed that given the long history of the background of Messrs Soorty/Cocov with the property, its previous insolvency and default, and the unknown background of the REIT supplying the financing, there was reason to question whether the offer was one that would benefit the Applicant in the way proposed.

[18] In the event the Court were willing to consider option 3 as the most appropriate in the circumstances, both the Applicant and the Monitor, though counsel, were of the view that a very short timetable with strict terms should be imposed.

[19] It is with some reluctance that I have concluded that in the circumstances, option 3 is the most appropriate at this time. I am mindful that this is a CCAA proceeding, not an auction process. Both sides have pointed to the decision of the Court of Appeal in *Soundair* as setting out the guiding principles. The factual distinction between this case and the facts in *Soundair* is that here there is at least the potential for a much-improved return for unsecured creditors.

[20] The improved return is a factor, which while not necessarily the only consideration, it is a significant one. While I am concerned with the risk to the estate of the company of the cost of the further time involved, I have concluded that it is a risk worth taking, since the unsecured creditors who will bear that risk are prepared to do so.

[21] In my view, it is appropriate for the Court to in effect allow what might be called further evidence in this case. There is some merit in the submission that the current offer is nothing more than elaboration on or answering legitimate queries, rather than a new offer in itself.

[22] A CCAA proceeding is different from an ordinary civil action and trial. The process itself anticipates dynamic and "real time" process that should only be stifled when to do otherwise would operate as a significant prejudice to a creditor or group of creditors. There is no need to apply the criteria of introduction of new evidence to this proceeding in my view.

[23] What is of greater significance is whether the offer process should be allowed to continue. I have concluded that in these somewhat unique circumstances that it should.

[24] I do think that it would operate unfairly to Sagecrest to accept they Soorty/Cocov offer outright at this stage. Among other matters, there is an outstanding appeal by Sagecrest of

disallowance of part of its claim, which is waived only if its offer is accepted. In addition, Sagecrest has become in effect a "stalking horse" with its firm offer and should not be prejudiced by what is both a last minute and still somewhat uncertain position.

[25] In addition, the unsecured creditors should not be deprived of the possibility of Court consideration of an improved Sagecrest offer.

[26] For the above reasons, I am satisfied that the process should be re-opened for a very short timeframe. As a result, I do not think it appropriate to comment on the present offers, except to say that the Soorty/Cocov offer does appear on the surface to offer the potential for greater recovery for unsecured creditors – a matter that should receive further airing as against which Sagecrest may or may not do.

[27] I am assuming in these circumstances that until replaced with another offer if so advised, the Sagecrest offer will remain in place.

[28] Counsel were advised that in the event this was the disposition, they should re-attend on Wednesday October 11, 2006, having discussed what further direction would be required to implement the disposition now made.

[29] An Order will go accordingly.

C. CAMPBELL J.

Released:

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

v.

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

and

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

- and -

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

v.

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

and

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

c.

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

et

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

- et -

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

c.

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

et

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

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

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

2020 SCC 10

File No.: 38594.

Hearing and judgment: January 23, 2020.

Reasons delivered: May 8, 2020.

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

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

2020 CSC 10

N° du greffe : 38594.

Audition et jugement : 23 janvier 2020.

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

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

EN APPEL DE LA COUR D'APPEL DU QUÉBEC

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Cases Cited

By Wagner C.J. and Moldaver J.

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

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

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

Jurisprudence

Citée par le juge en chef Wagner et le juge Moldaver

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The reasons for judgment of the Court were delivered by

THE CHIEF JUSTICE AND MOLDAVER J.—

I. Overview

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

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

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

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

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

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

Version française des motifs de jugement de la Cour rendus par

LE JUGE EN CHEF ET LE JUGE MOLDAVER —

I. Aperçu

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

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

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

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

II. Facts

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

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

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

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

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

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

II. Les faits

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. *The Initial Competing Plans of Arrangement*

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

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

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

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

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

B. *Les premiers plans d'arrangement concurrents*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. Decisions Below

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

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

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

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

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

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

III. Historique judiciaire

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

IV. Issues

[37] These appeals raise two issues:

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

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

V. Analysis

A. *Preliminary Considerations*

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

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

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

IV. Questions en litige

[37] Les pourvois soulèvent deux questions :

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

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

V. Analyse

A. *Considérations préliminaires*

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

(1) The Evolving Nature of *CCAA* Proceedings

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Good faith

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

Good faith — powers of court

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

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

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

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

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

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

Bonne foi

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

Bonne foi — pouvoirs du tribunal

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Related creditors

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

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

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

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

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

Créancier lié

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

General power of court

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

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

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

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

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

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

Pouvoir général du tribunal

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Interim financing

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

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

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

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

Financement temporaire

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

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

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

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

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

Priority — secured creditors

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

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

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

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

Priorité — créanciers garantis

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

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

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

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

Factors to be considered

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

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

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

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

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

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

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

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

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

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

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

Facteurs à prendre en considération

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(Houlden, Morawetz and Sarra, at §33)

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

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

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

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

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

(Houlden, Morawetz et Sarra, §33)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

dans l'exercice de son pouvoir discrétionnaire. Nous ne savons pas avec certitude si l'AFL était aussi favorable aux créanciers de Bluberi qu'il aurait pu l'être — dans une certaine mesure, il donne priorité au recouvrement de Bentham sur le leur — mais nous nous en remettons néanmoins à l'exercice par le juge surveillant de son pouvoir discrétionnaire.

[108] To the extent the Court of Appeal held otherwise, we respectfully do not agree. Generally speaking, our view is that the Court of Appeal again failed to afford the supervising judge the necessary deference. More specifically, we wish to comment on three of the purported errors in the supervising judge's decision that the Court of Appeal identified.

[108] Dans la mesure où la Cour d'appel a conclu le contraire, en toute déférence, nous ne sommes pas d'accord. De façon générale, nous estimons que la Cour d'appel a encore une fois omis de faire preuve de la déférence nécessaire à l'égard du juge surveillant. Plus particulièrement, nous souhaitons faire des observations sur trois des erreurs qu'aurait décelées la Cour d'appel dans la décision du juge surveillant.

[109] First, it follows from our conclusion that LFAs can constitute interim financing that the Court of Appeal was incorrect to hold that approving the LFA as interim financing "transcended the nature of such financing" (para. 78).

[109] Premièrement, il découle de notre conclusion selon laquelle les AFL peuvent constituer un financement temporaire que la Cour d'appel a eu tort de conclure que l'approbation de l'AFL à titre de financement temporaire [TRADUCTION] « transcendait la nature de ce type de financement » (par. 78).

[110] Second, in our view, the Court of Appeal was wrong to conclude that the LFA was a plan of arrangement, and that *Crystallex* was distinguishable on its facts. The Court of Appeal held that the LFA and associated super-priority Litigation Financing Charge formed a plan because they subordinated the rights of Bluberi's creditors to those of Bentham.

[110] Deuxièmement, à notre avis, la Cour d'appel a eu tort de conclure que l'AFL était un plan d'arrangement, et qu'il était possible d'établir une distinction entre l'espèce et les faits de l'affaire *Crystallex*. La Cour d'appel a conclu que l'AFL et la charge relative au financement de litige super prioritaire s'y rattachant constituaient un plan parce qu'ils subordonnaient les droits des créanciers de Bluberi à ceux de Bentham.

[111] We agree with the supervising judge that the LFA is not a plan of arrangement because it does not propose any compromise of the creditors' rights. To borrow from the Court of Appeal in *Crystallex*, Bluberi's litigation claim is akin to a "pot of gold" (para. 4). Plans of arrangement determine how to distribute that pot. They do not generally determine what a debtor company should do to fill it. The fact that the creditors may walk away with more or less money at the end of the day does not change the nature or existence of their rights to access the pot once it is filled, nor can it be said to "compromise" those rights. When the "pot of gold" is secure — that

[111] Nous souscrivons à l'opinion du juge surveillant selon laquelle l'AFL ne constitue pas un plan d'arrangement parce qu'il ne propose aucune transaction visant les droits des créanciers. Pour reprendre la formule qu'a employée la Cour d'appel dans *Crystallex*, la réclamation de Bluberi s'apparente à une [TRADUCTION] « marmite d'or » (par. 4). Les plans d'arrangement établissent la façon dont le contenu de cette marmite sera distribué. Ils n'indiquent généralement pas ce que la compagnie débitrice devra faire pour la remplir. Le fait que les créanciers puissent en fin de compte remporter plus ou moins d'argent ne modifie en rien la nature ou

is, in the event of any litigation or settlement — the net funds will be distributed to the creditors. Here, if the Retained Claims generate funds in excess of Bluberi's total liabilities, the creditors will be paid in full; if there is a shortfall, a plan of arrangement or compromise will determine how the funds are distributed. Bluberi has committed to proposing such a plan (see supervising judge's reasons, at para. 68, distinguishing *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.*, 2008 BCCA 327, 296 D.L.R. (4th) 577).

[112] This is the very same conclusion that was reached in *Crystallex* in similar circumstances:

> The facts of this case are unusual: there is a single "pot of gold" asset which, if realized, will provide significantly more than required to repay the creditors. The supervising judge was in the best position to balance the interests of all stakeholders. I am of the view that the supervising judge's exercise of discretion in approving the Tenor DIP Loan was reasonable and appropriate, despite having the effect of constraining the negotiating position of the creditors.
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> . . . While the approval of the Tenor DIP Loan affected the Noteholders' leverage in negotiating a plan, and has made the negotiation of a plan more complex, it did not compromise the terms of their indebtedness or take away any of their legal rights. It is accordingly not an arrangement, and a creditor vote was not required. [paras. 82 and 93]

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

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

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

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

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

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

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

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

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

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

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

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

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

VI. Conclusion

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

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

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

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

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

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

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

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

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

VI. Conclusion

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

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

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

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

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

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

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

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

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

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: ***Edgewater Casino Inc. (Re),***
2009 BCCA 40

Date: 20090206
Docket: CA035922; CA035924

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

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

In the Matter of Edgewater Casino Inc. and
Edgewater Management Inc.

Between:

Canadian Metropolitan Properties Corp.

Appellant
(Applicant)

And

**Libin Holdings Ltd., Gary Jackson Holdings Ltd.
and Phoebe Holdings Ltd.**

Respondents
(Respondents)

Before: The Honourable Madam Justice Levine
The Honourable Mr. Justice Tysoe
The Honourable Madam Justice D. Smith

J.J.L. Hunter, Q.C. and J.A. Henshall	Counsel for the Appellant
J.R. Sandrelli and A. Folino	Counsel for the Respondents
Place and Date of Hearing:	Vancouver, British Columbia January 7, 2009
Place and Date of Judgment:	Vancouver, British Columbia February 6, 2009

Written Reasons by:
The Honourable Mr. Justice Tysoe

Concurred in by:
The Honourable Madam Justice Levine
The Honourable Madam Justice D. Smith

Reasons for Judgment of the Honourable Mr. Justice Tysoe:

Introduction

[1] This application raises the question of the nature and application of the test to be utilized when leave is sought to appeal from an order made in proceedings under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "*CCAA"*).

[2] On August 29, 2008, the chambers judge refused Canadian Metropolitan Properties Corp. (the "Landlord") leave to appeal from two orders pronounced on March 5, 2008 and December 18, 2008, by the judge supervising the *CCAA* proceedings (the "*CCAA* judge") concerning Edgewater Casino Inc. and Edgewater Management Inc. ("Edgewater"). The Landlord applies under section 9(6) of the *Court of Appeal Act*, R.S.B.C. 1996, c. 77, to vary or discharge the order of the chambers judge so that it is given leave to appeal from the two orders. The respondents, being the original shareholders of Edgewater, oppose the application.

Background

[3] The Landlord and Edgewater entered into a lease agreement dated for reference November 8, 2004 (the "Lease") under which the Landlord leased part of the Plaza of Nations site in downtown Vancouver for the operation of a casino by Edgewater. Edgewater took possession of the leased property on May 4, 2004 and, prior to commencing operation of the casino on February 5, 2005, spent approximately $15 million renovating the main building covered by the Lease. These renovations indirectly led to two disputes between the parties. The first

dispute related to the extent, if any, to which Edgewater was responsible to reimburse the Landlord for increases in property taxes attributable to improvements made by Edgewater. A related issue was whether Edgewater was responsible to pay a portion of the consulting fees incurred by the Landlord in appealing property tax assessments. The second dispute related to Edgewater's responsibility to pay for the cost of utilities supplied to the leased property prior to the commencement of the operation of the casino while Edgewater was in possession and renovating the building.

[4] Edgewater commenced the *CCAA* proceedings on May 2, 2006, and the *CCAA* judge supervised the proceedings. Edgewater proposed a plan of arrangement by which sufficient funds would be paid into a law firm's trust account in an amount to fully pay all claims of creditors accepted by Edgewater and the asserted amounts of creditor claims disputed by Edgewater. I gather that the plan of arrangement was predicated on a sale of the shares in Edgewater by the respondents to a new owner and that it was agreed that the respondents would be the benefactors of any monies recovered from the Landlord and any monies left in trust following the resolution of the property tax and utilities disputes.

[5] On August 11, 2006, the *CCAA* judge pronounced a "Claims Processing Order" establishing a process for claims to be made by Edgewater's creditors and to be either accepted by Edgewater or adjudicated upon in a summary manner in the *CCAA* proceedings. On August 29, 2006, the *CCAA* judge pronounced a "Closing Order" pursuant to which the plan of arrangement was implemented and sufficient

funds were paid into trust to satisfy the accepted and disputed claims of Edgewater's creditors.

[6] The Landlord filed a proof of claim asserting that Edgewater was indebted to it in the amount by which the property taxes for the leased property had increased since 2004. Edgewater disallowed the proof of claim. Edgewater subsequently claimed a right of setoff against the Landlord in respect of the utilities that it alleged had been improperly charged by the Landlord and had been paid by mistake.

[7] By a case management order dated March 29, 2007, the *CCAA* judge directed that, among other things, the property tax and utilities disputes were to be determined summarily, with the parties exchanging pleadings and having representatives cross-examined on affidavits or examined for discovery. Hearings took place before the *CCAA* judge in August and September, 2007.

[8] In his reasons for judgment dealing with the property tax dispute, indexed as 2008 BCSC 280, the *CCAA* judge held that: (i) clause 3.05 of the Lease, which dealt with Edgewater's responsibility for increases in the property taxes, was sufficiently clear to be enforceable; (ii) the Landlord had not made negligent misrepresentations to Edgewater on matters relevant to the property tax increase; (iii) Edgewater was only responsible for increases in the assessment of the "Lands" (defined as the lands and improvement thereon) solely attributable to the improvements made by it, with the result that Edgewater was only obliged to pay the Landlord the increased taxes based on the increase in the assessed value of the buildings; and (iv) Edgewater was not liable, either in contract, *quantum meruit* or unjust

enrichment, to reimburse the Landlord for any consulting fees incurred by it in appealing the property tax assessments in question.

[9] In his reasons for judgment dealing with the utilities dispute, indexed as 2007 BCSC 1829, the *CCAA* judge held that: (i) clause 4.01 of the Lease, which was clear on its face, restricted the amount of rent and additional rent during the period preceding the commencement of operation of the casino to the sum specified in the clause, and Edgewater was not responsible to pay for any additional sum in respect of utilities; (ii) the Landlord did not meet the test in order to have the Lease rectified in respect of the payment for utilities during the period of possession preceding the commencement of operation of the casino; and (iii) Edgewater was entitled to the return of the payments for utilities during the period of possession preceding the commencement of the casino made by it as a result of a mistake.

Decision of the Chambers Judge

[10] In dismissing the applications for leave to appeal the two orders, the chambers judge commented that the *CCAA* judge had held the language of clauses 3.05 and 4.01 of the Lease to be clear and unambiguous. Relying on *Re Pacific National Lease Holding Corp.* (1992), 72 B.C.L.R. (2d) 368, 15 C.B.R. (3d) 265 (C.A. Chambers), and *Re Pine Valley Mining Corporation*, 2008 BCCA 263, 43 C.B.R. (5th) 203 (Chambers), the chambers judge stated that leave to appeal in proceedings under the *CCAA* is granted sparingly. He commented that there were none of the time pressures that often attend *CCAA* proceedings.

[11] The chambers judge noted that the *CCAA* judge had applied settled principles of contractual interpretation and expressed the view that there were very limited prospects of success on appeal. He observed that the issues had been decided in the context of summary proceedings under the *CCAA* and stated that the decision of the chambers judge was entitled to substantial deference.

Discussion

[12] The parties are agreed that the test to be applied by a reviewing court on an application to review an order of a chambers judge is to determine whether the judge was wrong in law or principle or misconceived the facts: see *Haldorson v. Coquitlam (City)*, 2000 BCCA 672, 3 C.P.C. (5th) 225.

[13] The parties made their submissions on the basis that there is a special test or standard for the granting of leave to appeal from an order made in *CCAA* proceedings. The genesis of this perception is the following passage from the decision of Mr. Justice Macfarlane in *Pacific National Lease*:

> [30] Despite what I have said, there may be an arguable case for the petitioners to present to a panel of this court on discreet questions of law. But I am of the view that this court should exercise its powers sparingly when it is asked to intervene with respect to questions which arise under the C.C.A.A. The process of management which the Act has assigned to the trial court is an ongoing one. In this case a number of orders have been made. Some, including the one under appeal, have not been settled or entered. Other applications are pending. The process contemplated by the Act is continuing.
>
> [31] A colleague has suggested that a judge exercising a supervisory function under the C.C.A.A. is more like a judge hearing a trial, who makes orders in the course of that trial, than a chambers judge who makes interlocutory orders in proceedings for which he has no further responsibility.

> [32] Also, we know that in a case where a judgment has not been entered, it may be open to a judge to reconsider his or her judgment, and alter its terms. In supervising a proceeding under the C.C.A.A. orders are made, and orders are varied as changing circumstances require. Orders depend upon a careful and delicate balancing of a variety of interests and of problems. In that context appellate proceedings may well upset the balance, and delay or frustrate the process under the C.C.A.A. I do not say that leave will never be granted in a C.C.A.A. proceeding. But the effect upon all parties concerned will be an important consideration in deciding whether leave ought to be granted.

Numerous subsequent decisions have referred to these comments. These decisions include *Re Westar Mining Ltd.* (1993), 75 B.C.L.R. (2d) 16, 17 C.B.R. (3d) 202 (C.A.) at para. 57; *Re Woodward's Ltd.* (1993), 105 D.L.R. (4th) 517, 22 C.B.R. (3d) 25 (B.C.C.A. Chambers) at para. 34; *Re Repap British Columbia Inc.* (1998), 9 C.B.R. (4th) 82 (B.C.C.A. Chambers) at para. 8; *Luscar Ltd. v. Smoky River Coal Ltd.,* 1999 ABCA 179, 175 D.L.R. (4th) 703 at para. 62; *Re Blue Range Resource Corp.*, 1999 ABCA 255, 12 C.B.R. (4th) 186 (Chambers) at para. 3; *Re Canadian Airlines Corp.*, 2000 ABCA 149, 19 C.B.R. (4th) 33 (Chambers) at para. 42; *Re Skeena Cellulose Inc.*, 2003 BCCA 344, 13 B.C.L.R. (4th) 236 at para. 52; *Re Fantom Technologies Inc.* (2003), 41 C.B.R. (4th) 55 (Ont. C.A. Chambers) at para. 17; and *Re New Skeena Forest Products Inc.*, 2005 BCCA 192, [2005] 8 W.W.R. 224 at para. 20.

[14] The Landlord accepts the general proposition that leave to appeal from *CCAA* orders should be granted sparingly, but says that there should be an exception where, as here, the time constraints present in typical *CCAA* situations do not exist. In this regard, the Landlord relies on the views expressed by Chief Justice

McEachern in *Westar Mining*. After quoting the above passage from *Pacific National Lease*, McEachern C.J.B.C. said the following:

> [58] I respectfully agree with what Macfarlane J.A. has said, but in this case the situation of the Company has stabilized as its principal assets have been sold. The battle for the survival of the Company is over, at least for the time being. What remains is merely to determine priorities, and the proper distribution of the trust fund which was established with the approval of the Court primarily for the protection of the Directors.

Although McEachern C.J.B.C. was speaking in dissent when making these comments, an appeal to the Supreme Court of Canada was allowed, [1993] 2 S.C.R. 448, and the Court agreed generally with his dissenting reasons.

[15] The respondents submit that there should be the same test for leave to appeal from all orders made in *CCAA* proceedings. The respondents maintain that the test has been consistently applied throughout Canada and that a different test in some circumstances would lead to the result that there would be many more leave applications to appeal orders made in *CCAA* proceedings and appellate courts would be required to analyze the underlying *CCAA* proceeding in every leave application.

[16] The requirement for leave to appeal from an order made in *CCAA* proceedings is found in the *CCAA* itself (section 13), as opposed to the provincial or territorial statutes governing the appellate courts in Canada. This suggests that Parliament recognized that appeals as of right from orders made in *CCAA* proceedings could have an adverse effect on the efforts of debtor companies to reorganize their financial affairs pursuant to the Act and that appeals in *CCAA*

proceedings should be limited: see *Re Algoma Steel Inc.* (2001), 147 O.A.C. 291, 25 C.B.R. (4th) 194 at para. 8.

[17] However, it does not follow from the fact that the statute itself is the source of the requirement for leave that the test or standard applicable to applications for leave to appeal orders made in *CCAA* proceedings is different from the test or standard for other leave applications. It is my view that the same test applicable to all other leave applications should be utilized when considering an application for leave to appeal from a *CCAA* order. In British Columbia, the test involves a consideration of the following factors:

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

(b) whether the point raised is of significance to the action itself;

(c) whether the appeal is *prima facie* meritorious or, on the other hand, whether it is frivolous; and

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

The authority most frequently cited in British Columbia in this regard is *Power Consolidated (China) Pulp Inc. v. British Columbia Resources Investment Corp.* (1988), 19 C.P.C. (3d) 396 (B.C.C.A. Chambers).

[18] This is not to suggest that I disagree with the above comments of Macfarlane J.A. in *Pacific National Lease*. To the contrary, I agree with his comments, but I do not believe that he established a special test for *CCAA* orders. Rather, his comments are a product of the application of the usual standard used on leave applications to orders that are typically made in *CCAA* proceedings and a

recognition of the special position of the supervising judge in *CCAA* proceedings. In particular, a consideration of the third and fourth of the above factors will result in leave to appeal from typical *CCAA* orders being given sparingly.

[19] The third of the above factors involves a consideration of the merits of the appeal. In non-*CCAA* proceedings, a justice will be reluctant to grant leave where the order constitutes an exercise of discretion by the judge because the grounds for interfering with an exercise of discretion are limited: see *Silver Standard Resources Inc. v. Joint Stock Co. Geolog*, [1998] B.C.J. No. 2298 (C.A. Chambers). Most orders made in *CCAA* proceedings are discretionary in nature, and the normal reluctance to grant leave to appeal is heightened for two reasons alluded to in the comments of Macfarlane J.A.

[20] First, one of the principal functions of the judge supervising the *CCAA* proceeding is to attempt to balance the interests of the various stakeholders during the reorganization process, and it will often be inappropriate to consider an exercise of discretion by the supervising judge in isolation of other exercises of discretion by the judge in endeavouring to balance the various interests. Secondly, *CCAA* proceedings are dynamic in nature and the supervising judge has intimate knowledge of the reorganization process. The nature of the proceedings often requires the supervising judge to make quick decisions in complicated circumstances. These considerations are reflected in the comment made by Madam Justice Newbury in *New Skeena Forest Products* that “[a]ppellate courts also accord a high degree of deference to decisions made by Chambers judges in CCAA matters

and will not exercise their own discretion in place of that already exercised by the court below" (para. 20).

[21] The fourth of the above factors relates to the detrimental effect of an appeal on the underlying action. In most non-*CCAA* cases, the events giving rise to the underlying action have already occurred, and a consideration of this factor involves the prejudice to one of the parties if the trial is adjourned or if the action cannot otherwise move forward pending the determination of the appeal. *CCAA* proceedings are entirely different because events are unfolding as the proceeding moves forward and the situation is constantly changing – some refer to *CCAA* proceedings as "real-time" litigation.

[22] The fundamental purpose of *CCAA* proceedings is to enable a qualifying company in financial difficulty to attempt to reorganize its affairs by proposing a plan of arrangement to its creditors. The delay caused by an appeal may jeopardize these efforts. The delay may also have the effect of upsetting the balance between competing stakeholders that the supervisory judge has endeavoured to achieve.

[23] Similar views were expressed by Mr. Justice O'Brien in *Re Calpine Canada Energy Ltd.*, 2007 ABCA 266, 35 C.B.R. (5th) 27 (Chambers):

> [13] This Court has repeatedly stated, for example in *Liberty Oil & Gas Ltd., Re*, 2003 ABCA 158, 44 C.B.R. (4th) 96 (Alta. C.A.), at paras. 15-16, that the test for leave under the CCAA involves a single criterion that there must be serious and arguable grounds that are of real and significant interest to the parties. The four factors used to assess whether this criterion is present are:
>
> (1) Whether the point on appeal is of significance to the practice;

(2) Whether the point raised is of significance to the action itself;

(3) Whether the appeal is *prima facie* meritorious or, on the other hand, whether it is frivolous; and

(4) Whether the appeal will unduly hinder the progress of the action.

> [14] In assessing these factors, consideration should also be given to the applicable standard of review: *Canadian Airlines Corp., Re*, 2000 ABCA 149, 261 A.R. 120 (Alta. C.A. [In Chambers]). Having regard to the commercial nature of the proceedings which often require quick decisions, and to the intimate knowledge acquired by a supervising judge in overseeing a CCAA proceedings, appellate courts have expressed a reluctance to interfere, except in clear cases: *Smoky River Coal Ltd., Re*, 1999 ABCA 179, 237 A.R. 326 (Alta. C.A.) at para. 61.

Other decisions on leave applications where the usual factors were expressly considered include *Re Blue Range Resource Corp*., *Re Canadian Airlines Corporation* and *Re Fantom Technologies Inc*., each of which quoted the above comments of Macfarlane J.A. in *Pacific National Lease*.

[24] As a result of these considerations, the application of the normal standard for granting leave will almost always lead to a denial of leave to appeal from a discretionary order made in an ongoing *CCAA* proceeding. However, not all of the above considerations will be applicable to some orders made in *CCAA* proceedings. Thus, in *Westar Mining*, McEachern C.J.B.C., while generally agreeing with the comments made in *Pacific National Lease*, believed that the considerations mentioned by Macfarlane J.A. were not applicable in that case because the *CCAA* proceeding had effectively come to an end with the sale of the principal assets of the debtor company. Madam Justice Newbury made a similar point in *New Skeena*

Forest Products at para. 25 (which was a hearing of an appeal, not a leave application), although she found it unnecessary to decide the appeal on the point.

[25] The chambers judge did give consideration to the usual factors in the present case, but none of the considerations I have mentioned were applicable to the two orders. The *CCAA* judge was deciding questions of law in each case and was not exercising his discretion. The knowledge gained by the *CCAA* judge during the reorganization process was not relevant to his decisions, which involved events that occurred prior to the commencement of the *CCAA* proceeding. The plan of arrangement made by Edgewater has been implemented, and appeals from the two orders will not delay or otherwise jeopardize the reorganization process. There is no prospect that the outcome of the appeals will affect the continuing viability of Edgewater; indeed, although the disputes involve Edgewater in name, the parties with a monetary interest in the disputes are the Landlord and the respondents, who are the former shareholders of Edgewater. In the circumstances, there was no reason to give substantial deference to the *CCAA* judge.

[26] I am not saying that the considerations I have mentioned will never apply to a determination of claims pursuant to a claims process in a *CCAA* proceeding. For example, a plan of arrangement may only be successful if the total amount of claims against the debtor company is less than a specified sum. An appeal from an order quantifying a claim of a creditor would delay the *CCAA* proceeding and could jeopardize the company's reorganization.

[27] I have no doubt that there will be other circumstances in which the claims process will have an impact on the reorganization process. Even if the claims process will not jeopardize the reorganization process, some of the other considerations I have mentioned may apply to the determination of the claims. For example, the outcome of an appeal may affect the amounts received by other creditors and may delay the full implementation of the plan of arrangement. The fact that section 12 of the *CCAA* mandates the determination of claims to be by way of a summary application to the court illustrates that Parliament recognized that the claims process will often be sensitive to time constraints.

[28] There is one other point about the order relating to the utilities dispute that differentiates it from the typical *CCAA* order. The dispute did not involve a claim against Edgewater but, rather, it was a claim by Edgewater to have the Landlord refund utilities payments made by it. Such a claim would normally be pursued in a normal lawsuit and, if it was determined on a summary application (i.e., a Rule 18A application), there would have be an appeal as of right, and leave would not have been required. It was only because the claim was raised as a setoff to the Landlord's property tax claim that it came to be determined in the *CCAA* proceeding.

[29] I now turn to a consideration of the usual factors in relation to the order dealing with the property tax dispute:

1. As stated by the chambers judge, the point in issue is of no significance to the practice.

2. As conceded by the respondents on the application before the chambers judge, the point in issue is of significance to the action itself (in the sense that it finally determines the Landlord's claim).

3. The order did not involve an exercise of discretion by the *CCAA* judge. The chambers judge was mistaken in his belief that the *CCAA* judge held that clause 3.05 was clear and unambiguous; the first issue considered by the *CCAA* judge was whether the clause was sufficiently clear as to make it enforceable. In my opinion, the appeal is not frivolous.

4. The appeal will not unduly hinder the progress of the action because Edgewater's plan of arrangement has been implemented and the *CCAA* proceeding has come to a conclusion.

On a consideration of all of the factors, it is my view that leave to appeal the order dealing with the property tax dispute should be given.

[30] A consideration of the usual factors in relation to the order dealing with the utilities dispute leads to the same observations with one exception. As conceded by the Landlord on this application, the prospects of success of an appeal do not appear to be as high as the prospects in an appeal from the other order. However, I am not persuaded that the appeal has so little merit that it amounts to a frivolous appeal. If the dispute had not become intertwined with the property tax dispute as a result of Edgewater's claim of a right of setoff, the dispute would not have been determined in the *CCAA* proceeding, and the Landlord would have had an appeal as

of right. In all the circumstances, it is my view that leave to appeal from the order dealing with the utilities dispute should also be given.

Conclusion

[31] I would discharge the order made by the chambers judge dismissing the leave application, and I would grant the Landlord leave to appeal from both of the orders.

"The Honourable Mr. Justice Tysoe"

I agree:

"The Honourable Madam Justice Levine"

I agree:

"The Honourable Madam Justice D. Smith"

CITATION: Canrock Ventures v. Ambercore Software, 2011 ONSC 2308
COURT FILE NO.: CV-10-8985-00CL
DATE: 20110413

SUPERIOR COURT OF JUSTICE – ONTARIO

COMMERCIAL LIST

RE: Canrock Ventures LLC, Applicant

AND:

Ambercore Software Inc. and Terrapoint Canada (2008) Inc., Respondents

BEFORE: D. M. Brown J.

COUNSEL: F. Spizzirri and M. Nowina, for the Shimmerman Penn Title & Associates Inc., Receiver and Manager of Ambercore Software Inc. and Terrapoint Canada (2008) Inc.

P. Shea, for the Canrock Ventures LLC

J. Spiegelman, for Quorum Investment Pool Limited Partnership

M. Green, for Quorum Oil & Gas Technology Fund Limited

R. Brosseau and A. Rush, for GeoDigital International

HEARD: April 11, 2011

REASONS FOR DECISION

I. Receiver's motion: approval of sale

[1] Shimmerman Penn Title & Associates Inc., in its capacity as receiver and manager of Ambercore Software Inc. and Terrapoint Canada (2008) Inc., seeks approval of the sale of the assets of Terrapoint to GeoDigital International Inc., a related vesting order, approval of an associated technology licence agreement, approval of a Master Services Agreement, approval of its Interim Report dated March 14, 2011 and Third Report dated April 3, 2011, as well as orders sealing the sale agreement and certain valuations.

[2] For the reasons set out below, I grant the orders sought.

II. Events leading up to the motion before Newbould J.

[3] This past February the Receiver sought court approval for the sale of the assets of Ambercore and Terrapoint. Newbould J. refused to approve the sale: 2011 ONSC 1138. In his February 18, 2011 Reasons Newbould J. described the business activities of Ambercore and Terrapoint, as well as the pre-receivership borrowings of those companies:

> [3] Ambercore is a development company that provides spatial data solutions for the energy, mining and natural resources sector. It collects high resolution light detection and ranging ("LiDAR ") spatial data. Ambercore has patented software algorithms and its technology, according to the affidavit of Mr. Goffin filed on behalf of Quorum, is a robust, efficient and scalable design for extremely large data applications. This evidence has not been challenged and, indeed, very little of the nature of the business of Ambercore or of Terrapoint has been included in the material filed by the receiver. The assets of Ambercore are fixed assets, largely comprised of computer technology, intellectual property comprised of patents, proprietary software applications, trademarks and processes, supply contracts under which Ambercore has various software maintenance supply contracts in software licensing agreements, and an investment in shares of Terrapoint USA Inc., a wholly-owned subsidiary of Ambercore acquired in 2008.
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> [4] Terrapoint is a provider of cost-effective, high value on time LiDAR and related geo-spatial technology solutions. Its assets consist of fixed assets, being a fleet of LiDAR systems, intellectual property and contracts in progress. There are two large contracts in process, one being for Ontario Power Generation originally valued at $1.57 million with remaining billings of approximately $667,000 and the second being for Nalcor originally valued at $1 million with remaining billings of approximately $275,000.
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> [5] Ambercore and Terrapoint borrowed from RBC which held security over all of their assets. They had a revolving demand facility of $1.5 million, a $250,000 demand facility by way of letters of guarantee and other minimal loans. On August 23, 2010 RBC assigned its security to Canrock and on the same day Canrock, Ambercore and Terrapoint signed a loan amending agreement under which Canrock became the lender[1]. While there is no evidence in the record, Mr. Shea advises that Canrock is a U.S. based financing company that looks for distressed debt situations. On November 18, 2010 Canrock applied on an ex parte basis and obtained an order appointing the receiver. At the date of the receivership Canrock was in a first secured position owed $1.745 million. Since then Canrock/GeoDigital has advanced approximately $344,000 to the receiver on receiver certificates secured by the assets of Ambercore and Terrapoint.
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> [6] Quorum is an indirect and direct secured creditor of Ambercore. It advanced $3.15 million to an Alberta numbered corporation which advanced that amount and more to Ambercore under debenture security. The Alberta numbered corporation has a second secured position against Ambercore and Terrapoint for U.S. $5.65 million. Quorum

advanced a further $2.335 million to Ambercore and holds a third secured position for that amount against Ambercore and Terrapoint.

The Receiver stated, in its Third Report, that it is important to recall that until 2008 Ambercore and Terrapoint were unrelated companies. That year Ambercore acquired Terrapoint and its US affiliate, Terrapoint USA, Inc.

[4] The Receiver was appointed receiver and manager of all the assets, properties and undertakings of Ambercore and Terrapoint by order dated November 18, 2010. The results of the initial efforts of the Receiver to sell the assets of the Debtors were described by Newbould J. as follows:

> [11] The receiver received seven expressions of interest, all but one of which were in respect of specific assets. Only one en bloc offer was received, that being from Canrock/GeoDigital. An asset purchase agreement was negotiated and signed January 14, 2011.

[5] On the motion before Newbould J. the Receiver sought approval of a sale agreement with Canrock/GeoDigital. The proposed sale agreement was in the nature of a credit bid. Newbould J. described the proposed agreement:

> [12] Salient features of the APA include:
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> - the en bloc purchase of all Ambercore and Terrapoint assets
> - a purchase price of $1.7 million, to be paid by the partial forgiveness of $1.7 million of the debt owed to Canrock
> - there is no allocation of the price between Ambercore and Terrapoint
> - the purchaser is to assume the receiver's customer and supplier obligations with respect to the completion of customer contracts.
> - while the Ambercore intellectual property is sold under the APA, there is a provision in section 1.03 for the marketing of the Ambercore intellectual property either by Canrock/GeoDigital or, at the option of the receiver, by the receiver.
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> [13] Section 1.03 of the APA dealing with the Ambercore IP provides that the Ambercore IP sold to the purchaser will, following the completion of the transaction, be marketed under either of two arrangements. While the language of section 1.03 is not entirely clear, it would appear that the alternative methods of marketing the Ambercore IP after the completion of the sale to Canrock/GeoDigital are as follows:
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> (a) Canrock will market the Ambercore IP for 30 days from the time of closing on terms satisfactory to the receiver, which terms shall include the

provision of a non-exclusive, worldwide, perpetual, irrevocable, royalty-free, fully paid up licence to Canrock/GeoDiigital to use or modify the IP for the purpose of integrating it into any product or service offered by Canrock/GeoDigital, provided that such product or service containing Ambercore IP is not made available principally for the purpose of providing the Ambercore IP. The first $450,000 of sale proceeds plus marketing expenses will be paid to Canrock and the balance, if any, to the receiver. Or,

(b) The receiver may market the Ambercore IP for resale for a maximum period of 75 days after closing provided that the receiver and Canrock receive payment from a third-party in advance for all reasonable expenses with respect to the marketing and preservation of the Ambercore IP. Any sale of the Ambercore IP shall include a term that a copy of the source code shall be retained by Canrock/GeoDigital and the purchaser of the Ambercore IP shall enter into a third-party source code agreement with a depository to hold the software to preserve the underlying code base and permit Canrock/GeoDigital full access to that source code.

[6] One secured creditor, Quorum Oil and Gas Technology Fund Limited ("QOGT"), opposed the proposed sale agreement. In his February Reasons Newbould J. voiced numerous concerns about the proposed sale, including the following:

> [14] There has been no evidence provided to the Court, even on a confidential basis, of a valuation or indication of value of most of the assets sold. The reason is that no such valuations were obtained by the receiver, save for a forced liquidation value of the Ambercore office and equipment assets. Two assets stand out.
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> [15] One of the assets sold were the shares of Terrapoint USA. The receiver obtained no valuation or opinion regarding their value and there has been no analysis of those assets provided by the receiver. They may have little or great value, but that is not known to the Court.
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> [16] The appraisal of the Ambercore office and equipment at the end of the report stated that the Ambercore IP had no value, stating that the IP contained little to no value due to licence agreements, proprietary and transferable issues. The report stated that the Ambercore IP would only have value on a company going forward scenario, and no value on that basis was provided. What the qualifications of the appraiser were to be dealing with the sophisticated software in question were not provided. Essentially, therefore, the receiver obtained no valuation of the Ambercore IP, a valuation which KPMG, the receiver of the Alberta numbered company, urged the receiver to obtain.
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> [17] The affidavit evidence of Mr. Goffin filed on behalf of Quorum, on which there was no cross-examination, stated that he had discussions with Mr. Jim Estill, a partner at

Canrock working with Ambercore to sell the Ambercore business, and was led to believe by Mr. Estill that the Ambercore IP was worth many millions of dollars. Mr. Estill told him that the Ambercore IP was a potential "lottery ticket" potentially worth many millions of dollars.

[18] This is a credit bid in which no cash is being paid to the receiver. Without an indication of the value of the assets that have been sold, is not possible to consider whether the payment by way of a reduction of debt is satisfactory. Without this information, what is taking place is essentially a foreclosure with the prospect that any upside may well be all to the benefit of Canrock/GeoDigital. There is no basis for a court to conclude that a sale in the circumstances should be approved.

[19] There is also a concern raised, and not without merit, that the time provided for the marketing and submission of bids for the Ambercore assets, particularly the Ambercore IP, was too short. The receiver noted in his first report that there was less urgency for the Ambercore assets to be sold than for the Terrapoint assets, yet he used the extremely short time frame for the sale of assets of both companies. There appears to be little justification for this, which is compounded by the fact that the receiver had no advice as to the value of the Ambercore IP. Moreover, there was only one ad placed in the Globe and Mail, with no description of the Ambercore IP other than “Intellectual Property”, and no discussion by the receiver whether that single ad could be expected to reach persons who might be interested in it. I am not persuaded that there was sufficient exposure of the Ambercore assets, particularly the Ambercore IP, to the market place. The belated carve out of the Ambercore IP on section 1.03 of the APA is a recognition of this concern by the receiver.

[20] The carve out of the Ambercore IP in section 1.03 of the APA gives rise to some fundamental concerns. The first is that it is difficult to understand why it would be in the interests of Canrock/GeoDigital to sell the IP. Mr. Shea asserted that the IP was critical to the Terrapoint business, without which his client would not be interested in purchasing Terrapoint. I have severe doubts that Canrock/GeoDigital would be a motivated seller. In argument, Mr. Shea recognized the concern and said that his client would waive its right to attempt to sell the Ambercore IP and instead let the receiver do it. The fact that the receiver agreed to this term in the first place gives some concern as to the independence of the receiver from Canrock. I will have more to say about that.

…

[23] In light of the concerns expressed by KPMG regarding the method of selling the Ambercore IP proposed by the receiver and its urging to obtain a valuation, one would have expected the receiver to have given far more consideration as to what should be done with the Ambercore IP. I have no confidence that this unusual method of marketing the Ambercore IP by the receiver after the closing of the sale of it to Canrock/GeoDigital will produce a reasonable bid.

> [24] There is no indication in the material filed that discusses the relationship between Canrock and GeoDigital or what GeoDigital is paying for the assets being acquired. Mr. Shea advised the court that the two companies are separate and that GeoDigital has paid Canrock $600,000. He also stated that they had put a value of $450,000 on the Ambercore IP, although on what basis that was done is unknown.

[7] In his Reasons Newbould J. also expressed concerns about the amount of advocacy contained in the Receiver's Second Report seeking approval of the sale, as well as the representation of the Receiver by the counsel who had acted for Canrock on the application to appoint a receiver. Newbould J. concluded:

> [32] In my view the receiver should retain new counsel and any further material provided by the receiver be done in a manner that will give comfort that the receiver has given due consideration to all important aspects of the receivership and is acting as a neutral, non- interested court officer providing balanced reports.
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> [33] The principles to be considered by a court in deciding to approve a sale recommended by a receiver are well known and set out in *Royal Bank of Canada v. Soundair Corp.* 1991 CanLII 2727 (ON C.A.), (1991), 4 O.R. (3d) 1 (C.A.). Regrettably, I have come to the conclusion that the tests set out in *Soundair* have not been met. In all the circumstances, the motion to approve APA is dismissed.

III. Assets, liabilities and status of Ambercore and Terrapoint

[8] In its Third Report the Receiver described the current state of the affairs of Ambercore and Terrapoint:

(i) The Receiver retained new counsel following the release of the decision of Newbould J.;

(ii) Ambercore has conducted little in the way of new business. Since its appointment the Receiver has only issued one invoice, for US $16,000, for work performed by Ambercore. The company's main assets are the intellectual property it owns. The Ambercore Software has been used, without licence, by Terrapoint to carry on its business;

(iii) Ambercore owns Ambercore Ukraine, which develops software for its parent. Ambercore Ukraine presently is developing software under the name of "Project Cloud". The Receiver has not taken any steps to control the operations of Ambercore Ukraine. That company has 8 employees, and uses 14 independent consultants to develop software. Its monthly payroll totals US $25,000. Neither Ambercore nor Ambercore Ukraine have any revenues. To March 20, 2011, Ambercore had advanced $191,174 to fund Ambercore Ukraine, with a significant portion of those funds coming from advances by Canrock to the Receiver;

(iv) Seven patents exist relating to software developed by Ambercore Ukraine on behalf of Ambercore. Four are provisional; legal disputes may surround some of the provisional patents;

(v) As at March 20, 2011, Terrapoint held cash of $32,207 and its books and records reflected receivables totaling $271,847. The Receiver expected to invoice a further $200,000 to $300,000 during the balance of March and early April, 2011. The Receiver has collected most of the receivables which were on the books of Terrapoint at the time of its appointment, and the Receiver noted that its ability to do so was connected to Terrapoint's completion of work-in-progress under existing contracts. As of March 20, 2011 Terrapoint's work-in-progress amounted to $623,740. It has five remaining open contracts, the largest being with electricity generation utilities. Most of the work remaining under those contracts will be completed this spring. Under the receivership Terrapoint has not entered into any new contracts. The fixed assets of Terrapoint consist largely of LiDAR systems with a book value of $986,248;

(vi) The Receiver entered into a Master Services Agreement with GeoDigital on March 4, 2011 under which it subcontracted the use of certain Terrapoint equipment to that company. That agreement has generated some revenue for Terrapoint.

[9] On February 21, 2011, Canrock advised the Receiver that it was no longer prepared to advance funds for the operation of Ambercore Ukraine. Neither the receiver of 148 Alberta nor QOGT have offered to fund Ambercore. The Appointment Order of November 18, 2010 limited the Receiver's power to borrow to $350,000.00. To date the Receiver has borrowed up to that permitted limited; it has no further power to borrow without leave of the Court. In its Third Report the Receiver noted the lack of funds in the receivership, the unwillingness of any secured creditor to advance further funds, and the limit it had reached on its borrowing power.

[10] Although the source code for Ambercore's Intellectual Property is maintained in the Ukraine, the Receiver has possession of a baseline copy of the source code and has verified the accuracy of the copy in its hands.

[11] There are three secured creditors of Ambercore and Terrapoint – Canrock, 1482747 Alberta Inc., and QOGT. Funds advanced by 148 Alberta came from Quorum Investment Pool Limited Partnership ("QIP) in the amount of $2.5 million and QOGT in the amount of $3.15 million. Although on his cross-examination Mr. Michael Goffin, a representative of QOGT, refused to answer questions regarding the relative priority of the investments of QIP and QOGT within 148 Alberta, public filings indicate that QIP enjoys priority.

[12] In its Third Report the Receiver summarized the administrative and secured claims against Ambercore and Terrapoint as of April 3, 2011: (i) Receiver's administrative fees and disbursements: $458,618; (ii) Receiver's certificates: Canrock and GeoDigital: $343,508; (iii) CRA deemed trust: $15,695; (iv) Canrock secured claim: $1,745,749; (v) 148 Alberta: $5,650,000; (v) QOGT: $1,200,000, for a total of $8,595,749.

[13] The Receiver has obtained an independent legal opinion that Canrock has a valid, first-ranking security interest against both Ambercore and Terrapoint.

[14] As of the date of the receivership, Terrapoint has unsecured debts of approximately $1.165 million and Ambercore, $164,000.

IV. Efforts of Receiver to sell assets since the decision of Newbould J.

A. Decision not to conduct a new sale process

[15] In its Third Report the Receiver stated that it considered its options for sale in light of the decision of Newbould J. and concluded that the impediments to running a new sales process of any length involving Terrapoint's assets outweighed any possible benefits for several reasons: (i) by the end of March there would be no significant work for Terrapoint's employees other than work under a subcontracting agreement with GeoDigitial and residual work under the five contracts; (ii) as a result there will be a delay in Terrapoint generating receivables; (iii) there is no money to support additional due diligence by prospective purchasers; (iv) no additional interested purchasers have come forward; (v) Terrapoint is likely to start losing employees; (vi) the Receiver does not have access to additional financing; and (vii) purchasers must be Controlled Goods registrants, a process which requires some time for an unregistered interested party to complete.

B. Valuation of Ambercore Intellectual Property

[16] To address the concern expressed by Newbould J. in his reasons about the lack of valuations for the Intellectual Property, the Receiver sought out a valuator. Due to cost constraints, the Receiver elected to secure a valuation letter of opinion, in lieu of a more expensive appraisal. The Receiver retained Astrina Capital LLC, a company with experience in commercializing technology, to provide a valuation letter of opinion. Astrina prepared a valuation of the Ambercore Intellectual Property dated March 27, 2011, as well as a letter opinion dated April 4, 2011commenting on the potential impairment of the licencing value of the Ambercore Intellectual Property caused by the Receiver's proposed transaction with GeoDigital.

[17] The Receiver sought orders sealing both letters of opinion from Astrina. The Receiver was prepared to provide copies of the valuation to QOGT if it entered into a non-disclosure agreement and confirmed that it was not a potential purchaser of the Ambercore Intellectual Property. Those requests were reasonable ones in order to protect the integrity of the sale process. QOGT was not prepared to give an assurance that it would not be a purchaser; consequently, it has not received copies of the valuations. Having considered the principles set out in *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522, I conclude that it is appropriate to grant the requested sealing orders for the Astrina valuations in order to protect the integrity of the sale process, and I grant the sealing order sought by the Receiver in paragraph 6 of its Notice of Motion.

C. Further discussions with GeoDigital

[18] GeoDigital is the largest provider of corridor aerial LiDAR mapping in North America. It had joined Canrock on the proposed purchase which Newbould J. did not approve. After the release of the Court's decision, the Receiver inquired of GeoDigital whether it was interested in acquiring Terrapoint's assets. GeoDigital submitted a draft offer to the Receiver for Terrapoint's assets, leading to the execution of a Purchase and Sale Agreement dated April 1, 2011 between GeoDigital and the Receiver (the "Purchase Agreement").

[19] The Receiver provided GeoDigital's Offer to certain parties, including QOGT, and provided a redacted version of the Purchase Agreement to QOGT. The Receiver seeks a sealing order for the Purchase Agreement.

V. Key elements of proposed sale of Terrapoint's assets

[20] Under the Purchase Agreement GeoDigital would acquire all of the assets and undertaking of Terrapoint as vested in the Receiver, other than accounts receivable and cash. The purchase price is to be satisfied by payment of a deposit, with the balance to be paid on closing. The Purchase Agreement allocates the purchase price amongst several categories of assets, including an allocation for a Technology License Agreement for Ambercore IP. Execution of the Technology License Agreement is a condition of closing in favour of the purchaser.

[21] Under the proposed Technology License Agreement, the Receiver, in its capacity as receiver of Ambercore, would grant to GeoDigital a non-exclusive, world-wide, perpetual, irrevocable, royalty-free, fully paid-up licence to use and integrate into any of its products and services the Ambercore IP. GeoDigital would be permitted to sublicence the Ambercore IP as part of its own services or products, but only in the stipulated "Field of Use" and provided any product containing the Ambercore IP was not made available for the principal purpose of offering for sale the Ambercore IP. The definition of "Field of Use" in the Technology Licence Agreement is intended to restrict the use of the Ambercore IP to the scope of services and products falling within Terrapoint's business. All parties recognize that the operation of Terrapoint's business depends upon access to the Ambercore IP.

[22] The Technology License Agreement includes within the ambit of licensed software both the object and source code for the Ambercore IP, so that on closing a copy of the source code would be delivered to GeoDigital.

[23] Finally, the Technology License Agreement provides that GeoDigital will own any improvements which it makes or creates to the Ambercore IP and GeoDigital may use such improvements in the defined Field of Use.

VI. Positions of the parties

[24] Canrock supports approval of the proposed Purchase Agreement and its associated Technology License Agreement. QIP submitted that the proposed transaction appears likely to be the best available in the circumstances.

[25] QOGT voiced several concerns about the proposed transaction: (i) the Receiver has not marketed the assets of Terrrapoint and Ambercore as it should have; (ii) the assets of Ambercore and Terrapoint should be sold *en bloc*, not separately; (iii) the source code for the Ambercore IP should not be delivered to GeoDigital as part of the sale of Terrapoint's assets; and, (iv) any licence to GeoDigital to use the Ambercore IP should be temporary in nature, permitting any eventual purchaser of Ambercore's assets to re-negotiate the licence. QOGT submitted that it would support the proposed sale to GeoDigital, but only on the basis that source code was not provided to GeoDigital but, instead, be placed in the hands of an escrow agent. QOGT made no suggestions about appropriate terms of escrow.

[26] Counsel for GeoDigital indicated that her client was prepared to close the proposed transaction as quickly as possible. She also stated that GeoDigital would not purchase Terrapoint's assets unless it received a copy of the source code for the Ambercore IP as part of the Technology License Agreement.

VII. Governing principles

[27] The principles to be considered by a court in deciding whether to approve a sale recommended by a receiver are set out in *Royal Bank of Canada v. Soundair Corp.*[1] I accept as an accurate summary of the *Soundair* principles the following passage from Kevin McElcheran's work, *Commercial Insolvency in Canada, Second Edition*:

> The Ontario Court of Appeal…listed the following standards for the court's review of a receiver conducting a court-supervised sale process:
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> (1) It should consider whether the receiver has made a sufficient effort to get the best price and has not acted improvidently.
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> (2) It should consider the interest of all parties.
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> (3) It should consider the efficacy and integrity of the process by which offers are obtained.

1 (1991), 4 O.R. (3d) 1 (C.A.).

(4) It should consider whether there has been unfairness in the working out of the process.[2]

VIII. Analysis

[28] In his February Reasons Newbould J. outlined the positions of the parties at that time regarding the sale process for Terrapoint:

> [8] With respect to Terrapoint, the receiver stated that he was of the opinion that the most significant recoveries would come from Terrapoint's accounts receivable and work in process and that while a fully advertised, open and transparent sales process of Terrapoint's assets might seem preferable, it would be best if the contracts were sold quickly. Quorum does not take strong issue with this process so far as Terrapoint is concerned. Mr. Wener of KPMG, the receiver of the Alberta numbered company, wrote to the receiver concurring with the need to act quickly to realize maximum value of the Terrapoint assets.

[29] Newbould J. refused to approve the Canrock/GeoDigital offer to purchase all the assets of Ambercore and Terrapoint. QOGT now states that the Receiver should sell those assets *en bloc*, not separately. The evidence reveals that such an approach is not realistic in current circumstances. As a result of its marketing efforts in late 2010 the Receiver obtained only one expression of interest for an *en bloc* purchase, and that was the credit bid put forward by Canrock/GeoDigital which the Court refused to approve. Although Mr. Michael Goffin, on behalf of QOGT, deposed that he had indicated to the Receiver the possible interest of two other companies in the assets of Ambercore and Terrapoint, he was short on details and certainly did not adduce evidence to suggest any degree of serious interest by either of the two companies.

[30] I must also give weight to the financial reality facing both companies as described by the Receiver – they lack the cash to fund an extensive second round of marketing, the Receiver has exhausted its court-approved borrowing limit, no secured creditor is prepared to advance further funds to the Receiver, and Terrapoint is running out of work for its employees.

[31] Two other points are of significance regarding the sale process. First, following the release of the decision of Newbould J. the Receiver obtained the Astrina letters of opinion regarding the value of the Ambercore IP and the potential impact the Technology License Agreement might have on the sale value of the Ambercore IP. I have reviewed the Astrina letters of opinion, as well as the RDAS December, 2010 appraisal of certain assets of Ambercore and Terrapoint valued on a forced liquidation basis.

[32] Second, the Receiver made available, to those prepared to execute non-disclosure agreements, the GeoDigital offer to purchase, a redacted Purchase Agreement, and the

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2 Kevin McElcheran, *Commercial Insolvency in Canada, Second Edition* (Toronto: LexisNexis, 2011), p.215.

Technology License Agreement. In its Third Report the Receiver described the consultations it had undertaken with secured parties for the proposed sale to GeoDigital.

[33] I am satisfied that since the release of the Reasons of Newbould J., the Receiver has used sufficient efforts, appropriate in the circumstances, to pursue the sale of the assets. Some degree of urgency surrounded the need to secure the sale of Terrapoint while still a going concern, so the Receiver's decision to pursue the sale of Terrapoint on its own was reasonable. Further, it is apparent that the Receiver has tried to take into account the interests of all parties, giving due recognition to the overall amount of liabilities attaching to both companies and the priorities amongst the secured creditors, and it has attempted to consult with the secured parties to ensure a fair sales process.

[34] As to the proposed transaction, I am satisfied that the price in the Purchase Agreement, together with the allocation of the purchase price, when measured against the valuations obtained by the Receiver, is reasonable in the circumstances.

[35] Regarding the terms of the proposed sale, QOGT's primary objection was that the Technology License Agreement should not provide GeoDigital with a copy of the source code for the Ambercore IP, but only a copy of the object code. In support of its position QOGT filed affidavits from Robert Percival, a lawyer at Ogilvy Renault in Toronto who practises in the Technology and Outsourcing area, and from Michael Rebeiro, a solicitor in the London, U.K., office of Norton Rose LLP who specializes in information technology law. Both affidavits were filed at the last possible moment – one during the hearing – affording the Receiver and others no opportunity to test the opinions advanced by both lawyers. Moreover, the affidavits, containing as they did expert opinions, did not comply with the requirements of Rule 53.03(2.1) of the *Rules of Civil Procedure* regarding the content of expert reports. That said, the Receiver did not object to their admission, submitting that both affidavits actually supported the approach taken by the Receiver in the Technology License Agreement.

[36] Mr. Rebeiro deposed that "in my experience, software owners will not in the normal course of business provide a copy of the source code to a licensee". Mr. Percival stated: "In my experience it is the general practice in the software industry that the end user licensees do not in the normal course of the licensing transaction generally receive a copy of the source code, since the source code is considered to be the confidential trade secret."

[37] In its Third Report the Receiver addressed the issue of delivering a copy of the source code to GeoDigital under the Technology License Agreement:

> 112. At this time, it is not clear what will become of Ambercore or its assets. To ensure that GeoDigital is able to maintain the software necessary to carry on the Terrapoint business that is being licenced from Ambercore, GeoDigital, in addition to a licence to use the Ambercore software, will need to have access to a "baseline" or reference code for the software.
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> …

> 114. GeoDigital maintains that unless the development of LiDAR IQ and related software continues as developments and improvements are generally produced in the field of use, the viability of the LiDAR data acquisition and processing business, Terrapoint's business, will fail due to competitive pressures.
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> …
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> 119. The source code therefore is required to i) maintain the software's functionality; and ii) to further develop the LiDAR IQ software and to complete development of other software under development, particularly given that Ambercore is not required to maintain or upgrade the software under licence nor may it have that ability going forward.

[38] Unfortunately, neither Mr. Percival nor Mr. Rebeiro offered any opinion on this portion of the Receiver's Third Report for it appears from their affidavits that they were not given a copy of the Report to review. Accordingly, the general opinions they expressed in their affidavits provide little assistance to me in the specific circumstances of the proposed sale. Notwithstanding this fundamental limitation on the utility of their opinions, Mr. Rebeiro did offer some views about what might happen if a transaction fell outside of the ordinary course of business. He deposed:

> At most, a software owner may, if commercial circumstances dictate, sometimes be prepared to agree with its licensee that it will put a copy of the source code into 'escrow' with an escrow agent who keeps the source code stored in a confidential depository. These arrangements usually work whereby the software owner, the licensee and the escrow agent enter into any agreement where, *in certain agreed circumstances such as the material failure of the software owner to provide maintenance and support in accordance with an agreed support and maintenance contract, the licensee, needing access to the source code, can apply to the escrow agent in pre-agreed circumstances to obtain access to the source code to enable it to make the required developments/upgrades to the software itself*. (my emphasis)

[39] The circumstances in which Mr. Rebeiro opined that it would be reasonable to provide the licensee with access to the source code strike me as precisely those in which Terrapoint now finds itself – the provider of its software, Ambercore, may not be able to repair or maintain the Ambercore IP's functionality on a go-forward basis.

[40] Two final comments are necessary. First, I do not accept QOGT's submission that any licence to GeoDigital to use the Ambercore IP should be temporary in nature, permitting any eventual purchaser of Ambercore's assets to re-negotiate the licence. Why would GeoDigital pay any amount for a software license if it was open to an eventual purchaser of Ambercore's assets to re-negotiate its terms? QOGT's position makes no commercial sense. Second, counsel for GeoDigital was clear about its client's position – no source code, no deal.

[41] Balancing all these factors, I conclude that the Receiver has acted prudently and reasonably in its efforts to secure the sale of some of the assets since the release of the decision

of Newbould J. and that the sale process, and the resulting proposed Purchase Agreement and associated Technology License Agreement, satisfy the principles set out in the *Soundair* decision. Accordingly, I approve the proposed sale.

IX. Conclusion and orders

[42] By way of summary, the Receiver has sought orders sealing the Astrina valuations and the earlier RDAS liquidation valuation, as well as the Purchase Agreement and associated Technology License Agreement. Those orders are necessary in order to protect the integrity of the sale processes. I am satisfied that the Receiver's request meets the principles set out in *Sierra Club of Canada, supra.*, so I grant the sealing orders requested in paragraphs 5 and 6 of its notice of motion.

[43] I approve the proposed Purchase Agreement with GeoDigital, together with the necessary vesting order, as well as the associated Technology License Agreement. No party took exception to the requests by the Receiver for approval, *nunc pro tunc*, of the Master Services Agreement with GeoDigital or for approval of the Interim Report dated March 14, 2011 and the Third Report dated April 3, 2011, so I grant those approvals. Counsel may appear before me any day this week to obtain my issuance of the appropriate order.

D. M. Brown J.

Date: April 13, 2011

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Farm Credit Canada v. Gidda,*
2015 BCSC 2188

Date: 20151007
Docket: S146599
Registry: Vancouver

Between:

Farm Credit Canada

Plaintiff

And

Nirmal Singh Gidda
Jaspreet Kaur Gidda
Kaldep Singh Gidda also known as Kaldeep Singh Gidda
Neelam Rani Gidda
Gidda Bros. Orchards Ltd.
Mt. Boucherie Vineyards & Cellars Inc.
Kan-A Farms Corporation Ltd.
0837582 B.C. Ltd.
Sunrise Vineyards Ltd.
West-Kana Farms Ltd.
O.K. Motel & Mobile Home Park Ltd.
O.K. Labour Company Ltd.
British Columbia Safety Authority
Bylands Nurseries Ltd.
Toyota Credit Canada Inc.
Royal Bank of Canada
Mercedes-Benz Financial Services Canada Corporation
Mercedes-Benz Financial

Defendants

Before: The Honourable Madam Justice Fitzpatrick

Oral Reasons for Judgment

Counsel for the Plaintiff:	Kieran E. Siddall
Counsel for the Defendants, Nirmal Singh Gidda and Jaspreet Kaur Gidda:	Steven A. Wilson
Counsel for the Defendant, Kaldep Singh Gidda also known as Kaldeep Singh Gidda;	H. David Edinger Michael J. Peraya
Counsel for the Receiver, Wolrige Mahon Limited:	Kimberley Robertson
Place and Date of Trial/Hearing:	Vancouver, B.C. October 6, 2015
Place and Date of Judgment:	Vancouver, B.C. October 7, 2015

Introduction

[1] By way of introduction, this proceeding was commenced by the plaintiff, Farm Credit Canada ("FCC"), to collect a substantial debt owing by certain defendants, being the individual Gidda Defendants and their various corporate entities (the "Gidda Defendants").

[2] Wolrige Mahon Limited (the "Receiver"), was appointed as receiver of various properties secured in favour of FCC and, as I will discuss below, was authorized to take steps to sell those properties.

[3] The Receiver brings an application to approve a sale of the Gidda Defendants' properties. The Gidda Defendants oppose any sale at this time. They take the position that the Receiver has failed to adequately expose the properties to the market, and that the proposed sale price is an improvident one.

Background Facts

[4] On September 29, 2014, the Receiver was appointed by order of Madam Justice Sharma. That order authorized the Receiver to take steps to sell 11 pieces of real estate owned by the Gidda Defendants. That order was appealed by the Gidda Defendants. That Court held that leave to appeal was required: *Farm Credit Canada v. Gidda*, 2014 BCCA 501 (Chambers). Ultimately, leave to appeal was denied: *Farm Credit Canada v. Gidda*, 2015 BCCA 236 (Chambers).

[5] On September 29, 2014, judgment was also granted in favour of FCC against the Gidda Defendants for approximately $17.3 million. Counsel for FCC advises that the debt, with the added receivership costs, is such that the amount now owing is approximately $18.6 million.

[6] The real property in question is a unique set of properties. Counsel for the Receiver has described the "jewel" of them to be the Mt. Boucherie Winery located in West Kelowna, B.C. There is also a vineyard and nursery property in that area. The nursery is the Prichard Road property, which is subject to a tenancy and right of first refusal in favour of Bylands Nurseries 2005 Ltd. ("Bylands").

[7] There are eight additional properties located in the South Okanagan. They include a mobile home park, said to be used by the winery to house workers, vacant property, and various vineyards.

[8] On July 2, 2015, Sharma J., who is seized of this matter, granted an order that the Receiver be allowed access to the South Okanagan properties, apparently based on evidence that Kaldep Gidda had been hindering the Receiver's efforts to deal with those properties.

[9] In August 2015, the Receiver brought applications before the court to approve three sales. The first was a sale of the Pritchard Road property to Bylands for $1.9 million. Secondly, the Receiver applied to sell the Mt. Boucherie Winery to Haakon Investments Ltd. for $ 2.75 million, and the winery equipment and wine inventory to Terrabella Wineries Ltd. The sales of the Mt. Boucherie Winery, equipment, and inventory were related and dependent on approval of both. Finally, the Receiver sought approval of the sale of the Oliver Ranch Road property to Richmond Innovations Capital Ltd. for $900,000.

[10] The difficulty with the Haakon/Terrabella offer was that the Receiver was not authorized to sell the equipment and wine inventory by the court order then in place. By that time, the Receiver was also aware that there were other parties interested in making offers on the various assets, but these parties were waiting for the court date before doing so.

[11] On August 31, 2015, the matter came on before Sharma J. The hearing resulted in her granting an amended and re-stated receivership order. By this order, the Receiver was authorized to sell the Gidda Defendants' personal property, including the equipment and wine inventory. This authority was subject to court approval, as were the real estate sales.

[12] Given Sharma J.'s unavailability, the Receiver's application for court approval of the various sales came on before me on September 21, 2015. By that time, the Receiver had decided it would be beneficial to introduce a "sales process" in order to

marshal all available bids for the various assets prior to an actual court hearing. An order to that effect was granted, which required bids to be provided to the Receiver by September 29, 2015. This order was granted over the objections of Kaldep Gidda; however, it provided:

> This Order is without prejudice to any position that may be raised on the Return Hearing Date, as would be acceptable on a sale approval application.

[13] The Receiver's second report to the court, dated October 2, 2015, has been filed. That report outlines the results of the sale process. Thirteen bids were received from ten parties, including from Bylands, Haakon and Terrabella. Only one offer, from 1047204 B.C. Ltd. ("104"), related to all the assets. The other offers included bids only on some of the assets.

[14] The analysis of the various bids, and the permutations of accepting a combination of them, has been difficult. For example, the 104 bid, entitled the "Base Case", results in a net recovery of $14,074,997. The next best option, entitled "Scenario 2", is a combination of the Haakon and Terrabella bids with other piecemeal bids, and results in a recovery of $14,417,851. However, the significant downside of the latter option is that five properties are left unsold or "orphaned". It is expected that the Receiver will have to spend significant amounts to maintain those properties into the future with added risk to their ultimate selling price.

[15] Both the Receiver and FCC submit that the 104 offer should be approved. I should add that, in that event, the Receiver also seeks approval to pay Haakon a $25,000 break fee arising from its original offer, which has since been replaced by its later offer submitted during the sales process.

[16] The Gidda Defendants support that 104 should be the successful party *if* a sale must be approved. However, they continue to take the position that no offer should be approved, for reasons I will discuss below.

Relevant Authorities

[17] There is no dispute about the law. I have been referred to well-known statements by Frank Bennett, author of *Bennett on Receiverships*, 2nd ed. (Toronto: Carswell, 1999).

[18] The leading case is *Royal Bank of Canada v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (O.N.C.A.). That decision has been applied in various decisions of this Court of which I am aware, and I refer to *Digital Domain Media Group, Inc. (Re)*, 2012 BCSC 1567, at para. 15; *Leslie & Irene Dube Foundation Inc. v. P218 Enterprise Ltd.*, 2014 BCSC 1855, at para. 21; *Veris Gold Corp. (Re)*, 2015 BCSC 1204, at para. 24.

[19] In *Soundair,* the court discussed certain factors to be considered on an application to approve an offer (at 6, 12):

1. Whether the party conducting the sale has made sufficient efforts to obtain the best price and has not acted improvidently.

2. The interests of all parties. In that regard, while the interests of the creditors are a primary consideration, it is not an overriding one and other interests must be considered.

3. The efficacy and integrity of the process by which offers were obtained.

4. Whether there has been any unfairness in the sales process.

[20] The Gidda Defendants' arguments are substantially in relation to the first factor.

Discussion and Analysis

[21] As I have alluded to above, the sales process conducted by the Receiver has taken place over a long time and included various steps. I have reviewed those steps and the results they obtained, as have the Gidda Defendants. I agree that

there are concerns about the process undertaken by the Receiver. My concerns are as follows.

The Appraisal Evidence

[22] The Gidda Defendants refer to various indications of value from FCC in mid-2014 that state the properties were worth $20-$26 million. I do not consider these valuations to be of particular importance on this application, as they would appear to be more dated than later appraisals, and the details of these valuations are not in the evidence.

[23] The appraisals obtained by the Gidda Defendants, in late 2014, indicate values of $17.7-$21.7 million. Those appraisals appear to indicate that these values were anticipated after a longer exposure to the market of between 24 and 36 months.

[24] The Receiver did obtain, as one would expect, various appraisals on the real properties. I am advised that those were received sometime in late 2014 and indicate an overall value of $15.6 million. They did not, of course, address the equipment and inventory.

[25] In support of a consideration of the bids received through the sales process, the Receiver purportedly listed those appraisal amounts in its schedules. However, with respect to five of what were described as the “orphan” vineyards, the actual appraisal amounts were higher than what the Receiver listed in its schedules. For example, the Highway 3 lands were appraised at $1,912,000 and $2,785,000, whereas, the Receiver indicated those amounts at $1,434,150 and $1,976,360. The total appraised values for all properties, save for the wine inventory, was indicated as $13.9 million. No explanation for these lower amounts was in evidence.

[26] An explanation was forthcoming from the Receiver’s counsel during her reply submissions. In substance, it appears the Receiver asked the appraisers to give updated values. Needless to say, the Gidda Defendants were entirely taken by

surprise by this "evidence", and have had absolutely no opportunity to understand how these lower figures were arrived at, or consider whether they are valid.

[27] It remains the case that evidence about the appraisals of the properties in question is an important consideration for the Court if it is to accurately assess any potential offers. The complete lack of evidence as to these more current opinions of value is significant. Simply, as a matter of fairness, I do not accept counsel's submissions on what could be a very important and disputed fact.

[28] Various submissions were made regarding the deterioration of the vineyards being a possible explanation for the decrease in the "appraisal" amounts given by the Receiver. Again, there is no evidence on this matter and, therefore, I am not in a position to make any findings of fact as to whether there has been any deterioration, or whether it has caused any decrease in value.

The Private Sale Efforts

[29] For reasons that are not entirely apparent, the Receiver did not list any of the real estate properties until late June 2015. It appears that after receiving the appraisals in late 2014, the Receiver undertook what it describes as "initial outreach efforts." By that, the Receiver described his efforts as creating "a list of prospective purchasers developed from contacts within the local wine and vineyard industry, and approached these parties directly seeking expressions of interest in the Properties." Those efforts are described in more detail in Schedule C to the second report as being parties who were contacted by the Receiver. Many of these parties are clearly existing wineries in the Okanagan Valley. These contacts began on March 9, 2015 and, for the most part, concluded at the end of April 2015.

[30] From this limited description of the Receiver's efforts, it is not clear to me that these calls to various parties would have resulted in a full canvassing of the market for these particular and unique assets. For example, there is no evidence that, during this period of time, these assets were marketed on the Internet or through industry publications relating to the wine trade. It is also not particularly apparent what qualifications or expertise the Receiver has to discern who would comprise this

particular market beyond a general statement by the Receiver's counsel that the Receiver had previously marketed winery assets in this area.

The Listings

[31] The lack of evidence regarding the discounted appraisal values is also compounded by the fact that, in many cases, the listing price set by the Receiver was lower than the Receiver's own appraisal value or, alternatively, was lower than the actual appraisal value before it was subsequently discounted by the Receiver. For example, on the Highway 3 properties, the listing prices were $1.5 million and $2.2 million. These were substantially below the written appraisal amounts of $4.7 million obtained by the Receiver, but slightly above the discounted appraisal price. It is also relevant that the offer from 104 on these two properties is only $2.2 million.

[32] As argued by the Gidda Defendants, the MLS real estate listings of most of the real properties have only been in place since the end of June 2015. The Receiver's appraisals indicate values that were estimated to be achieved in a marketing period of between 8 to 12 months. I accept the Receiver's argument that it is not necessary to wait that full period of time before bringing what it considers to be an acceptable offer to the Court for approval: see *Manufacturers Life Insurance Co. v. Granada Investments Ltd.*, (2001) 150 O.A.C. 253; *430707 B.C. Ltd. v. Royal Bank of Canada*, 2004 BCSC 350.

[33] Nevertheless, it remains the case that the more extensive market exposure achieved through the MLS listings (to the extent of nine of the properties only) has only been in place a little over three months. On that point, counsel for Kaldep Gidda refers to *Azura Management v. Hemlock Valley Resorts*, 2006 BCSC 824, where Master Taylor found:

> [28] ... I find there was insufficient time allowed for the marketing of the defendants' lands and undertakings so as to create a proper climate to generate offers more closely akin to the fair market value of the property. I find the proposed sale price is only in the best interests of the purchaser, not the best interests of the interested parties, such as the creditors or the defendants.

[34] Lastly, I agree that there is limited information from the realtors regarding any international advertising that might have been done to attract overseas buyers, beyond publication on the Internet.

The Haakon Offer

[35] What is also inexplicable is that the Receiver appears to have tentatively accepted an offer from Haakon for the Mt. Boucherie Winery, before even listing the property for sale, and after having only completed what I consider to be inadequate private sale efforts. Formal acceptance of this offer took place on August 6, 2015, less than 30 days into the listing and while showings of the property were underway.

[36] The issues relating to this offer are further complicated by the fact that the Receiver describes it as a "stalking-horse" that was intended to stand as the first offer in order to get other bidders to the table. As this Court discussed in *Leslie & Irene Dube Foundation*, stalking-horse bids can be an appropriate component of a sales process in receivership. Mr. Justice G.C. Weatherill stated:

> [20] The use of stalking horse bids to set a baseline for a bidding process in receivership proceedings has been recognized by Canadian courts as a legitimate means of maximizing recovery in a bankruptcy or receivership sales process: *CCM Master Qualified Fund Ltd. v. blutip Power Technologies Ltd.*, 2012 ONSC 1750 at para. 7 *[CCM]*; *Bank of Montreal v. Baysong Developments Inc.*, 2011 ONSC 4450 at para. 44 *[Baysong]; Re Digital Domain Media Group Inc.,* 2012 BCSC 1567.
>
> [21] The factors to be considered when determining the reasonableness of a stalking horse bid are those used by the court when determining whether a proposed sale should be approved: *CCM* at para. 6. Some of those factors were set out in *Royal Bank of Canada v. Soundair Corp.*, [1991] O.J. No. 1137 (C.A.) at para. 16:
>
> a) whether the receiver has made a sufficient effort to get the best price and has not acted improvidently;
>
> b) the efficacy and integrity of the receiver's sale process by which offers were obtained;
>
> c) whether there has been unfairness in the working out of the process; and
>
> d) the interests of all parties.

[37] However, the Receiver, in this case, completely ignored the fact that approval of a stalking-horse bid must be granted by the court prior to undertaking such a

process. In this case, the Receiver did not apply to approve the Haakon bid as a stalking-horse bid. By failing to apply to the court, the Receiver completely avoided having to justify whether such a stalking-horse bid was appropriate in the circumstances.

[38] The original Haakon offer included a $25,000 break fee. This is something that should have been the subject of submissions and consideration by the court when it decided whether or not to approve the stalking-horse bid.

[39] What is even more perplexing is that the Receiver now seeks authorization to pay a break fee to Haakon in the event the 104 offer is approved. Further, if the 104 offer is not approved and the Receiver proceeds with the sales in Scenario 2, which includes Haakon's second offer, no break fee will be payable as the sale will have been completed pursuant to that offer, not the first.

[40] While the Receiver's counsel submits that the original Haakon offer achieved some benefits to the process and, therefore, the break fee is justified, there is no evidence to that effect. As I indicated to counsel during argument, it could equally be the case that there were no benefits received from this earlier bid and that the court, assuming it had been given the opportunity to consider the matter, might well have indicated that it was not justified and that the Receiver should just list the properties in the usual fashion.

[41] It is worth noting, at this point, that the later offers received for the Mt. Boucherie Winery were higher, being between $2.9-$3.5 million.

[42] Accordingly, I see no basis on which payment of any break fee is appropriate in the circumstances. I reject the relief sought by the Receiver in that respect.

[43] Also of concern is that the Receiver's negotiation of the Haakon/Terrabella offer was made in a vacuum; this is because there was no consideration of the equipment and wine inventory since the Receiver did not have any authorization to sell it at that time. Although it appears that the Receiver had made some efforts prior to that time to determine the value of the personal property through appraisals, it is

far from clear that the Receiver had made any efforts to market those assets to anyone else.

The Bylands Offer

[44] Also of concern is the Receiver's approach to the Pritchard Road property. That property has never been listed for sale. The Receiver specifically decided not to list the property because they had received an offer from Bylands.

[45] I appreciate that Bylands would have been considered a natural purchaser of the property, given their existing tenancy and their right of first refusal, although I am not convinced that there was any reason to avoid any marketing of the property through a listing agent. Rather, the Receiver seems to have simply accepted that Bylands was the right purchaser and negotiated the price. It is of some importance that the negotiated price was less than the Receiver's own appraised price. The rationale suggested by the Receiver, in that it avoided any real estate commission of $52,000 by proceeding this way, is not persuasive.

The Sales Process

[46] I agree with Kaldep Gidda's counsel that the sale efforts of the Receiver, from March 2015 to the present, can only be described as fractured. It has involved private sale efforts, which I consider to have been inadequate as I described above, and there are various difficulties with the listings of some of the properties. In addition, the Receiver brought forward offers that clearly presented problems.

[47] Rather than developing a plan at the outset for marketing these unique properties, the Receiver has embarked upon what I can only describe as an *ad hoc* process that has bumped along with little success.

[48] In the face of these difficulties, the Receiver sought to "reboot" the sales process by obtaining the order granted on September 21, 2015. Nevertheless, that order was made without as full of a review of the history of this matter as is now before the Court. In addition, as I have noted above, the September 21, 2015 offer was made without prejudice to arguments that might be advanced concerning the

efficacy of the previous sales process, or even the one ordered by the court on that date.

[49] My intention in granting that order was to try to achieve some clarity for the benefit of the bidders. However, at that time, I also expressed concern about the short amount of time allowed to the bidders. The dates set out in the September 21, 2015 order were largely driven by the deadline in the original Haakon/Terrabella offer that court approval of that offer had to be obtained on or before October 6, 2015.

[50] In short, the September 21, 2015 order, while imposing a sale process, was not intended to, and did not absolve the Receiver of any issues arising from the entire sales process.

Conclusions

[51] The Gidda Defendants refer to the decision in *Kokanee Mortgage MIC Ltd. v. 669655 B.C. Ltd.*, 2014 BCSC 458, where Mr. Justice Gaul stated:

> [27] My review of the jurisprudence leads me to conclude that before finding a proposed sale is provident, the court must be satisfied that both the marketing and sales process has been a fair and proper one for all, and that the proposed price reflects the fair market value for the property in question.

[52] As noted by Gaul J., these are two related concepts in the sense that, assuming that the Receiver has properly conducted a fair sales process, it will usually be the case that the offers that resulted from that process are indicative of fair market value. That interrelationship between these concepts is inherently found in the factors discussed in *Soundair,* as applied in previous decisions of this Court.

[53] I agree that it is not sufficient for the Gidda Defendants to say that the offer from 104 is simply "not enough." They do, however, say that the sales process has not been undertaken over a sufficient period of time, and has not been undertaken properly by the Receiver so as to support the contention that the 104 offer before the Court represents the fair market value for the properties in question.

[54] I am aware of the consequences of extending the sales process; specifically, the risk that the 104 offer, and perhaps other offers, may not be available at a later point in time, or may only be available with lesser consideration. There is also, of course, a cost to FCC in respect of any delay in terms of increasing FCC's debt and the cost of having to deal with the properties into the future. At present, even assuming acceptance of the 104 offer, FCC submits that it will suffer a shortfall of approximately $4.9 million. Needless to say, that possibility must be considered.

[55] However, the interests of the Gidda Defendants must also be considered. The companion application before me is an application by FCC for the Gidda Defendants to show cause as to why their interest in various properties in their personal names should not be sold to satisfy the judgment granted against them. It is not clear what the value of those properties is, although it appears to be accepted that it would not satisfy the shortfall currently estimated by FCC.

[56] As counsel for Nirmal and Jaspreet Gidda argues, if both the Receiver's appraisal values for the properties, and the amount offered by Terrabella for the equipment and wine inventory were obtained, there could potentially be recoveries close to the estimated amount owing under FCC's debt.

[57] It is difficult to balance the interests of all of the parties. Nevertheless, I have reluctantly concluded that there is merit in the criticisms offered by the Gidda Defendants of the sales process to date. I conclude that my concerns noted above are sufficient to refuse any approval of the 104 offer, or any other offer, at this time.

[58] In short, I find that the Receiver has not satisfied its onus of proving, on a balance of probabilities, that it has made sufficient efforts to obtain the best price and that it has not acted improvidently.

[59] It remains open to the Receiver to continue with its current marketing plan, or perhaps fashion another process going forward, that will represent a cohesive and fair process to properly test the market and afford bidders sufficient time to put their best offer forward. Of course, the Receiver may seek court approval of that process

before embarking on it, in which case the Gidda Defendants can present any arguments before the court rules on such a plan.

[60] In summary, there are three notices of application before the Court that relate to the previous offers accepted by the Receiver that are subject to court approval. None of them specifically relate to the Receiver seeking court approval of the 104 offer. As none of the offers set out in those applications are currently extant, all three applications are dismissed.

[61] As agreed by the parties, and given my decision not to approve the 104 offer, FCC's notice of application filed against the individual Gidda Defendants for a show cause hearing is adjourned generally.

[62] Anything arising, counsel?

[63] MR. SIDDALL: Sorry for not rising earlier. I just maybe would ask for a little bit of clarification on the order adjourning this motion generally. It was FCC's intention to proceed with the application in any event, bearing in mind that this is step one of three steps. We're not seeking sale by this application, only to show cause and then to go to the registrar's report. Then my submission was going to be, in the third stage, that's where the court weighs the parties' interests as to whether a sale should be ordered. So just for direction from the Court, I didn't hear you say you're staying any rights that we have against the Gidda Defendants' judgments, and so we are liberty to apply to bring that on again?

[64] THE COURT: Yes, that is correct. There was no application to stay that matter, which I understood to be contested by the Gidda Defendants. Mr. Edinger, is that correct?

[65] MR. EDINGER: I don't have any specific instructions, but I assume those will be my instructions.

[66] THE COURT: Well, in that event, I think the matter will simply have to be put over to another day. I heard this application given its urgency, or what was urgency

at the time, but Madam Justice Sharma continues to be seized of the matter generally. If she is not available, I am happy to hear the matter, depending on my schedule.

"Fitzpatrick J."

COURT OF APPEAL FOR ONTARIO

CITATION: Grant Forest Products Inc. v. The Toronto-Dominion Bank, 2015 ONCA 570
DATE: 20150807
DOCKET: C58636

Doherty, Gillese and Lauwers JJ.A.

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 Grant Forest Products Inc., Grant Alberta Inc., Grant Forest Products Sales Inc., and Grant U.S. Holdings G.P.

BETWEEN

Grant Forest Products Inc., Grant Alberta Inc., Grant Forest Products Sales Inc., and Grant U.S. Holdings GP

Applicants

and

The Toronto-Dominion Bank, in its capacity as agent for the secured lenders holding first lien security and the Bank of New York Mellon, in its capacity as agent for secured lenders holding second lien security

Respondents

Mark Bailey and Deborah McPhail, for the appellant Superintendent of Financial Services

Jane Dietrich, for the respondents Grant Forest Products Inc., Grant Alberta Inc., Grant Forest Products Sales Inc., and Grant U.S. Holdings GP

John Marshall and Roger Jaipargas, for the respondent West Face Capital Inc.

Alex Cobb, for the respondent Mercer (Canada) Limited

David Byers and Dan Murdoch, for the respondent Ernst & Young Inc.

Andrew J. Hatnay, James Harnum and Adrian Scotchmer, for the intervener the court-appointed Representative Counsel to non-union active employees and retirees of U.S. Steel Canada Inc. in its CCAA proceedings

Heard: February 3, 2015

On appeal from the order of Justice Colin Campbell of the Superior Court of Justice, dated September 20, 2013, with reasons reported at 2013 ONSC 5933, 6 C.B.R. (6th) 1.

Gillese J.A.:

OVERVIEW

[1] The debtor companies in this case obtained protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "**CCAA**") and entered into a liquidation process. After selling their assets and paying out the first lien lenders in full, there were insufficient funds to satisfy the claims of the second lien lenders and the claims asserted on behalf of two of the debtor companies' pension plans. A contest ensued between one of the secured creditors and the pension claimants.

[2] The CCAA judge ordered the remaining debtor companies into bankruptcy, thereby resolving the contest in favour of the secured creditor.

[3] Ontario's Superintendent of Financial Services (the "**Superintendent**") appeals.

[4] During the CCAA proceeding, the Superintendent made wind up orders in respect of the two pension plans. He contends that a deemed trust arose on

wind up of each plan (the "**wind up deemed trust**"). He says that those wind up deemed trusts, which encompass all unpaid contributions, took priority over the claims of the secured creditors because the remaining funds are the proceeds of sale of the debtor companies' accounts and inventory.

[5] The basis for the Superintendent's position is a combination of ss. 57(3) and (4) of the *Pension Benefits Act*, R.S.O. 1990, c. P.8 ("**PBA**") and s. 30(7) of the *Personal Property Security Act*, R.S.O. 1990, c. P.10 ("**PPSA**").

[6] Sections 57(3) and (4) of the PBA read as follows:

> 57 (3) An employer who is required to pay contributions to a pension fund shall be deemed to hold in trust for the beneficiaries of the pension plan an amount of money equal to the employer contributions due and not paid into the pension fund.
>
> 57 (4) Where a pension plan is wound up in whole or in part, an employer who is required to pay contributions to the pension fund shall be deemed to hold in trust for the beneficiaries of the pension plan an amount of money equal to employer contributions accrued to the date of the wind up but not yet due under the plan or regulations.

[7] The priority of the PBA deemed trusts is established by s. 30(7) of the PPSA. Section 30(7) reverses the first-in-time principle for certain assets and gives the beneficiaries of the deemed trusts priority over an account or inventory and its proceeds. Section 30(7) states:

> 30 (7) A security interest in an account or inventory and its proceeds is subordinate to the interest of a person

> who is the beneficiary of a deemed trust arising under the *Employment Standards Act* or under the *Pension Benefits Act*.

[8] The Superintendent contends that the decision below is wrong because, among other things, he says that it is inconsistent with the Supreme Court of Canada's recent decision in *Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6, [2013] 1 S.C.R. 271.

[9] For the reasons that follow, I would dismiss the appeal.

THE CAST OF CHARACTERS

[10] Grant Forest Products Inc. ("**GFPI**") and certain of its subsidiaries carried on an oriented strand board manufacturing business from facilities in Ontario, Alberta and the United States. At the beginning of these proceedings, GFPI and its subsidiaries were the third largest such manufacturer in North America.

[11] GFPI and related companies (the "**Applicants**") brought an application for protection from creditors under the CCAA (the **CCAA Proceeding**"). Following the sale of certain assets, the CCAA Proceeding was terminated in relation to some of the Applicants. GFPI, Grant Forest Products Sales Inc. and Grant Alberta Inc. are the "**Remaining Applicants**" in the CCAA Proceeding.

[12] Mercer (Canada) Ltd. is the administrator of the two pension plans in question in the CCAA Proceeding (the "**Administrator**"). Mercer replaced PricewaterhouseCoopers Inc. as administrator in August 2013.

[13] Stonecrest Capital Inc. was appointed the chief restructuring organization (the "**CRO**") by court order dated June 25, 2009.

[14] Ernst & Young Inc. was appointed the monitor (the "**Monitor**") by court order dated June 25, 2009.

[15] The "**First Lien Lenders**" are the first-ranking secured creditors in the CCAA Proceeding. Following the sale of assets during the CCAA Proceeding, distributions were made and the First Lien Lenders were paid in full.

[16] The "**Second Lien Lenders**" are secured creditors ranking behind the First Lien Lenders, and are collectively owed approximately $150 million.

[17] The Bank of New York Mellon served as agent for the Second Lien Lenders in these proceedings (the "**Second Lien Lenders' Agent**").

[18] The Superintendent is the regulator of pension plans under the PBA and the *Financial Services Commission of Ontario Act, 1997*, S.O. 1997, c. 28. He is also the administrator of the pension benefits guarantee fund under the PBA, which partially insures pension benefits in certain circumstances.

[19] West Face Long Term Opportunities Limited Partnership, West Face Long Term Opportunities (USA) Limited Partnership, West Face Long Term Opportunities Master Fund L.P. and West Face Long Term Opportunities Global Master L.P. (collectively, "**West Face**"), are parties to the **Second Lien Credit Agreement** with the Remaining Applicants. The Second Lien Lenders (including

West Face) are currently the highest ranking secured creditors. West Face is owed approximately $31 million.

[20] Shortly after the oral hearing of this appeal, the court-appointed representative counsel to non-union active and retired employees of United States Steel Canada Inc. ("**USSC**") in USSC's unrelated proceedings under the CCAA (the "**Intervener**") sought leave to intervene. The Intervener wished to have the opportunity to make submissions on the issues raised in this appeal from the perspective of retirees and pension beneficiaries. Approximately 6,000 affected employees and retirees of USSC are subject to the representation order.

[21] By endorsement dated March 19, 2015, this court granted the Intervener leave to intervene as a friend of the court: *Re Grant Forest Products Inc.*, 2015 ONCA 192. Under the terms of that endorsement, the Intervener was limited to addressing only those issues already raised on the appeal and to the existing record.

BACKGROUND IN BRIEF

Sale of the Applicants' Assets

[22] On March 19, 2009, GE Canada Leasing Services Company applied for a bankruptcy order against GFPI under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("**BIA**"). In response, the Applicants sought protection under the CCAA through the CCAA Proceeding.

[23] The court gave that protection by order dated June 25, 2009 (the "**Initial Order**"). The Initial Order also stayed the bankruptcy application against GFPI and approved a marketing process designed to locate potential investors to purchase, as a going concern, the Applicants' business and operations. Consequently, the CCAA Proceeding proceeded as a liquidation, rather than as a restructuring.

[24] In the CCAA Proceeding, no order was made authorizing a debtor-in-possession financing or other "super priority" lending arrangement.

[25] GFPI's assets were sold in a number of transactions that closed between May 26, 2010 and November 7, 2012.

[26] GFPI and certain of its subsidiaries sold the large majority of their core operating assets to Georgia Pacific LLC and certain of its affiliates ("**Georgia Pacific**"). The sale to Georgia Pacific was court approved on March 30, 2010, and closed on May 26, 2010. On sale, Georgia Pacific assumed the Pension Plan for Hourly Employees of Grant Forest Products Inc. – Englehart Plan, which was the pension plan associated with the assets it had purchased.

[27] Other than the assets sold to Georgia Pacific, GFPI's only other significant operating asset was a 50% interest in a mill in Alberta. The sale of that interest was approved by court order on January 5, 2011, and closed on February 17,

2011. Additional assets were sold over the following two years, with the final sale closing on November 7, 2012.

[28] Each sale was court approved and subject to the standard provision that all encumbrances and claims which applied to the assets prior to the sale applied to the sale proceeds with the same priority.

[29] The court made distribution orders that resulted in the First Lien Lenders being paid in full in January of 2012.

[30] A distribution of $6 million was made to the Second Lien Lenders. Approximately $150 million remains owing to those lenders under the Second Lien Credit Agreement. Of that amount, West Face is owed approximately $31 million.

[31] As of February 1, 2013, GFPI held cash of approximately US$2.1 million and the Monitor held cash of approximately $6.6 million and US$0.3 million (the "**Remaining Funds**").

The Pension Plans

[32] GFPI was the employer, sponsor and administrator of four pension plans. The two plans of significance in this appeal are (1) the Pension Plan for Salaried Employees of GFPI – Timmins Plant (the "**Salaried Plan**") and (2) the Pension Plan for Executive Employees of GFPI (the "**Executive Plan**") (together, the "**Plans**").

[33] Both of the Plans are defined benefit pension plans under the PBA.

[34] The Initial Order provided that the Applicants were "entitled but not required" to pay "all outstanding and future … pension contributions … incurred in the ordinary course of business".

[35] On August 26, 2011, the "Timmins Pension Plan Order" was made. This order authorized GFPI to take steps to initiate the wind up of the Salaried Plan and to work with the Superintendent to appoint a replacement plan administrator for the Salaried Plan. This order also directed the Monitor to hold back approximately $191,000 from any distribution to creditors. The holdback was thought to be sufficient to satisfy the anticipated wind up deficit of the Salaried Plan. The Timmins Pension Plan Order expressly provided that nothing in it "affects or determines the priority or security of the claims" against the holdback.

[36] A similar order was made in respect of the Executive Plan on September 21, 2011. However, the hold back amount in respect of the Executive Plan was $2,185,000.

[37] The Administrator recommended that the Plans be wound up and on February 27, 2012, the Superintendent ordered the Plans wound up (the "**Superintendent's Wind Up Orders**"). Under those orders, the effective date of wind up for the Executive Plan is June 10, 2010, and for the Salaried Plan it is March 31, 2011.

[38] As will become apparent, it is significant that the Plans were ordered to be wound up after the CCAA Proceeding commenced.

The Pension Motion

[39] GFPI continued to make all required contributions to the Plans (both current service and special payments) until June 2012. However, on June 8, 2012, the Remaining Applicants brought a motion seeking an order declaring that none of GFPI, the CRO or the Monitor were required to make further contributions to the Plans (the "**Pension Motion**"). The grounds for the motion included that there was uncertainty relating to the priority of amounts owing in respect of the wind up deficits in the Plans and it was possible that *Indalex*, which was then before the Supreme Court, might have an impact on that matter.

[40] When the wind up reports showed that the estimated deficits in the Plans had increased, by order dated June 25, 2012, the hold back for the Salaried Plan was increased from approximately $191,000 to $726,372 and for the Executive Plan from approximately $2.185 million to $2,384,688 (collectively, the "**Reserve Funds**").

[41] The Pension Motion was originally returnable on June 25, 2012. However, it was adjourned several times.

[42] On the first return date, acting on his own motion, the CCAA judge adjourned the Pension Motion and directed that further notice be given to the

Second Lien Lenders. By endorsement dated June 25, 2012, a term of the adjournment was that no further payments were to be made to the Plans.[1]

[43] It should be noted that several weeks prior, on March 19, 2012, counsel for the Second Lien Lenders' Agent sent an email to all those on the Service List saying that it no longer represented the Agent and asking to be removed from the Service List.

[44] On August 8, 2012, the Remaining Applicants served a notice of return of the Pension Motion for August 27, 2012.

[45] On August 27, 2012, again on his own motion and over the objections of the pension claimants, the CCAA judge adjourned the Pension Motion to a date to be determined at a comeback hearing to be held prior to the end of September 2012. He also directed the Monitor to provide additional communication to the Second Lien Lenders and to seek their positions on the Pension Motion.

[46] By letter dated August 31, 2012, the Monitor advised the Second Lien Lenders' Agent that the Pension Motion had been adjourned at the hearing on August 27 and requested a conference call with, among others, the various Second Lien Lenders, to determine what positions they would take on the Pension Motion.

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[1] Although the wording of the endorsement is somewhat unclear, it appears that all parties proceeded on that basis. The relevant part of the endorsement states: "I am satisfied that GFPI, CRO and the monitor hold funds that may otherwise be due under the pension plans pending notice to second lien creditors ..."

[47] The conference call took place on September 5, 2012. West Face did not participate in it. The two Second Lien Lenders that did attend on the call indicated that they supported the Pension Motion.

[48] On September 17, 2012, the Pension Motion was scheduled to be heard on October 22, 2012.

[49] On September 21, 2012, the Monitor sent the Second Lien Lenders' Agent a letter advising that the Pension Motion would be heard on October 22, 2012. In the letter, the Monitor also indicated that any Second Lien Lender that wished to make its position on the Pension Motion known should contact the Monitor.

[50] When West Face became aware that the Second Lien Lenders' Agent would not be able to obtain timely instructions in respect of the Pension Motion, it retained its own counsel to respond to the Pension Motion.

[51] By letter dated October 12, 2012, West Face advised the Monitor that it would support the Pension Motion.

[52] West Face served a notice of appearance in the CCAA Proceeding on October 19, 2012. It sought an adjournment of the October 22, 2012 hearing date but the Administrator opposed the adjournment request.

The Bankruptcy Motion

[53] By notice of motion dated October 21, 2012, West Face then brought a motion returnable on October 22, 2012, seeking to be substituted for GE Canada

Leasing Services Company in the outstanding bankruptcy application issued against GFPI. Alternatively, it sought to have the court lift the stay of proceedings in the CCAA Proceeding and permit it to petition the Remaining Applicants into bankruptcy (the "**Bankruptcy Motion**").

[54] On October 22, 2012, it was submitted[2] that the Bankruptcy Motion should be adjourned but that the Pension Motion should be argued. The CCAA judge adjourned both motions (together, the "**Motions")**, however, citing the close relationship between the two. The adjournment continued the terms of the adjournment of the Pension Motion on June 25, 2012.

The Motions are Heard

[55] The first round of oral submissions on the Motions was heard on November 27, 2012. The CCAA judge reserved his decision.

[56] The Supreme Court released its decision in *Indalex on* February 1, 2013.

[57] On February 6, 2013, the CCAA judge identified certain additional issues to be dealt with on the Motions and directed the parties to make written submissions on them.

[58] A further oral hearing on the Motions took place on July 23, 2013.

[2] The record is unclear as to which party or parties made this submission.

The Transition Order

[59] The CCAA judge dealt with the Motions by order dated September 20, 2013 (the "**Transition Order**"). Among other things, in the Transition Order, the court ordered that:

> 1. none of the funds held by GFPI or the Monitor are subject to a deemed trust pursuant to ss. 57(3) and (4) of the PBA;
>
> 2. none of GFPI, the CRO or the Monitor shall make any further payments to the Plans; and
>
> 3. GFPI and each of the other Remaining Applicants are adjudged bankrupt and ordered into bankruptcy.

[60] In short, the Transition Order resolved the priority contest between the pensioners and West Face in favour of West Face.

The Appeal

[61] The Superintendent then sought and obtained leave to appeal to this court.

THE DECISION BELOW

[62] In his reasons for decision, the CCAA judge observed that through the CCAA Proceeding, the Applicants' assets had been sold in a way that provided the maximum benefit to the widest group of stakeholders. Moreover, some of the

assets were sold on a going concern basis, which provided continued employment and benefits for many. The alternative to the CCAA Proceeding was a bankruptcy proceeding, which might well have resulted in a greater loss of employment and a lower level of recovery for secured creditors.

[63] The CCAA judge then found that the Remaining Funds were not subject to wind up deemed trusts.

[64] The Superintendent and the Administrator had submitted that, notwithstanding the Initial Order, the wind up deemed trusts should prevail over other creditors' claims.

[65] In rejecting this submission, the CCAA judge stated that a wind up deemed trust will prevail when wind up occurs before insolvency but not when a wind up is ordered after the Initial Order is granted. He said that this approach provides predictability and certainty for the stakeholders of the insolvent company and enables secured creditors to decide whether they are willing to pursue a plan of compromise or immediately apply for a bankruptcy order.

[66] The CCAA judge relied on the Supreme Court's decision in *Indalex* for the proposition that provincial statutory provisions in the pension area prevail prior to insolvency but once the federal statute is involved, the insolvency regime applies.

[67] The CCAA judge also rejected the argument that the CCAA court, in authorizing the wind up of the Plans, had given the wind up deemed trusts

priority in the insolvency regime. He noted that the orders authorizing the wind ups explicitly state that they do not affect or determine the priority or security of the claims against those funds, and the orders say nothing in respect of the deemed trust issue.

[68] The CCAA judge opined that, on the basis of this analysis, a lifting of the stay was not necessary to defeat the wind up deemed trusts said to have arisen after the Initial Order.

[69] The CCAA judge then observed that the issue of whether to terminate a CCAA proceeding and permit a petition in bankruptcy to proceed is a discretionary matter. In the absence of provisions in a plan of compromise under the CCAA or a specific court order, any creditor is at liberty to request that the CCAA proceedings be terminated if its position might better be advanced under the BIA. The question was whether it was fair and reasonable, bearing in mind the interests of all creditors, that the interests of the creditor seeking preference under the BIA should be allowed to proceed.

[70] The CCAA judge found that there was no evidence of a lack of good faith on the part of West Face in seeking to lift the stay, beyond the allegations relating to delay. He went on to reject the argument based on West Face's alleged delay in bringing the Bankruptcy Motion, saying that no party had been prejudiced by the delay.

[71] West Face argued that its interests should prevail because otherwise a wind up deemed trust that did not exist at the time of the Initial Order would *de facto* be given priority and that would be contrary to the priorities established under the BIA. The CCAA judge accepted this submission. He said that in *Indalex*, the Supreme Court limited the wind up deemed trust to obligations arising prior to insolvency and to deny West Face the relief it sought would be at odds with that reasoning.

[72] Accordingly, the CCAA judge concluded, the monies held by the Monitor should not be applied to the Plans.

A SUMMARY OF THE PARTIES' POSITIONS ON APPEAL

The Superintendent

[73] The Superintendent submits that the CCAA judge erred in concluding that no wind up deemed trusts arose during the CCAA Proceeding. He contends that where a pension plan is wound up after an initial order is made under the CCAA, but before distribution is complete, unpaid contributions to the pension plan constitute a wind up deemed trust under the PBA. In this case, he says, the wind up deemed trusts arose during the CCAA Proceeding and took priority over other creditors' claims. Those deemed trusts were not rendered inoperative by the doctrine of federal paramountcy because there was no debtor-in-possession loan or charge.

[74] The Superintendent further submits that because of the procedural history of this matter, the CCAA judge should have required payment of the full wind up deficits prior to lifting the stay to permit the bankruptcy application. He says that the CCAA judge adjourned the Pension Motion to provide further notice to the Second Lien Lenders when additional notice was not required because the Second Lien Lenders had received sufficient notice. Further, he contends, the adjournments were prejudicial to the pension claimants because if the CCAA judge had considered the Pension Motion in a timely manner, there would have been no basis on which to relieve against pension plan contributions.

[75] The Superintendent also submits that the CCAA judge erred in concluding that it was necessary for the pension claimants to have opposed the Initial Order and the sale and vesting orders made during the CCAA Proceeding in order to assert the wind up deemed trusts.

The Administrator

[76] The Administrator supports the Superintendent and adopts his submissions. It offers the following additional reasons in support of the appeal.

[77] First, the Administrator says that the CCAA judge erred by failing to answer the question posed by the Pension Motion, namely, whether GFPI should be relieved from making further payments into the Plans. It submits that the test GFPI had to meet to obtain such relief is: could GFPI make the required

payments without jeopardizing the restructuring? Instead of answering that question, the Administrator says that the CCAA judge asked and answered this question: can a wind up deemed trust be created during the pendency of a stay of proceedings? The Administrator contends that the CCAA judge erred in recasting the Pension Motion in this way because the creation of a wind up deemed trust and the obligation to make special payments are two separate concepts. It submits that the existence of a deemed trust has no bearing on whether a CCAA court should grant a debtor relief from the obligation to make special pension payments.

[78] Second, the Administrator submits, contrary to the CCAA judge's finding, where a wind up deemed trust arises before, and has an effective date before, the date of a court-approved distribution to creditors, the priority of that deemed trust must be considered before a distribution is approved.

[79] Third, the Administrator submits that the wind up deemed trust is not rendered inoperative in a CCAA proceeding unless the operation of the wind up deemed trust conflicts with a specific provision in the CCAA or an order issued under the CCAA. The Administrator says that, in the present case, there is no CCAA provision or order that conflicts with the wind up deemed trust. Therefore, those trusts operate and have priority pursuant to s. 30(7) of the PPSA.

[80] Fourth, the Administrator submits that because bankruptcy is not the inevitable result of a liquidating CCAA proceeding, the CCAA judge had to consider the totality of the circumstances, including West Face's lengthy delay in bringing the Bankruptcy Motion, when ordering GFPI into bankruptcy. It says that West Face did not satisfy its onus to have the stay lifted but, even if it did, the Bankruptcy Motion should have been granted on condition that the outstanding amounts owed to the Plans were paid prior to the bankruptcy taking effect.

[81] Finally, the Administrator says that the CCAA judge erred by requiring the Superintendent and it to challenge all orders made in the CCAA Proceeding had they wished to assert the priority of the wind up deemed trusts.

The Remaining Applicants

[82] The Remaining Applicants take no position on the issues raised by the Superintendent. However, if the appeal is successful, they ask that the court affirm that paras. 1-6 of the Transition Order remain operative. Those paragraphs can be found in Schedule A to these reasons.

West Face

[83] West Face maintains that the core issue to be decided on this appeal is whether it was necessary or appropriate for the pension claims to be paid as a "pre-condition" to ordering GFPI into bankruptcy. It says that if this court accepts

that the CCAA judge made no error in ordering GFPI into bankruptcy, without first requiring payment of the pension claims, the issues raised by the Superintendent are moot.

[84] West Face further submits that the doctrine of federal paramountcy puts an end to the wind up deemed trust claims. Bankruptcy proceedings are the appropriate forum to resolve wind up deemed trust claims at the close of CCAA proceedings. It would have been improper for the CCAA judge to order payment of the wind up deemed trust deficits before putting GFPI into bankruptcy, as such an order would have usurped Parliament's bankruptcy regime.

The Monitor

[85] Because the Bankruptcy Motion was primarily a priority dispute between two creditor groups, the Monitor took no position on that motion and it takes no position on that issue in this appeal.

[86] However, the Monitor notes that in making the Transition Order, the CCAA judge addressed issues relating to the existence and potential priority of a wind up deemed trust in the CCAA context. Given the relevance of those issues to other insolvency proceedings, the Monitor made the following submissions:

1. the main question giving rise to the Transition Order was whether it was appropriate to lift the stay and order GFPI into bankruptcy;

2. wind up deemed trusts are not created during the pendency of a CCAA proceeding;

3. if wind up deemed trusts did arise during this CCAA Proceeding, because the Superintendent's Wind Up Orders were made after the Initial Order, the earliest date on which those deemed trusts could be effective was February 27, 2012, the date of the Superintendent's Wind Up Orders; and

4. the CCAA judge did not suggest that the pension claimants were obliged to take steps earlier in the CCAA Proceeding to assert the priority of their wind up deemed trust claims. While the CCAA judge did state that the pension claimants were required to obtain an order lifting the stay for a wind up deemed trust to be created, that was because the winding up of a pension plan is outside of the ordinary course of business and the Initial Order permitted payments of pension contributions only in "the ordinary course of business".

The Intervener

[87] The Intervener's position is that:

1. a pension plan does not have to be wound up as of the CCAA filing date for the wind up deemed trust to be effective;

2. the beneficiaries of the wind up deemed trust have priority in CCAA proceedings ahead of all other secured creditors over certain assets;

3. an initial CCAA order does not operate to invalidate the wind up deemed trust regime; and

4. the CCAA judge erred in granting the Bankruptcy Motion, which was brought to defeat the wind up deemed trust priority regime.

THE ISSUES

[88] The parties do not agree on what issues are raised on this appeal. A comparison of the issues as articulated by each of the Superintendent and West Face demonstrates this.

[89] The Superintendent says that the following three issues are to be determined in this appeal:

1. do unpaid contributions related to a pension plan that is wound up after the initial order in a CCAA proceeding constitute a deemed trust under the PBA?

2. if such unpaid contributions constitute a deemed trust under the PBA, what is the priority of the deemed trust where there is no debtor in possession loan?

3. what actions must pension creditors take to assert the deemed trust under the PBA in a CCAA proceeding, both before and after the deemed trust arises?

[90] West Face, on the other hand, says that there is but one issue for determination: did the pension claims have to be paid as a precondition to an order to put GFPI into bankruptcy at the end of the CCAA Proceeding?

[91] In these circumstances, it falls to the court to determine what issues must be addressed in order to resolve this appeal.

[92] To do this, I begin by noting two things. First, in appeals of this sort, the role of this court is to correct errors. Put another way, its overriding task is to determine whether the result below is correct. It is not the role of this court to provide advisory opinions on abstract or hypothetical questions*: Kaska Dena Council v. British Columbia (Attorney General)*, 2008 BCCA 455, 85 B.C.L.R. (4th) 69, at para. 12. Second, an appeal lies from an order or judgment and not from the reasons for decision which underlie that order or judgment: *Grand River Enterprises v. Burnham* (2005), 197 O.A.C. 168 (C.A.), at para. 10.

[93] With these parameters in mind, it appears to me that the question which must be answered to decide this appeal and resolve the dispute between the parties is: did the CCAA judge err in lifting the stay and ordering the Remaining

Applicants into bankruptcy without first requiring that the wind up deemed trusts deficits be paid in priority to the Second Lien Lenders?

[94] To answer that question, I must address the following issues:

1. what standard of review applies to the CCAA judge's decision to lift the CCAA stay of proceedings and order the Remaining Applicants into bankruptcy?
2. did the CCAA judge make a procedural error in his treatment of the Pension Motion? and
3. did the CCAA judge err in principle, or act unreasonably, in lifting the stay and ordering the Remaining Applicants into bankruptcy?

THE STANDARD OF REVIEW

[95] The Superintendent submits that the standard of review of a decision made under the CCAA is correctness with respect to errors of law, and palpable and overriding error with respect to the exercise of discretion or findings of fact. As authority for this submission, the Superintendent relies on *Resurgence Asset Management LLC v. Canadian Airlines Corporation*, 2000 ABCA 149, 261 A.R. 120, at para. 29.

[96] I would not accept this submission for two reasons.

[97] First, in articulating this standard of review, *Resurgence* purported to follow *UTI Energy Corp. v. Fracmaster Ltd.*, 1999 ABCA 178, 244 A.R. 93. However, *UTI* does not set out the standard of review in the terms expressed by *Resurgence*. At para. 3 of *UTI*, the Alberta Court of Appeal states that discretionary decisions made under the CCAA "are owed considerable deference" and appellate courts should intervene only if the CCAA judge "acted unreasonably, erred in principle, or made a manifest error".

[98] Second, the applicable standard of review has been established by two decisions of this court: *Re Air Canada* (2003), 66 O.R. (3d) 257 and *Re Ivaco Inc.* (2006), 83 O.R. (3d) 108. In *Air Canada*, at para. 25, this court states that deference is owed to discretionary decisions of the CCAA judge. In *Ivaco*, at para. 71, this court reiterated that point and added that appellate intervention is justified only if the CCAA judge erred in principle or exercised his or her discretion unreasonably.

[99] The decision to lift the stay and order the Remaining Applicants into bankruptcy was a discretionary decision: *Ivaco*, at para. 70. Therefore, the question becomes, did the CCAA judge err in principle or exercise his discretion unreasonably in so doing?

[100] Before turning to this question, I will consider whether the CCAA judge made a procedural error in the process leading up to the making of the Transition Order.

DID THE CCAA JUDGE MAKE A PROCEDURAL ERROR?

[101] The procedural complaint levied against the CCAA judge is based on his having adjourned the Pension Motion on more than one occasion, on his own motion, so that additional notice could be given to the Second Lien Lenders. The Superintendent says that additional notice was not required because the Second Lien Lenders had been given sufficient notice and the resulting delay in having the Pension Motion heard caused prejudice to the pension claimants.

[102] I would not accept this submission. Considered in context, I do not view the CCAA judge as having acted improperly in adjourning the Pension Motion on his own motion.

[103] It is important to begin this analysis by reminding ourselves of the role played by the CCAA judge in a CCAA proceeding. Paragraphs 57-60 of *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379 are instructive in this regard. From those paragraphs, we see that the role of the CCAA judge is more than to simply decide the motions placed before him or her. The CCAA is skeletal in nature. It gives the CCAA judge broad discretionary powers that are to be exercised in furtherance of the CCAA's purposes. The

CCAA judge must "provide the conditions under which the debtor can attempt to reorganize" (para. 60). This includes supervising the process and advancing it to the point where it can be determined whether reorganization will succeed. In performing these tasks, the CCAA judge "must be cognizant of the various interests at stake in the reorganization, which can extend beyond those of the debtor and creditors" (para. 60).

[104] *Century Services*, it can be seen, makes it clear that the CCAA judge in the present CCAA Proceeding had to "be cognizant" of the interests of the Second Lien Lenders, as well as those of the moving parties and the pension claimants.

[105] It would have been apparent to the CCAA judge that the Pension Motion had the potential to adversely affect the interests of the Second Lien Lenders. At the time that the Pension Motion was brought, the Applicants' assets had been sold and only limited funds were left for distribution. Those funds were clearly insufficient to meet the claims of both the Second Lien Lenders and the pension claimants. It will be recalled that by means of the motion, GFPI, the CRO and the Monitor sought to be relieved of any obligation to continue making contributions into the Plans. The Pension Motion was vigorously opposed. Had the CCAA judge refused to grant the Pension Motion and contributions continued to be made to the Plans, the Second Lien Lenders would have been prejudiced

because there would have been even fewer funds available to satisfy their claims.

[106] The CCAA judge was also aware that in March 2012 – some three months before the Pension Motion was brought – counsel for the Second Lien Lenders' Agent had given notice that it was to be removed from the service list because it no longer represented the Second Lien Lenders' Agent.

[107] Despite service of the Pension Motion on the Second Lien Lenders' Agent and on the Second Lien Lenders, in these circumstances, it is understandable that the CCAA judge had concerns about the adequacy of notice to the Second Lien Lenders.

[108] That this concern drove the adjournments is apparent from the CCAA judge's direction to the Monitor on August 27, 2012, to provide additional communication to the Second Lien Lenders themselves, not the Agent. (The Monitor followed those directions, holding a conference call directly with the Second Lien Lenders themselves.)

[109] In these circumstances, I do not accept that the adjournments of the Pension Motion amounted to procedural unfairness. Rather, the adjournments are consonant with the Supreme Court's dictates in *Century Services*, described above.

DID THE CCAA JUDGE ERR IN PRINCIPLE OR ACT UNREASONABLY IN LIFTING THE STAY AND ORDERING THE REMAINING APPLICANTS INTO BANKRUPTCY?

[110] In general terms, I see no error in the CCAA judge's exercise of discretion to lift the CCAA stay and order the Remaining Applicants into bankruptcy.

[111] At the time the Motions were heard, GFPI had long since ceased operating, its assets had been sold, and the bulk of the sale proceeds had been distributed. It was a liquidating CCAA with nothing left to liquidate. Nor was there anything left to reorganise or restructure. All that was left was to distribute the Remaining Funds and it was clear that those funds were insufficient to meet the claims of both the Second Lien Lenders and the pension claimants.

[112] In those circumstances, the breadth of the CCAA judge's discretion was sufficient to "construct a bridge" to the BIA – that is, he had the discretion to lift the stay and order the Remaining Applicants into bankruptcy. Although this was not a situation in which creditors had rejected a proposal, the reasoning of the Supreme Court at paras. 78 and 80 of *Century Services* applied:

> … The transition from the CCAA to the BIA may require the partial lifting of a stay of proceedings under the CCAA to allow commencement of the BIA proceedings. However, as Laskin J.A. for the Ontario Court of Appeal noted in a similar competition between secured creditors and the [Superintendent] seeking to enforce a deemed trust, "[t]he two statutes are related" and no "gap" exists between the two statutes that would allow

> the enforcement of property interests at the conclusion of CCAA proceedings that would be lost in bankruptcy (*Ivaco,* at paras. 62-63). [Citation excluded.]
>
> …
>
> [T]he comprehensive and exhaustive mechanism under the *BIA* must control the distribution of the debtor's assets once liquidation is inevitable. Indeed, an orderly transition to liquidation is mandatory under the *BIA* where a proposal is rejected by creditors. The *CCAA* is silent on the transition into liquidation but the breadth of the court's discretion under the Act is sufficient to construct a bridge to liquidation under the *BIA.* The court must do so in a manner that does not subvert the scheme of distribution under the *BIA*. Transition to liquidation requires partially lifting the *CCAA* stay to commence proceedings under the *BIA*. This necessary partial lifting of the stay should not trigger a race to the courthouse in an effort to obtain priority unavailable under the *BIA*. [Emphasis added.]

[113] Consequently, the question for this court is whether the CCAA judge erred in principle, or exercised his discretion unreasonably, by lifting the stay and ordering the Remaining Applicants into bankruptcy.

[114] The various complaints levied against the CCAA judge's exercise of discretion can be summarized as raising the following questions. Did the motion judge err in:

1. failing to properly take into consideration West Face's conduct in bringing the Bankruptcy Motion?

2. failing to recognize, and require payment of, the wind up deemed trusts that arose during the CCAA Proceeding before ordering GFPI into bankruptcy?

3. wrongly considering that the pension claimants had to take certain steps earlier in the CCAA Proceeding in order to successfully assert their claims? and

4. failing to consider the question posed by the Pension Motion, namely, whether GFPI, the CRO and the Monitor should be relieved from making further payments into the Plans?

1. West Face's Conduct

[115] Two complaints are levied about West Face's conduct. The first is that West Face delayed in bringing the Bankruptcy Motion and the second is that West Face brought that motion to defeat the wind up deemed trust regime.

[116] Even if delay is a relevant consideration when considering West Face's conduct, I do not accept that West Face failed to bring the Bankruptcy Motion in a timely manner. The Pension Motion was brought on June 8, 2012, and originally returnable on June 25, 2012. Although in March 2012, West Face had been served with notice that counsel for the Second Lien Lenders' Agent no longer represented the Agent, the record is not clear on when West Face discovered that the Agent could not obtain timely instructions from the Second

Lien Lenders in respect of the Pension Motion. From the record, it appears that West Face acted promptly upon discovering that fact. West Face retained its own counsel on October 19, 2012, served a notice of appearance that same day and brought the Bankruptcy Motion on October 21, 2012, returnable on October 22, 2012.

[117] In the circumstances, I do not view West Face as having been dilatory in the bringing of the Bankruptcy Motion.

[118] As for the submission that the Bankruptcy Motion was brought to defeat the wind up deemed trust priority regime, assuming that to have been West Face's motivation, it does not disentitle West Face from being granted the relief it sought in the Bankruptcy Motion. A creditor may seek a bankruptcy order under the BIA to alter priorities in its favour: see *Federal Business Development Bank v. Québec*, [1988] 1 S.C.R. 1061, at p. 1072; *Bank of Montreal v. Scott Road Enterprises Ltd.* (1989), 57 D.L.R. (4th) 623 (B.C.C.A), at pp. 627, 630-31; and *Ivaco*, at para. 76.

2. The Wind up Deemed Trusts

[119] The Superintendent (joined by the Administrator and the Intervener) makes two submissions as to why the CCAA judge erred in failing to order payment of the wind up deemed trusts deficits before ordering the Remaining Applicants into bankruptcy. First, he submits that, unlike bankruptcy where PBA deemed trusts

are inoperative, the wind up deemed trusts in this case were not rendered inoperative because they did not conflict with a provision of the CCAA or an order made under the CCAA (for example, an order establishing a debtor-in-possession charge). Second, he contends that *Indalex* requires that the wind up deemed trusts be given priority in this case.

[120] I would not accept either submission.

Federal Paramountcy

[121] In my view, the first submission misses a crucial point: federal paramountcy in this case is based on the BIA.

[122] As I have explained, at the time that the Motions were heard, it was open to the CCAA judge to order the Remaining Applicants into bankruptcy. Once the CCAA judge exercised his discretion and made that order, the priorities established by the BIA applied to the Remaining Funds and rendered the wind up deemed trust claims inoperative.

[123] Because wind up deemed trusts are created by provincial legislation, their payment could not be ordered when the Motions were heard because payment would have had the effect of frustrating the priorities established by the federal law of bankruptcy. A provincial statute cannot alter priorities within the federal scheme nor can it be used in a manner that subverts the scheme of distribution under the BIA: *Century Services*, at para. 80.

Indalex

[124] As for the second submission, in my view, *Indalex* does not assist in the resolution of the priority dispute in this case.

[125] In *Indalex*, the CCAA court authorized debtor-in-possession ("DIP") financing and granted the DIP charge priority over the claims of all creditors.

[126] There were two pension plans in issue in *Indalex*: the executives' plan and the salaried employees' plan. When the CCAA proceedings began, the executives' plan had not been declared wound up. As s. 57(4) of the PBA provides that the wind up deemed trust comes into existence only when the pension plan is wound up, no wind up deemed trust existed in respect of the executives' plan.

[127] The salaried employees' pension plan was in a different position, however. That plan had been declared wound up prior to the commencement of the CCAA proceeding and the wind up was in process.

[128] A majority of the Supreme Court concluded that the PBA wind up deemed trust for the salaried employees' pension plan continued in the CCAA proceeding, subject to the doctrine of federal paramountcy. However, the CCAA court-ordered priority of the DIP lenders meant that federal and provincial laws gave rise to different, and conflicting, orders of priority. As a result of the

application of the doctrine of federal paramountcy, the DIP charge superseded the deemed trust.

[129] Both the facts and the issues in *Indalex* differ from those of the present case.

[130] There are two critical factual distinctions. First, the wind up deemed trust under consideration in *Indalex* arose before the CCAA proceeding commenced. In this case, neither of the Plans had been declared wound up at the time the Initial Order was made – the Superintendent's Wind Up Orders were made after the CCAA Proceeding commenced.

[131] Second, the BIA played no part in *Indalex.* In this case, however, the BIA was implicated from the beginning of the CCAA Proceeding. Prior to the issuance of the Initial Order, one of the debtor companies' creditors (GE Canada) had issued a bankruptcy application, which was stayed by the Initial Order. Further, and importantly, at the time the priority contest came to be decided in this case, both the Pension Motion and the Bankruptcy Motion were before the CCAA judge and he found that there was no point to continuing the CCAA proceeding.[3]

[132] The issues for resolution in *Indalex* were whether: the deemed trust in s. 57(4) applied to wind up deficiencies; such a deemed trust superseded a DIP

[3] See para. 62 of the reasons, where the CCAA judge states that the usefulness of the CCAA proceeding had come to an end.

charge; the company had fiduciary obligations to the pension plan members when making decisions in the context of insolvency proceedings; and, a constructive trust was properly imposed as a remedy for breach of fiduciary duties.

[133] As I already explained, because of the point in the proceedings at which the Motions were heard, the primary issue for the CCAA judge in this case was whether to lift the CCAA stay and order the Remaining Applicants into bankruptcy.

[134] Given the legal and factual differences between the two cases, I do not find *Indalex* to be of assistance in the resolution of this dispute.

3. Steps by the Pension Claimants

[135] It was submitted that the CCAA judge wrongly required the pension claimants to have taken steps earlier in the CCAA Proceeding, had they wished to assert their wind up deemed trust claims.

[136] I understand this submission to be based largely on paras. 94 and 95 of the CCAA judge's reasons. The relevant parts of those paragraphs read as follows:

> [94] It does seem to me that a commitment to make wind up deficiency payments is not in the ordinary course of business of an insolvent company subject to a CCAA order unless agreed to. Even if the obligation could be said to be in the ordinary course for an

> insolvent company GFPI was not obliged to make the payments … .
>
> [95] This is precisely the reason for the granting of a stay of proceedings that is provided for by the *CCAA.* Anyone seeking to have a payment made that would be regarded as being outside the ordinary course of business must seek to have the stay lifted or if it is to be regarded as an ordinary course of business obligation, persuade the applicant and creditors that it should be made.

[137] I do not read the CCAA judge's reasons as saying that the pension claimants had to have taken certain steps earlier in the CCAA Proceeding in order to assert their claims. Rather, I understand the CCAA judge to be saying the following. A contribution towards a wind up deficit made by an insolvent company subject to a CCAA order is not a payment made in the ordinary course of business. The Initial Order only permitted payments in the ordinary course of business. Thus, if during the CCAA Proceeding the pension claimants wanted payments be made on the wind up deficits, they would have had to have taken steps to accomplish that. These steps include reaching an agreement with the Applicants and secured creditors or seeking to have the stay lifted and an order made compelling the making of the payments.

[138] Understood in this way, I see no error in the CCAA judge's reasoning. I would add that the timing of the relevant events supports this reasoning. When the Initial Order was made, the Plans were on-going – the Superintendent's Wind Up Orders were not made until almost three years later. The Initial Order

permitted, but did not require, GFPI to pay "all outstanding and future … pension contributions … incurred in the ordinary course of business". The nature and magnitude of contributions to ongoing pension plans is different from those made to pension plans in the process of being wound up. Thus, it does not seem to me that payments made on wind up deficits fall within the terms of the Initial Order which permitted the making of pension contributions "incurred in the ordinary course of business".

[139] Accordingly, had the pension creditors sought to have payments made on the wind up deficits, they would have had to have taken steps – such as those suggested by the CCAA judge – to enable and/or compel such payments to be made.

4. The Question Posed by the Pension Motion

[140] I do not accept that the CCAA judge erred by failing to answer the question posed by the Pension Motion. That question, it will be recalled, was whether GFPI, the CRO and the Monitor should be relieved from making further payments into the Plans.

[141] In ordering the Remaining Applicants into bankruptcy, the CCAA judge found that there was no point to continuing the CCAA Proceeding. It was plain and obvious that there were insufficient funds to meet the claims against the Remaining Funds. Accordingly, there was no need for the CCAA judge to

address the question posed by the Pension Motion because distribution of the Remaining Funds had to be in accordance with the BIA priorities scheme.

A CONCLUDING COMMENT

[142] In my view, this case illustrates the value that a CCAA proceeding – rather than a bankruptcy proceeding – offers for pension plan beneficiaries. Three examples demonstrate this.

[143] First, from the outset of the CCAA Proceeding until June 2012, all pension contributions (both ongoing and special payments) continued to be made into the Plans. Had GFPI gone into bankruptcy, those payments would not have been made to the Plans.

[144] Second, on the sale to Georgia Pacific, Georgia Pacific assumed the Pension Plan for Hourly Employees of Grant Forest Products Inc. – Englehart Plan. Had GFPI gone into bankruptcy, it is unlikely in the extreme that the Englehart Plan would have continued as an on-going plan.

[145] Third, the CCAA Proceeding gave GFPI sufficient "breathing space" to enable it to take steps to ensure that the Plans continued to be properly administered. This is best seen from the orders dated August 26, 2011, and September 21, 2011. Through those orders, GFPI was authorized to initiate the Plans' windups and work with the Superintendent in appointing a replacement administrator, and the Monitor was authorized to hold back funds against which

the pension claimants could assert their claims. Co-operation of this sort typically leads to reduced costs of administration with the result that more funds are available to plan beneficiaries.

[146] I hasten to add that these remarks are not intended to suggest a lack of sympathy for the position of pension plan beneficiaries in insolvency proceedings. Rather, it is to recognize that while no panacea, at least there is some prospect of amelioration of that position in a CCAA proceeding.

DISPOSITION

[147] Accordingly, I would dismiss the appeal. Dismissal of the appeal would leave paras. 1-6 of the Transition Order operative, thus nothing more need be said in relation to the Remaining Applicants' submissions.

[148] If the parties are unable to agree on costs, I would permit them to make written submissions to a maximum of three pages in length, within fourteen days of the date of release of these reasons.

Released: August 7, 2015 "DD"

"E.E. Gillese J.A."
"I agree Doherty J.A."
"I agree P. Lauwers J.A."

Schedule A

Paragraphs 1-6 of the Transition Order read as follows:

SERVICE

1. THIS COURT ORDERS that the Motions are properly returnable and hereby dispenses with further service thereof.

CAPITALIZED TERMS

2. THIS COURT ORDERS that all capitalized terms not defined herein shall have the meaning ascribed to them in the Stephen Affidavit.

APPROVAL OF ACTIVITIES

3. THIS COURT ORDERS that the Twenty-Sixth Report, the Twenty-Seventh Report and the Twenty-Ninth Report and the activities of the Monitor as set out therein be and are hereby approved.

EXTENSION OF STAY PERIOD

4. THIS COURT ORDERS that the Stay Period in respect of the Remaining Applicants as defined in the Order of Mr. Justice Newbould made in these proceedings on June 25, 2009 (the “Initial Order”), as previously extended until January 31, 2014, be and is hereby extended until the filing of the Monitor’s Discharge Certificate as defined in paragraph 23 hereof or further order of this Court.

5. THIS COURT ORDERS that none of GFPI, Stonecrest Capital Inc. (“SCI”) in its capacity as Chief Restructuring Organization (the “CRO”), or the Monitor shall make any further payments to either of the Timmins Salaried Plan or the Executive Plan (collectively, the “Pension Plans”) or their respective trustees or to the Pension Administrator.

6. THIS COURT ORDERS and declares that none of GFPI, the CRO or the Monitor shall incur any liability for not making any payments when due to the Pension Plans or their respective trustees or the Pension Administrator.

COURT OF APPEAL FOR ONTARIO

CITATION: KingSett Mortgage Corporation v. 30 Roe Investments Corp., 2023 ONCA 219
DATE: 20230329
DOCKET: M54133 (COA-23-CV-0215)

Brown, Trotter and Paciocco JJ.A.

BETWEEN

KingSett Mortgage Corporation

Applicant
(Respondent/Responding Party)

and

30 Roe Investments Corp.

Respondent
(Appellant/Responding Party)

Mark Dunn, for the moving party Receiver, KSV Restructuring Inc.

Mervyn Abramowitz and Lou Brzezinski, for the responding party 30 Roe Investments Corp.

Richard Swan, for the respondent KingSett Mortgage Corporation

Darren Marr, for the Canadian Imperial Bank of Commerce

Raymond Zar, acting in person in his capacity as a guarantor of the responding party's debt

Heard: March 27, 2023

On appeal from the orders of Justice Jana Steele of the Superior Court of Justice, dated February 7, 2023.

REASONS FOR DECISION

I. OVERVIEW

[1] The court-appointed receiver, KSV Restructuring Inc., moves for: (i) an order quashing the February 23, 2023 appeal initiated by the respondent debtor, 30 Roe Investments Corp. ("30 Roe"), from the two February 7, 2023 approval and vesting orders made by Steele J. (the "Approval Orders"); (ii) alternatively, an order expediting the appeal; (iii) in the further alternative, an order denying 30 Roe leave to appeal the Approval Orders under s. 193(e) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"); and (iv) in the further alternative, an order pursuant to *BIA* s. 195 lifting any automatic stay of the proceedings.

[2] The Approval Orders authorized the Receiver to complete sale transactions for two of the nine units owned by 30 Roe at the Minto 30 Roe condominium building, specifically units PH04 and PH09.

[3] Although the agreements for purchase and sale of those two units between the receiver and the purchasers contemplated an end of February closing, amending agreements filed in the motion record extended the closing dates for both transactions to the end of this week, Friday, March 31, 2023.

[4] A personal guarantor of the company's indebtedness, Raymond Zar, who is also the principal of 30 Roe, opposes the Receiver's motion.

II. KEY EVENTS CONCERNING THE RECEIVERSHIP

[5] The events leading up to the appointment of a receiver over 30 Roe were described by this court in its decision quashing the company's appeal from the May 9, 2022 Receivership Order: 2022 ONCA 479.

[6] Since that time, the Receiver obtained from McEwen J. a July 18, 2022 Sale Process Approval Order, which authorized the Receiver to proceed with an individual-unit sales process described in s. 4.0 of its First Report (the "July Sales Order"). In approving that marketing and sales approach, McEwen J. rejected 30 Roe's submission that the nine units should "be sold en masse, essentially as an income producing hospitality-type of model akin to a hotel." No appeal was taken from the July Sales Order.

[7] McEwen J. subsequently authorized the Receiver to change listing agents for the sale of the units in his December 14, 2022 order (the "December Sales Order"). No appeal was taken from the December Sales Order.

[8] Earlier this year, the Receiver negotiated sale agreements for PH04 and PH09. The Receiver provided details of the events leading up to those agreements, including the listing history for the two units, in s. 4.0 of its Third Report dated January 26, 2023. In s. 4.5 of that report, the Receiver addressed the debtor's continued insistence that the nine units be sold as a block. In s. 4.5(6) the Receiver stated: "Based on its own review of the information

available to it, the Receiver continues to believe there is no merit to the suggestion that the Units could be sold as a going concern hospitality business for a premium relative to the individual resale value of the Units".

[9] The Receiver moved before Steele J. for approval of the two sale transactions.

[10] The day before the return of that motion, 30 Roe filed an affidavit from Mr. Zar that repeated the company's criticism of the Receiver's plan to market the units individually. Mr. Zar contended that individual sales would not realize the units' optimum value. He deposed, at paras. 12 and 13 of his affidavit, that an income approach was more suitable for determining the aggregate value of the units (which he described as a business). Mr. Zar deposed that he valued the units on a "going concern" basis at approximately $12.476 million as of February 6, 2023.

[11] Steele J. was not persuaded by Mr. Zar's personal valuation and advocacy of an *en bloc* sale. She noted in her February 7, 2023 endorsement that:

- McEwen J. had rejected the "same argument" when he made the July Sales Approval Order;
- The Receiver had asked 30 Roe several times for evidence supporting the debtor's view that a going concern sale would be preferable but 30 Roe did not provide such information; and

- The Receiver challenged the reliability of the valuation proffered by Mr. Zar, observing that 30 Roe had not provided up-to-date financial statements or information about the market for the type of business it contended was operated using the nine condominium units.

[12] Steele J. was satisfied that the criteria enumerated by this court in *Royal Bank of Canada v. Soundair Corporation* (1991), 83 D.L.R. (4th) 76 (Ont. C.A.) had been met. She approved the two sale transactions and granted the Approval Orders.

[13] On February 23, 2023, 30 Roe served a notice of appeal from the Approval Orders (the "Notice of Appeal").

III. PROCEDURAL ISSUES

[14] Before dealing with the relief sought by the Receiver in its notice of motion, we wish to recount several procedural issues raised by Mr. Zar during this appeal.

[15] On the initial return of the motion on Monday, March 27, 2023 before a slightly differently constituted panel, Mr. Zar asked Lauwers J.A. to recuse himself from the panel. The previous week, Lauwers J.A. had heard and denied a motion by 30 Roe's counsel of record, Blaney McMurtry LLP, to remove itself from the record: 2023 ONCA 196. Lauwers J.A. acceded to Mr. Zar's request and recused himself. As a result, one of the scheduled duty judges, Brown J.A., joined the panel.

[16] Upon the resumption of the hearing before the reconstituted panel, Mr. Zar requested a 24-hour adjournment of the hearing to permit the filing of a responding factum. By way of background, on Friday, March 24, 2023, Blaneys had sent a letter to the court advising that "our client has instructed us to not to file any responding material" on the Receiver's motion to quash. As a result, no responding materials were before the panel.

[17] When this correspondence was brought to Mr. Zar's attention, he orally changed his instructions to Blaneys in open court. Mr. Zar wanted Blaneys to make submissions on behalf of 30 Roe as they were still on the record. Counsel from Blaneys was not prepared to do so.

[18] From the interaction between counsel from Blaneys and Mr. Zar, it was clear to the panel that a complete breakdown had occurred between the law firm and its client. In those circumstances, the panel had no confidence that if we were to compel Blaneys to make submissions, Mr. Zar as the principal of 30 Roe or on his own behalf would accept the adequacy or appropriateness of those submissions or their faithfulness to instructions he had given Blaneys. Consequently, we informed Mr. Zar that we would not call on Blaneys but would hear submissions from him on behalf of 30 Roe.

[19] We advised Mr. Zar that if he wished to file with our court registrar a draft respondent's factum that he was holding in his hands, we would have the registrar

make copies for the panel so that we could review it before the continuation of the hearing. We granted Mr. Zar a 30-minute adjournment to decide whether he would file the factum and send electronic copies to the other parties. We thereupon recessed for 30 minutes.

[20] Upon resuming, the panel learned that Mr. Zar had not filed a factum for the panel's consideration or provided copies to the other parties.

[21] Instead, Mr. Zar requested that Brown J.A. recuse himself because, according to Mr. Zar, some familial relationship created a conflict of interest. When questioned, Mr. Zar was not prepared to name the person who allegedly had some familial relationship with Brown J.A. that might create a conflict. Consequently, the panel called on the moving party Receiver's counsel to make his submissions on the motion.

[22] When the panel called upon Mr. Zar to make responding submissions, he advised that a medical condition of his was making it difficult for him to formulate submissions. The panel offered, and Mr. Zar accepted, a 10-minute recess to allow him to collect his thoughts. Upon reconvening, argument of the motion proceeded to its conclusion, with the panel taking the matter under reserve.

[23] Throughout the hearing Mr. Zar took the position that the submissions he made were solely in his capacity as a guarantor of the corporate debt of 30 Roe

and not on behalf of the company, although the substance of his submissions certainly conveyed a response by the debtor corporation to the Receiver's motion.

IV. ANALYSIS

The Receiver's motion to quash

[24] Although in a factum filed on a provisional execution motion below 30 Roe agreed that an appeal in the matter could only proceed with leave, apparently it "walked back" that admission during the course of argument. Consequently, we will examine whether in the specific circumstances of this case an appeal as of right lies under s. 193 from the Approval Orders.

[25] Consideration of the Receiver's motion to quash must begin with an examination of the order sought to be appealed and the grounds of appeal pleaded by 30 Roe in its Notice of Appeal.

[26] The Approval Orders follow the form of standard Commercial List approval and vesting orders: they approve the sale transactions; authorize the Receiver to execute the sale agreements "with such minor amendments as the Receiver may deem necessary" and to "execute such additional documents as may be necessary or desirable for the completion" of the transactions; and provide that upon the delivery of a Receiver's Certificate all of the debtor's right, title, and interest in the purchased units shall vest absolutely in the purchaser free and clear from all security interests. The Approval Orders make no provision for the distribution of

the sale proceeds. Pursuant to para. 12 of the initial Receivership Order, the Receiver must deposit those funds into an account and hold the monies "to be paid in accordance with the terms of this Order or any further Order of this Court."

[27] The grounds of appeal advanced by 30 Roe in its Notice of Appeal reflect the debtor's repeatedly expressed view that the nine units should be sold *en bloc*, not individually. The Notice of Appeal alleges that:

- the Receiver ought not to have marketed the units as separate properties;
- the evidence on the motion was clear that the units were part of a larger commercial "Enterprise", a term 30 Roe and Mr. Zar use to describe a hospitality business they contend the nine units collectively supported;
- the failure to market the units for sale together led to a marked diminution in the value of the Enterprise;
- the motion judge "failed to appreciate the entire concept of the Enterprise and the loss in value of the Enterprise, if the Units were sold off separately";
- the motion judge failed to apply the *Soundair* test "as the Units ought not to have been marketed or offered for sale in the first place"; and
- the motion judge "failed to find that the marketing and offering of the Units for sale here, on their own, would not be in the best interests of the creditors or other stakeholders here."

[28] The Notice of Appeal states that 30 Roe has an appeal as of right pursuant to *BIA* ss. 193(a)-(c). We shall consider each provision.

[29] As to *BIA* s. 193(a), 30 Roe's Notice of Appeal from the Approval Orders does not raise any "point in issue [that] involves future rights". The narrow scope of the concept of future rights was described in *Business Development Bank of*

Canada v. Pine Tree Resorts Inc., 2013 ONCA 282, 115 O.R. (3d) 617, at para. 15: "'Future rights' are future legal rights, not procedural rights or commercial advantages or disadvantages that may accrue from the order challenged on appeal. They do not include rights that presently exist but that may be exercised in the future".

[30] In the present case, the Notice of Appeal challenges the Approval Orders on the basis of the methodology, or procedure, followed by the Receiver for the unit sale process and alleged commercial disadvantages caused by that process. 30 Roe's appeal concerns rights that presently exist, not ones that may be exercised in the future. Consequently, the appeal of the Approval Orders does not engage *BIA* s. 193(a).

[31] Under *BIA* s. 193(c), an appeal as of right lies "if the property involved in the appeal exceeds in value ten thousand dollars." There is no dispute that the sale price for both units exceeds $10,000. However, the jurisprudence on *BIA* s. 193(c), as summarized by this court in *Hillmount Capital Inc. v. Pizale*, 2021 ONCA 364, 462 D.L.R. (4th) 228, at paras. 36-39, identifies three types of orders that do not fall within the ambit of that section:

- an order that does not result in a loss or does not "directly involve" property exceeding $10,000 in value;
- an order that does not bring into play the value of the debtor's property; or
- an order that is procedural in nature.

[32] To determine whether an order sought to be appealed falls within *BIA* s. 193(c), a court must analyze the economic effect of the order: *Hillmount*, at para. 41. As stated in *Hillmount*, at para. 42:

> What is required in any consideration of whether the appeal of an order falls within *BIA* s. 193(c) is a critical examination of the effect of the order sought to be appealed. Such an examination requires scrutinizing the grounds of appeal that are advanced in respect of the order made below, the reasons the lower court gave for the order, and the record that was before it. The inquiry into the effect of the order under appeal therefore is a fact-specific one; it is also an evidence-based inquiry, which involves more than merely accepting any bald allegations asserted in a notice of appeal: *Bending Lake* [*infra*], at para. 64. [*MNP Ltd. v. Wilkes*, 2020 SKCA 66, 449 D.L.R. (4th) 439] concurs on this point, holding, at para. 64, that the loss claimed must be "sufficiently grounded in the evidence to the satisfaction of the Court determining whether there is a right of appeal," a point repeated in the subsequent chambers decision in *Re Harmon International Industries* [*Inc.*, 2020 SKCA 95, 81 C.B.R. (6th) 1], at para. 32.

[33] In the present case, the Approval Orders authorized the Receiver to proceed with sale transactions for two units. Section 4.0 of the Receiver's Third Report detailed the listing history (including listing prices) for both units. Unredacted copies of the negotiated agreements of purchase and sale were provided to the debtor and were before the motion judge. No evidence was put before the motion judge that the sale prices for both transactions were unreasonable or not reflective of prevailing market conditions. Accordingly, there was no basis to suggest that

approval of the two transactions would result in a “loss” of value for the properties when compared to available market prices.

[34] Instead, 30 Roe sought to oppose the sale transactions by repeating the “*en bloc* sale” argument it had made at the time of the July Sales Order but which McEwen J. had rejected. On its face, the evidence 30 Roe filed before Steele J. carried virtually no weight, consisting as it did of a bald assertion by Mr. Zar about the possible value of an *en bloc* transaction that was not supported by an independent valuation and was advanced against a history of 30 Roe refusing requests by the Receiver for financial information about the “Enterprise”.

[35] Moreover, the position taken by 30 Roe before Steele J. amounted to a collateral attack on the July and December Sales Orders, which it had not appealed. 30 Roe repeated its *en bloc* arguments before McEwen J. in December and then before Steele J., taking the position that it had “reserved” its right to object to future sales on the basis that an *en bloc* sale would generate more value. That unilateral reservation of rights did not alter the legal effect of the July and December Sales Orders under which the court authorized the Receiver to market and sell the units individually, which the Receiver did.

[36] By failing to appeal and set aside the July and December Sales Orders, 30 Roe lost the legal basis to advance an argument that the Approval Orders would create a loss of value by reason of the individual-unit marketing and sales

methodology used by the Receiver as compared to an "*en bloc*" sales process. It was the July Sales Order, not the Approval Orders, that put in jeopardy any difference in value of the property that might arise from an "individual-unit" sales approach as compared to an "*en bloc*" sales approach. Given that 30 Roe's Notice of Appeal asserts no other basis on which to reverse the Approval Orders, in the circumstances of this case its appeal from the Approval Orders does not fall within the ambit of *BIA* s. 193(c).

[37] Finally, 30 Roe's appeal does not fall within the ambit of *BIA* s. 193(b), which provides an appeal as of right "if the order or decision is likely to affect other cases of a similar nature in the bankruptcy proceedings." The jurisprudence has consistently interpreted *BIA* s. 193(b) as meaning that a right of appeal will lie where "the decision in question will likely affect another case raising the same or similar issues in the same bankruptcy proceedings" as the provision concerns "real disputes" likely to affect other cases raising the same or similar issues in the same bankruptcy or receivership proceedings: see *2403177 Ontario Inc. v. Bending Lake Iron Group Limited*, 2016 ONCA 225, 396 D.L.R. (4th) 635, at para. 32.

[38] As mentioned, by failing to appeal and set aside the July and December Sales Orders, 30 Roe lost the legal basis to advance an argument that the Approval Orders – or subsequent approval orders for other individual units – would create a loss of value by reason of the individual-unit marketing and sales

methodology used by the Receiver. Further, subsequent motions by the Receiver for the approval of sale transactions for other units will be decided upon the evidence related to those sale transactions, not the transactions for PH04 and PH09 authorized by the Approval Orders.

[39] For these reasons, we conclude that 30 Roe's appeal does not fall within the ambit of *BIA* ss. 193(a)-(c). Accordingly, we quash its appeal.

Leave to appeal

[40] Although 30 Roe did not file a notice of motion seeking leave to appeal the Approval Orders pursuant to *BIA* s. 193(e), it did seek such alternative relief in its Notice of Appeal. As well, several of the submissions made by Mr. Zar during the hearing dealt with elements of the leave to appeal test. Accordingly, we will consider whether leave should be granted to 30 Roe to appeal the Approval Orders.

[41] In considering whether to grant leave to appeal an order under *BIA* s. 193(e) a court will look to whether the proposed appeal: (i) raises an issue that is of general importance to the practice in bankruptcy/insolvency matters or to the administration of justice as a whole, and is one that this court should therefore consider and address; (ii) is *prima facie* meritorious; and (iii) would unduly hinder the progress of the bankruptcy/insolvency proceedings: *Pine Tree Resorts*,

at para. 29; *Impact Tool & Mould Inc. v. Impact Tool & Mould Inc. Estate*, 2013 ONCA 697, at para. 3.

[42] 30 Roe's proposed appeal does not raise an issue of general importance, based as it is on the fact-specific sales process approved in its receivership. Its proposed appeal is not *prima facie* meritorious: as discussed, it amounts to nothing more than a collateral attack on the July and December Sales Orders. Finally, its appeal would unduly hinder the progress of the receivership. Granting leave to appeal probably would put in jeopardy the pending closings of the sales of PH04 and PH09. 30 Roe has not filed any evidence of equivalent or superior offers for those two units or of its present ability to satisfy the claims of its creditors. One therefore is left with the distinct impression that its attempt to appeal the Approval Orders is nothing more than a delay tactic.

[43] For these reasons, we deny 30 Roe leave to appeal the Approval Orders.

Lifting the automatic stay

[44] Since we have quashed 30 Roe's appeal and denied it leave to appeal, there is no need to consider the Receiver's alternative request for an order lifting the automatic stay under *BIA* s. 195.

V. DISPOSITION

[45] For the reasons set out above, we grant the Receiver's motion. The appeal of 30 Roe from the Approval Orders is quashed. We deny 30 Roe leave to appeal the Approval Orders.

[46] The Receiver is entitled to seek its costs of this motion when it applies in the ordinary course for the approval of the supervising judge below of its activities and accounts.

"David Brown J.A."
"Gary Trotter J.A."
"David M. Paciocco J.A."

This judgment is temporarily redacted pending the closing

of the sale of Lash Point.

COURT OF APPEAL FOR ONTARIO

CITATION: Lash v. Lash Point Association Corp., 2022 ONCA 361
DATE: 20220511
DOCKET: C69733

Fairburn A.C.J.O., Pepall and Sossin JJ.A.

BETWEEN

John Edward Anthony Lash

Applicant

and

Lash Point Association Corp.

Respondent

AND BETWEEN

Timothy John Francis Lash

Applicant (Respondent)

and

Lash Point Association Corp., Lash Avalon Holdings Limited, Penelope Lash Lorimer, Elizabeth Gaye Harden, Donalda Secor, Timothy Charles Stevenson Lorimer, John Roger Miller Lash, Wendy Tanis Lash, Jennifer Lash, Catherine Penelope Lash, Anthony Baldwin Lash, Peter Charles Baldwin Lash, John Edward Anthony Lash, David Marshall Casey Lash, Nancy Tanis Lash Robinson, Tanis Elizabeth Robinson, Seanna Mackenzie Robinson and Airlie Lash Robinson

Respondents (Appellants/Respondents)

Patrick Shea and Christopher Stanek, for the appellants, Lash Point Association Corp., Peter Charles Baldwin Lash and John Edward Anthony Lash

Justin W. de Vries and Jacob Kaufman, for the respondents Elizabeth Gaye Harden, Donalda Secor, Wendy Tanis Lash, Jennifer Lash, Catherine Penelope Lash, Tanis Elizabeth Robinson, Seanna Mackenzie Robinson and Airlie Lash Robinson

Kenneth Kraft and Sara-Ann Wilson, for the respondent Grant Thornton Limited in its capacity as court-appointed receiver of Lash Point Association Corp.

Timothy Lash, acting in person

Heard: April 19, 2022

On appeal from the order of Justice Sean F. Dunphy of the Superior Court of Justice, dated June 24, 2021.

By the Court:

Introduction

[1] Lash Point is a cottage property consisting of about 28 acres on Lake Rosseau in the Township of Muskoka Lakes.[1] It has been in the Lash family for over 100 years. This appeal highlights the challenges that may arise when cottage property is owned by multiple family members.

[2] In 1996, thirteen family members (the “founding members”) transferred their ownership interests in Lash Point to a non-profit corporation, Lash Point Association Corporation (“LPAC”). The object of LPAC, as stated in its letters

[1] The property had been 30 acres in size but in January 2018, a two-acre portion of it known as “Lower High Rock” was severed and sold.

patent, was “to own and conserve land and its natural features for the enjoyment of its members and guests.” In the event LPAC was ever wound up, the founding members would receive a percentage of the proceeds realized from the sale of Lash Point equal to the percentage of their interest in Lash Point contributed to LPAC.

[3] By 2016, LPAC had 25 family members from five groups or “clans”. They consisted of 13 founding members and 12 non-founding members. The founding members were those who retained an economic interest in the LPAC assets upon dissolution or wind up. The non-founding members were the adult children of the founding members who had the benefit of, and some responsibility for, the property. They had no interest in the property on dissolution or wind up but were voting members of LPAC.

[4] The family members disagreed on the future of Lash Point. Some wanted to stay, continue to enjoy the property, and avoid triggering capital gains tax (the “Remainers”) while others wanted to leave and realize on the fair market value of their interests (the “Departers”). Neither side could muster a two-thirds majority of voting members as required by LPAC’s by-laws. The parties concluded that a court-supervised solution was required. This appeal involves the evolution and outcome of that process.

Background Facts

Competing Court Applications

[5] Two competing applications were heard by Penny J. in September 2016. Some Departers, led by Tim Lash, sought a wind-up order and a sale of all of Lash Point through a well-designed marketing plan. In his reasons for decision, Penny J. noted the Departers' position that it was "impossible to determine fair market value without exposing the Property to the open market".

[6] The Remainers sought approval of a plan of arrangement or, alternatively, a court-ordered buy-out of the Departers' interests. This would permit retention of a portion of the property and the Remainers could also avoid paying capital gains tax.

[7] Penny J. was of the view that winding up was a remedy of last resort and the buy-out option, properly structured, was a viable alternative. He thus found in favour of the buy-out alternative proposed by the Remainers and ordered a staged buy-out which was described in Schedule A attached to the order.[2]

[8] The order contemplated various severances. The main family compound would be severed from the remaining property and would be retained by the Remainers (through LPAC). The remaining property would then itself be severed

[2] Penny J.'s original reasons were dated October 31, 2016. Following a supplementary endorsement dated November 24, 2016, that arose from issues of contention, and reasons to settle the order dated March 17, 2017, that reflected further disagreements, the order was ultimately issued and entered on April 18, 2017.

into various parcels which would be marketed and sold to generate the cash to fund the buy-out of the Departers. If the sale proceeds were insufficient to pay out the Departers' interests, the Remainers (through LPAC) would pay any shortfall. The Remainers conceded before Penny J. that the main family compound might have to be sold if they could not, or did not want to, make that shortfall payment.

[9] Penny J. directed LPAC to purchase the LPAC memberships of the Departers who in exchange received an undivided interest in the property of LPAC equal to what they would have received on the corporation's wind-up or dissolution. On purchase of their memberships, the Departers would no longer have the use of Lash Point. Once the severed lots had been sold, they would receive payment.

[10] Penny J. appointed Grant Thornton Limited as the Receiver of all the assets and properties of LPAC for the purpose of implementing the buy-out on the terms described in the order.[3] Among other things, the order directed the Receiver to obtain appraisals, engage a real estate broker, and effect the severance and sale of the severed lots. The Receiver was also authorized to apply to court for advice and directions in the discharge of its powers and duties.

[11] Any dispute including the pace of the valuation and sales process and any dispute arising from the terms of Schedule A were to be determined by the court

[3] The Receiver did not take possession of the property nor was it granted the power to manage the property.

on the motion of the Receiver or a founding member. The Receiver was not to participate in disputes among the founding members except as directed by the court.

[12] On May 31, 2017, the Receiver determined that eight LPAC members, four of whom were founding members, had elected to be Remainers. Seventeen LPAC members, nine of whom were founding members, elected or were deemed to be Departers. Consistent with Penny J.'s direction, LPAC purchased the memberships of those who elected to be Departers.

[13] On November 24, 2016, Penny J. addressed various issues that had arisen including the Departers' request for interim distributions. He dismissed that request noting that "concerns may be addressed with the court if the [Departers] are unhappy with the pace at which the valuation and sales process is unfolding."

[14] No one sought to appeal the order granted by Penny J.

Progress and Delay

[15] The process for approval and revision of the severances proved to be both complex and time consuming. Each group blames the other for the delay. The Departers complain that delay results in costs being borne by them with no corresponding benefit while the Remainers enjoy the use of Lash Point. Financing

for the receivership was also required which, along with the Receiver's fees, has proved costly.[4]

[16] In June 2017, an appraiser provided an appraisal report to the Receiver that appraised the entire property as having an estimated fair market value of [redacted]. Another appraisal was obtained dated June 1, 2019 for the main family compound only which consisted of 6.25 acres. The appraisal reflected a value of [redacted]. Although not an appraisal, a 2019 estimate of value of the entire property as severed lots amounted to [redacted].

[17] On July 2, 2020, Dietrich J. heard a motion for various relief brought by the Receiver. Dietrich J. approved the Receiver's request and found that the Receiver had complied with the buy-out order, including the court-mandated timelines.[5] Tim Lash raised some issues, including the possibility of a neighbouring property owner, Andrew Sheiner, buying one or more of the proposed lots. Dietrich J. noted that the Departers "had the opportunity to seek an order extending the timelines or varying the terms of the order, but they did not do so."

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[4] Financing is currently in place for a reasonable period.
[5] Although the buy-out order had no pre-determined deadline, it did set time limits for specific steps in the process: e.g., 10 days for the members of LPAC to elect to be Remainers, 30 days for the Remainers to consider the boundaries of the family compound and respond to the Receiver, etc.

Miscellaneous Purchase Overtures

[18] On July 29, 2020, Philip Harding, a real estate agent who is also the mayor of the Township of Muskoka Lakes, presented an offer from another neighbour, Pat DiCapo. The purchase price offered was [redacted] for all of Lash Point including the main family compound. In Mr. Harding's affidavit, he attaches a WhatsApp message from Peter Lash, a Remainer, informing Mr. Harding that Peter had sent a letter to the Receiver, advising that all the Remainers supported the offer.

[19] However, a few days later, without any authorization from the Receiver or the court, Tim Lash sent a "prospectus letter" dated August 2, 2020 to several third parties, soliciting indications of interest. He described the area as consisting of 28 acres with 3,195 feet of waterfront and noted that a new road was in place. He noted that COVID-19 had stimulated real estate sales on the big Muskoka lakes and noted a nearby sale of 1.36 acres having 500+ feet of waterfront for [redacted]. He invited the third parties to send indications of interest to the Receiver by August 4, 2020. For its part, the Receiver took the position that in the absence of an order varying Penny J.'s buy-out order or unanimity, he had no authority to deal with offers for all of Lash Pont. The Receiver would not negotiate or otherwise engage with any potential purchasers. Meanwhile, the DiCapo offer expired.

[20] On August 7, 2020, the parties reattended before Dietrich J. to address two proposed amendments to her order. Tim Lash asked that she add a paragraph ordering the Receiver to pursue a viable financing arrangement with Mr. Sheiner which she declined. He also again raised concerns about the sales process and limitations and gaps in the buy-out order. Dietrich J. agreed with the Receiver that if Mr. Lash wished to challenge the buy-out order or seek to vary it, he would need to bring a motion in the proceeding. Tim Lash did not do so nor did anyone else.

[21] On August 10, 2020, Mr. Sheiner presented an offer for [redacted], again for all of Lash Point. Further offers and expressions of interest materialized from other interested purchasers, ranging from [redacted] to [redacted]. One of these offers, from a developer, was approximately [redacted] more than Mr. Sheiner's offer. Still, no one sought to vary the buy-out order which contemplated a very different approach and which continued to bind all of the parties.

Sheiner/DiCapo Offer

[22] On October 7, 2020, Messrs. Sheiner and DiCapo made a joint offer for [redacted]. They also agreed to pay Mr. Harding's real estate commission fee in the fixed amount of [redacted]. That offer was subsequently adjusted downwards to [redacted] when Messrs. Sheiner and DiCapo agreed to assume the risk of HST.

[23] Tim Lorimer and Paula Lash, who had previously been Remainers, changed their position and agreed to the new Sheiner/DiCapo offer. This meant that the 4/9

founding member split that reflected Penny J.'s order was now 2/11. Between October 14-19, 2020, the Receiver received letters of direction signed by 11 of the 13 founding members of LPAC asking the Receiver to seek an order from the court facilitating the sale of all of Lash Point and approving the agreement of purchase and sale with Messrs. Sheiner and DiCapo. John and Peter Lash opposed the proposed agreement of purchase and sale, as did LPAC of which they are the controlling directors and which the Remainers control.

[24] Messrs. Sheiner and DiCapo finalized the agreement of purchase and sale with the Receiver, who then brought a motion for directions from the court.

June 10, 2021, Motion

[25] The motion was heard on June 10, 2021. The Receiver took no position on the motion and made no recommendation to the court regarding the proposed sale. The Receiver acknowledged that it did not retain any expert either to validate that the proposed purchase price represented the highest and best possible offer that could be obtained for Lash Point *en bloc* or to otherwise "test" the purchase price and terms of the proposed agreement of purchase and sale.

[26] In an order dated June 24, 2021, the motion judge effectively reversed the approach adopted by Penny J. which recognized the desire of the Remainers to retain a portion of their cottage property. The Receiver was directed to cease the severance process. The motion judge approved the agreement of purchase and

sale with Messrs. Sheiner and DiCapo for the whole of Lash Point. On the closing of the transaction, LPAC's right, title, and interest in Lash Point would vest in Messrs. Sheiner and DiCapo. As such, the underpinning of Penny J.'s order that provided some protection to those who wished to retain their interest in the cottage property effectively disappeared. He relied, in June 2021, on what he described as appraisal evidence from 2017 and 2019 to measure the purchase price for an agreement of purchase and sale dated October 2020.

Issues

[27] Before us, the appellants appeal from that order. The Receiver takes no position on the appeal.

[28] The appellants advance two grounds of appeal: (1) the motion judge lacked jurisdiction to vary the buy-out order and (2) the motion judge should not have approved the sale to Messrs. Sheiner and DiCapo. The appellants also seek to admit fresh evidence.

Fresh Evidence

[29] Dealing first with the fresh evidence, it has two components. The respondents consent to leave being granted to admit the Sixth Report of the Receiver provided the Receiver's Supplement to the Sixth Report, which pertains to the receivership's financing, is also admitted. They object, however, to the admission of an appraisal report dated April 1, 2022 that reveals a vastly higher

value for Lash Point than the proposed agreement of purchase and sale with Messrs. Sheiner and DiCapo.

[30] An appellate court may exercise its discretion to admit fresh evidence when (1) the tendered evidence is credible; (2) it could not have been obtained by the exercise of reasonable diligence prior to trial; and (3) the evidence, if admitted, will likely be conclusive of an issue in the appeal: *Sengmueller v. Sengmueller* (1994) 17 O.R. (3d) 208 (C.A.). Where, however, the evidence did not exist at the time of trial, the evidence will only be admitted where it is necessary to deal fairly with the issues on appeal and where to decline to admit it would lead to a substantial injustice in result: *Sengmueller*, at p. 23.

[31] In our view, leave should not be granted to admit the requested appraisal report. Quite simply, the appraisal is unnecessary to deal fairly with the issues on appeal. Leave to admit the appraisal report is refused and leave to admit the Sixth Report of the Receiver and the Supplement to the Sixth Report is granted on consent.

Grounds of Appeal

(1) Did the motion judge have jurisdiction?

[32] The first ground of appeal advanced by the Remainers is that the motion judge had no jurisdiction to vary Penny J.'s order to authorize the Receiver to sell all of Lash Point.

[33] We disagree.

[34] The Receiver is a court-appointed officer over whom the court has supervisory jurisdiction. The order appointing Grant Thornton Limited expressly provided it with the ability to return to court to seek advice and directions. In addition, s. 16 of Schedule A provided to the Receiver and any founding member the ability to return to court to address any dispute arising from the terms of Schedule A. Indeed, Penny J. recognized this point in his endorsement of November 24, 2016, and Dietrich J. reiterated the possibility of a variation in both of her endorsements. Penny J.'s order provided the court with the flexibility to address disputes that arose including the pace at which the valuation and sales process was unfolding. We conclude that the motion judge had jurisdiction to make an order varying the order of Penny J. Given our conclusion that the motion judge had jurisdiction to vary the order, there is no need to address the appellants' alternative argument based on r. 59.06(2)(a) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

[35] We agree with the motion judge that jurisdiction extended to authorizing the Receiver to terminate the severance plan and take steps to sell all of Lash Point. The parties ought to have moved much earlier in the process for advice and directions and/or a variation in the terms of Penny J.'s order which governed them. That said, the motion judge was not precluded from taking jurisdiction. We see no reason to interfere with this aspect of the motion judge's order. As the motion judge

noted, the process launched by the buy-out order did not have a pre-determined deadline. The Receiver initially estimated, however, that completion of the severance process would require about two years, or about five years from when the Departers first began to seek an exit. The motion judge found that the circumstances had changed in a material way since the buy-out order. As he put it:

> The [Departers] have already been delayed longer and subjected to greater expense while waiting to be paid than is reasonable and the additional delay and expenses anticipated puts that conclusion beyond debate.

[36] Both the appellants and the respondents agree that the severance plan originally contemplated is currently unworkable. However, they disagree on whether the Sheiner/DiCapo agreement of purchase and sale should be approved. This takes us to the next ground of appeal.

(2) Approval of Sheiner/DiCapo Agreement of Purchase and Sale

[37] The second ground of appeal advanced by the appellants is that the motion judge erred in approving a sale that contravened the principles established in *Royal Bank of Canada v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (C.A.).

[38] The motion judge himself said, “The principles governing the approval of sale agreements in a receivership context restated by the Court of Appeal in *Royal Bank of Canada v. Soundair Corp.* have three decades of consistent

precedent to recommend them and, were that not sufficient, the weight of good common sense as well." (Citation omitted.)

[39] Under the principles described in *Soundair*, a court is to consider:

1. whether a sufficient effort has been made to obtain the best price and whether the receiver has acted improvidently;
2. the interests of all of the parties;
3. the efficacy and integrity of the process by which the offers were obtained; and
4. whether the working out of the process was unfair.

[40] The motion judge found at para. 87 of his reasons that: "The Sheiner/DiCapo Agreement cannot reasonably be held up as satisfying *any* of the *Soundair* principles." [Emphasis in original.] He nonetheless approved the sale. He listed various factors that led him to conclude that the sale to Messrs. Sheiner and DiCapo was a substitute for the *Soundair* criteria.

[41] The motion judge's finding of non-compliance with *Soundair* is unassailable.

[42] Significantly, Lash Point has never been listed for sale on the open market – the "best evidence" of fair market value: Frank Bennett, *Bennett on Receiverships*, 4th ed. (Toronto: Thomson Reuters, 2021), at p. 431. Indeed, in cross-examination the purchasers' own agent, Mr. Harding, described the process leading up to the joint offer as "almost an illegal auction". There is no evidence that

anyone tried to meaningfully negotiate the purchase price. It is the case that during the hearing, the motion judge asked the Receiver what the recommendation would be were he to order an *en bloc* sale of Lash Point. The Receiver responded that it would proceed with the transaction desired by an overwhelming majority of the people entitled to a share of the proceeds. That said, at no time did the Receiver provide any written recommendation or sales analysis of the agreement and the Receiver took no steps to validate the purchase price. The Receiver was never authorized nor directed to sell the property as a whole and, as the motion judge found, thus expended no efforts to obtain the highest and best price. Nor was there any evidence that any of the family members involved had any particular expertise in real estate. In addition, no consideration was given to the effect of COVID-19 on the market for cottage properties.

[43] The evidence before the motion judge was that the proposed purchase price was less than what Messrs. Sheiner and DiCapo initially jointly offered and over [redacted] less than the 2019 stated value, although the 2019 estimate was based on multiple severed lots, as contemplated by the severance plan. Clearly, there was no evidence of sufficient efforts to obtain the best price. One could not reasonably conclude that the Receiver acted improvidently – or indeed providently, because he did not act at all. This was because, as he had previously explained, he had not been authorized to negotiate or otherwise engage with potential

purchasers for all of Lash Point. This brings us to the remaining three elements of the *Soundair* principles.

[44] LPAC was not involved in the negotiation of the agreement of purchase and sale and the evidence before the motion judge was that the sale of all of Lash Point to Messrs. Sheiner and DiCapo was unanimously defeated by LPAC's board. There was no efficacy or integrity to the process by which the agreement was obtained and the working out of the agreement was also unfair. Indeed, it was negotiated in contravention of an existing court order that made no allowance for such an agreement. That same order provided the parties with an opportunity, which they failed to take, to return to court for directions in the event of dissatisfaction with the pace of the valuation and sales process or any dispute arising from the terms of the order. In essence, the Departers took matters into their own hands rather than relying on the terms of the order that bound them.

[45] Counsel for the appellants submitted that since *Soundair* was decided, there did not appear to be any reported case in Canada where a court had approved a sale of property in the face of an express finding that the transaction did not satisfy any of the *Soundair* principles. Counsel for the respondents was unable to suggest otherwise. Although this case does not involve a traditional receivership, it does engage many of the same principles including the involuntary transfer of property, and McKinlay J.A.'s comments in her concurring reasons for decision in *Soundair* are apt:

> It is most important that the integrity of procedures followed by court-appointed receivers be protected in the interests of both commercial reality and the future confidence of business persons in their dealings with receivers. Consequently, in all cases, the court should carefully scrutinize the procedure followed by the receiver to determine whether it satisfies the tests set out by Anderson J. in *Crown Trust Co. v. Rosenberg* (1986), 60 O.R. (2d) 87, 39 D.L.R. (4th) 526 (H.C.J.).[6]

[46] The motion judge erred in approving the Sheiner/DiCapo agreement of purchase and sale in the face of an express finding that none of the factors in *Soundair* were satisfied. This was particularly problematic given that there was no true sales process, the property had not been exposed to the open market, there was no evidence from the Receiver that efforts had been made to obtain the best price and there was no written recommendation or analysis from the Receiver as he had not been clothed with that mandate or given those directions from the court. As the motion judge said in his reasons for decision: "The Receiver makes no recommendation to the Court regarding the proposed sale agreement beyond factually informing me of how it came about and what alterations to the Buy-Out Order are likely required should the Receiver by [*sic*] ordered to accept and proceed to close it."

[47] The motion judge also erred in his identification of the factors that purportedly served as substitutes for the *Soundair* principles.

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[6] The *Soundair* principles derived from the *Crown Trust v. Rosenberg* decision.

[48] First in that regard, he determined that Lash Point was “attractive to a relatively specialized portion of the Muskoka real estate market” and that it was a “narrow and specialized market”. He relied on this to conclude that the informal canvassing undertaken by some of the founding members provided interested buyers with an opportunity to make an offer and that “an effort to contact those most likely to be in a position to make an offer to acquire it was undertaken”.

[49] There was no expert or other evidence to support these findings. Moreover, there was no evidence that the property was ever advertised either locally, nationally, internationally or indeed at all.

[50] Second, the motion judge also placed great weight on there being no evidence that any of the founding members had any interest in the Sheiner/DiCapo agreement apart from the common financial interest of all in obtaining the highest price obtainable. Although not technically an interest in the Sheiner/DiCapo agreement, it should be noted that Messrs. Sheiner and DiCapo are contributing financially to the Departers’ litigation. The agreement governing this arrangement was not brought to our attention.

[51] Third, the motion judge also indicated that the purchase price compared very favourably to updated appraisal evidence. However, there was no such evidence. The main compound consisting of 6.25 acres and 1,210 feet of waterfront was

appraised in April 2019 for [redacted]; the entire property was not. There was simply an estimate of value.

[52] Fourth, the motion judge determined that the overwhelming majority of those with an interest in the size of the "pie" was powerful and convincing evidence that the proposed transaction reflected fair market value. As the motion judge noted, of the four Remainer founding members of LPAC, two had changed camps and supported the transaction and two were firmly opposed, while the rest of the non-founding Remainers expressed no opinion to the court. Including the two who had changed sides, 87% of the economic interest supported the transaction. However, the *Soundair* principles do not rest on a head count. Rather they demand integrity in the process and fairness to all claimants with an interest in the property: *Regal Constellation Hotel Ltd. (Re)* (2004), 71 O.R. (3d) 355 (C.A.), at para. 26, citing *Toronto-Dominion Bank v. Usarco Ltd.* (2001), 196 D.L.R. (4th) 448 (Ont. C.A.).

[53] In conclusion, the Sheiner/DiCapo agreement of purchase and sale failed to satisfy any of the *Soundair* principles and ought not to have been approved. The factors relied upon by the motion judge could not serve as an effective substitute in the circumstances of this case.

Disposition

[54] The appeal is allowed and the motion judge's order is set aside. As already noted, we see no reason to interfere with the motion judge's determination that

Lash Point should be sold *en bloc* and that the severance plan should be abandoned. The Receiver should forthwith develop a sales process so that the entire property may be listed for sale immediately and shall bring a motion for approval of the proposed sales process and such other directions as are necessary before the Commercial List Team Leader who will, undoubtedly, determine the most expeditious way to move this case forward so that the order of Penny J. may be amended as appropriate, the intention being that the property be listed for sale in time for this season's market.

[55] The parties were directed to deliver their costs submissions to the court on April 26, 2022. In the interests of time, we are releasing these reasons in the absence of those submissions. The parties are to file their costs submissions forthwith.

Released: May 11, 2022 "J.M.F."

"Fairburn A.C.J.O."
"S.E. Pepall J.A."
"L. Sossin J.A."

Ontario Supreme Court
Laurentian Bank of Canada v. World Vintners Corp.
Date: 2002-07-19

In the Matter of the Bankruptcy and Insolvency Act, R.S.C. 1985, c.B-3, Section 47(1), as Amended

Laurentian Bank of Canada, (Applicant)

and

World Vintners Corporation, Wine Art Ltd., The Ultimate Winery Systems Inc. and Wine Kitz Franchise Corp., (Respondents)

Ontario Superior Court of Justice Cumming J.

Heard: July 19, 2002

Judgment: July 19, 2002

Docket: 02-CL-4591

A. Kauffman, K. McEachern, for Laurentian Bank

Mahesh Uttamchandani, for KPMG Inc.

Fraser Hughes, for Franchisees

Roger Jaipargas, for Rudolf Keller, Paklab Products Inc.

P. Shea, for First Ontario Labour Sponsored

Graham Smith, for names Respondents (World Vintners Group)

Stephen Schwartz, for Business Development Corporation ("BDC"), Bank of Montreal Credit Corporation ("BMCC")

Howard Manis, for Mosti Mondiale Inc. ("Mondiale")

John Chapman, for Wine Kitz Prairies Inc.

***Cumming J.*:**

The Application

1 The Bank is the primary secured creditor under a GSA of the respondent group of companies (“Vintners”). Vintners’ business manufactures kits for individuals to make their own wine or beer, with 87 franchise stores and 26 corporate stores owned directly. Vintners has been in default under loan facilities with the Bank since at least March 22, 2002.

2 KPMG was engaged March 6, 2002 by the Bank to review the affairs of Vintners. The Bank was advised by KPMG April 17, 2002 that Vintners was experiencing a liquidity crisis and had exhausted their operating line. The draft financial statements for the fiscal year ending January 31, 2002 indicate a net loss of about $2.8 million.

3 KPMG reported that an immediate cash injection was required. Discussions took place amongst the various stakeholders with a view to restructuring the indebtedness. These discussions were unsuccessful. Vintners has now literally run out of capital. The indebtedness to the Bank was $2,499,627.16 as of July 4, 2002. The Bank states that to preserve the value of the business it is necessary that an Interim Receiver be appointed and that the assets and undertaking be sold forthwith.

4 Hence, the Bank applies for (1) the appointment of KPMG as an Interim Receiver and (2) approval of the terms and conditions of an agreement of purchase and sale, vesting title in the purchased assets from Newco, free and clear of all claims.

5 The application was signed July 10, 2002, returnable July 12, 2002. There was significant opposition to the proposed sale evidenced July 12. This included subordinated creditors BDC and BMCC. The subordinated creditors claims totaled about $3,784,000 as of July 4, 2002.

6 Paklab/Keller, an unsecured trade supplier, is owed some $1,691,838.93. It is apparent from the record that Paklab/Keller and other trade creditors were taken by complete surprise by the Application. Paklab/Keller learned of the Application by happenstance through corporate searches July 11, 2002.

7 The payables of Vintners total some $4.9 million as at June 30, 2002. KPMG reports that Vintners switched suppliers several times in the last year and owes about $3 million to companies Vintners no longer does business with.

8 The proposed purchase price of $3,410,000. would meet the payroll and rent obligations of $465,000. and the indebtedness to the Bank The present indebtedness to the Bank is about $2.715 million.

9 KPMG estimates the net realizable value of assets on liquidation to be only $2.1 to $2.9 million. The costs of an interim receivership, if there is an immediate sale, are estimated to be about $150,000. Understandably, Newco's offer is supported by the Bank who may otherwise incur a shortfall of up to $1 million.

10 The Bank emphasizes the continuing, rapid financial deterioration of Vintners, that Vintners has now run out of sugar and wine concentrate and expresses the concern of understandably nervous employees and franchisees. The Bank states that it will oppose any third party funding of a 'going concern' Interim Receivership with the Receiver's certificate ranking in priority to the Bank's position as, in the Bank's view, there is not adequate protection with respect to the Bank's debt.

11 When the application was first returned July 12, Epstein J. adjourned it until 2:30 p.m. today, July 19, to give interested parties further time, until 2:00 p.m. July 18, to offer to purchase the assets.

12 An affidavit sworn July 18, 2002 by a solicitor for some nine franchisees attaches a letter to KPMG of that date in which a long list of asserted grievances are asserted against Vintners' existing management and litigation by a franchisee in Alberta is referred to.

13 The second report as proposed Interim Receiver, KPMG, states that seven parties expressed potential interest in purchasing the assets. Four of these parties, including Newco, executed a confidentiality agreement, and the three outside parties inspected the premises.

14 Newco is the only party to come forward with an offer. This present, revised offer provides for a purchase price of $3,335,000, with $2,765,000 of the purchase price being payable in cash and the balance through certain assumed liabilities. The offer is conditional upon the granting of the vesting order.

15 KPMG recommends approval of the sale.

Disposition

16 This hearing commenced at 2:30 p.m. and adjourned at 8:00 p.m. There is no question that given the record that KPMG is to be appointed as an Interim Receiver. Indeed, there is no opposition to the motion in this regard.

17 The contentious issue relates to the proposed immediate sale to Newco.

18 The creditor, Paklab/Keller has made submissions. That firm has sent a representative from Italy to conduct its due diligence before deciding as to whether to make an offer to purchase. It is clear that the firm has gone to some considerable expense and been making best efforts to determine its position as a prospective purchaser but has simply not had sufficient time to do so. Hence, it was unable to make an offer within the past six day time period.

19 The secured creditors BDC and BMCC have made submissions to extend the time further for offers. The nine franchisees and the regional franchisee present also submit that there should be an extension of time.

20 First Ontario Labour Sponsored Investment Fund Ltd., a creditor, advises that it is taking an equity position in Newco together with existing management but that Newco will not extend its present offer beyond today. That is, Newco will not hold open its offer for a further period of time.

21 The Bank and the proposed Interim Receiver state that the proposed immediate sale should be approved. Alternatively, they submit there should be an immediate liquidation. I disagree.

22 The Bank could have appointed KPMG as an Interim Receiver under its GSA in March or April. Instead, it has observed a continually, rapidly deteriorating financial situation over three or four months and only at the point in time when Vintners is completely out of money and there is a crisis asks the Court to approve a sale to existing management on two days notice.

23 Existing management has seen the continually, rapidly deteriorating financial situation over several months but, so far as the record shows, has not tried at all itself to find an arms-length purchaser for the business in the marketplace. The proposed sale would extinguish the claims of at least $5 or $6 million of existing creditors.

24 The process for the sale of a business by an Interim Receiver must be seen to be fair and commercially reasonable. The existing process does not meet that criterion.

25 Paragraph 29 of the requested approval order put forward by the Bank reads:

> This Court orders and declares that the purchase price set out in the Asset Purchase Agreement is fair and commercially reasonable and was arrived at in a commercially reasonable manner.

26 This Court does not agree that the process followed supports the statement that there can be any confidence that the purchase price offered by Newco is fair and was arrived at in a commercially reasonable manner. I say this because the only path to confidence in a 'going-concern' sale is through a competitive bidding process in the marketplace with a reasonable opportunity for informed arms-length purchasers to bid.

27 In *Royal Bank. v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (Ont. C.A.) at 17, Galligan J.A. contrasts the situations of a creditor acting privately in appointing a receiver and thus controlling the process of a sale of assets, albeit with certain risks, and that of the appointment of a receiver by a court with a subsequent receiver's sale. The process of a sale of assets by a court-appointed receiver *is within the control of the Court.*

28 In effect, the Bank and management of Vintners ask the Court that they, not this Court, control the process of the sale and that the Court simply sanction the inadequate and unseemly process they have established. I say this because it is their own actions or inaction that have created the present dire situation. They then submit that because this situation is critical the only choice for the Court is to choose the probable least disadvantageous course of action presently available and approve the sale to Newco, the existing management. They say in effect that because it is now very improbable, given the financial condition of Vintners, that anyone other than the Bank can ever recover anything at all through a third party purchase of assets after a normative process of solicitation of offers and a sale, that the Court should simply hold its nose and approve the Newco offer. Newco compounds this difficulty by insisting that its present offer be immediately accepted or it is off the table today.

29 Considering all the circumstances, in my view it is reasonable to achieve some greater assurance that the sale process is seen to be fair by keeping the bidding process open for some further period of time. Paklab/Keller, BDC, BMO, Mondiale (a new prospective purchaser) and the franchisees present all agree that a further six days to 2:00 p.m. on

July 25, 2002 is reasonable and that due diligence for the interested parties present can be completed by then. KPMG can also immediately advise all those known parties who previously indicated some interest of the extended period for offers.

30 KPMG is to be given limited terms of reference as Interim Receiver. The Bank refuses to fund the Interim Receiver for this extended period. KPMG will have to borrow monies for some matters, such as to purchase supplies for franchisees and corporate stores and to pay employees. Any such borrowing by KPMG, together with its fees and any disbursements it makes as Interim Receiver shall constitute a first charge against the assets of Vintners. While this extension of six days is itself less than ideal, considering all the circumstances it is a fair balancing of the interests of all the stakeholders given the present difficult situation.

31 For the reasons given, the Order signed is to issue forthwith. The Application is adjourned to July 26, 2002 at 2:00 p.m. While the final disposition of the Application remains, of course, within the discretion of the Court, the expectation at this time, given the above course of events, is that an offer recommended for acceptance by KPMG will be approved or, if there is no offer to be so recommended, that KPMG's terms of reference will be expanded to those seen in a normative order for an Interim Receiver and Vintners will proceed to a liquidation.

Application granted in part.

COURT OF APPEAL FOR ONTARIO

CITATION: Peakhill Capital Inc. v. 1000093910 Ontario Inc., 2024 ONCA 584
DATE: 20240722
DOCKET: COA-24-CV-0671

Brown, Harvison Young and Gomery JJ.A.

BETWEEN

Peakhill Capital Inc.

Applicant (Respondent)

and

1000093910 Ontario Inc.

Respondent (Respondent)

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

Kevin D. Sherkin and Mitchell Lightowler, for the appellant, 2557904 Ontario Inc.

Gary M. Caplan and Aram Simovonian, for the respondent, 1000093910 Ontario Inc.

Dominique Michaud and Joseph Jamil, for the respondent, Peakhill Capital Inc.

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

D.J. Miller, for Firm Capital Corporation

George Benchetrit and Laura Culleton, for the second mortgagee, Zaherali Visram

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

Ran He, for 20 Regina JV Ltd.

Heard: July 19, 2024

On appeal from the order of Justice Phillip Sutherland of the Superior Court of Justice dated July 9, 2024, with reasons at 2024 ONSC 3887.

REASONS FOR DECISION

OVERVIEW

[1] 2557904 Ontario Inc. (“255”), the stalking horse bidder in the court-approved sale process in the receivership of 1000093910 Ontario Inc. (the “Debtor”), appeals the July 9 order (the “Order”) of the motion judge that: (i) dismissed the motion of the court-appointed receiver, KSV Restructuring Inc. (the “Receiver”), for an approval and vesting order (“AVO”) to transfer the purchased assets of the Debtor to 255, the successful bidder in the sales process; and, (ii) instead, approved the Debtor’s motion seeking approval to redeem the first mortgage held by Peakhill Capital Inc. on the Debtor’s Vaughan industrial property (the “Refinancing Transaction”), which had formed the subject matter of a cross-motion by the Debtor in response to the Receiver’s AVO motion. The Debtor plans to effect the redemption through a combination of funding obtained from Firm Capital Corporation, pursuant to a Letter of Commitment dated June 13, 2024 and amended on July 12, 2024, together with other sources, including the existing second mortgagee.

[2] The history of this receivership and the motions that led to this appeal are set out in prior reasons of this court and need not be repeated: 2024 ONCA 59; 2024 ONCA 261; and 2024 ONCA 558.

[3] The appeal was heard on an expedited basis pursuant to the July 11, 2024 directions of this court: 2024 ONCA 558.

[4] 255 raises two main grounds of appeal: (i) the motion judge committed reversible error by dismissing the Receiver's motion for an AVO and, instead, granting the Debtor the opportunity to redeem the first mortgage; and (ii) the motion judge erred by varying his July 4 redemption approval to provide for provisional execution of the order under s. 195 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"), notwithstanding that 255 had already filed a notice of appeal with this court.

[5] As a preliminary matter, the Debtor submits that this court should not hear the appeal filed by 255 because (i) 255 lacks standing to bring an appeal and (ii) if 255 does have standing, it requires leave to appeal pursuant to *BIA* s. 193(e), which should be refused.

STANDING OF 255

[6] We disagree that 255 lacks the standing to appeal the Order. 255 provided the stalking horse bid for the court-approved sale process pursuant to an agreement it entered into with the Receiver (the "Stalking Horse Agreement"). At the completion of the sale process, the Receiver selected 255 as the successful bidder. The Receiver then moved for an AVO to complete the Stalking Horse Agreement transaction.

[7] The motion judge's Order, which dismissed the Receiver's motion and terminated the Stalking Horse Agreement, adversely affected 255 as the successful bidder in a court-approved sale process. 255 thereby has an interest in the subject matter of the proceeding that entitles it to seek appellate review of the Order: *Royal Bank of Canada v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (C.A.), 1991 CarswellOnt 205, at paras. 39-40; *Winick v. 1305067 Ontario Limited* (2008), 41 C.B.R. (5th) 81 (Ont. S.C.), at paras. 3 and 4.[1]

APPLICABLE AVENUE OF APPEAL

[8] The Debtor submits 255 does not have an automatic right to appeal the Order under *BIA* s. 193 but requires leave to appeal, which should be refused. Again, we disagree. According to the table set out in section 3.0 of the Supplement to the Receiver's Second Report, the Order approved a Refinancing Transaction that would result in proceeds of approximately $23.788 million, while dismissing the Receiver's AVO motion which, had it been approved, would have resulted in proceeds of $24.255 million. Accordingly, the Order brings into play a difference in the realized value of the Debtor's property in excess of $10,000 that would entitle 255 to appeal as of right: *BIA* s. 193(c); *Cardillo v. Medcap Real Estate Holdings*

[1] *Skyepharma PLC v. Hyal Pharmaceutical Corporation* (2000), 47 O.R. (3d) 234 (C.A.) does not apply to the situation of a successful bidder. It considered whether an unsuccessful "bitter bidder" had the standing to appeal, concluding it did not. The court in *Skyepharma* distinguished *Soundair* on the basis that the latter decision dealt with the situation of a successful bidder: at para. 28. As well, the analysis in *Skyepharma* proceeded under s. 6(1)(b) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, whereas the determination of standing and appeal rights in the present case is governed by *BIA* s. 193: *Business Development Bank of Canada v. Astoria Organic Matters Ltd.*, 2019 ONCA 269, 69 C.B.R. (6th) 13.

Inc., 2023 ONCA 852, at para. 21. In any event, if 255 required leave to appeal, we would grant leave for a number of reasons: 255 raises an issue of general importance to insolvency practice, namely, the reasonableness of granting a debtor leave to redeem at the 11th hour in the face of a receiver's recommendation to proceed with a transaction resulting from a court-supervised sales process; the appeal certainly raises a serious question; and given the expedited scheduling of this appeal, the appeal would not hinder the progress of the receivership proceeding: *Cardillo*, at para. 50. 255 is entitled to seek appellate review of the Order.

FIRST GROUND OF APPEAL: PERMITTING THE DEBTOR TO REDEEM THE FIRST MORTGAGE

[9] Regarding the merits of 255's appeal, the motion judge's reasons explain why he permitted the Debtor to redeem. They disclose that he correctly identified the governing principles as those summarized by this court in *Rose-Isli Corp. v. Smith*, 2023 ONCA 548, at paras. 9 and 10. In applying those principles, the motion judge engaged in the required circumstance-specific balancing of the factors relating to a mortgagor's right to redeem with those concerning the integrity of a court-supervised receivership process. He concluded that, in the exceptional circumstances of this case, the integrity of the receivership process would not be undermined by permitting the redemption. Although other judges might have weighed the applicable factors differently and reached a different result, for the

most part, the motion judge's weighing of the factors in the circumstances of this case was not unreasonable.

[10] However, the reasoning underpinning the Order was legally deficient in one respect, which prompts us to intervene and vary it.

[11] On one reading of paras. 33 to 35 of his July 15 reasons, the motion judge suggested that permitting the Debtor to redeem would not have a significant impact on the integrity of the receivership process as the Break Fee and legal costs totalling $250,000, as contemplated by s. 14.2 of the Stalking Horse Agreement, would be paid into court as security for 255, the stalking horse bidder. However, the motion judge's reasons ultimately left 255's entitlement to the $250,000 unresolved and his Order did not deal with that issue.

[12] In our respectful view, in the circumstances of this case, where the Debtor made an 11th hour attempt to redeem the first mortgage, the motion judge erred by approving the Refinancing Transaction without ensuring that 255, as the successful stalking horse bidder recommended by the Receiver for an AVO, would receive reasonable compensation for its costs thrown away in the sale process that culminated in the July 9 Order.

[13] In our view, it was necessary for the motion judge to order payment of such compensation to 255 from the proceeds of the Refinancing Transaction in order to adequately protect the integrity of the court-supervised receivership process.

Without ordering such compensation, approval of the Debtor's 11th hour redemption request should not have been granted.

[14] The Debtor's redemption motion was made at the 11th hour. By that point in time: the Receiver had entered into the Stalking Horse Agreement with 255; the Receiver had obtained court approval of a sale process that used 255's stalking horse bid, that approval had been upheld on appeal by this court, and the process had run its course. When the sale process concluded in early May 2024, 255's stalking horse bid emerged as the successful bid, and the Receiver then filed a motion for an AVO with the court to complete the transaction with 255 as set out in the Stalking Horse Agreement. Only then did the Debtor bring its early June cross-motion for redemption, and the Debtor was only able to confirm to the court "cheque in the hand" financing in early July after it had sought, and received, several adjournments of the Receiver's motion.

[15] There is no suggestion that the sale process failed to comply with the *Soundair* principles. In our view, to permit a debtor to redeem at the 11th hour and, at the same time, to reject a receiver's AVO motion without requiring the debtor, as a condition of redemption, to compensate the successful bidder in a *Soundair*-compliant court-approved sale process for its costs thrown away in that process would amount to sanctioning an abuse of the court-supervised receivership process, thereby undermining the integrity of that process.

[16] The Debtor contends that 255 is not entitled to any compensation for its costs thrown away in the sale approval process as the Stalking Horse Agreement only entitled 255 to a Break Fee and legal costs in the event it was not the successful bidder. That is an unreasonable submission. It is true that the Stalking Horse Agreement talked in terms of compensation if 255 was not the successful bidder. However, there can be no doubt that the agreement did not deal with compensation in the event 255 was the successful bidder because, in the ordinary course, court approval of the stalking horse transaction would follow. Last-minute derailments of a court-approved sale process by a debtor's request to redeem are not common – there "may be a 1% chance", as put by the Debtor's counsel in oral submissions. However, 255's entitlement to reasonable compensation for costs thrown away in the sale process is not limited to the terms of the Stalking Horse Agreement. In the circumstances of this case, as described, protecting the integrity of the receivership sale process required the court to impose, as a condition of properly exercising its judicial discretion to grant an 11th hour redemption request, the obligation that the redeeming Debtor pay the successful bidder's reasonable costs thrown away. The motion judge erred by failing to so condition his approval of the Debtor's Refinancing Transaction.[2]

[2] As 255 points out in its supplementary factum, the case of *BCIMC Construction Fund Corporation et al v. The Clover Yonge Inc.*, 2020 ONSC 3659, relied on by the motion judge involved quite a different circumstance than the present case. (It was not a "similar situation" as incorrectly suggested by the motion judge at para. 23 of his July 15 reasons.) As Koehnen J. noted in *BCIMC*, in that case the debtor offered to pay the costs of BCIMC, including the reasonable costs BCIMC had incurred in preparing a stalking horse bid.

[17] As to the quantum of 255's reasonable costs thrown away, we are not prepared to remit the issue of the amount of such compensation to the court below. This proceeding has consumed a disproportionate amount of court time since the Receiver filed its AVO motion, a situation caused by the Debtor's 11th hour redemption cross-motion. We shall fix the amount of the reasonable compensation to which 255 is entitled: *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 134(1)(a) and (c) ("*CJA*").

[18] The Stalking Horse Agreement fixed the amount of costs thrown away at $250,000 up until the end of the sale process. It is beyond question that 255 has incurred further, unforeseen, legal costs as a result of the Debtor's 11th hour redemption cross-motion and the resulting numerous attendances that followed the original June 12, 2024, return date of the Receiver's AVO motion, largely driven by the Debtor's adjournment requests in order to win time to obtain "cheque in the hand" funding. 255 is entitled to reasonable compensation for those costs thrown away. Taking this into account, the Debtor should be required to pay 255 a total of $300,000 in costs thrown away as a condition of closing the Refinancing Transaction.

[19] Although 255 submits that its compensation should take into account its exposure for the deposit currently held in escrow by Ren/Tex Realty Inc. in respect of the September 2023 Pre-Appointment Agreement of Purchase and Sale between 255 and the Debtor, we do not regard that amount as a cost thrown away

by 255 as a result of its participation in the receivership sale process as the stalking horse bidder.

[20] Consequently, we vary para. 3 of the July 9 Order approving the Refinancing Transaction to include that, as conditions of closing the Refinancing Transaction, the Debtor pay the following two amounts:

(a) to Receiver's counsel, the Receivership expenses – Professional Fees, including Additional Fee Accrual, Receivership expenses, and Broker work fee – as set out in the table in para. 1 of section s. 3.0 of the Receiver's Supplement to its Second Report; and

(b) to counsel for 255, in trust for his client, the sum of $300,000 as compensation for 255's costs thrown away in the receivership sale process.

PROVISIONAL ENFORCEMENT PROVISION IN THE ORDER

[21] The motion judge granted the Debtor's redemption motion by order made on July 4, 2024. The same day, 255 filed a notice of appeal. By his further Order dated July 9, 2024, the motion judge, at the Debtor's request, varied his July 4 order to include a term for provisional execution pursuant to *BIA* s. 195. That section provides:

> Except to the extent that an order or judgment appealed from is subject to provisional execution notwithstanding any appeal therefrom, all proceedings under an order or judgment appealed from shall be stayed until the appeal is disposed of, but the Court of Appeal or a judge thereof may vary or cancel the stay or the order for provisional execution if it appears that the appeal is not being

> prosecuted diligently, or for such other reason as the Court of Appeal or a judge thereof may deem proper.

[22] Paragraph 9 of the motion judge's July 9 Order stated, in part:

> [T]he terms of this Order and the closing of the Refinance Transaction as defined herein shall be implemented forthwith notwithstanding any motion to vary, notice of appeal or notice of motion for leave to appeal that may be sought. For greater certainty, this Order is subject to provisional execution and if any of the provisions of this Order shall be stayed, modified, varied, amended, reversed or vacated in whole or in part (collectively, a "Variation"), such Variation shall not in any way impair, limit or lessen the protections, priorities, rights and remedies of the parties providing funding in connection with the Refinance Transaction.

[23] 255 submits the motion judge erred in granting provisional enforcement of his order approving the Refinance Transaction. We agree with its submission. This was not an appropriate case for the motion judge to grant provisional enforcement of the Order. There was nothing extraordinary or exceptional about the circumstances of the case: in order to save its interest in a property, a debtor engaged in a last-minute scramble to secure financing; there had been no history of delay by the successful bidder, 255, who was eager to complete the sale process; and the only "deadline" that emerged after the Receiver filed its AVO motion was the artificial one created by the Debtor as part of its 11th hour financing scramble.[3] As well, it was not appropriate for the motion judge to grant provisional

[3] *Kingsett Mortgage Corp. v. 30 Roe Investment* (16 February 2023), Toronto, CV-21-00674810-00CL (Ont. S.C), where Steele J. wrote at para. 15:

enforcement after 255 had filed notice of appeal from his July 4 order. In those circumstances, the motion judge should not have interfered with the ordinary-course automatic stay and lift stay provisions contained in *BIA* s. 195. Our court operates its motions list on a virtually open basis, so a party is able to obtain a quick attendance to seek a lift-stay order, if the circumstances warrant.

[24] Accordingly, we set aside para. 9 of the Order.

ADDITIONAL ISSUES

[25] The filings before us indicate that the Firm Capital Corporation commitment letter has been amended to set 5 p.m. on Monday, July 22, 2024, as the "Final Outside Date" for closing the Refinancing Transaction.

[26] Peakhill submits, in effect, that if the Refinancing Transaction does not close, then this court should exercise its powers under *CJA* s. 134 to grant the Receiver the authority to close the Stalking Horse Agreement transaction.

[27] We accept that submission. Given the ongoing accumulation of interest and other costs, finality must be brought to the treatment of the Debtor's property and undertaking. No party has suggested that the sale process run by the Receiver did not comply with the *Soundair* principles. Accordingly, in the event the Refinancing

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15. I agree with the Company. The sales of properties subject to approval and vesting orders are common occurrences in insolvency proceedings. The fact that there is an upcoming closing date for a sale of a property is not sufficient as to constitute the type of extraordinary circumstances necessary to alter a party's appeal rights. There is a statutory scheme regarding appeals in the BIA. Although section 195 of the BIA contemplates that an order may be subject to provisional execution, it is clear from the few cases cited that this is an extraordinary provision.

Transaction does not close by 5 p.m. on Monday, July 22, 2024, on the terms as varied by these reasons, then the July 9 Order is set aside and, in its place, we grant the AVO and Distribution and Discharge Order sought by the Receiver in its May 31, 2024 motion, varied to reflect the updated Receiver's expenses.

DISPOSITION

[28] By way of summary, we allow the appeal in part and make the following orders:

(a) Paragraph 3 of the July 9 Order is varied to include that, as conditions of closing the Refinancing Transaction, the Debtor pay the following two amounts:

(i) to Receiver's counsel, the Receivership expenses – Professional Fees, including Additional Fee Accrual, Receivership expenses, and Broker work fee – as set out in the table in para. 1 of section 3.0 of the Receiver's Supplement to its Second Report; and

(ii) to counsel for 255, in trust for his client, the sum of $300,000 as compensation for 255's costs thrown away in the receivership sale process;

(b) Paragraph 9 of the July 9 Order is set aside; and

(c) In the event the Refinancing Transaction does not close by 5 p.m. on Monday, July 22, 2024, on the terms as varied by these reasons, then the

July 9 Order is set aside and, in its place, we grant the AVO and Distribution and Discharge Order sought by the Receiver in its May 31, 2024 motion, varied to reflect the updated Receiver's expenses.

[29] Only 255 and the Debtor sought an order for the costs of the appeal: Peakhill advised it would add its costs to the mortgage debt and the Receiver advised its costs would come out of the Receivership estate. 255 sought appeal costs of $25,000; the Debtor submitted that in view of the divided success on the appeal, there should be no order as to the costs of the appeal. We accept the Debtor's submission; there shall be no order as to costs of the appeal as between 255 and the Debtor.

[30] We repeat our indebtedness to counsel for the assistance provided by their submissions, both written and oral.

"David Brown J.A."
"A. Harvison Young J.A."
"S. Gomery J.A."

CITATION: Peakhill Capital Inc. v. 1000093910 Ontario Inc., 2024 ONSC 3887
NEWMARKET FILE NO.: CV-23-4031-00
DATE: 20240709

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
Peakhill Capital Inc. Applicant	)	Dominique Michaud, Joey Jamil and Philip Holdsworth, for the Applicant
– and –	)	
1000093910 Ontario Inc. Respondent	)	Gary Caplan, Derek Ketelaars and Aram Simovonian for the Respondent/Debtor
	)	Richard Swan and Aiden Nelms for the receiver, KSV Restructuring Inc.
	)	Kevin Sherkin and Mitchell Lightowler for the purchaser, 2557904 Ontario Inc. (“255”)
	)	Domenico Magisano for Ren/Tex Realty Inc. and ReMax Premier Inc.
	)	Laura Cullerton for the second mortgagee, Zaherali Visram
	)	D.J. Miller for Firm Capital Corporation (third party lender for the respondent)
	)	Ran He for 20 Regina JV Ltd (joint owner of the respondent)
	)	**Heard: July 5 and 8, 2024 - Virtually**

DECISION: SETTLE THE ORDER

SUTHERLAND J.:

[1] The respondent has brought an urgent motion for me to sign a draft order that has been approved as to from and content by the receiver, KSV Restructuring Inc., the applicant/first mortgagee and the financial lender, Firm Capital. The prospective purchaser, 2557904 Ontario Inc. ("255") does not agree with the Order, or my dispositive Endorsement dated July 4, 2024. In the draft order is a provisional execution that 255 objects.

[2] I am advised that 255 has brought an urgent motion to the Court of Appeal seeking a stay and has filed an appeal concerning my dispositive Endorsement of July 4, 2024.

[3] As indicated in the material filed and my Endorsement of July 4, 2024, the reason for the urgency is that costs were being incurred with every day of delay which includes interest in the first mortgage with the applicant and the new financial lender, Firm Capital in the amount of approximately $17,000 per day along with the applicant not being paid on its mortgage and the Receiver and applicant incurring further costs.

[4] Further, the financing with Firm Capital has to be completed by July 12, 2024, or the financing offer expires.

The Law

[5] The pertinent sections of the *Bankruptcy & Insolvency Act* ("*BIA*") (RSC 1985 c. B-3) are 193 and 195. These sections read as follows:

> **193** Unless otherwise expressly provided, an appeal lies to the Court of Appeal from any order or decision of a judge of the court in the following cases:
>
> **(a)** if the point at issue involves future rights;
>
> **(b)** if the order or decision is likely to affect other cases of a similar nature in the bankruptcy proceedings;
>
> **(c)** if the property involved in the appeal exceeds in value ten thousand dollars;
>
> **(d)** from the grant of or refusal to grant a discharge if the aggregate unpaid claims of creditors exceed five hundred dollars; and
>
> **(e)** in any other case by leave of a judge of the Court of Appeal.
>
> **195** Except to the extent that an order or judgment appealed from is subject to provisional execution notwithstanding any appeal therefrom, all proceedings under an order or judgment appealed from shall be stayed until the appeal is disposed of, but the Court of Appeal or a judge thereof may vary or cancel the stay or the order for provisional execution if it appears that the appeal is not

> being prosecuted diligently, or for such other reason as the Court of Appeal or a judge thereof may deem proper.

[6] Counsel have provided the Court with the following decisions:

> a. *Century Services Inc. v. Brooklin Concrete Products Inc.* [2005] O.J. No. 124, 10 C.B.R. (5th) 169. ("*Century*").
>
> b. *Computershare Trust Company of Canada v. Beachfront Developments Inc and Beachfront Realty Inc*. 2010 ONSC 4833 ("*Computershare*").
>
> c. *YG Limited Partnership and YSL Residences RE*, 2021 ONSC 5206 ("*YG*").
>
> d. *Kingsett Mortgage Corp v. 30 Roe Investment* CV-22-674810-OOCL dated February 16, 2023 ("*Kingsett*").

[7] From the cases provided, I conclude the following:

a) In determining whether to exercise the jurisdiction, the Court should consider "whether there is a serious issue to be appealed,[1] whether the moving party would suffer irreparable harm if the stay were not lifted and whether the moving party would suffer greater harm than the responding party if the stay were not lifted." Or as stated by the Alberta Court of Appeal, "generally in application under section 195 focused on the relative prejudice to the parties and the interest of justice generally." (*Computershare* at para. 9).

b) The factual matrix of each case is determinative on whether the Court should or should not exercise its jurisdiction under section 195.

[8] In *YG*, the Court exercised its jurisdiction due to the delay in the proceeding and the further delay that would occur by simply filing of a notice of appeal. In addition, the Court concluded that section 195 brought uniformity between the *BIA* and the *Companies Creditors Arrangements Act* proceedings.

[9] In *Computershare*, the Court granted the order subject to provisional execution due to the substantial risk the receiver feared, that the tenant Canada Post will not renew and would move elsewhere. Justice Newbould determined that the fear of the receiver was well "grounded" and "that the value of the under receivership would likely deteriorate substantially without Canada Post being a tenant." (para. 13).

[10] In *Kingsett*, Justice Steele determined that a provisional execution was not necessary. Justice Steele determined that unlike *YG* and *Computershare* that involved "extraordinary

[1] A copy of the Notice of Appeal was not provided and as such, no determination could be made on the whether there is a serious issue to be appealed.

circumstances", no such circumstances were present in *Kingsett* (paras. 10-12). There was no issue that the Court did not have jurisdiction to make provisional execution even though it was known that there was an intention by the debtor to file a notice of appeal and such a notice of appeal was filed shortly thereafter.

Positions Argued

[11] The receiver took no position. The applicant supported the request and argument of the respondent and indicated that the applicant was in agreement to be paid in full sooner rather than later.

[12] The respondent, guarantors, second mortgagee, and tenants all argued that the circumstances here were exceptional. In not one of the cases presented, did the debtor the have funds and financing to satisfy all the parties: the creditor(s), and the receiver. The respondent has obtained the financing to pay into Court the sum of $250,000 which was the amount set out in the Second Agreement that compensated 255 for the failure to close in certain circumstances, as described in the Second Agreement, as the Break fee, legal costs and disbursements. If the provisional execution is not provided, then the financing will fall and there may be further losses for the applicant, and definitely further losses for the second mortgagee, and the guarantors. The respondent would lose their property. Tenants would have to vacate. Also, it is argued that it is not certain that the appeal filed by 255 automatically stays the Order and that leave would not be required.

[13] 255 argued that to permit the provisional execution would cause harm to 255 and would be prejudicial. 255 has a valid appeal and that appeal is automatic. To permit the provisional execution would in affect remove 255's right to appeal. It would make the receivership process meaningless and unreliable. 255 also argued that the respondent did not request the provisional execution in their motion material and as such cannot not request that relief now. The Court cannot grant relief not requested (*Garfin v. Mirkopoulos* 2009 ONCA 421 ("*Garfin"*) at para. 9 and *Midland Resources Holding Limited v. Shtaif* 2017 ONCA 320 at paras. 109-115 (*Midland* 2017) and 2018 ONCA 743 (CanLII) (*Midland* 2018)). 255 also argues that it has a one-million-dollar deposit on the First Agreement of Purchase and Sale with the respondent that the realtor is claiming payment for its commission. Lastly, 255 argues that this Court has no jurisdiction to grant the relief requested. Section 195 mandates that such relief is to be determined by a Judge of the Court of Appeal and this Court consequently has no jurisdiction to grant such relief.

Conclusion

[14] I will first consider 255's argument relying on *Garfin* and *Midland*. Then I will consider the jurisdiction argument and lastly, I will consider whether the Court should grant provisional execution.

Relief not Requested

[15] I do not give much credence to this argument.

[16] *Garfin* involved the issue of awarding costs in matrimonial litigation where there was a purported agreement for payment of costs between the appellant and respondent. The Court determined that the evidence at trial could not support the trial judges finding of an agreement to pay the appellant's costs and further "the appellant did not plead a claim in contract" (para. 9).

[17] *Midland* 2017 considered whether a defence could be raised at the appeal stage when no such defence was raised in the pleadings or argued at trial. The availability of the defence was known at the time of the pleading and at trial. *Midland* 2018 is a motion for reconsideration of the decision of the Court of Appeal in *Midland* 2017. In *Midland* 2018, the Court of Appeal confirmed its reasoning in *Midland* 2017.

[18] The circumstances here are much different. Here, it was not known to the respondent or the receiver at the time of drafting the motion materials that the respondent would be successful and that 255 would appeal any decision that it did not favour. To expect such a claim of relief on the off chance that the Court's decision may not favour an interested party and that interested party may appeal, is hypothetical at best and is not supported by *Midland* 2017 and *Midland* 2018 or *Garfin. Midland* and *Garfin*, in my view, stands for the proposition that in a pleading the party seeking relief, or a defence must set out the specifics of that relief or defence in the pleading to be granted such relief or utilize such defence. The relief or defence was known as factually in existence at the time the pleading was drafted. That is not the circumstances here. The respondent or receiver would not have known the decision of the Court and would not have known that 255 would appeal at the time the motion material for court approval and redemption was drafted, served, and filed.

[19] Further, 255 has not provided any cases to support its argument that on a motion like the one brought by the receiver and respondent, where there may be a possible appeal and request for provisional execution may be necessary, such relief should have been sought in notice of motion requesting court approval or redeem the mortgage. Given that there are no cases presented that supports 255's argument and in my view, the argument was not grounded in a factual known at the time of drafting, serving and filing the motion material, I give no weight to the argument.

Jurisdiction

[20] On the suggestion that the appeal is not automatic, I make no finding. There was no substantial argument on this point and further, whether the appeal requires leave or not is not material to a determination on the issue of provisional execution.

[21] It is not in dispute that in reviewing section 195, the Court is to use the modern approach to statutory interpretation that the words of the *Act* are to be read in their entire context in their grammatical and ordinary sense (*LaPresse Inc v. Quebec* 2023 SCC 22 at paras. 22-24).

[22] In reviewing section 195 in its grammatical and ordinary sense, I agree with the respondent that the section reads as an exception to a stay and that this Court has the jurisdiction to make

a provisional execution "notwithstanding any appeal therefrom." Thus, this Court has the jurisdiction to make such provisional execution and that the provisional execution is not stayed. It is not as argued by 255 that this Court has no jurisdiction to make provisional execution and that jurisdiction solely lies with the Court of Appeal. The section, in my view, does not read in its grammatical ordinary sense as suggested by 255.

[23] I agree with Steeles J. and with Newbould J. that this Court has the jurisdiction to make an order for provisional execution, but such jurisdiction should be exercised with caution "given the operation of a notice of appeal." (*Century* at para. 5).

Provisional Execution

[24] I agree with the respondent, the second mortgagee, the financial lender, the tenants and the guarantors, that the circumstances here are exceptional. The fact that the respondent has a cheque in hand to pay the applicant in full, the receiver in full, the amount for 255 is exceptional. No party has provided a case where the factual matrix that a cheque in hand has been provided to pay all required with a request for provisional execution.

[25] Moreover, looking at the irreparable harm or prejudice, it is clear to me that there would be irreparable harm or prejudice to the applicant, respondent, second mortgagee, and guarantors if provisional execution is not granted. The financing would fall away. The applicant would incur further costs and interest which may or may not be paid. The applicant would have to wait longer for its money. The second mortgagee would have a loss. The respondent would lose the property. Existing tenants will have to find alternate premises. The guarantors would be liable for any deficiency with the applicant and the second mortgagee. If the respondent is permitted to redeem, as accepted by this Court and that redemption can finalize before July 12, 2024, costs and interest would be limited and would come to an end. The applicant would be paid in full. The tenants would remain in the premises. The second mortgagee would not have a deficiency and the guarantors would not be subject to any deficiency on the first mortgage and without question, the second mortgage.

[26] In contrast, 255 would lose the purchase of the property. It would still have the Break Fee, costs and disbursements of $250,000 which it can claim as an agreed quantification for its costs and expenses in the Second Agreement. It also still has the outstanding proceeding with the realtor on the First Agreement. But again, it is not certain that the realtor would be successful in that proceeding and if it is successful, against whom.

[27] Having said this, I am cognizant that 255 has not delayed this proceeding. 255 is a prospective purchaser that followed the procedure of the bidding process. But it was not hidden that the closing of the purchase pursuant to the Second Agreement was always a risk that could not happen without approval of this Court. It is for this reason, I presume, why the Break Fee and amount for legal cots and disbursements was negotiated and included as a term in the Second Agreement.

[28] Taking all these circumstances into consideration, I conclude that the irreparable harm or prejudice that would be suffered by the respondent, the guarantors, the applicant and the second mortgagee if provisional execution is not granted outweighs any harm or prejudice that may be suffered by 255.

[29] The harm and prejudice to the parties other than 255 are real and immediate. The harm or prejudice to 255 on the realtor proceeding is not certain. The loss of the purchase of the property exists but there was no evidence before me that indicates any real costs or harm that 255 will suffer if the property is not sold to it, other than the amount agreed upon in the Second Agreement.

[30] Accordingly, I conclude that in these circumstances the balancing favours and the general interest of justice favours the granting of provisional execution.

[31] I therefore grant provisional execution in the draft order provided by the receiver that has been approved as to form and content by all interested parties except 255. Draft order signed by me this day.

[32] I will accept submissions on costs on this motion at the same time I hear or receive submissions on the motion brought by the receiver for an approval and vesting order and the motion of the respondent requesting the right to redeem.

[33] This Decision to be sent to all interested parties listed above and the Order be sent to KVS and the respondent immediately.

_____

Justice P. W. Sutherland

Released: July 9, 2024.

CITATION: Peakhill Capital Inc. v. 1000093910 Ontario Inc., 2024 ONSC 3887
NEWMARKET COURT FILE NO.: CV-23 4031-00

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

Peakhill Capital Inc.

Applicant

– and –

1000093910 Ontario Inc.

Respondent

DECISION: SETTLE THE ORDER

Justice P.W. Sutherland

Released: July 9, 2024

Court of Appeal for Saskatchewan
Docket: CACV3667

Citation: *Re Harmon International Industries Inc.*, 2020 SKCA 95

Date: 2020-08-06

Between:

Harmon International Industries Inc.

Applicant/Proposed Appellant (Respondent)

And

Hardie & Kelly Inc., receiver of Harmon International Industries Inc.

Respondent/Proposed Respondent (Applicant)

And

Pillar Capital Corp.

Interested Party (Initial Applicant)

And

The City of Saskatoon

Interested Party

Before:	Jackson J.A. (in Chambers)
Disposition:	Applications dismissed
On application from:	QB 1401 of 2019, Saskatoon
Application heard:	July 30, 2020
Counsel:	Ryan Pederson for the Applicant Jeffrey Lee, Q.C., and Paul Olfert for the Respondent (Hardie & Kelly) Mike Russell and Kevin Hoy for Pillar Capital Corp. Alan Rankine for the City of Saskatoon

Jackson J.A.

I. Introduction

[1] The issues in this application concern whether Harmon International Industries Inc. [Harmon] is entitled to pursue an appeal in the Court of Appeal from a sale process order made under the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 [*BIA*]. In addition to addressing questions of fresh evidence and late filing, the issues involve the application of this Court's recent decisions in *Patel v Whiting*, 2020 SKCA 49 (in Chambers) [*Patel*], and *MNP Ltd. v Wilkes*, 2020 SKCA 66 [*Wilkes*].

[2] By way of introductory background, the assets of Harmon are currently the subject of a receivership order made under the *BIA*. As part of that ongoing process, the receiver, Hardie & Kelly Inc., obtained a sales process order [Order]. The Order authorizes the receiver to enter into two listing agreements with ICR Commercial Real Estate [ICR] to effect a sale of the Harmon assets and also sets a listing price. It is that Order that Harmon seeks to appeal.

[3] The Order was issued on June 5, 2020. On June 11, 2020, Harmon's former counsel served a notice of withdrawal of solicitor on the receiver and the senior secured creditor, Pillar Capital Corp. [secured creditor]. At the same time, Harmon's former counsel also served an application for leave to appeal and a draft notice of appeal on the same parties. These latter documents were, however, not filed with the Court of Appeal until July 9, 2020, thus placing Harmon beyond the 10-day time limit for appealing orders made under the rules established for the *BIA* (see s. 31 of the *Bankruptcy and Insolvency General Rules*, CRC, c 368 [the *General Rules*]).

[4] In addition to its application for leave to appeal, Harmon applies

(a) to adduce fresh evidence in the form of an appraisal attesting to the value of its assets as being in excess of the listing price contained in the Order;

(b) to extend the time to appeal under s. 31 of the *General Rules*; and

(c) for an order imposing a stay of the Order pending the hearing of the appeal.

[5] In support of its position, in addition to filing a fresh evidence application, Harmon has filed two briefs of law. Harmon's first position is that, contrary to its application for leave to appeal, it has an appeal as of right under s. 193(c) of the *BIA* such that leave is not required, and that, in light of this, it should not be deprived of exercising that right by virtue of the confusion surrounding the serving and filing of the application for leave to appeal. In the alternative, Harmon submits that leave to appeal should be granted under s. 193(e) of the *BIA* as its appeal is sufficiently meritorious and sufficiently important to justify such orders and leave to extend the time to appeal should be granted for the same reasons. It did not pursue its application for a stay because if the appeal were permitted to proceed, an automatic stay would be imposed.

[6] Both the receiver and the secured party oppose all applications. They assert that (a) leave is required under s. 193(e) of the *BIA*, and (b) the appeal is neither sufficiently meritorious nor sufficiently important to the practice of law or to this specific receivership to warrant leave being granted. Indeed, they submit that the appeal is destined to fail, which, in their submissions, disposes of both the application for leave to appeal and the application to extend the time to appeal. They resist the application to adduce the fresh evidence as not meeting the *Palmer* criteria for the admission of same (*R v Palmer*, [1980] 1 SCR 759). Finally, as a means of demonstrating prejudice to the receivership and the secured party, the receiver has filed a second report indicating all that has been done to date to proceed with the sale of the property. The receiver indicated that if the appeal is permitted to proceed, it would be filing a subsequent application in order to lift the stay so as to allow the sales process to continue.

[7] The various applications and submissions give rise to these issues:

(a) Should the fresh evidence be received?

(b) Is Harmon required to apply for leave to appeal under s. 193(e) of the *BIA*, or does it have an appeal as of right under s. 193(c) of the *BIA*?

(c) If Harmon is required to apply for leave to appeal, should leave be granted?

(d) Should the time to appeal be extended?

[8] For the reasons that follow, I have concluded the following:

(a) the fresh evidence should not be admitted;

(b) Harmon requires leave to appeal as it does not have an appeal as of right; and

(c) leave to appeal should not be granted.

[9] In light of my conclusions in relation to (b) and (c), it would not be strictly necessary to consider whether to extend the time to appeal. In the interest of completeness, however, I have gone on to consider that question and have concluded that, in any event, I would not grant leave extending the time to appeal.

II. Background to the Order

[10] In July of 2018, Harmon obtained a credit facility to the maximum principal amount of $3,300,000 from the secured creditor. To secure the loan, Harmon granted a general security agreement over all present and after-acquired property, a collateral mortgage on certain real property, a general assignment of rents and a promissory note to the value of $3,300,000, plus interest and other amounts owing from time to time. The real property comprises an approximately 18,000 square foot commercial building [the 821 Building], and an approximately 62,000 square foot commercial building [Millar Avenue Building].

[11] Harmon defaulted on the loan. On September 30, 2019, the secured creditor applied to the Court of Queen's Bench for an order appointing Hardie and Kelly Inc. as the receiver of all of the assets, undertakings and properties of Harmon. The application was adjourned on several occasions. On January 17, 2020, Elson J., who had been the Queen's Bench judge supervising the Harmon receivership, granted the requested order. As of May 21, 2020, Harmon owed the secured creditor approximately $4,501,644, with interest accruing at approximately $3,616 per day.

[12] On May 29, 2020, the receiver served Harmon with an application proposing that the receiver enter into two listing agreements naming ICR as the listing agent. The first listing agreement sets the list price of the Millar Avenue Building at $3.8 million and the second listing agreement sets the list price of the 821 Building at $740,000. Harmon did not object to either property being sold but submitted that Coldwell Banker Signature Commercial [Coldwell

Banker] should be substituted as the listing agent rather than ICR and that the initial listing price for the Millar Avenue Building should be $4.95 million. It does not appear that any serious objection was made regarding the list price for the 821 Building.

[13] In support of a listing price of $4.95 million for the Millar Avenue Building, Harmon relied on these pieces of evidence:

(a) Colliers McClocklin Real Estate Corp. had previously listed it for $5,250,000 in 2018;

(b) Ken Kreutzwieser of ICR had initially valued it at $5,125,000;

(c) ICR had listed it for $5,295,000 in 2019;

(d) Coldwell Banker had offered to list the property for $4,950,000 in 2020; and

(e) William R. I. Brunsdon, a partner of the firm Brunsdon Lawrek & Associates, had appraised the Millar Avenue Building at $5,500,000 in 2017 [Brunsdon Appraisal].

[14] Justice Elson granted the Order in substantially the form requested, with ICR as the listing agent and fixing a list price of $3.8 million for the Millar Avenue Building and $740,000 for the 821 Building. In a brief oral fiat, Elson J. stated as follows:

> The principals of Harmon International Industries Inc. have been granted indulgences in the past, not only by the court but also by the patience of the receiver, since the receivership order was put in place.
>
> Those indulgences must now come to an end.

[15] As I have indicated, it is from this decision that Harmon seeks to appeal. In its amended form, the draft notice of appeal contains one ground of appeal only:

> (b) That the Learned Chambers Judge erred in fact and/or in law in failing to conclude that ICR Commercial Real Estate was intending to list the Harmon Lands, as described in the Sales Process Order, at a value significantly less than fair market value … .

III. Fresh Evidence

A. Nature of the evidence and positions of the parties

[16] Harmon's proposed fresh evidence is composed of two affidavits. The first affidavit is of Calvin Moneo, who is a director, officer and shareholder of Harmon. He states that, prior to being served with the receiver's notice of application on May 29, 2020, he had no knowledge that the suggested listing price would be so low. In his opinion, there had been insufficient time between the date of service and the date of the hearing for him to obtain an updated appraisal. He states further that almost immediately after the Order issued on June 5, 2020, i.e., on June 8, 2020, he contacted Mr. Brunsdon to order an updated appraisal of Harmon's real property, including the Millar Avenue Building.

[17] The second affidavit is from Mr. Brunsdon. He indicates he conducted an inspection of the Millar Avenue Building and the 821 Building. He determined that the former had a market value of $6 million and the latter had a market value of $930,000 both as of June 15, 2020. He attached his appraisal as an exhibit to his affidavit.

[18] Harmon submits that its proposed fresh evidence meets the *Palmer* test for the admission of fresh evidence as recently stated in *Risseeuw v Saskatchewan College of Psychologists*, 2019 SKCA 9 at para 19, [2019] 2 WWR 452 [*Risseeuw*]. In *Risseeuw*, this Court affirmed the four-part test for accepting fresh evidence: (a) the evidence will not be admitted, if by due diligence it could have been admitted at trial; (b) the evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the action; (c) the evidence must be credible in the sense that it is reasonably capable of belief; and (d) the evidence must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

[19] The receiver opposes the fresh evidence application. The receiver submits that, on this appeal from an interlocutory order, Court of Appeal Chambers is not the place to assess evidence of this nature, saying, if it is truly fresh evidence, the proper place to assess its cogency is the Court of Queen's Bench. If this evidence were placed before that Court, the receiver states that it would seek to cross-examine Mr. Brunsdon. The receiver submits further that this updated

appraisal is hardly more current than some of the other evidence that Elson J. rejected and could not have been expected to have affected the result in any event.

[20] The secured party takes the view that the four-part test for the admission of fresh evidence has not been met and suggests that I should be highly sceptical of Mr. Moneo's statement that he was taken by surprise given all that had transpired since the appointment of the receiver in January of 2020. The secured party points out that if Harmon had been taken by surprise, it must be noted that its counsel did not seek an adjournment of the receiver's application to obtain the Order.

B. Analysis

[21] While Harmon's application is framed as an application to adduce fresh evidence, this Court has held that a single judge of the Court does not have the authority "to grant leave pertaining to the reception of further evidence" (*Turbo Resources Ltd v Gibson* (1987), 60 Sask R 221 (CA) at para 19 [*Turbo*]). As the Court indicated in *Turbo*, and as Rule 59 of *The Court of Appeal Rules* provides, a fresh evidence application must be made in the context of an appeal to the Court itself. For a recent statement of this principle, see *C.L.B. v J.A.B.*, 2016 SKCA 18 at para 24, 476 Sask R 1, and *Haug v Dorchester Institution*, 2016 SKCA 55 at para 3, [2016] 10 WWR 484.

[22] In light of this, I have treated the application to adduce this evidence as "material upon which the applicant relies to support" Harmon's application that leave to appeal should be granted and its application to extend the time to appeal (see Rule 48(1)(b) of *The Court of Appeal Rules*). But, even with this approach, I still have some difficulty with this proposed fresh evidence. This is so because, even if I agreed to accept this evidence for the purposes of this Chambers application, and, as a result of it, I were to grant leave to appeal, there is no guarantee that the panel of the Court ultimately hearing the appeal would admit the evidence on the appeal proper. In other words, my acceptance of the fresh evidence would not bind the Court in any event.

[23] If this evidence were taken *on its own*, and at face value, the receiver would have granted an improvident listing agreement, but on what basis can I, as the Chambers judge, assess this

untested evidence? Confronted by this issue, if the Court were satisfied with the credibility and reliability of the evidence and Harmon's due diligence, the Court would have the authority to remit the matter to Elson J. to assess the evidence. In my view, I, as a single judge, do not have that authority as I would then be disposing of the appeal. It seems to me that the better place to assess this evidence is the Court of Queen's Bench.

[24] All parties agree that the Order is interlocutory. A further order of the Court of Queen's Bench will be needed to confirm any sale of Harmon's properties. Further, I also note that s. 187(5) of the *BIA* provides that "[e]very court may review, rescind or vary any order made by it under its bankruptcy jurisdiction". *Court* in s. 187(5) means a court that has been vested with jurisdiction by the *BIA* (i.e., by s. 2 and s. 183(1) working in tandem), which means the Court of Queen's Bench in this province (see s. 183(1)(f)). Subsection 187(5) permits a judge to deal with continuing matters if new evidence comes to light. The court's discretion must be exercised judicially, having regard for a wide range of factors, including if it is just and expedient in the control of its own process: see, generally, L.W. Houlden, C.H. Morawetz and J. Sarra, "Power of Court to Review, Rescind or Vary an Order", *Bankruptcy and Insolvency Law of Canada*, loose-leaf (Rel 2012-07) 4th ed, vol 3 (Toronto: Thomson Reuters, 2009) at I§24 [*Houlden, Morawetz & Sarra*].

[25] I would not want to be taken as saying there can be no instance when a Chambers judge hearing an application under s. 193 of the *BIA* or s. 31 of the *General Rules* could receive such material under Rule 48(1)(b). However, in this case, the proper place to assess this new evidence is the Court of Queen's Bench, either on the basis of a s. 187(5) application or as part of the application to approve any sale of the property that might ensue.

[26] Thus, I would dismiss the application to adduce fresh evidence and have not considered it for any other purpose.

IV. Leave to Appeal is Required to Advance the Appeal

A. Introduction to the leave issue

[27] The primary provisions under consideration in this application are s. 193(c) and (e) of the *BIA*. They read as follows:

Appeals **Court of Appeal** **193** Unless otherwise expressly provided, an appeal lies to the Court of Appeal from any order or decision of a judge of the court in the following cases: **(c)** if the property involved in the appeal exceeds in value ten thousand dollars; **(e)** in any other case by leave of a judge of the Court of Appeal. RS, 1985, c B-3, s 193 1992, c 27, s 68.	**Appels** **Cour d'appel** **193** Sauf disposition expressément contraire, appel est recevable à la Cour d'appel de toute ordonnance ou décision d'un juge du tribunal dans les cas suivants : **c)** les biens en question dans l'appel dépassent en valeur la somme de dix mille dollars; **e)** dans tout autre cas, avec la permission d'un juge de la Cour d'appel. LR (1985), ch B-3, art 193 1992, ch 27, art 68.

[28] Harmon initially applied for leave to appeal under s. 193(e) of the *BIA*. However, when Harmon's application was heard, its first position was that it had an appeal as of right under s. 193(c) such that its application for leave to appeal should be dismissed. But, if I determined that Harmon did not have an appeal as of right, it was submitted that leave to appeal should be granted. In describing the process in this manner, Harmon relied on *Patel*. In *Patel*, Leurer J.A. held that where an application for leave to appeal is made when leave to appeal is not required, the proper procedure is to dismiss the application. If the party applying for leave is out of time, the next step is to consider whether leave to file late should be granted. Thus, following *Patel*, I will determine whether Harmon has a right of appeal as a preliminary issue.

[29] In asserting a right of appeal under s. 193(c) of the *BIA*, Harmon relies on *Wilkes*. In *Wilkes*, this Court, on an application to strike an appeal on the basis that leave to appeal was required and had not been obtained, opted to follow a line of authority stemming from *Orpen v Roberts*, [1925] 1 SCR 364 [*Orpen*], and *Fallis v United Fuel Investments Limited*, [1962] SCR 771 [*Fallis*], i.e., the *Orpen–Fallis* line.

[30] In *Wilkes*, I wrote for the Court and drew these principles from the *Orpen–Fallis* line:

[61] While it is solidly established in the jurisprudence that there is no right of appeal under s. 193(c) from a question involving procedure *alone*, courts should not start with that question. The primary task is to answer the question raised by s. 193(c) and determine whether the property involved in the appeal exceeds $10,000. Courts have used different ways of giving meaning to s. 193(c), but it is still the words of the statute that govern. Thus, in *Fallis*, by its adoption of what the Court had said in *Orpen*, the test is stated as, What is the loss which the granting or refusing of the right claimed will entail? In *Fogel*, the Court asked what is "the value in jeopardy" (at para 6). In *McNeil*, the Chambers judge observed that "[t]he 'property involved in the appeal' … may be determined by comparing the order appealed against the remedy sought in the notice of appeal" (at para 13). In *Trimor*, the Chambers judge added to the *Orpen–Fallis* test by stating "[t]he focus of the inquiry under s. 193(c) is the amount of money at stake …" (at para 10). All of these expressions are consistent with the statutory language present in s. 193(c).

[62] In answering any of those questions, an appeal court may determine that there is no property involved in the appeal exceeding in value $10,000 but rather that the question in issue is procedural only. But merely because the question in issue is procedural, does not necessarily mean there is not property involved in the appeal that exceeds in value $10,000. An issue can be procedural while also having more than $10,000 at stake. In examining this principle further, it is helpful to look again at the three leading cases that put forward the proposition that the property involved in the appeal did not exceed $10,000 because the question in issue was procedural:

> (a) *Coast* [[1926] 2 WWR 536 (BCCA)] – the issue was whether the Chambers judge had erred by permitting the bringing of an action rather than requiring the matter to be heard in Chambers;
>
> (b) *Dominion Foundry* [(1965), 52 DLR (2d) 79 (Man CA)] – the issue pertained to the manner of sale; and
>
> (c) *Pine Tree* [2013 ONCA 282] – the issue was whether a receiver should have been appointed or not.

It should be noted that the reported decisions do not show that the proponent of a right of appeal in these cases put forward evidence to show that the procedural issue in question had resulted in or could result in a loss.

[63] It is one thing to say there is no appeal as of right under s. 193(c) from an order that directs a receiver as to the *manner* of sale because the "property involved in the appeal [does not exceed] in value ten thousand dollars" where no claim of loss is alleged. Classifying such an order as procedural appears to have no consequence because the complaint is about the *choice* of procedure that the trustee or receiver made rather than about the value of the property (*Dominion Foundry*). It is quite another matter to say there is no *right* of appeal under s. 193(c) from any order that is procedural in nature when there is a claim of loss in excess of $10,000. In short, courts must be careful not to extrapolate from decided cases to reduce every choice that a trustee or a receiver makes to a question of procedure so as to deny a proposed appellant a right of appeal. The issue in s. 193(c) is whether based on the evidence there is at least $10,000 at stake, not whether the order is procedural.

[64] According to the *Orpen–Fallis* line of authority, which I believe this Court should follow, an appellate court's task is to determine first and foremost whether the appeal involves property that exceeds in value $10,000, i.e., to answer the question posed by

> s. 193(c). It is not necessary that recovery of that amount be guaranteed or immediate. Rather the claim must be sufficiently grounded in the evidence to the satisfaction of the Court determining whether there is a right of appeal. As the Court in *Fallis* indicated, the determination of the amount or value may be proven by affidavit. It may be that a court will conclude that the appeal does not involve property that exceeds in value $10,000, but rather involves a question of procedure alone, but one does not begin with the second question first. In my view, this is an important distinction.
>
> (Italic emphasis in original, underline emphasis added)

B. Analysis

[31] In the receiver's Chambers application before Elson J., Harmon submitted that the Millar Avenue Building should have been listed at $4,950,000 rather than $3,800,000. The issue is whether the difference between these two numbers represents a claim of loss sufficient to ground a right of appeal in s. 193(c) of the *BIA*.

[32] As the *Orpen–Fallis* line of authority indicates, the question is, "What is the loss which the granting or refusing of the right claimed will entail?" In answering this question, recovery of the claimed amount need not "be guaranteed or immediate", but the claim must be "sufficiently grounded in the evidence to the satisfaction of the Court determining whether there is a right of appeal" (*Wilkes* at para 64). As I review Harmon's claim, I am not satisfied that Harmon's proposed claim of loss is sufficiently grounded in the evidence.

[33] It must be understood that Harmon does not contest that the Millar Avenue Building must be sold, and that it is going to be sold through the receivership process. It also must be understood that any sale of the property must be confirmed by further order of the Court of Queen's Bench. The interlocutory nature of the Order is made clear by its paragraph 2, which provides as follows:

> 2. Any proposed sale of any Harmon Lands Property by the Receiver which is identified as a result of the Sale Process shall be conditional upon the Receiver obtaining a further Order of this Court approving such proposed sale and vesting title to such Harmon Lands Property in the name of the proposed purchaser.

[34] Thus, what the Court has before it is an Order that authorizes a *list price* of $3.8 million for the Millar Avenue Building. It does not propose a sale price of $3.8 million. All that the Order does is establish a process for the sale of the property. Any proposed sale must still be confirmed.

[35] At this point, the claim of loss is without any foundation at all. It is, as such, entirely speculative. It assumes that the listing agent will not market the property to its fullest potential or that the receiver will place an improvident sale before the Court of Queen's Bench to be confirmed and the Court will confirm it. It is possible that Harmon will apply to Elson J. under s. 185(7) of the *BIA* or wait until it is determined that the property is proposed to be sold for less than what Harmon believes it is worth and place the Brunsdon Appraisal before Elson J. at that time. It is also possible that Harmon will obtain other financing so as to permit it to buy the property at the list price or the property will sell for an amount acceptable to Harmon. In my view, the Order does not directly have an impact on the proprietary or monetary interests of Harmon or crystallize any loss at this time. It concerns a matter of procedure only. It is merely an order as to *manner of sale*, as was the case in *Dominion Foundry Co. (Re)* (1965), 52 DLR (2d) 79 (Man CA). No value is in jeopardy, and no party can claim a loss as a result. In my view, the property involved in the proposed appeal does not exceed in value $10,000 as those words are used in s. 193(c) of the *BIA*. Thus, I conclude it was necessary for *Harmon* to apply for leave to appeal.

V. Leave to Appeal should not be Granted

[36] That brings me to Harmon's initial application for leave to appeal under s. 193(c). *Rothmans, Benson & Hedges Inc. v Saskatchewan*, 2002 SKCA 119, 227 Sask R 121 [*Rothmans*], sets the test for leave to appeal as follows:

> [6] The power to grant leave has been taken to be a discretionary power exercisable upon a set of criteria which, on balance, must be shown by the applicant to weigh decisively in favour of leave being granted: *Steier* v. *University Hospital*, [1988] 4 W.W.R. 303 (Sask. C.A., *per* Tallis J.A. in chambers). The governing criteria may be reduced to two – each of which features a subset of considerations – provided it be understood that they constitute conventional considerations rather than fixed rules, that they are case sensitive, and that their point by point reduction is not exhaustive. Generally, leave is granted or withheld on considerations of *merit* and *importance*, as follows:
>
> > *First*: Is the proposed appeal of *sufficient merit* to warrant the attention of the Court of Appeal?
> >
> > - Is it prima facie frivolous or vexatious?
> > - Is it prima facie destined to fail in any event, having regard to the nature of the issue and the scope of the right of appeal, for instance, or the nature of the adjudicative framework, such as that pertaining to the exercise of discretionary power?

> - Is it apt to unduly delay the proceedings or be overcome by them and rendered moot?
> - Is it apt to add unduly or disproportionately to the cost of the proceedings?
>
> *Second*: Is the proposed appeal of *sufficient importance* to the proceedings before the court, or to the field of practice or the state of the law, or to the administration of justice generally, to warrant determination by the Court of Appeal?
>
> - does the decision bear heavily and potentially prejudicially upon the course or outcome of the particular proceedings?
> - does it raise a new or controversial or unusual issue of practice?
> - does it raise a new or uncertain or unsettled point of law?
> - does it transcend the particular in its implications?
>
> (Emphasis in original)

[37] In *Paulsen & Son Excavating Ltd v Royal Bank*, 2012 SKCA 101 at para 12, 399 Sask R 283, Richards J.A. (as he then was) confirmed that the test for leave to appeal, set out in *Rothmans*, applies with equal force to applications for leave to appeal in bankruptcy and insolvency matters.

[38] Harmon's appeal, as amplified by its submissions on this application, can be summarized as an assertion of two points:

(a) the Chambers judge erred by admitting as evidence an appraisal by Suncorp Valuations [Suncorp Appraisal]; and

(b) the Chambers judge erred by weighing the evidence as he did so as to set a list price of $3.8 million.

[39] The first question is a question of law. Harmon submits that the Chambers judge should have rejected the Suncorp Appraisal because it was exhibited to the affidavit of Kevin Hoy, who is counsel to the secured creditor. According to this argument, the Chambers judge should have applied the authorities, prohibiting the filing of evidence on substantive or contentious matters by way of a lawyer's affidavit. Harmon relies on the following: *Crouser v 493485 Alberta Ltd*., [1996] AJ No 967 (QL) (Alta QB); *Owen v White Bear Lake Development Corp.*, [1997] 7 WWR 296 (Sask QB) at para 7; and *Pavao v Ferreira*, 2018 ONSC 1573, 36 E.T.R. (4th) 307. The problem with this argument is that no objection was taken to the admission of this evidence

before the Chambers judge. In my view, that is the complete answer to this aspect of the appeal, making it destined to fail.

[40] With respect to the second aspect of the appeal, in my view, it too is destined to fail. I say this because of the nature of the matter at stake and the discretionary nature of the order. Bankruptcy and insolvency matters stand apart from other forms of secured debt collection and are governed by their own standard of review, which accords considerable deference to the Chambers judge. In *9354-9186 Québec inc. v Callidus Capital Corp.*, 2020 SCC 10, the Supreme Court commented upon the standard of review to apply to the exercise of discretion by a supervising judge in proceeding under the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 [*CCAA*]:

> [53] A high degree of deference is owed to discretionary decisions made by judges supervising *CCAA* proceedings. As such, appellate intervention will only be justified if the supervising judge erred in principle or exercised their discretion unreasonably (see *Grant Forest Products Inc. v. Toronto-Dominion Bank*, 2015 ONCA 570, 387 D.L.R. (4th) 426, at para. 98; *Bridging Finance Inc. v. Béton Brunet 2001 inc.*, 2017 QCCA 138, 44 C.B.R. (6th) 175, at para. 23). Appellate courts must be careful not to substitute their own discretion in place of the supervising judge's (*New Skeena Forest Products Inc., Re*, 2005 BCCA 192, 39 B.C.L.R. (4th) 338, at para. 20).
>
> [54] This deferential standard of review accounts for the fact that supervising judges are steeped in the intricacies of the *CCAA* proceedings they oversee. In this respect, the comments of Tysoe J.A. in *Canadian Metropolitan Properties Corp. v. Libin Holdings Ltd.*, 2009 BCCA 40, 305 D.L.R. (4th) 339 ("*Re Edgewater Casino Inc.*), at para. 20, are apt:
>
> > [O]ne of the principal functions of the judge supervising the *CCAA* proceeding is to attempt to balance the interests of the various stakeholders during the reorganization process, and it will often be inappropriate to consider an exercise of discretion by the supervising judge in isolation of other exercises of discretion by the judge in endeavoring to balance the various interests. … *CCAA* proceedings are dynamic in nature and the supervising judge has intimate knowledge of the reorganization process. The nature of the proceedings often requires the supervising judge to make quick decisions in complicated circumstances.

[41] While this was said in the context of the *CCAA*, the same principle applies when an appellate court is reviewing the exercise of discretion by a supervising judge in the bankruptcy context. According to the current practice of the Court of Queen's Bench, one judge has carriage of receiverships under the *BIA*.

[42] Thus, the issue becomes whether Harmon's claim that the Chambers judge erred in principle or exercised his discretion unreasonably when he decided to grant the Order setting the list price of the Millar Avenue Property at $3.8 million rather than the amount suggested by Harmon, i.e., $4.95 million. This is a clear discretionary decision. It is a decision made by a judge who has had the carriage of this receivership from the outset and who has heard two previous applications. It is also, as I have indicated, an interlocutory decision that may or may not have an impact on the final sale price. The application of the standard of review to this decision, made in this context, creates a significant hurdle for Harmon that would not be surmounted if this appeal were permitted to proceed. In my view, such an appeal is destined to fail. It is for these reasons that I have concluded that leave to appeal should not be granted.

VI. Leave to File Late should not be Granted

[43] The applicable provisions from the *General Rules* are as follows:

Appeal to Court of Appeal	**Appels devant la cour d'appel**
31(1) An appeal to a court of appeal referred to in subsection 183(2) of the Act must be made by filing a notice of appeal at the office of the registrar of the court appealed from, within 10 days after the day of the order or decision appealed from, or within such further time as a judge of the court of appeal stipulates.	**31(1)** Un appel est formé devant une cour d'appel visée au paragraphe 183(2) de la Loi par le dépôt d'un avis d'appel au bureau du registraire du tribunal ayant rendu l'ordonnance ou la décision portée en appel, dans les 10 jours qui suivent le jour de l'ordonnance ou de la décision, ou dans tel autre délai fixé par un juge de la cour d'appel.
(2) If an appeal is brought under paragraph 193(e) of the Act, the notice of appeal must include the application for leave to appeal.	**(2)** En cas d'application de l'alinéa 193e) de la Loi, l'avis d'appel est accompagné de la demande d'autorisation d'appel.
SOR/98-240, s 1 SOR/2007-61, s 63(E)	DORS/98-240, art 1DORS/2007-61, art 63(A)

[44] Without an order from a judge of the Court extending the time to appeal under s. 31(1) of the *General Rules*, the Court hearing an appeal under s. 193 of the *BIA* has no jurisdiction to hear a late-filed appeal. In this case, the Order issued on June 5, 2020. Harmon served its notice of appeal on June 11, 2020, but did not file it until July 9, 2020. Thus, Harmon was 24 days late in filing the motion and, without an order extending the time to appeal, there is no appeal. Harmon applied under s. 31(1) of the *General Rules* to extend the time for filing.

[45] As previously indicated, it would not be necessary to address this issue in light of my conclusion in relation to the leave issue, but, if I am in error as to whether Harmon has an appeal as of right or whether leave should be granted, I would, nonetheless, dismiss Harmon's application for an extension of the time to file late.

[46] An applicant seeking to extend the time to appeal must meet a more stringent test than the *Rothmans* test. Often an appeal is neither frivolous nor vexatious, but it is not possible to say that it is destined to fail. However, when an applicant for leave must seek an order extending the time to appeal, an appellate Chambers judge is permitted to delve more deeply into the merits and determine whether the appeal is arguable (see *Wilkes* at para 75 and *Houlden, Morawetz & Sarra*, generally, at vol 3, M§24). However, in this case, I am satisfied that the appeal is destined to fail, which conclusion also satisfies the question as to whether leave should be granted to file late under s. 31(1) of the *General Rules*. An appeal that is destined to fail cannot be considered to be an arguable appeal.

[47] As with all applications, the governing principle in determining whether to grant an extension of time is whether the justice of the case requires that an order should be made (see, generally, *Houlden, Morawetz & Sarra* at M-24 and the reference to *Re Braich*, 2007 BCCA 641 at para 10, 250 BCAC 53). However, it would avail no one if leave to file late were granted in relation to an appeal that is not arguable.

VII. Costs

[48] At one point during these proceedings, when Harmon was unrepresented by counsel, the receiver applied for the appointment of an *amicus curiae* for Harmon and filed a brief by a lawyer from another law firm. When Harmon successfully obtained counsel, I dismissed the receiver's *amicus* application with brief oral reasons. I made no order as to costs.

[49] That brings me to the question of the costs of the applications before me. As the above reasons indicate, I have dismissed the following applications:

(a) Harmon's application to adduce fresh evidence;

(b) Harmon's application for a determination that it has an appeal as of right;

(c) Harmon's application for leave to appeal; and

(d) Harmon's application to file late.

[50] It seems to me, with respect to the above four applications, that the receiver is entitled to its fees according to the receivership order and therefore costs should not be awarded to it on these applications. Similarly, while the secured creditor was represented on this appeal, and made oral submissions through its counsel, it is not clear to me that the secured creditor is entitled to any costs over and above what its credit facility allows. If the secured creditor is of the contrary view, it may make written submissions to me.

VIII. Conclusion

[51] Order to issue in accordance with these reasons.

"Jackson J.A."

Jackson J.A.

COURT OF APPEAL FOR ONTARIO

CITATION: Reciprocal Opportunities Incorporated v. Sikh Lehar International Organization, 2018 ONCA 713
DATE: 20180831
DOCKET: C65109

Hoy A.C.J.O., van Rensburg and Pardu JJ.A.

BETWEEN

Reciprocal Opportunities Incorporated

Plaintiff (Respondent)

and

Sikh Lehar International Organization, Narinderjit Singh Mattu, Rajwant Kaur Nijjar, Manjit Singh Mangat, Kamaljit Kaur Mangat, Suchet Singh Saini, Kamaljit Kaur Saini, Gurdev Singh Gill, Kanwaljit Kaur Gill, Inderjeet Singh Saini, Jatinder Kaur Saini, Harjeet Singh Thabal, Jaswinder Thabal, Hardeep Singh Dhoot, Raminder Dhoot, Daljit Singh Jammu, Parnpal Jammu, Harkanwal Singh, Kanwaljit Singh, Ramandeep Singh Athwal, Harnish Mangat, Sikanderjit Singh Dhaliwal, Sukhinder Dhaliwal, Gurdish Singh Mangat, Satinderjit Kaur Mangat and Guru Nanak Property Management Ltd.

Defendants (Respondent)

Paul J. Pape, for the appellant Sukhinder Sandhu

Dennis Touesnard, for the receiver JP Graci & Associates Ltd.

Ted R. Laan, for the respondent Sikh Lehar International Organization

Jonathan Piccin, for the respondent Community Trust Company and 2283435 Ontario Inc.

Heard: July 18, 2018

On appeal from the order of Justice R.J. Harper of the Superior Court of Justice, dated February 28, 2018.

Hoy A.C.J.O.:

[1] The appellant, Sukhinder Sandhu, appeals the February 28, 2018 order of the motion judge, declining to approve the sale by a court-appointed receiver of the property known as 79 Bramsteele Road, Brampton, Ontario (the "Property") to him.

[2] For the following reasons, I would allow the appeal, set aside the order of the motion judge, and direct a new hearing.

Background

[3] Sikh Lehar International Organization ("SLIO") was established as a religious, private charitable organization to buy the Property and establish, manage and operate a Gurdwara (a Sikh temple). The Gurdwara is a tenant, but not the sole tenant, of the Property.

[4] By 2014, SLIO was insolvent.

[5] The Property has been the subject of litigation. The trustees of SLIO all wanted to sell the Property, and purported to sell it to different purchasers. Disagreements about selling the Property led to the departure of some of the trustees and litigation about the amounts owing to the departing trustees: see *Sikh Lehar International Organization v. Saini*, 2018 ONSC 2839. It also gave rise to litigation between SLIO, its two remaining trustees, Manjit Mangat and Harkanwal Singh, and the appellant, who had sought to purchase the Property:

see *Sandhu v. Sikh Lehar International Organization*, 2017 ONSC 5680.[1] Further, Canadian Convention Centre Inc. ("CCC"), a tenant of the Property, is seeking damages for alleged breaches of its lease in the amount of $2 million.[2]

[6] On September 1, 2017, at the instance of the first mortgagee of the Property,[3] Reciprocal Opportunities Incorporated ("ROI"), the motion judge granted an order appointing J.P. Graci and Associates Ltd. (the "Receiver") as receiver of all the assets, undertakings and property of SLIO. The order authorized the Receiver to sell the Property, subject to the approval of the court.

[7] The Receiver proceeded to have the Property appraised on September 15, 2017 and contacted persons who had expressed an interest in purchasing the Property.

[8] However, in an email on October 4, 2017, SLIO advised the Receiver that it had a firm commitment from a lender to take an assignment of "your mortgage" (presumably referring to the first mortgage), with the transaction to close in the next two weeks. The Receiver responded by email on October 5, 2017. It advised that the payout on the first mortgage was $4,092,745.31, the per diem rate was $1,114.51, and the Receiver's fees and legal fees were $80,000. The

[1] In that action, the trial judge found that neither party was ready, willing and able to close the transaction, as at the contemplated closing date, and ordered SLIO and its two remaining trustees to pay a total of $2,206,729.07 to the appellant. An appeal of the decision is pending to this court.
[2] CCC's action has been stayed by the receivership order in these proceedings.
[3] While at the instance of the first mortgagee, ROI, the appointment ultimately proceeded with the consent of SLIO and CCC.

Receiver further advised that if the mortgage amount and outstanding expenses were paid, it would apply to the court to approve the assignment of the mortgage and to be discharged. The Receiver also stated it anticipated having the information necessary to begin marketing the Property by November 1, 2017. The Receiver copied its counsel and SLIO's real estate counsel with its response, and separately forwarded its response (together with SLIO's October 4, 2017 email) to, among others, counsel for the appellant.

[9] There is no indication in the record that SLIO – or the proposed assignee – was in funds and prepared to close within two weeks of its October 4, 2017 email to the Receiver.

[10] The Receiver retained the services of a commercial real estate broker, who listed the Property for sale and put it on MLS as of October 31, 2017. The real estate broker also opined that the current value of the Property was significantly less than the appraised value, as the appraisal obtained by the Receiver assumed that the Property's roof structures were in good working order, but in fact a significant portion of the roof required immediate replacement.

[11] By letter dated October 31, 2017 to real estate counsel for SLIO, counsel for the Receiver confirmed that "provided [SLIO] buys out the first mortgage on the property on or before November 14, 2017, then the Receiver will move for an Order having itself discharged." He advised that, as of that date, the payout of

the first mortgage was in the amount of $4,121,722.50, with a per diem rate of $1,114.51. He further advised that provided payment was made before November 14, 2017, the Receiver's fees and legal fees would be capped at $80,000 plus HST.

[12] The Receiver received three offers to purchase the Property. It entered into an agreement (the "Agreement") to sell the Property to the appellant on November 2, 2017.[4]

[13] Under the Agreement, the appellant agrees to purchase the Property on an "as is where is" basis, and to complete the transaction 15 business days after the Receiver obtains an approval and vesting order. With the exception of the requirement for an approval and vesting order, the appellant's obligation to complete the purchase is essentially unconditional. The Agreement provides for a purchase price that exceeds the current value of the Property as assessed by the commercial real estate broker retained by the Receiver, and that approximates the appraised value of the Property.

[14] In an affidavit sworn December 22, 2017, Mr. Mangat, one of the remaining trustees of SLIO, deposed that the appellant was "aware of the

[4] The Receiver received offers from: (1) the appellant; (2) 2207190 Ontario Inc.; and (3) Sukhmeet S. Sandhu. 2207190 Ontario Inc. is controlled by the appellant and is a judgment creditor in the action relating to the appellant's prior attempt to purchase the Property: see *Sandhu v. Sikh Lehar International Organization*, 2017 ONSC 5680. In his affidavit dated December 22, 2017, Mr. Mangat deposes that Sukhmeet S. Sandhu is the appellant's son.

Receiver's intention to assign the first mortgage upon payment of the amounts owing." Mr. Mangat was not cross-examined on his affidavit.

[15] The "buy out" of the first mortgage did not proceed by November 14, 2017.

[16] In an email to the Receiver on November 23, 2017, real estate counsel for SLIO confirmed that SLIO had secured financing from a lender that was prepared to pay out all amounts owed to the Receiver in exchange for an assignment of the first mortgage. He advised that, among other items, the lender required a corporate resolution of ROI authorizing the assignment, the consent of the Receiver to the discharge of the certificate of pending litigation ("CPL") registered on title to the Property by the appellant, and the Receiver's undertaking to obtain a court order discharging the receivership upon payment of all amounts owing, in order to complete the assignment.

[17] In an email later the same day, counsel for the Receiver clarified that while the Receiver could undertake to move for an order discharging the Receiver, the court would have discretion to grant the relief. He asked that counsel for the lender confirm that the lender was in funds. He indicated that the Receiver and its counsel could confirm their fees, and the Receiver could prepare a summary of its receipts and disbursements. He stated he trusted that the information he had previously provided regarding the amount owing on the first mortgage was satisfactory. He inquired as to the closing date.

[18] In an email from counsel for the Receiver to real estate counsel for SLIO dated November 24, 2017, counsel for the Receiver seems to suggest the proposed lender would have to work out the discharge of the CPL and, if it could not, would have to decide whether or not to take the assignment without the CPL being discharged.[5] Counsel for the Receiver cautioned that, "[i]f we cannot move forward with your proposal, I will be moving on January 5, 2018 for an order approving a sale agreement signed by the Receiver."

[19] In an email later that day to SLIO's litigation counsel, counsel for the Receiver indicated that, "[i]f your client can get financing and the CPL issue can be dealt with, we will deal with you as per [SLIO's real estate counsel's] original email to the receiver." (This presumably refers to the November 23, 2017 email, which is the earliest email in the record from SLIO's real estate counsel). He cautioned, "[t]hat said, we will keep moving towards the sale of the property and I intend to bring the motion on January 5, 2018 for approval if the mortgage is not assigned beforehand."

[20] In an email on November 29, 2017 to both SLIO's real estate and litigation counsel, counsel for the Receiver characterized their prior exchanges as "without prejudice settlement discussions." He indicated that, as an officer of the court, the Receiver must have its actions approved by the court. He explained that the

[5] In his affidavit sworn December 21, 2017, real estate counsel to SLIO advised that the CPL was discharged before the hearing date on the motion below.

Receiver could not assign ROI's mortgage, but SLIO has a right to redeem the mortgage.

[21] He further outlined the Receiver's position on the proposed assignment of the first mortgage:

> As you also know, prior to receipt of [the November 23 proposal] the receiver signed an agreement to sell the property to a third party. A motion will be served returnable January 5, 2017 [sic] for approval of that sale.
>
> If your client wishes to redeem the mortgage and have the receiver discharged, it can bring a motion for [sic] in my action on notice to all affected parties for an order allowing it to redeem, and, on redemption, an order that the receiver be discharged. The Receiver will consent to leave to bring the motion and will not oppose that relief if sought.

[22] In an email to counsel for the Receiver on November 30, 2017, litigation counsel for SLIO asked who ROI's representative was for the purpose of assigning the first mortgage.

[23] Counsel for the Receiver provided the identity of ROI's counsel in a responding email on the same date. ROI's counsel is with the same law firm as Receiver's counsel.

[24] By email dated December 5, 2017, counsel for the Receiver provided his fees and those of the Receiver to date to real estate counsel for SLIO.

[25] Real estate counsel for SLIO contacted counsel for ROI by email dated December 5, 2017. He advised of the documents the proposed assignee was requesting from ROI, including an accounting of all monies owed to ROI under the mortgage. He asked counsel for ROI to confirm that ROI was prepared to deliver the assignment and the other requested documents. He stated that "[t]he solicitor for the proposed assignor [sic] confirms he is in funds."

[26] The First Report of the Receiver is dated December 6, 2017. The Receiver prepared it in support of its motion for court approval of the Agreement and sale of the Property. The Report details the sales process the Receiver undertook with respect to the Property, leading it to seek court approval of the Agreement. The Report makes no reference to SLIO's attempts to arrange an assignment of the first mortgage held by ROI.

[27] In his affidavit of December 6, 2017, real estate counsel for SLIO deposed that SLIO was concerned that if counsel for ROI did not respond quickly to the requisitions referred to in his email of December 5, 2017, the Property would be lost to a third-party purchaser in January 2018.

[28] In his supplementary affidavit of December 21, 2017, filed in response to the Receiver's motion for approval of the Agreement, real estate counsel for SLIO further deposed that:

> - On December 8, 2017, counsel for ROI delivered a draft mortgage statement to counsel for SLIO.

- He advised counsel for ROI that counsel for the proposed lender took the position that the default interest rate charged by ROI was contrary to s. 8 of the *Interest Act*, R.S.C 1985, c. I-15 and the proposed lender would not pay it. Counsel for ROI suggested that some amount in excess of the rate charged on the principal balance of the mortgage may have been the result of extension agreements entered into by SLIO and ROI.

- On December 19, 2017, counsel for ROI delivered various documents setting out revised amounts required for the payout of the first mortgage. These amounts differed from those set out in the original Notice of Sale, dated May 17, 2017, and from other amounts provided by ROI in the interim.

- The delay in effecting the assignment of the first mortgage was entirely the responsibility of ROI because of its failure to provide appropriate calculations of the amount owing.

- The requisitions required by the proposed assignee from the Receiver or ROI had otherwise been substantially complied with.

[29] In his affidavit sworn December 22, 2017, Mr. Mangat deposed that the emails of October 5, November 23 and 24, 2017 and the letter of October 31, 2017, referred to above, led SLIO to believe that "upon payment of the proper amounts owing under the First Mortgage, the Receiver would arrange the assignment of the First Mortgage. As a result [SLIO] took steps to secure the proper financing of that assignment and incurred substantial costs in the process." Mr. Mangat then detailed borrowings from five individuals totaling approximately $396,268.87 incurred since the beginning of September 2017,

which he says are or "will be" debts of SLIO. He deposed that of those borrowings:

> - $207,000 was paid to the broker who had been trying to arrange financing for SLIO since September 2017, in part payment of his brokerage fee;
>
> - $24,518 was paid to the second mortgagee on October 14, 2017 to bring that mortgage into good standing, as required by the proposed assignee of the first mortgage;[6]
>
> - $ 91,617.36 was paid to the City of Brampton on November 24, 2017 on account of tax arrears, again a condition of the proposed assignee of the first mortgage; and
>
> - $73,133.51 was paid on or after November 21, 2017 to obtain the discharge of a CRA lien for HST arrears, again a condition of the proposed assignee of the first mortgage.

[30] Mr. Mangat further deposed that SLIO was unaware of the Agreement until the Receiver delivered its motion materials. The Receiver's motion materials are dated December 6, 2017.

[31] Neither Mr. Mangat nor SLIO's real estate counsel deposed that all the proposed assignee's conditions of closing had been satisfied and that, but for the determination of the payout amount, the proposed assignee was prepared to close the assignment transaction.

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[6] Counsel for the second mortgagee (who is also counsel for the proposed assignee of the first mortgage) advised at the hearing of the appeal that, as of that date, the second mortgage was in arrears.

The January 5, 2018 attendance before the motion judge

[32] In its notice of motion dated December 6, 2017, filed in connection with the January 5, 2018 attendance before the motion judge, the Receiver sought an order approving the sale of the Property to the appellant.

[33] SLIO opposed the Receiver's motion. In response, SLIO brought its own motion seeking: (1) an order requiring ROI to assign the first mortgage, upon payment of all amounts owed to the Receiver or ROI; and (2) an order discharging the Receiver upon payment of such amounts.

[34] In its factum filed on the motion, the Receiver indicated that it was prepared to be discharged – but only on the condition that the court be satisfied that it had discharged its duties, and on approval of the activities and accounts of the Receiver and its counsel. It stated that it entered into the Agreement prior to the "conditional request to take an assignment of the first mortgage of ROI." It noted that the effect of the discharge sought by SLIO, as a condition of the assignment of the first mortgage, was that the sale transaction would not be approved and that the Receiver would seek, as part of the discharge order, a release from any potential liability to the appellant. The Receiver noted that the appellant and CCC opposed its discharge. In the event that the court was unwilling to exercise its discretion to discharge the Receiver, it sought an order approving the sale of the Property to the appellant.

[35] The appellant appeared and filed a factum. Among other arguments, the appellant submitted that SLIO had not said how it would make future payments to its mortgagees or creditors if the assignment transaction proceeded, or even that it would. The appellant argued that the sale to him should be approved and a vesting order issued.

[36] CCC filed a responding motion record opposing the form of vesting order sought because that order purported to vest the Property in the appellant free and clear of all encumbrances, including CCC's lease.

The motion judge's reasons

[37] The motion judge declined to approve the sale of the Property to the appellant and, instead, established a process that would permit the assignment of the first mortgage: *Reciprocal Opportunities Incorporated v. Sikh Lehar International Organization et al.*, 2018 ONSC 227.

[38] In his reasons, the motion judge briefly reviewed SLIO's financial position. He noted that the first, second and third mortgages on the Property remained in default; a construction lien was registered in the amount of $406,500; the Ministry of Revenue had a tax lien in the amount of $108,156; the City of Brantford [sic] was in a position to put the Property up for sale for tax arrears in the amount of $433,818.59; CCC was seeking damages in the amount of $2 million for breach

of its lease; there was a judgment in favour of the appellant in the amount of $2,206,729.01; and that there were numerous other debts.

[39] At para. 18, the motion judge instructed himself on the four duties which *Royal Bank of Canada v. Soundair Corp.* (1991), 4 O.R. (3d) 1, 83 D.L.R. (4th) 76 (C.A.) directs a court must perform when deciding whether to approve a sale of a property by a receiver:

> 1. The court should consider whether the receiver has made a sufficient effort to get the best price and has not acted improvidently.
>
> 2. The court should consider the interests of all parties.
>
> 3. The court should consider the efficacy and integrity of the process by which the offers are obtained.
>
> 4. The court should consider whether there has been unfairness in the working out of the process.

[40] The motion judge found that the Receiver took reasonable steps to obtain the best price for the Property. The motion judge noted, at para. 22, that interest was accruing rapidly on both the first mortgage and SLIO's other debts:

> The [first] mortgage has been in arrears since September 2, 2016. There are substantial other debts that have also been in arrears for lengthy periods of time. Interest on the first mortgage and other debts has been accruing and escalating at a rate that the receiver must consider when acting in a manner that is efficient and fair to all interested parties.

[41] Then, at para. 23, the motion judge stated he would not approve the sale, explaining: “[e]xcept for the conduct of the Receiver/Plaintiff relative to the Defendant SLIO, I would have approved the sale.”

[42] At para. 26, the motion judge found that central to the communications from October 5, 2017 to the end of December 2017 between counsel for the Receiver, counsel for SLIO, and counsel for the intended assignee “were inconsistent representations of what the pay-out amount would be in order to effect the proposed assignment of the first mortgage.”

[43] He found, at para. 30:

> It is clear that as of the end of December, 2017, the Receiver/Plaintiff was prepared to accept payment of the outstanding balance of the first mortgage and assign the mortgage to a third party. The only thing that had not been established was the proper payout.

[44] He concluded, at para. 32:

> Having regard to the final consideration of *Royal Bank of Canada v. Soundair Corp*, I find the manner in which the process was conducted resulted in an unfairness to the Defendant SLIO and the prospective assignee of the first mortgage.

[45] In his order dated February 28, 2018, the motion judge ordered that the proposed sale was not approved. He ordered ROI and the Receiver to provide a statement that they intend to rely on for purposes of the payout of the first mortgage and adjourned the matter to a further hearing before him, in order to fix

the payout and set the terms of closing the payout and assignment of the first mortgage. He specifically ordered that the Receiver was not discharged.

The parties' submissions on appeal

(a) The appellant's submissions

[46] The appellant does not challenge the motion judge's finding that the manner in which the process was conducted resulted in an unfairness to SLIO and the prospective assignee of the first mortgage. Rather, the appellant argues that the motion judge provided insufficient reasons because he did not explain why the unfairness to SLIO and the prospective assignee of the first mortgage should trump the unfairness to the appellant of not having the sale approved.

[47] Further, the appellant argues that the motion judge erred in his application of the second *Soundair* duty by failing to consider the interests of creditors and the interests of the appellant, *qua* purchaser. He submits that this court should set aside the order of the motion judge and approve the sale of the Property to him. Alternatively, he asks that the order be set aside and new hearing ordered.

[48] The appellant does not argue that that SLIO's right of redemption or assignment terminated when the Receiver entered into the Agreement.

(b) The Receiver's submissions

[49] On appeal, the Receiver supports the position of the appellant. It argues that the motion judge erred in his application of the second *Soundair* duty by

failing to consider the interests of all parties and by focusing solely on the interests of SLIO. It says that not approving the sale leaves SLIO's creditors in limbo as to when and by what means the Property will be sold to satisfy their debts.

[50] It also argues that the motion judge failed to consider the third *Soundair* factor – namely, the efficacy and integrity of the process by which offers were obtained. It argues that this factor weighs in favour of approving the sale.

[51] Finally, the Receiver argues that the fourth *Soundair* duty only requires an inquiry into the fairness of the sale process, and does not contemplate an inquiry into the fairness of other aspects of the receivership. In its submission, any unfairness resulting from the Receiver's conduct in relation to SLIO and the proposed assignment is unrelated to the sale process undertaken with respect to the Property. Its position is that unfairness in the broader receivership is relevant only to an analysis of the interests of the parties under the second *Soundair* duty.

(c) SLIO's submissions

[52] SLIO argues that the motion judge correctly identified the test in *Soundair*, identified the appellant as a creditor, and considered the creditors' interests. It states that there is sufficient equity in the Property such that the appellant's position as a creditor is not at risk.

[53] SLIO argues that it was treated unfairly because the Receiver breached its written consent to permit the redemption/assignment of the first mortgage and to obtain an order for discharge. In SLIO's submission, it is implicit in the motion judge's reasons that he found that the unfairness to SLIO was the most important factor in the circumstances and the motion judge's reasons were sufficient in this regard. SLIO notes that, in any event, insufficiency of reasons is not automatically fatal to a decision.

Analysis

(a) The motion judge erred in his performance of the second *Soundair* duty

[54] The motion judge's order was discretionary in nature. An appeal court will interfere only where the judge considering the receiver's motion for approval of a sale has erred in law, seriously misapprehended the evidence, exercised his or her discretion based upon irrelevant or erroneous considerations, or failed to give any or sufficient weight to relevant considerations: see *HSBC Bank of Canada v. Regal Constellation Hotel (Receiver of)* (2004), 71 O.R. (3d) 355, 242 D.L.R. (4th) 689 (C.A.), at para 22.

[55] I agree with the appellant and the Receiver that the motion judge erred in performing the second *Soundair* duty: first, by failing to properly consider and give sufficient weight to the interests of the creditors; and second, by failing to consider the interests of the appellant, *qua* purchaser.

[56] I begin by acknowledging that while the primary interest is that of the creditors of the debtor, the interests of the creditors is not the only or overriding consideration. The interests of a person who has negotiated an agreement with a court-appointed receiver ought also to be taken into account. And in appropriate cases, the interests of the debtor must also be taken into account: see *Soundair*, at paras. 39-40.

[57] Although the motion judge noted that there were substantial debts in arrears and interest was accruing on those debts, he did not consider how declining to approve the sale, so that the assignment of the first mortgage might proceed, would affect the creditors' interests.

[58] If the sale proceeded, the creditors could be repaid. On the other hand, the assignment of the first mortgage would simply replace one creditor with another. It would not permit SLIO to repay the other substantial debts which the motion judge indicated were in arrears. It is also not clear that SLIO would be in a position to service the first mortgage, if assigned to a new mortgagee.

[59] Further, according to Mr. Mangat's evidence, if the assignment proceeds SLIO will assume additional debt in respect of the brokerage fees payable for arranging the assignment, thus worsening SLIO's financial position. While Mr. Mangat deposed that certain debts had been repaid (at least in part) to satisfy the prospective assignee's conditions of closing, it is intended that SLIO will

assume debts incurred to facilitate those repayments. It also appears that the Property is deteriorating and urgently requires repair. There is no indication as to how those repairs will be funded.[7]

[60] The receivership was triggered by SLIO's insolvency. The motion judge did not engage in any analysis of the continued viability of SLIO and SLIO's ability to pay the creditors if the sale did not proceed. He did not consider whether declining to approve the sale transaction would merely delay the inevitable. Given that *Soundair* directs the primary interest to be considered is that of the creditors of the debtor, this was an error.

[61] Moreover, the motion judge did not give any consideration to the interests of the appellant, *qua* purchaser. He did not consider the potential prejudice that would result to the appellant's interests if the sale was not approved. Significantly, while the motion judge declined to approve the sale based on the conduct of the Receiver and first mortgagee vis-à-vis SLIO, he did not find that the appellant was implicated in this conduct.

[62] As a result, I conclude that the motion judge erred in his application of the second *Soundair* duty. In light of this conclusion, it is unnecessary to address the appellant's argument that the motion judge provided insufficient reasons or the

[7] In a letter dated October 31, 2017, the commercial real estate broker retained by the Receiver notes that there are visible roof leaks and a portion of the tar-gravel roof needs to be replaced immediately. The broker estimated that half of the HVAC units and a portion of the parking lot will need to be replaced. The broker also indicated that the exterior of the building requires immediate attention.

Receiver's arguments regarding the application of the third and fourth *Soundair* factors.

(b) The appropriate remedy is to set aside the order below and direct a new hearing

[63] As I have concluded that the motion judge erred in principle, the next question is whether this court should consider whether to approve the sale transaction *de novo* or set aside the order below and order a new hearing. For several reasons, I would set aside the order below and order a new hearing, on notice to all persons with an interest in the Property, including the lessees, and any execution creditors.

[64] First, the circumstances are unusual. Contrary to what is suggested by the Receiver's notice of motion filed below, and to what I had understood at the hearing of the appeal, this is not a case where the Receiver unequivocally recommended that the sale be approved. Rather, its factum below indicates that it did not oppose the assignment, provided it was discharged and released from any potential liability to the appellant. It recommended the sale only in the event that the motion judge was unwilling to insulate it from liability to the appellant. A re-hearing would permit the motion judge to obtain clarity on the Receiver's position.

[65] Second, the First Report of the Receiver does not provide an update on SLIO's financial position, indicate how the assignment option would affect creditors other than ROI, explain what it told the appellant about the proposed assignment before entering into the Agreement and what it told SLIO about the proposed sale, or describe what role it took in determining the amount outstanding under the first mortgage. A re-hearing would permit the Receiver to provide a further report and assist the motion judge in balancing the interests of the creditors, the appellant, SLIO, and the proposed assignee. If the motion judge were inclined to discharge the Receiver, an updated report would also assist the motion judge in determining the terms of its discharge.

[66] Third, it is not clear that the proposed assignee is ready, willing and able to close the assignment upon determination by the motion judge of the payout amount under the first mortgage. Among other things, the discharge of the Receiver, which the motion judge declined to grant, at least at this juncture, appears to be a condition of the proposed assignment.

[67] Mr. Mangat deposed that SLIO has borrowed money to discharge certain debts, as required by the proposed assignee of the first mortgage. But, based on the amounts owing to those creditors as set out in the motion judge's reasons, the amounts Mr. Mangat says have been repaid are less than the amounts owing to those creditors. Moreover, despite Mr. Mangat's evidence that the arrears on the second mortgage had been repaid, the motion judge's reasons indicate, and

counsel for the second mortgagee advised this court in oral argument, that the second mortgage is in arrears. SLIO's overture to the Receiver also followed on the heels of unsuccessful attempts by SLIO to refinance the first mortgage before the Receiver was appointed. A re-hearing should permit the motion judge to determine whether the assignment transaction could proceed without delay.

[68] Fourth, a number of factual determinations may need to be made in order to permit the balancing of the interests of the creditors, the appellant, SLIO and the proposed assignee, to determine whether or not the sale should be approved and, if the motion judge is inclined to order the discharge of the Receiver, the terms of its discharge.

[69] For example, as indicated above, Mr. Mangat deposed that the appellant was aware of the Receiver's intention to assign the first mortgage upon payment of the amounts owing. I understand that his allegation is based on the fact that counsel for the Receiver forwarded its October 5, 2017 email, and SLIO's email of October 4, 2017, to counsel for the appellant. However, as I have stated, the motion judge made no finding as to what the appellant knew, and when. The emails of October 4 and 5, 2017 seemed to contemplate that the assignment would close by October 18, 2017 (i.e. "in the next two weeks"). It is unclear what the appellant knew about the proposed assignment transaction thereafter. There may also be credibility issues at play, as Mr. Mangat has been previously censured for his serious failure to disclose material facts to the court on a motion

for an injunction involving the Property: *Sikh Lehar International Organization v. Suchet Saini et al.*, (28 January 2016), Brampton, CV-15-1855-00 (Ont. S.C.).

[70] Nor did the motion judge make any findings about what SLIO knew, and when. In his affidavit of December 22, 2017, Mr. Mangat deposes SLIO did not know of the Agreement until the delivery of the Receiver's motion materials on the motion to approve the sale of the Property. The Receiver's motion materials are dated December 6, 2017. However, counsel for the Receiver advised both SLIO's litigation counsel and real estate counsel by emails dated November 24, 2017 that he intended to bring a motion to approve the sale of the property returnable January 5, 2018 if the assignment did not proceed. Counsel for the Receiver repeated this caution in his email of November 29, 2017. Indeed, as early as October 5, 2017, the Receiver had told SLIO that it would likely be in a position to market the Property by November 1, 2017. It may be that Mr. Mangat incurred at least some – and perhaps most – of the costs he did, purportedly on behalf of SLIO, with "fair warning" that, in the appellant's words, the Receiver was "riding two horses."

[71] Also, in terms of the unfairness to SLIO, the motion judge made no findings about what the Receiver knew about Mr. Mangat incurring indebtedness in connection with the assignment, purportedly on behalf of SLIO. The motion judge also did not make any finding as to whether Mr. Mangat incurred these debts contrary to the receivership order, which empowers and authorizes the

Receiver, to the exclusion of SLIO and all other persons, to manage SLIO's business and incur obligations.

[72] Similarly, while the motion judge referred to what he described as inconsistent representations about the payout amount between counsel for the Receiver, counsel for SLIO, and counsel for the intended assignee as creating the unfairness to SLIO and the prospective assignee of the first mortgage, the evidence of SLIO's real estate counsel was that the delay was "entirely the responsibility of ROI because of its failure to provide appropriate payout calculations of the amount owing" [emphasis added]. More detailed findings may be required about the cause of the delay in settling the payout amount.

[73] To be clear, I do not purport to make any of these factual findings; that is a matter for the motion judge on the new hearing, to the extent necessary to resolve the motion.

[74] Fifth and finally, the issue raised by CCC regarding the form of the vesting order contemplated by the Agreement remains to be resolved.

Disposition

[75] For these reasons, I would allow the appeal, set aside the order below, and order a re-hearing, on notice to all persons with an interest in the Property, including the lessees, and any execution creditors.

[76] Subject to any further directions that the motion judge may provide, I would also direct that, for the re-hearing: (1) the Receiver provide a further report, detailing SLIO's current financial position, indicating how the sale and assignment options would affect SLIO's creditors, explaining what it told the appellant about the proposed assignment before entering into the Agreement, explaining what it told SLIO about the proposed sale, explaining what role it took in determining the amount outstanding under the first mortgage, and clarifying its position; (2) ROI provide a statement of the amounts owing under the first mortgage, indicating the extent to which interest on arrears has been calculated at a rate greater than the pre-default interest rate; and (3) SLIO provide a copy of its agreement with the proposed assignee of the first mortgage and evidence from the prospective assignee of the first mortgage, confirming what (if any) conditions to closing remain outstanding and that it is in funds and willing and able to close upon satisfaction of those conditions.

[77] I would order that the appellant be entitled to his costs of the appeal, fixed in the amount of $19,100, inclusive of HST and disbursements.

Released: "AH" "AUG 31 2018"

"Alexandra Hoy A.C.J.O."
"I agree K.M. van Rensburg J.A."
"I agree G. Pardu J.A."

In the Court of Appeal of Alberta

Citation: River Rentals Group Ltd. v. Hutterian Brethren Church of Codesa, 2010 ABCA 16

Date: 20100118
Docket: 0903-0191-AC
0903-0236-AC
Registry: Edmonton

Between:

Bank of Montreal

Not a Party To the Appeal
(Plaintiff)

- and -

River Rentals Group Ltd., Taves Contractors Ltd. and McTaves Inc.

Respondent
(Defendant)

- and -

Hutterian Brethren Church of Codesa

Appellant
(Other)

- and -

Bill McCulloch and Associates Inc.

Respondent
(Other)

- and -

Don Warkentin

Respondent
(Other)

The Court:

The Honourable Mr. Justice Ronald Berger
The Honourable Madam Justice Patricia Rowbotham
The Honourable Mr. Justice R. Paul Belzil

Memorandum of Judgment

Appeal from the Orders by
The Honourable Chief Justice A.H. Wachowich
Dated the 2nd day of June, 2009 and
Dated the 17th day of June, 2009
(Docket: 0903 03233)

Memorandum of Judgment

The Court:

[1] At the hearing of this appeal, we announced that the appeal is allowed with reasons to follow.

[2] Bill McCulloch and Associates Inc. is the court-appointed Interim Receiver and/or Receiver Manager of the corporate Respondents ("the Taves Group") by order dated March 5, 2009. Prior to that date, the Receiver had become Trustee in Bankruptcy of the Taves Group.

[3] The Receiver issued an information package and called for offers to purchase the assets of the Taves Group which included a property known as the Birch Hills Lands. The call for offers was dated April 17, 2009. The deadline for submission of offers was on or before May 7, 2009 (the tender closing date).

[4] On June 2, 2009, the Receiver brought an application before Wachowich C.J.Q.B. to approve the sale of the Birch Hills Lands to the Appellant. The Appellant's offer was $2,205,000. An appraisal concluded that the most probable sale price was $1,560,000. Counsel for the Receiver explained that "the Receiver did effect wide advertizing in local and national newspapers. Sent out 160 tender packages and made the tender package available on the Receiver's website." (A.B. Record Digest, 3/30-33)

[5] Fifteen offers were received on the Birch Hills Lands, six of which were for the entirety of the parcel.

[6] In his submission to the Chief Justice, counsel for the Receiver stated:

> "Now, what we have advised the party that we're looking to accept is that we can't put them in possession yet until the Court approves the offer. That has caused some angst given the time of year and it is agricultural land, but we're not in a position to put people on the land before we get court approval to do so. So - - and that's fine, they're still - - they're still at the table so we're good with that.
>
> The offer that the Receiver is recommending acceptance of is - - was from the Hutterite Church of Codesa. That offer was for $2,205,000 ... the offer is very significant ... it was an excellent offer."
>
> (A.B. Record Digest, 5/46 -6/19)

[7] In considering other tenders with respect to other portions of the property of the Taves Group, the Chief Justice expressed his views regarding the importance of adhering to the integrity of the tender process:

> "You know, we ran a tender process, tender process is meant to be - - there are certain rules. It is like, you do not change the rules of baseball or football during the middle of the game. This is the same thing except in this particular case the Court is prepared to exercise the - - its inherent jurisdiction to extend the time in Mr. Taves' position. But I - - you know, I could be the person who says no, Mr. Taves, you were late, I am sorry. Next time use Fed Ex."
>
> (Appeal Record Digest, 12/11-19)

And further:

> "We could be coming back right and left. I am inclined, you know, to grant the applications as submitted on these tenders because the tender process was followed properly. That was the market at the time, this is the people that - - this is how they bid. You know, circumstances change and when circumstances change, somebody is the beneficiary of it, some - - somebody is the loser on this. But the rules were adhered to and having the rules adhered to if, you know - - if you want to - - if you want to go to the Court of Appeal after the order is entered and say to the Court of Appeal, guess what, oil is now at $90, we want this one resubmitted. And if those five people are wise enough to accept that argument, then good luck to you but - - but you know, I am inclined to say we follow a process, the law has to be certain. The law has to be definite. This is what we did and we complied." (Appeal Record Digest, 12/40-13/8)

[8] One of the persons who had tendered an offer to purchase the Birch Hills Lands was the Respondent Don Warkentin. Counsel for the guarantor, Mr. Orrin Toews, addressed the Court. He explained that Mr. Warkentin had submitted an offer of $2.1 million "on the understanding that he would be receiving possession of the property sometime in the fall." Counsel further explained that "I believe it was the Receiver while during the initial auction, that it was brought to his attention on May 21st that he would in fact get possession of the property much earlier than he was anticipating. And on that basis he increased his bid by 200,000 which brings his offer to 2.3 million dollars cash." (A.B. Record Digest, 13/27-36) He submitted that Mr. Warkentin's offer be accepted.

[9] In response, counsel for the Receiver advised the Court that he had been in written communication with counsel for Mr. Warkentin "and there was no indication in that correspondence that he thought he would get [possession of the lands] in the fall." (Appeal Record Digest, 14/18-20) He added: "I think the tender package is clear that the way it was supposed to close is after the appeal periods on any order has expired. ... So how anybody could reasonably conceive that possession wouldn't be granted until the fall based on that escapes me." (Appeal Record Digest, 14/20-25) He further added: "But the bottom line was at the time tenders closed, Mr. [Warkentin]'s offer was found wanting." (Appeal Record Digest, 14/36-38)

[10] On the basis of that information, the Court ruled as follows:

> "Well, you know, rather than adjourning it to hear from Mr. Carter, what I am - - what I am inclined to do with that piece of property, because of - - is - - because of an uncertainty as to occupation, dates of occupation or potential lease or whatever it may be, it is too late to put in the crop right now anyway so - - ... Retender on this one and make it clear in the tender." (Appeal Record Digest, 15/7-19)

[11] Wachowich, C.J. then granted an order extending the deadline to submit revised offers to purchase the Birch Hills Lands; with submissions restricted to the Appellant and Warkentin. During this extension period, Warkentin submitted a bid higher than the Appellant's. The Appellant did not increase its original offer. Subsequently, on June 17, 2009, Wachowich, C.J. granted an order directing that the Birch Hills Lands be sold to Warkentin. An application by the Appellant to reconsider the June 17, 2009 order was dismissed. The Court also granted a stay order for parts of the June 2 order and the entirety of its June 17 order, pending the determination of the appeal of the June 2 order. The Appellant appealed the June 2 order on July 22, 2009; and appealed the June 17 order on August 13, 2009 (the appeals were consolidated on August 20, 2009).

[12] On applications by a Receiver for approval of a sale, the Court should consider whether the Receiver has acted properly. Specifically, the Court should consider the following:

> (a) whether the Receiver has made a sufficient effort to get the best price and has not acted improvidently;
>
> (b) the interests of all parties;
>
> (c) the efficacy and integrity of the process by which offers are obtained; and
>
> (d) whether there has been unfairness in the working out of the process.
>
> ***Royal Bank of Canada v. Soundair Corp***., [1991] 4 O.R. (3d) 1 (C.A.) at para. 16

[13] The Court should consider the following factors to determine if the Receiver has acted improvidently or failed to get the best price:

> (a) whether the offer accepted is so low in relation to the appraised value as to be unrealistic;

(b) whether the circumstances indicate that insufficient time was allowed for the making of bids;

(c) whether inadequate notice of sale by bid was given; or

(d) whether it can be said that the proposed sale is not in the best interest of either the creditors or the owner.

Cameron v. Bank of Nova Scotia (1981), 45 N.S.R. (2d) 303 (C.A.)
Salima Investments Ltd. v. Bank of Montreal (1985), 65 A.R. 372 (C.A.) at para. 12.

[14] The central issue in this appeal is whether the chambers judge, mindful of the record before him, should have permitted rebidding and whether he should have thereafter entertained and accepted the higher offer of $2.51 million plus GST tendered by Mr. Warkentin during the extension period.

[15] The relevance of higher offers after the close of process was considered by the Ontario Court of Appeal in ***Royal Bank v. Soundair***, ***supra***. Upon review of the jurisprudence, the Court stated at para. 30:

> "What those cases show is that the prices in other offers have relevance only if they show that the price contained in the offer accepted by the receiver was so unreasonably low as to demonstrate that the receiver was improvident in accepting it. ..."

[16] The chambers judge made no such finding. Indeed, he made no assessment whatever of the conduct of the Receiver. The only evidence before the Court at the June 2, 2009 application was the Receiver's fifth report and the affidavit of Orrin Toews who proffered no evidence that the Receiver acted improvidently in accepting the offer of the Appellant.

[17] Moreover, the June 2, 2009 order neither considers the interests of the Appellant as the highest bidder nor the interests of others who made compliant, but unsuccessful, bids to purchase the Birch Hills Lands pursuant to the call for offers.

[18] This Court has consistently favoured an approach that preserves the integrity of the process. See ***Salima Investments Ltd.***, ***supra***, and ***Royal Bank of Canada v. Fracmaster Ltd.***, 1999 ABCA 178, 244 A.R. 93.

[19] That was also the view of the Nova Scotia Supreme Court (Appeal Division) in ***Cameron v. Bank of Nova Scotia, supra***, at para. 35:

> "In my opinion if the decision of the receiver to enter into an agreement of sale, subject to court approval, with respect to certain assets is reasonable and sound under the circumstances at the time existing it should not be set aside simply because a later and a higher bid is made. To do so would literally create chaos in the commercial world and receivers and purchasers would never be sure they had a binding agreement. On the contrary, they would know that other bids could be received and considered up until the application for court approval is heard - this would be an intolerable situation. ..."

[20] In addition, there was no cogent evidence before the chambers judge of any unfairness to Warkentin. On the contrary, the impugned order of June 2 conferred an advantage upon Warkentin who then knew the price that had previously been offered by the Appellant when re-tendering his offer.

[21] In cases involving the Court's consideration of the approval of the sale of assets by a court-appointed Receiver, decisions made by a chambers judge involve a measure of discretion and "are owed considerable deference". The Court will interfere only if it concludes that the chambers judge acted unreasonably, erred in principle, or made a manifest error.

[22] In our opinion, the chambers judge erred in principle and on insufficient evidence ordered that the property in question be the subject of an extended re-tendering process. The appeal is allowed. An order will go setting aside paras. 26 through 32 of the June 2, 2009 and the June 17, 2009 orders, and approving the tender of the Appellant on the terms and conditions upon which the Receiver originally sought approval.

Appeal heard on January 7, 2010

Memorandum filed at Edmonton, Alberta
this 18th day of January, 2010

Berger J.A.

As authorized: Rowbotham J.A.

As authorized: Belzil J.

Appearances:

D.R. Bieganek
for the Respondent - River Rentals Group, Taves Contractors Ltd. and McTaves Inc.
for the Respondent - Bill McCulloch and Associates Inc.

G.D. Chrenek
for the Appellant - Hutterian Brethren Church of Codesa

T.M. Warner
for the Respondent - Don Warkentin

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

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

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

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

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

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

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

Held, the appeal should be dismissed.

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

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

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

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

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

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

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

Cases referred to

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

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

Statutes referred to

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

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

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

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

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

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

W.G. Horton, for Ontario Express Ltd.

Nancy J. Spies, for Frontier Air Ltd.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

I will deal with the two issues separately.

I. DID THE RECEIVER ACT PROPERLY

IN AGREEING TO SELL TO OEL?

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

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

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

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

2. It should consider the interests of all parties.

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

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

I intend to discuss the performance of those duties separately.

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

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

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

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

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

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

(Emphasis added)

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

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

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

(Emphasis added)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(Emphasis added)

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

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

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

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

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

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

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

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

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

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

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

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

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

2. Consideration of the interests of all parties

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

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

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

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

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

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

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

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

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

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

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

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

(Emphasis added)

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

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

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

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

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

4. Was there unfairness in the process?

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

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

purchaser would require in order to make a serious bid.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

I agree.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

To the extent that approval of the OEL agreement by Rosenberg

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

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

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

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

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

29, 1990.

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

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

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

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

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

include the purchase of any tangible assets or leasehold interests.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

I accept that statement as being an accurate statement of the

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

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

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

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

procedure adopted by the receiver.

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

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

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

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

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

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

Appeal dismissed.

In the Court of Appeal of Alberta

Citation: Salima Investments Ltd. v. Bank of Montreal, 1985 ABCA 191

Date: 19850826
Docket: 17697, 17696
Registry: Calgary

Between:

Salima Investments Ltd.

Appellant

- and -

Bank of Montreal

Respondent
(Plaintiff)

- and -

Mammoth Developments Ltd. and Bolero Management Ltd.

Respondents
(Defendants)

The Court:

The Honourable Chief Justice Laycraft
The Honourable Mr. Justice Harradence
The Honourable Mr. Justice Kerans

Memorandum of Judgment
Delivered from the Bench

COUNSEL:

Rajko Dodic, Esq., for the Appellant

Grant McKibben, Esq., for the Respondent (Plaintiff)

Quincy Smith, Esq., for the Respondent (Defendants)

MEMORANDUM OF JUDGMENT
DELIVERED FROM THE BENCH

KERANS, J.A. (for the Court):

[1] This is an appeal from an order approving the sale of property in receivership.

[2] A Queen's Bench order made April 16, 1985 named the respondent Coopers-Lybrand as receiver-manager of the property of Mammoth Developments Ltd. and Bolero Management Ltd. on the application of a secured creditor, the Bank of Montreal. The order granted to the receiver the power, among other things, to "sell … any … property" including a 168-room hotel complex and a 76-unit motel.

[3] The receiver advertised the property widely, and called for tenders. The tender notice indicated that the receiver considered the tenders as only a first step and that it was prepared to negotiate the sale.

[4] Seven tenders were received. The highest was from the appellant Salima Investments Ltd., at $4,400,000.00. The others were much lower. The tender of 304987 Alberta Ltd. also involved $300,000.00 less cash. The appraised value of the property for forced sale on terms was $4,593,000.00.

[5] The receiver decided to negotiate further with Salima and opened negotiations on July 24, six days after tenders were opened. A bargain was made the next day, and the receiver at once notified the other tenderers that their tenders were rejected and that the receiver was dealing with somebody else. When asked before us why the receiver did not approach other tenderers for further negotiations, counsel for the receiver replied that the receiver was of the view that the Salima tender was substantially better than all of the others and, in any event, that it was not appropriate to negotiate with more than one prospective purchaser at the same time.

[6] The bargain with Salima involved an increase of $50,000.00 from the tendered price, and an increase in the deposit from $150,000.00 to $400,000.00. Further, the negotiated sale was made subject to Court approval.

[7] The receiver then issued a motion on August 1, returnable August 8 for an order approving the sale. On the morning of August 8, before Court opened, 304987 Alberta Ltd. made a new offer of $4,533,000.00 through the clerk. We infer that this offer was made with knowledge of the Salima bargain, because that information was in the materials filed in support of the application.

[8] Apprised of this development, and of the fact that seasonal market fluctuations made an immediate sale of great importance, the learned chambers judge adjourned the matter for one day and said that he would consider new bids. Three were received: The highest was from 2884701 Alberta Ltd., at $4,800,000.00. The next highest was from 304987 Alberta Ltd. in the amount of $4,756,000.00 and the third, for $4,700,000.00 was from Salima. The learned chambers judge decided that, because it had the earliest completion date and offered the prospect of unbroken chain of management, the bid of 304987 Alberta Ltd. was the best offer. He directed the receiver to complete a sale. Salima appeals.

[9] The first ground raises the question of jurisdiction. It is said that the learned chambers judge had no application before him to approve the sale to 304987 Alberta Ltd. It is also said that he improperly considered the other offers and other materials. The existence of the other offers was relevant on the question whether to approve the Salima sale and we see no merit to that argument. Further, we understand the events before him in this way: he first refused to approve the sale to Salima; then he decided, on his own motion and because of the urgency of the matter, to conduct summarily a Court sale. He dispensed with notice of motion or other formalities. He had jurisdiction to do that which he did and there is no merit to this ground of appeal.

[10] The second ground of appeal raised for Salima is that the decision of the learned chambers judge gave an unfair advantage to 304987 Alberta Ltd. over Salima. Salima has no complaint. It agreed to buy the property subject to Court approval, and its contract left it exposed to the risk of something like this happening. I agree with what was said by Hart, J.A. in this respect in Cameron v. The Bank of Nova Scotia 38 Can. Bank Rep. 1 at p.9:

> It is obvious that the receiver did in fact have the power under the original court order to make the sale as he did. Furthermore, had there been no clause inserted in the sales agreement to the effect that it was subject to the approval of the court, it is doubtful whether the contract made with the appellant could be disturbed. The receiver, however, insisted that the clause be placed in the contract making it subject to the approval of the court, and the appellant considering all of the circumstances agreed to accept this clause as part of the agreement. Both of the parties to the contract therefore agreed that the sale would not become a binding sale if the vendor chose to submit its terms to the court for approval and failed to receive such approval.
>
> . . .
>
> This, in my opinion, shows an intention on behalf of the parties to invoke the normal equitable doctrines which place the court in the position of looking to the interests of all

> persons concerned before giving its blessing to a particular transaction submitted for approval.

[11] The real issue, in our view, is the appropriate exercise of the admitted discretion of the Court when "looking to the interests of all persons concerned". It certainly does not follow, for example, that the Court on an application for approval of a sale is bound to conduct a judicial auction or even to accept a higher last-minute bid. There are, however, binding policy considerations. In Canada Permanent Trust Co. v. King Art Developments (June 20, 1984) [1984] 4 W.W.R. 587, we said that receivers (and Masters on foreclosure) should look for new and imaginative ways to get the highest possible price in these cases. Sale by tender is not necessarily the best method for a commercial property which involves also the sale of an on-going business. The receiver here accepted the challenge offered by this Court, and combined a call for tenders with subsequent negotiations. In order to encourage this technique, which we understand has met with some success, the Court should not undermine it. It is undermined by a judicial auction, because all negotiators must then keep something in reserve. Worse, the person who successfully negotiates with the receiver will suffer a disadvantage because his bargain will become known to others.

[12] We think that the proper exercise of judicial discretion in these circumstances should be limited, in the first instance, to an enquiry whether the receiver has made a sufficient effort to get the best price and not acted improvidently. In examining that question, there are many factors which the Court may consider. As Macdonald, J.A. said in the Cameron case at p. 11:

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

[13] This is not a total catalogue of those factors which might lead a Court to refuse to approve a sale.

[14] The principal argument before us turned on the question why the receiver did not approach 304987 Alberta Ltd. to negotiate at the same time as it approached Salima.

[15] We do not have the benefit of the recorded Reasons by the learned chambers judge. We assume that he came to the conclusion that the efforts of the receiver - while

always in good faith - had not been adequate. In our view, there was evidence before him to support that finding, and we cannot say that this conclusion is so unreasonable as to warrant interference. Nor can we criticize his decision to conduct a summary court-supervised sale in the urgent circumstances which then arose.

[16] We dismiss the appeal.

CITATION: Terrace Bay Pulp Inc. (Re), 2012 ONSC 4247
COURT FILE NO.: CV-12-9566-00CL
DATE: 20120727

SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)

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

RE: **IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF TERRACE BAY PULP INC., Applicant**

BEFORE: **MORAWETZ J.**

COUNSEL: **Pamela Huff, Marc Flynn and Kristina Desimini, for the Applicant, Terrace Bay Pulp Inc.**

Alec Zimmerman and James Szumski, for Birchwood Trading, Inc.

M. Starnino, for the United Steelworkers

Alan Merksey, for Tangshan Sanyu Group Xingda Chemical Fiberco Limited

Alex Ilchenko, for Ernst & Young Inc, Monitor

Jacqueline L. Wall, for Her Majesty The Queen in Right of Ontario as represented by the Ministry of Northern Development and Mines

Janice Quigg, for Skyway Canada Ltd.

Fred Myers, for the Township of Terrace Bay

Peter Forestell, Q.C., for Aditya Birla Group and AV Terrace Bay Inc.

HEARD: **JULY 16, 2012**

ENDORSED: **JULY 19, 2012**

REASONS: **JULY 27, 2012**

ENDORSEMENT

[1] Terrace Bay Pulp Inc. (the "Applicant") brought this motion for, among other things, approval of the Sales Transaction (the "Transaction") contemplated by an asset purchase agreement dated as of July 5, 2012 (the "Purchase Agreement") between the Applicant, as seller, and AV Terrace Bay Inc., as purchaser (the "Purchaser").

[2] The Applicant also seeks authorization to take additional steps and to execute such additional documents as may be necessary to give effect to the Purchase Agreement.

[3] Further, the Applicant seeks a Vesting Order, approval of the Fifth Report of the Monitor dated June 12, 2012 and a declaration that the subdivision control provisions contained in the *Planning Act*, R.S.O. 1990, c. P.13 (the "*Planning Act*") do not apply to the vesting of title to the Real Property (as defined in the Purchase Agreement) in the Purchaser and that such vesting is not, for the purposes of s. 50(3) of the *Planning Act*, a conveyance by way of deed or transfer.

[4] Finally, the Applicant sought an amendment to the Initial Order to extend the Stay of Proceedings to October 31, 2012.

[5] Argument on this matter was heard on July 16, 2012. At the conclusion of argument, on an unopposed basis, I extended the Stay of Proceedings to October 31, 2012. This decision was made after a review of the record which, in my view, established that the Applicant has been and continues to work in good faith and with due diligence such that the requested extension was appropriate in the circumstances.

[6] On July 19, 2012, I released my decision approving the Transaction, with reasons to follow. These are the reasons.

[7] With respect to the motion to approve the Transaction, the Applicant's position was supported by the United Steelworkers and the Township of Terrace Bay. Counsel to Her Majesty The Queen in Right of Ontario, as Represented by the Ministry of Northern Development and Mines, consented to the Transaction and also supported the motion.

[8] The motion was opposed by Birchwood Trading, Inc. ("Birchwood") and by Tangshan Sanyu Group Xingda Chemical Fiberco Limited ("Tangshan").

[9] Counsel to the Applicant challenged the standing of Tangshan on the basis that it was "bitter bidder". Argument was heard on this issue and I reserved my decision, indicating that it would be addressed in this endorsement. For the purposes of the disposition of this motion, it is not necessary to address this issue.

[10] The Applicant seeks approval of the Transaction in which the Purchaser will purchase all or substantially all of the mill assets of the Applicant for a price of $2 million plus a $25 million concession from the Province of Ontario. The Monitor has recommended that this Transaction be approved.

[11] Birchwood submits that the Applicant and the Monitor have taken the position that a competing offer from Tangshan for a purchase price of $35 million should not be considered, notwithstanding that the Tangshan offer (i) is subject to terms and conditions which are as good or better than the Transaction; (ii) would provide dramatically greater recovery to the creditors of the Applicant, and (iii) offers significant benefits to other stakeholders, including the employees of the Applicant's mill.

[12] Birchwood is a creditor of the Applicant. It holds a beneficial interest in the Subordinated Secured Plan Notes (the "Notes") in the face amount of approximately $138,000 and is also the fourth largest trade creditor of the Applicant. If the Transaction is approved, Birchwood submits that it expects to receive less than 6% recovery on its holdings under the Notes and no recovery on its trade debt. In contrast, if the Tangshan offer were accepted, Birchwood expects that it would receive full recovery under the Notes, and that it may also receive a distribution with respect to its trade debt.

[13] Birchwood also submits that the Tangshan offer provides substantial benefits to the creditors and other stakeholders of the Applicant which would not be realized under the Transaction. These include:

(a) an increase in the purchase price for the mill assets, from an effective purchase price of $27 million to a cash purchase price of $35 million;

(b) the potential for the Province of Ontario to be repaid in full or, if the Province is prepared to offer the same debt forgiveness concession under the Tangshan offer that it is providing to the Purchaser, the potential to increase the "effective" purchase price of the Tangshan offer to $60 million;

(c) as a consequence of (a) and (b), additional proceeds available for distribution to creditors subordinate to the Province of Ontario of between $8 million and $33 million;

(d) employment of approximately 75 additional employees, plus the existing management of the mill;

(e) conversion of the mill into a dissolving pulp mill in 18 months, rather than 4 years, with a higher expected yield once the conversion is complete and a business plan which calls for the production of a more lucrative interim product during the conversion process.

[14] Counsel to Birchwood submits that the substantial increase in the consideration offered by the Tangshan offer, which is a binding offer with terms and conditions that are at least as favourable as the Transaction, is sufficient to call into question the integrity and efficacy of the Sales Process (defined below). Counsel suggests that the market for the mill assets was not sufficiently canvassed, and provides evidence to support a finding that the criteria for approval of the sale as set out in s. 36 (3) of the CCAA and *Royal Bank v. Soundair Corp.* (1991) 7 C.B.R. (3d) 1 (C.A.) has not been met.

[15] Birchwood requests an adjournment of the Applicant's request for approval of the Transaction, or a refusal to approve the Transaction and a varying of the Sales Process to allow the Tangshan offer to be considered and, if appropriate, accepted by the Applicant. Tangshan supports the position of Birchwood.

[16] For the following reasons, I decline Birchwood's request and grant approval of the Transaction.

FACTS

[17] The Applicant filed the affidavit of Wolfgang Gericke in support of this motion. In addition, there is considerable detail provided in the Sixth Report of the Monitor and in the Supplemental Sixth Report of the Monitor.

[18] On January 25, 2012, the Initial Order was granted in the CCAA proceedings. The Initial Order authorized the Applicant to conduct, with the assistance of the Monitor and in consultation with the Province of Ontario, a sales process to solicit offers for all or substantially all of the assets and properties of the Applicant used in connection with its pulp mill operations (the "Sales Process").

[19] The Applicant and the Monitor conducted a number of activities in furtherance of the Sales Process, as outlined in detail in the Sixth Report.

[20] The Monitor received 13 non-binding Letters of Intent by the initial deadline of February 15, 2012. All of the parties that submitted Letters of Intent were invited to do further due diligence and submit binding offers by the March 16, 2012 deadline provided for in the Sales Process Terms (the "Bid Deadline").

[21] The Monitor received eight binding offers by the Bid Deadline and, based on the analysis of the offers received, the Monitor and the Applicant, in consultation with the Province, determined that the offer of AV Terrace Bay Inc. was the best offer. The ultimate parent of the Purchaser is Aditya Birla Management Corporation Private Ltd. ("Aditya"), one of the largest conglomerates in India.

[22] After identifying the Purchaser's offer as the superior offer in the Sales Process, and after extensive negotiations, the Applicant entered into the Purchase Agreement; executed July 5, 2012 for an effective purchase price in excess of $27 million.

[23] Counsel to the Applicant submits that in assessing the various bids, the Applicant and the Monitor, in consultation with the Province, considered the following factors:

(a) the value of the consideration proposed in the Transaction;

(b) the level of due diligence required to be completed prior to closing;

(c) the conditions precedent to closing of a sale transaction;

(d) the impact on the Corporation of the Township of Terrace Bay (the "Township"), the community and other stakeholders;

(e) the bidder's intended use for the mill site including any future capital investment into the mill; and

(f) the ability to close the Transaction as soon as possible, given the company's limited cash flow.

[24] Four parties expressed an interest in Terrace Bay after the Bid Deadline.

[25] The unchallenged evidence is that the Monitor informed each of the late bidders that they could conduct due diligence, but their interest would only be entertained if the Applicant could not complete a Transaction with the parties that submitted their offers in accordance with the Sales Process Terms (*i.e.* prior to the Bid Deadline).

[26] The Monitor states in its Sixth Report that it reviewed materials submitted by each late bidder. Tangshan, as one of the late bidders, submitted a non-binding offer on July 5, 2012 (the "Late Offer"). The terms of the Late Offer were subject to change, and Tangshan required final approval from regulatory authorities in China before entering into a transaction.

[27] It is also unchallenged that, before submission of the Late Offer, the Monitor had advised Recovery Partners Ltd., which submitted the Late Offer on Tangshan's behalf, that the Bid Deadline passed months before and that the Applicant was far advanced in negotiating and settling a purchase agreement with a prospective purchaser who submitted an offer in accordance with the Sales Process Terms.

[28] As indicated above, the Applicant executed the Purchase Agreement on July 5, 2012.

[29] The Monitor received a second non-binding offer from Recovery Partners Ltd., on behalf of Tangshan, on July 10, 2012 and a binding offer on July 12, 2012 (the "July Tangshan Offer") for a purchase price of $35 million.

[30] In its Sixth Report, the Monitor stated that it was of the view that it is not appropriate to vary the Sales Process Terms or to recommend the July Tangshan Offer for a number of reasons:

(a) the Applicant, in consultation with the Province, had entered into a binding purchase agreement with the Purchaser, which does not permit termination by Terrace Bay to entertain a new offer;

(b) the fairness and integrity of the Sales Process is paramount to these proceedings and to alter the terms of the court-approved Sales Process Terms at this point would be unfair to the Purchaser and all of the other parties who participated in the Sales Process in compliance with the Sales Process Terms;

(c) the Sales Process terms have been widely known by all bidders and interested parties since the outset of the Sales Process in January 2012;

(d) the Sales Process Terms provide no bid protections for the potential Purchaser;

(e) the Purchaser had incurred, and continues to incur, significant expenses in negotiating and fulfilling conditions under the Purchase Agreement. The Applicant has advised the Monitor that there is a significant risk that the Purchaser would drop out of the Sales Process if there were an attempt to amend the Sales Process Terms to pursue an open auction at this stage;

(f) to consider any new bids might result in a delay in the timing of the sale of the assets of the mill which, in the view of the Monitor, poses a risk due to the Applicant's minimal cash position;

(g) the Province, with whom the Applicant is required to consult, and which has entered into an agreement with the Purchaser, supports the completion of the Transaction;

(h) the Purchaser has made progress satisfying the conditions to closing, including meeting with the Applicant's employees and negotiating collective bargaining agreements with the unions.

[31] As set out in the affidavit of Mr. Gericke, the Purchaser is an affiliate of Aditya, a Fortune 500 company that intends to make a significant investment to restart the mill by October 2012 and invest more than $250 million to convert the mill to produce dissolving grade pulp.

[32] The purchase price payable is the aggregate of: (i) $2 million, plus or minus adjustments on closing, and (ii) the amount of the assumed liabilities.

[33] The obligation of the Applicant to complete the Transaction is conditional upon, among other things, all amounts owing by the Applicant to the Province pursuant to a Loan agreement dated September 15, 2010 (the "Province Loan Agreement") being forgiven by the Province and all related security being discharged (the "Province Loan Forgiveness").

[34] The Province is the first secured creditor of the Applicant, and is owed in excess of $24 million. The Province Loan Forgiveness is an integral part of the Transaction.

[35] The Applicant submits that as the net sale proceeds, subject to any super-priority claims, flow to the Province in priority to other creditors upon completion, the effective consideration for the Transaction is in excess of $27 million, namely the cash portion of the purchase price plus the Province Loan Forgiveness, plus the value of the assumed liabilities.

[36] The Monitor recommends approval of the Transaction for the following reasons:

(a) the market was broadly canvassed by the Applicant, with the assistance of the Monitor;

(b) the Purchase Agreement will result in a cash purchase price of $2 million, and will see the forgiveness of amounts outstanding, plus accrued interest and costs, under the Province Loan Agreement;

(c) the Transaction contemplated by the Purchase Agreement will result in significant employment in the region, as well as a substantial capital investment;

(d) the Transaction will also see a major multi-national corporation acquiring the mill, which will greatly improve the stability of the mill operations;

(e) the Transaction involves the expected re-opening of the mill in October 2012 and the Applicant will be rehiring the employees of the mill;

(f) the Monitor is aware of the late bids, including the July Tangshan Offer and has consulted the company and the Province in relation to same. The Monitor maintains that the Sales Process was conducted in accordance with the Sales Process Terms and provided an adequate opportunity for interested parties to participate, conduct due diligence, and submit binding purchase agreements and deposits within court-approved deadlines; and

(g) several further factors have been considered by the Monitor including, without limitation: the importance of maintaining the fairness and integrity of the Sales Process in relation to all parties, including the Purchaser; the terms of the Purchase Agreement; the fact that it has taken many weeks to negotiate various issues, and; the importance of certainty in relation to closing and the closing date.

[37] In its Supplement to the Sixth Report, the Monitor commented on the efforts that were made to canvass international markets. This Supplemental Report was prepared after the Monitor reviewed the affidavit of Yu Hanjiang (the "Yu Affidavit"), filed by Birchwood. The Yu Affidavit raised issues with the efficacy of the Sales Process. The Monitor stated, in response, that it is satisfied that the Sales Process was properly conducted and that international markets were canvassed for prospective purchasers. Specifically, one of the channels used by the Monitor to market the assets was a program managed by the Ministry of Economic Development in Innovation ("MEDI") for the Province of Ontario which had established an "international business development representative program" ("IBDR"). The IBDR program operates a network of contacts and agents throughout the world, including China, to enable the MEDI to disseminate information about investment opportunities in Ontario to a worldwide investment audience. The Monitor further advised that IBDR representatives provided the Sales Process documents to a global network of agents for worldwide dissemination, including in China.

[38] The Monitor restated that it was satisfied that the Sales Process adequately canvassed the market, and continues to support the approval of the Transaction.

[39] The Monitor also provided in the Supplemental Report an update with respect to the position of the Purchaser.

[40] The Purchaser advised the Monitor that it has negotiated an agreement in principle with executives of the Terrace Bay union locals regarding the terms of revised collective bargaining agreements. The Purchaser further advised that it is confident that the revised collective bargaining agreements will be ratified. Ratification of the collective agreements will remove one of the last conditions to closing, exclusive of court approval. It is noted that s. 9.2(e) of the Purchase Agreement specifically provides that a condition precedent to performance by the Purchaser is that on or before July 24, 2012, the Purchaser shall have obtained a five (5) year extension of the existing collective bargaining agreements on terms acceptable to the Purchaser acting reasonably.

[41] The Purchaser has further advised the Monitor that it is critical to complete the Transaction by the end of July 2012 in order that the mill can be restarted by October, prior to the onset of winter, to avoid increased carrying costs.

[42] The Purchaser also advised the Monitor directly that, if the Sales Process and the Sales Process Terms were varied, it would terminate its interest in Terrace Bay.

LAW AND ANALYSIS

[43] Section 36 of the CCAA provides the authority to approve a sale transaction. Section 36(3) sets out a non-exhaustive list of factors for the court to consider in determining whether to approve a sale transaction. It provides as follows:

> 36(3) In deciding whether to grant the authorization, the court is to consider, among other things,
>
> (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
>
> (b) whether the Monitor approved the process leading to the proposed sale or disposition;
>
> (c) whether the Monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than the sale or disposition under a bankruptcy;
>
> (d) the extent to which the creditors were consulted;
>
> (e) the effects of the proposed sale or disposition on the creditors and other interested parties; and
>
> (f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

[44] I agree with the submission of counsel on behalf of the Applicant that the list of factors set out in s. 36(3) largely overlaps with the criteria established in *Royal Bank of Canada v.*

Soundair Corp. (1991), 4 O.R. (3d) 1 (C.A.) [*Soundair*]. *Soundair* summarized the factors the court should consider when assessing whether to approve a transaction to sell assets:

> (a) whether the court-appointed officer has made sufficient effort to get the best price and has not acted improvidently;
>
> (b) the interests of all parties;
>
> (c) the efficacy and integrity of the process by which offers are obtained; and
>
> (d) whether there has been unfairness in the working out of the process.

[45] In considering the first issue, namely, whether the court-appointed officer has made sufficient effort to get the best price and has not acted improvidently, it is important to note that Galligan J. A. in *Soundair* stated, at para. 21, as follows:

> When deciding whether a receiver has acted providently, the court should examine the conduct of the receiver in light of the information the receiver had when it agreed to accept an offer. In this case, the court should look at the receiver's conduct in the light of the information it had when it made its decision on March 8, 1991. The court should be very cautious before deciding that the receiver's conduct was improvident based upon information which has come to light after it made its decision. To do so, in my view, would derogate from the mandate to sell given to the receiver by the order of O'Brien J. I agree with and adopt what was said by Anderson J. in *Crown Trustco v. Rosenberg* (1986), 60 O.R. (2d) 87 at p. 112 [*Crown Trustco*]:
>
> > Its decision was made as a matter of business judgment on the elements then available to it. It is of the very essence of a receiver's function to make such judgments and in the making of them to act seriously and responsibly so as to be prepared to stand behind them.
> >
> > If the court were to reject the recommendation of the Receiver in any but the most exceptional circumstances, it would materially diminish and weaken the role and function of the Receiver both in the perception of receivers and in the perception of any others who might have occasion to deal with them. It would lead to the conclusion that the decision of the Receiver was of little weight and that the real decision was always made upon the motion for approval. That would be a consequence susceptible of immensely damaging results to the disposition of assets by court-appointed receivers.

[46] In this case, the offer was accepted on July 5, 2012. At that point in time, the offer from Tangshan was of a non-binding nature. The consideration proposed to be offered by Tangshan

appears to be in excess of the amount of the Purchaser's offer. The Tangshan offer is for $35 million, compared with the Purchaser's offer of $27 million.

[47] The record establishes that the Monitor did engage in an extensive marketing program. It took steps to ensure that the information was disseminated in international markets. The record also establishes that a number of parties expressed interest and a number of parties did put forth binding offers.

[48] Tangshan takes the position, through Birchwood, that it was not aware of the opportunity to participate in the Sales Process. This statement was not challenged. However, it seems to me that this cannot be the test that a court officer has to meet in order to establish that it has made sufficient effort to get the best price and has not acted improvidently. In my view, what can be reasonably expected of a court officer is that it undertake reasonable steps to ensure that the opportunity comes to the attention of prospective purchasers. In this respect, I accept that reasonable attempts were made through IBDR to market the opportunity in international markets, including China.

[49] I now turn to consider whether the Monitor acted providently in accepting the price contained in the Purchaser's offer.

[50] It is important to note that the offer was accepted after a period of negotiation and in consultation with the Province. The Monitor concluded that the Purchaser's offer "was the superior offer, and provided the best opportunity to position the mill, once restarted, as a viable going concern operation for the long term".

[51] Again, it is useful to review what the Court of Appeal stated in *Soundair*. After reviewing other cases, Galligan J.A. stated at 30 and 31:

> 30. What those cases show is that the prices in other offers have relevance only if they show that the price contained in the offer accepted by the receiver was so unreasonably low as to demonstrate that the receiver was improvident in accepting it. I am of the opinion, therefore, that if they do not tend to show that the receiver was improvident, they should not be considered upon a motion to confirm a sale recommended by a court-appointed receiver. If they were, the process would be changed from a sale by a receiver, subject to court approval, into an auction conducted by the court at the time approval is sought. In my opinion, the latter course is unfair to the person who has entered *bona fide* into an agreement with the receiver, can only lead to chaos, and must be discouraged.
>
> 31. If, however, the subsequent offer is so substantially higher than the sale recommended by the receiver, then it may be that the receiver has not conducted the sale properly. In such circumstances, the court would be justified itself in entering into the sale process by considering competitive bids. However, I think that that process should be entered into only if the court is satisfied that the receiver has not properly conducted the sale which it has recommended to the court.

[52] In my view, based on the information available at the time the Purchaser's offer was accepted, including the risks associated with a Tangshan non-binding offer at that point in time, the consideration in the Transaction is not so unreasonably low so as to warrant the court entering into the Sales Process by considering competitive bids.

[53] It is noteworthy that, even after a further review of the Tangshan proposal as commented on in the Supplemental Report, the Monitor continued to recommend that the Transaction be approved.

[54] I am satisfied that the Tangshan offer does not lead to an inference that the strategy employed by the Monitor was inadequate, unsuccessful, or improvident, nor that the price was unreasonable.

[55] I am also satisfied that the Receiver made a sufficient effort to get the best price, and did not act improvidently.

[56] The second point in the *Soundair* analysis is to consider the interests of all parties.

[57] On this issue, I am satisfied that, in arriving at the recommendation to seek approval of the Transaction, the Applicant and the Monitor considered the interests of all parties, including the Province, the impact on the Township and the employees.

[58] The third point from *Soundair* is the consideration of the efficacy and integrity of the process by which the offer was obtained.

[59] I have already commented on this issue in my review of the Sales Process. Again, it is useful to review the statements of Galligan J.A. in *Soundair*. At paragraph 46, he states:

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

[60] At paragraph 47, Galligan J.A. referenced the comments of Anderson J. in *Crown Trustco*, at p. 109:

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

[61] In my view, the process, having been properly conducted, should be respected in the circumstances of this case.

[62] The fourth point arising out of *Soundair* is to consider whether there was unfairness in the working out of the process.

[63] There have been no allegations that the Monitor proceeded in bad faith. Rather, the complaint is that the consideration in the offer by Tangshan is superior to that being offered by the Purchaser so as to call into question the integrity and efficacy of the Sales Process.

[64] I have already concluded that the actions of the Receiver in marketing the assets was reasonable in the circumstances. I have considered the situation facing the Monitor at the time that it accepted the offer of the Purchaser and I have also taken into account the terms of the Late Offer. Although it is higher than the Purchaser's offer, the increase is not such that I would consider the accepted Transaction to be improvident in the circumstances.

[65] In all respects, I am satisfied that there has been no unfairness in the working out of the process.

[66] In my opinion, the principles and guidelines set out forth in *Soundair* have been adhered to by the Applicant and the Monitor and, accordingly, it is appropriate that the Transaction be approved.

[67] In light of my conclusion, it is not necessary to consider the issue of whether Tangshan has standing. The arguments put forth by Tangshan were incorporated into the arguments put forth by Birchwood.

[68] I have concluded that the Approval and Vesting Order should be granted.

[69] I do wish to comment with respect to the request of the Applicant to obtain a declaration that the subdivision control provisions contained in the *Planning Act* do not apply to a vesting of title to real property in the Purchaser and that such vesting is not, for the purposes of s. 50(3) of the *Planning Act* a conveyance by way of deed or transfer.

[70] The Purchase Agreement contemplates the vesting of title in the Purchaser of the real property. Some of the real property abuts excluded real property (as defined in the Purchase Agreement), which excluded real property is subsequently to be realized for the benefit of stakeholders of Terrace Bay.

[71] The authorities cited, *Lama v. Coltsman* (1978) 20 O.R. (2d) 98 (CO.CT.) [*Lama*] and *724597 Ontario Inc. v. Merol Power Corp*., (2005) O.J. No. 4832 (S.C.J.) are helpful. In *Lama*, the court found that the vesting of land by court order does not constitute a "conveyance" by way of "deed or transfer" and, therefore, "a vesting order comes outside the purview of the *Planning Act*".

[72] For the purposes of this motion, I accept the reasoning of *Lama* and conclude that the granting of a vesting order is not, for the purposes of s. 50(3) of the *Planning Act*, a conveyance by way of deed or transfer. However, I do not think that it is necessary to comment on or to

issue a specific declaration that the subdivision control provisions contained in the *Planning Act* do not apply to the vesting of title.

[73] The Applicants also requested a sealing order. I have considered the *Sierra Club* principle and have determined that disclosure of the confidential information could be harmful to stakeholders such that it is both necessary and appropriate to grant the requested sealing order.

DISPOSITION

[74] In the result, the motion is granted subject to the adjustment with respect to aforementioned *Planning Act* declaration and an order shall issue approving the Transaction.

MORAWETZ J.

Date: July 27, 2012

CAMERON STEPHENS MORTGAGE CAPITAL LTD.

Applicant/Respondent in Appeal

-and-

CONACHER KINGSTON HOLDINGS INC. AND 5004591 ONTARIO INC.

Respondents/Respondents in Appeal

Court of Appeal File No. COA-24-CV-1328
Court File No. CV-23-00701672-00CL

COURT OF APPEAL FOR ONTARIO

PROCEEDING COMMENCED AT
TORONTO

BOOK OF AUTHORITIES OF THE RESPONDENTS, ISSAM A. SAAD AND 2858087 ONTARIO INC.

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