

Clerk's Stamp

COURT FILE NUMBER 2601-03446
COURT COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE CALGARY

APPLICANTS IN THE MATTER OF THE COMPANIES' CREDITORS' ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED, 2601 03446
AND IN THE MATTER OF THE PLAN OF COMPROMISE OR ARRANGEMENT OF RDFN FUM NATURAL PRODUCTS LTD. AND RDFN FUM NATURAL PRODUCTS INC.

DOCUMENT **BOOK OF AUTHORITIES
FOR THE BENCH BRIEF OF RDFN FUM NATURAL
PRODUCTS LTD. AND RDFN FUM NATURAL PRODUCTS
INC. TO BE HEARD ON APRIL 23, 2026 AT 10:00 A.M.**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT
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LIST OF AUTHORITIES

STATUTES

1. *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, at sections 11, 11.02(2)-(4), and 11.04;

CASE LAW

2. *9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10;
3. *Bul River Mineral Corporation (Re)*, 2014 BCSC 1732;
4. *Canadian Airlines Corp. (Re)*, (2000), 19 CBR (4th) 1;
5. *Canwest Global Communications Corp.*, 2011 ONSC 2215;
6. *Century Services Inc v Canada (Attorney General)*, 2010 SCC 60;
7. *In the Matter of a Plan of Compromise or Arrangement of AlphaBow Energy Ltd.*, Order (Claims Process), granted on September 20, 2024 (ABKB Court File No. 2401-05179);
8. *In the Matter of the Compromise or Arrangement of Coalspur Mines (Operations) Ltd.*, Order (Claims Process), granted on August 9, 2021 (ABKB File No. 2101-05019);
9. *In the Matter of the Compromise or Arrangement of Lynx Air Holdings Corporation, et al.*, Order (D&O Claims Process), granted on June 28, 2024 (ABKB Court File No. 2401-02664);
10. *In the Matter of the Notice of Intention to Make a Proposal of Goldenkey Oil Inc.*, Order (Claims Process), granted on April 13, 2023 (ABKB Court File No. 25-2906009)
11. *Laurentian University of Sudbury*, 2021 ONSC 3885;
12. *Mantle Materials Group, Ltd (Re)*, 2024 ABKB 19;
13. *McEwan Enterprises Inc*, 2021 ONSC 6453;
14. *Metcalfe & Mansfield Alternative Investments II Corp. (Re)*, 2008 ONCA 587;
15. *Quest University Canada (Re)*, 2020 BCSC 1845;
16. *Re Canwest Global Communications Corp*, 59 CBR (5th) 72, 2009 CanLII 55114;
17. *Re Forme Development Group Inc* (30 November 2018), Toronto CV-18-608313-00CL (Ont Sup Ct [Comm List]), Initial Order;
18. *Re Lydian International Limited*, 2019 ONSC 7473;
19. *Re Northern Transportation Company Limited*, 2016 ABQB 522;
20. *Re Sino-Forest Corp*, 2012 ONSC 2063;

21. *ScoZinc Ltd. (Re)*, 2009 NSSC 136;
22. *Steels Industrial Products Ltd.*, 2012 BCSC 1501;
23. *Stelco Inc (Re)*, 2005 CanLII 8671;
24. *Target Canada Co. (Re)*, 2015 ONSC 303;
25. *Timminco Limited (Re)*, 2012 ONSC 506;
26. *Timminco Limited (Re)*, 2014 ONSC 3393;
27. *Wiebe v Weinrich Contracting Ltd*, 2020 ABCA 396; and,

OTHER AUTHORITIES

28. *Staying Guarantees By Non-Debtors and Section 11.04 of the CCAA, 2022 20 Annual Review of Insolvency Law*, Jamey D. Gage and Trevor Curtis, 2022 CanLIIDocs 4310.

TAB 1



CANADA

CONSOLIDATION

CODIFICATION

Companies' Creditors Arrangement Act

Loi sur les arrangements avec les créanciers des compagnies

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

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

Current to March 17, 2026

À jour au 17 mars 2026

Last amended on December 12, 2024

Dernière modification le 12 décembre 2024

Single judge may exercise powers, subject to appeal

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

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

Form of applications

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

Documents that must accompany initial application

(2) An initial application must be accompanied by

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

Publication ban

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

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

General power of court

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

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

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

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

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

Forme des demandes

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

Documents accompagnant la demande initiale

(2) La demande initiale doit être accompagnée :

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

Interdiction de mettre l'état à la disposition du public

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

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

Pouvoir général du tribunal

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

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

Relief reasonably necessary

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

2019, c. 29, s. 136.

Rights of suppliers

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

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

2005, c. 47, s. 128.

Stays, etc. — initial application

11.02 (1) A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 10 days,

- (a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;
- (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
- (c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

Stays, etc. — other than initial application

(2) A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

- (a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);

Redressements normalement nécessaires

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

2019, ch. 29, art. 136.

Droits des fournisseurs

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

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

2005, ch. 47, art. 128.

Suspension : demande initiale

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

- a) suspendre, jusqu'à nouvel ordre, toute procédure qui est ou pourrait être intentée contre la compagnie sous le régime de la *Loi sur la faillite et l'insolvabilité* ou de la *Loi sur les liquidations et les restructurations*;
- b) surseoir, jusqu'à nouvel ordre, à la continuation de toute action, poursuite ou autre procédure contre la compagnie;
- c) interdire, jusqu'à nouvel ordre, l'introduction de toute action, poursuite ou autre procédure contre la compagnie.

Suspension : demandes autres qu'initiales

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

- a) suspendre, jusqu'à nouvel ordre, toute procédure qui est ou pourrait être intentée contre la compagnie sous le régime des lois mentionnées à l'alinéa (1)a);

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

Burden of proof on application

(3) The court shall not make the order unless

(a) the applicant satisfies the court that circumstances exist that make the order appropriate; and

(b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

Restriction

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

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

Stays — directors

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

Exception

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

Persons deemed to be directors

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

2005, c. 47, s. 128.

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

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

Preuve

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

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

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

Restriction

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

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

Suspension — administrateurs

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

Exclusion

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

Présomption : administrateurs

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

2005, ch. 47, art. 128.

Persons obligated under letter of credit or guarantee

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

2005, c. 47, s. 128.

11.05 [Repealed, 2007, c. 29, s. 105]

Member of the Canadian Payments Association

11.06 No order may be made under this Act that has the effect of preventing a member of the Canadian Payments Association from ceasing to act as a clearing agent or group clearer for a company in accordance with the *Canadian Payments Act* or the by-laws or rules of that Association.

2005, c. 47, s. 128, 2007, c. 36, s. 64.

11.07 [Repealed, 2012, c. 31, s. 420]

Restriction — certain powers, duties and functions

11.08 No order may be made under section 11.02 that affects

(a) the exercise or performance by the Minister of Finance or the Superintendent of Financial Institutions of any power, duty or function assigned to them by the *Bank Act*, the *Cooperative Credit Associations Act*, the *Insurance Companies Act* or the *Trust and Loan Companies Act*;

(b) the exercise or performance by the Governor in Council, the Minister of Finance or the Canada Deposit Insurance Corporation of any power, duty or function assigned to them by the *Canada Deposit Insurance Corporation Act*; or

(c) the exercise by the Attorney General of Canada of any power, assigned to him or her by the *Winding-up and Restructuring Act*.

2005, c. 47, s. 128.

Stay — Her Majesty

11.09 (1) An order made under section 11.02 may provide that

(a) Her Majesty in right of Canada may not exercise rights under subsection 224(1.2) of the *Income Tax Act* or any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, an employee's premium, or employer's

Suspension — lettres de crédit ou garanties

11.04 L'ordonnance prévue à l'article 11.02 est sans effet sur toute action, poursuite ou autre procédure contre la personne — autre que la compagnie visée par l'ordonnance — qui a des obligations au titre de lettres de crédit ou de garanties se rapportant à la compagnie.

2005, ch. 47, art. 128.

11.05 [Abrogé, 2007, ch. 29, art. 105]

Membre de l'Association canadienne des paiements

11.06 Aucune ordonnance prévue par la présente loi ne peut avoir pour effet d'empêcher un membre de l'Association canadienne des paiements de cesser d'agir, pour une compagnie, à titre d'agent de compensation ou d'adhérent correspondant de groupe conformément à la *Loi canadienne sur les paiements* et aux règles et règlements administratifs de l'Association.

2005, ch. 47, art. 128; 2007, ch. 36, art. 64.

11.07 [Abrogé, 2012, ch. 31, art. 420]

Restrictions : exercice de certaines attributions

11.08 L'ordonnance prévue à l'article 11.02 ne peut avoir d'effet sur :

a) l'exercice par le ministre des Finances ou par le surintendant des institutions financières des attributions qui leur sont conférées par la *Loi sur les banques*, la *Loi sur les associations coopératives de crédit*, la *Loi sur les sociétés d'assurances* ou la *Loi sur les sociétés de fiducie et de prêt*;

b) l'exercice par le gouverneur en conseil, le ministre des Finances ou la Société d'assurance-dépôts du Canada des attributions qui leur sont conférées par la *Loi sur la Société d'assurance-dépôts du Canada*;

c) l'exercice par le procureur général du Canada des pouvoirs qui lui sont conférés par la *Loi sur les liquidations et les restructurations*.

2005, ch. 47, art. 128.

Suspension des procédures : Sa Majesté

11.09 (1) L'ordonnance prévue à l'article 11.02 peut avoir pour effet de suspendre :

a) l'exercice par Sa Majesté du chef du Canada des droits que lui confère le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* ou toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie à ce paragraphe et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, d'une cotisation ouvrière ou

TAB 2

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

v.

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

and

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

- and -

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

v.

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

and

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

c.

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

et

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

- et -

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

c.

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

et

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

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

2020 SCC 10

File No.: 38594.

Hearing and judgment: January 23, 2020.

Reasons delivered: May 8, 2020.

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

**ON APPEAL FROM THE COURT OF APPEAL
FOR QUEBEC**

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

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

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

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

2020 CSC 10

N° du greffe : 38594.

Audition et jugement : 23 janvier 2020.

Motifs déposés : 8 mai 2020.

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

EN APPEL DE LA COUR D'APPEL DU QUÉBEC

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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*

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

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

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

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

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

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

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

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

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

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

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

Good faith

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

Good faith — powers of court

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

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

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

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

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

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

Bonne foi

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

Bonne foi — pouvoirs du tribunal

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

(Voir aussi *LFI*, art. 4.2; *Loi n° 1 d’exécution du budget de 2019*, L.C. 2019, c. 29, art. 133 et 140.)

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

TAB 3

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Bul River Mineral Corporation (Re)*,
2014 BCSC 1732

Date: 20140915
Docket: S113459
Registry: Vancouver

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

And

**In the Matter of the *Business Corporations Act*, S.B.C. 2002, c. 57
and the *Business Corporations Act*, R.S.A. 2000, c. B-9**

And

**In the Matter of
Bul River Mineral Corporation, Big Bear Metal Mining Corporation, Earth's Vital
Extractors Limited, Fort Steele Mineral Corporation, Fort Steele Metals
Corporation, Fused Heat Ltd., Gallowai Metal Mining Corporation, Giant
Steeple's Mineral Corporation, Grand Mineral Corporation, International
Feldspar Ltd., Jao Mine Developers Ltd., Kutteni Diamonds Ltd., Stanfield
Mining Group of Canada Ltd., Sullibin Mineral Corporation, Sullibin Multi Metal
Corporation, Super Feldspars Corporation, White Cat Metal Mining
Corporation, Zeus Metal Mining Corporation, Zeus Metals Corporation and
Zeus Mineral Corporation**

Petitioners

Before: The Honourable Madam Justice Fitzpatrick

Reasons for Judgment

Counsel for the Petitioners:

Colin D. Brousson

Counsel for CuVeras, LLC:

William C. Kaplan, Q.C.
Peter Bychawski

Counsel for Eldon Clarence Stafford

J. Roger Webber, Q.C.

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Robert M. Curtis, Q.C.

Counsel for the Monitor, Deloitte
Restructuring Inc.

Tevia R.M. Jeffries

Place and Date of Hearing:

Vancouver, B.C.
September 3 and 5, 2014

Place and Date of Judgment:

Vancouver, B.C.
September 15, 2014

the petitioners and the Monitor with application materials. A creditor or shareholder who failed to file and serve such materials by the deadline was deemed to have accepted the particulars of its claim set out in the Notice of Disallowance.

[28] The Claims Process Order did not contemplate the appointment of a claims officer or the participation of the Monitor in the process of assessing the validity of the Proofs of Claim and/or Notices of Dispute submitted to the petitioners through the Claims Process. Nor did the Claims Process allow any independent review of claims submitted by other creditors of the petitioners or by CuVeras as the interim financier.

(i) Jurisdiction of the Court

[29] Before turning to claims process orders specifically, it is important to keep in mind the broad remedial objectives of the CCAA to facilitate a restructuring rather than a liquidation of assets: *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60 at paras. 15-18, 56. As the Supreme Court of Canada has noted, it is now well recognized that a supervising judge of a CCAA proceeding has a “broad and flexible authority” or statutory jurisdiction to make such orders as are necessary to achieve those objectives: *Century Services* at paras. 19, 57-66.

[30] The discretionary authority of the court is confirmed by s. 11 of the CCAA which provides that the court may make any order that it considers “appropriate in the circumstances”. As Madam Justice Deschamps observed in *Century Services*, whether an order will be appropriate is driven by the policy objectives of the CCAA:

[70] The general language of the CCAA should not be read as being restricted by the availability of more specific orders. However, the requirements of appropriateness, good faith, and due diligence are baseline considerations that a court should always bear in mind when exercising CCAA authority. Appropriateness under the CCAA is assessed by inquiring whether the order sought advances the policy objectives underlying the CCAA. The question is whether the order will usefully further efforts to achieve the remedial purpose of the CCAA — avoiding the social and economic losses resulting from liquidation of an insolvent company. I would add that appropriateness extends not only to the purpose of the order, but also to the means it employs. Courts should be mindful that chances for

TAB 4

**Alberta Court of Queen's Bench
Canadian Airlines Corp. (Re)
Date: 2000-05-04**

G. Morawetz, A.J. McConnell and R.N. Billington, for Bank of Nova Scotia Trust Co. of New York and Montreal Trust Co. of Canada.

A.L. Friend, Q.C., and H.M. Kay, Q.C., for Canadian Airlines.

S. Dunphy, for Air Canada and 853350 Alberta Ltd.

R. Anderson, Q.C., for Loyalty Group.

H. Gorman, for ABN AMRO Bank N.V.

P. McCarthy, for Monitor - Price Waterhouse Cooper.

D. Haigh, Q.C., and D. Nishimura, for Unsecured noteholders - Resurgence Asset Management.

C.J. Shaw, for Airline Pilots Association International.

G. Wells, for NavCanada.

D. Hardy, for Royal Bank of Canada.

(Calgary 0001-05071, 0001-05044)

May 4, 2000.

[1] PAPERNY J. [orally]: — Montreal Trust Company of Canada, Collateral Agent for the holders of the Senior Secured Notes, and the Bank of Nova Scotia Trust Company of New York, Trustee for the holders of the Senior Secured Notes, apply for the following relief:

1. In the CCAA proceeding (Action No. 0001-05071) an order lifting the stay of proceedings against them contained in the orders of this court dated March 24, 2000 and April 19, 2000 to allow for the court-ordered appointment of Ernst & Young Inc. as receiver and manager over the assets and property charged in favour of the Senior Secured Noteholders; and
2. In Action No. 0001-05044, an order appointing Ernst & Young Inc. as a court officer with the exclusive right to negotiate the sale of the assets or shares of Canadian Regional Airlines (1998) Ltd.

[2] Canadian Airlines Corporation ("CAC") is a Canadian based holding company which, through its majority owned subsidiary Canadian Airlines International Ltd. ("CAIL") provides domestic, U.S.-Canada transborder and international jet air transportation services. CAC also provides regional transportation through its subsidiary Canadian Regional Airlines (1998) Ltd. ("Canadian Regional"). Canadian Regional is not an applicant under the CCAA proceedings.

[3] The Senior Secured Notes were issued under an Indenture dated April 24, 1998 between CAC and the Trustee. The principal face amount is \$175 million U.S. As well, there is interest outstanding. The Senior Secured Notes are directly and indirectly secured

[15] In determining whether a stay should be lifted, the court must always have regard to the particular facts. However, in every order in a CCAA proceeding the court is required to balance a number of interests. McFarlane J.A. states in his closing remarks of his reasons in *Re Pacific National Lease Holding Corp.* (1992), 15 C.B.R. (3d) 265 (B.C. C.A. [In Chambers]):

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 problems.

[16] Also see Blair J.'s decision in *Campeau v. Olympia & York Developments Ltd.* (1992), 14 C.P.C. (3d) 339 (Ont. Gen. Div.), for another example of the balancing approach.

[17] As noted above, the stay power is to be used to preserve the status quo among the creditors of the insolvent company. Huddart J., as she then was, commented on the status quo in *Re Alberta-Pacific Terminals Ltd.* (1991), 8 C.B.R. (3d) 99 (B.C. S.C.). She stated:

The status quo is not always easy to find... Nor is it always easy to define. The preservation of the status quo cannot mean merely the preservation of the relative pre-stay debt status of each creditor. Other interests are served by the CCAA. Those of investors, employees, and landlords among them, and in the case of the Fraser Surrey terminal, the public too, not only of British Columbia, but also of the prairie provinces. The status quo is to be preserved in the sense that manoeuvres by creditors that would impair the financial position of the company while it attempts to reorganize are to be prevented, not in the sense that all creditors are to be treated equally or to be maintained at the same relative level. It is the company and all the interests its demise would affect that must be considered.

[18] Further commentary on the status quo is contained in *Quintette Coal Ltd. v. Nippon Steel Corp.* (1990), 80 C.B.R. (N.S.) 98 (B.C. S.C.). Thackray J. comments that the maintenance of the status quo does not mean that every detail of the status quo must survive. Rather, it means that the debtor will be able to stay in business and will have breathing space to develop a proposal to remain viable.

[19] Finally, in making orders under the CCAA, the court must never lose sight of the objectives of the legislation. These were concisely summarized by the chambers judge and adopted by the British Columbia Court of Appeal in *Re Pacific National Lease Holding Corp.* (1992), 15 C.B.R. (3d) 265 (B.C. C.A. [In Chambers]):

(1) The purpose of the CCAA is to allow an insolvent company a reasonable period of time to reorganize its affairs and prepare and file a plan for its continued operation subject to the requisite approval of the creditors and court.

(2) The CCAA is intended to serve not only the company's creditors but also a broad constituency which includes the shareholders and employees.

(3) During the stay period, the Act is intended to prevent manoeuvres for positioning amongst the creditors of the company.

(4) The function of the court during the stay period is to play a supervisory role to preserve the status quo and to move the process along to the point where a compromise or arrangement is approved or it is evident that the attempt is doomed to failure.

(5) The status quo does not mean preservation of the relative pre-stay debt status of each creditor. Since the companies under CCAA orders continue to operate and having regard to the broad constituency of interests the Act is intended to serve, the preservation of the status quo is not intended to create a rigid freeze of relative pre-stay positions.

(6) The court has a broad discretion to apply these principles to the facts of the particular case.

[20] At pages 342 and 343 of this text, *Canadian Commercial Reorganization: Preventing Bankruptcy* (Aurora: Canada Law Book, looseleaf). R.H. McLaren describes situations in which the court will lift a stay:

1. When the plan is likely to fail;
2. The applicant shows hardship (the hardship must be caused by the stay itself and be independent of any pre-existing condition of the applicant creditor);
3. The applicant shows necessity for payment (where the creditors financial problems are created by the order or where the failure to pay the creditor would cause it to close and thus jeopardize the debtor's company's existence);
4. The applicant would be severely prejudiced by refusal to lift the stay and there would be no resulting prejudice to the debtor company or the positions of creditors;
5. It is necessary to permit the applicant to take steps to protect a right which could be lost by the passage of time;
6. After the lapse of a significant time period, the insolvent is no closer to a proposal than at the commencement of the stay period.

[21] I now turn to the particular circumstances of the applications before me.

[22] I would firstly address the matter of the Senior Secured Noteholders' current rejection of the compromise put forward under the Plan. Although they are in a separate class under CAC's Plan and can control the vote as it affects their interest, they are not in a position to vote down the Plan in its entirety. However, the Senior Secured Noteholders submit that where a plan offers two options to a class of creditors and the class has selected which option it wants, there is no purpose to be served in delaying that class from proceeding with its chosen course of action. They rely on the *Nova Metal Products Inc. v.*

TAB 5

CITATION: Canwest Global Communications Corp., 2011 ONSC 2215
COURT FILE NO.: CV-09-8396-00CL
DATE: 20110407

ONTARIO

**SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF
CANWEST GLOBAL COMMUNICATIONS CORP. AND OTHER APPLICANTS

COUNSEL: *Douglas J. Wray and Jesse B. Kugler*, counsel for the Applicant,
Communications, Energy and Paperworkers Union of Canada (“CEP”)
David Byers and Maria Konyukhova, counsel for the Monitor

PEPALL J.

REASONS FOR DECISION

Introduction

[1] The Communications, Energy and Paperworkers Union of Canada (“CEP”) requests an order lifting the stay of proceedings in respect of certain grievances and directing that they be adjudicated in accordance with the provisions of the applicable collective agreement. In the alternative, CEP requests an order amending the claims procedure order so as to permit the subject claim to be adjudicated in accordance with the provisions of the collective agreement.

Background Facts

[2] On October 6, 2009, the CMI Entities obtained an initial order pursuant to the CCAA staying all proceedings and claims against them. Specifically, paragraphs 15 and 16 of that order stated:

**NO PROCEEDINGS AGAINST THE CMI ENTITIES
OR THE CMI PROPERTY**

instances, section 6(5) dealing with a sanction of a plan and section 36 dealing with a sale outside the ordinary course of business being two such examples, Parliament specifically dealt with certain employee claims. If Parliament had intended to make such a significant amendment whereby severance and termination payments (and all other payments under a collective agreement) would take priority over secured creditors, it would have done so expressly.¹⁹

[40] I agree with the Monitor's position that if Parliament had intended to carve grievances out of the claims process, it would have done so expressly. To do so, however, would have undermined the purpose of the CCAA and in particular, the claims process which is designed to streamline the resolution of the multitude of claims against an insolvent debtor in the most time sensitive and cost efficient manner. It is hard to imagine that it was Parliament's intention that grievances under collective agreements be excluded from the reach of the stay provisions of section 11 of the CCAA or the ancillary claims process. In my view, such a result would seriously undermine the objectives of the Act.

[41] Furthermore, I note that over 1,800 claims have been processed and dealt with by way of the claims procedure order, many of them involving claims filed by CEP on behalf of its members. CEP was provided with notice of the motion wherein the claims procedure order and the claims officers were approved. CEP did not raise any objection to the claims procedure order, the claims officers or the inclusion of grievances in the claims procedure at the time that the order was granted. The claims procedure order was not an order made without notice and none of the prerequisites to variation of an order has been met. Had I not lifted the stay, I would not have amended the claims procedure order as requested by CEP.

[42] CEP's last argument is that the claims procedure order interferes with Mr. Bradley's freedoms under the Canadian *Charter of Rights and Freedoms*. In this regard I make the

¹⁹ *Ibid*, at para. 33.

TAB 6

Century Services Inc. *Appellant*

v.

**Attorney General of Canada on behalf
of Her Majesty The Queen in Right of
Canada** *Respondent***INDEXED AS: CENTURY SERVICES INC. v. CANADA
(ATTORNEY GENERAL)****2010 SCC 60**

File No.: 33239.

2010: May 11; 2010: December 16.

Present: McLachlin C.J. and Binnie, LeBel, Deschamps,
Fish, Abella, Charron, Rothstein and Cromwell JJ.**ON APPEAL FROM THE COURT OF APPEAL FOR
BRITISH COLUMBIA**

Bankruptcy and Insolvency — Priorities — Crown applying on eve of bankruptcy of debtor company to have GST monies held in trust paid to Receiver General of Canada — Whether deemed trust in favour of Crown under Excise Tax Act prevails over provisions of Companies' Creditors Arrangement Act purporting to nullify deemed trusts in favour of Crown — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 18.3(1) — Excise Tax Act, R.S.C. 1985, c. E-15, s. 222(3).

Bankruptcy and insolvency — Procedure — Whether chambers judge had authority to make order partially lifting stay of proceedings to allow debtor company to make assignment in bankruptcy and to stay Crown's right to enforce GST deemed trust — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 11.

Trusts — Express trusts — GST collected but unremitted to Crown — Judge ordering that GST be held by Monitor in trust account — Whether segregation of Crown's GST claim in Monitor's account created an express trust in favour of Crown.

Century Services Inc. *Appelante*

c.

**Procureur général du Canada au
nom de Sa Majesté la Reine du chef du
Canada** *Intimé***RÉPERTORIÉ : CENTURY SERVICES INC. c. CANADA
(PROCUREUR GÉNÉRAL)****2010 CSC 60**

N° du greffe : 33239.

2010 : 11 mai; 2010 : 16 décembre.

Présents : La juge en chef McLachlin et les juges Binnie,
LeBel, Deschamps, Fish, Abella, Charron, Rothstein et
Cromwell.**EN APPEL DE LA COUR D'APPEL DE LA
COLOMBIE-BRITANNIQUE**

Faillite et insolvabilité — Priorités — Demande de la Couronne à la société débitrice, la veille de la faillite, sollicitant le paiement au receveur général du Canada de la somme détenue en fiducie au titre de la TPS — La fiducie réputée établie par la Loi sur la taxe d'accise en faveur de la Couronne l'emporte-t-elle sur les dispositions de la Loi sur les arrangements avec les créanciers des compagnies censées neutraliser ces fiducies? — Loi sur les arrangements avec les créanciers des compagnies, L.R.C. 1985, ch. C-36, art. 18.3(1) — Loi sur la taxe d'accise, L.R.C. 1985, ch. E-15, art. 222(3).

Faillite et insolvabilité — Procédure — Le juge en cabinet avait-il le pouvoir, d'une part, de lever partiellement la suspension des procédures pour permettre à la compagnie débitrice de faire cession de ses biens en faillite et, d'autre part, de suspendre les mesures prises par la Couronne pour bénéficier de la fiducie réputée se rapportant à la TPS? — Loi sur les arrangements avec les créanciers des compagnies, L.R.C. 1985, ch. C-36, art. 11.

Fiducies — Fiducies expresses — Somme perçue au titre de la TPS mais non versée à la Couronne — Ordonnance du juge exigeant que la TPS soit détenue par le contrôleur dans son compte en fiducie — Le fait que le montant de TPS réclamé par la Couronne soit détenu séparément dans le compte du contrôleur a-t-il créé une fiducie expresse en faveur de la Couronne?

The debtor company commenced proceedings under the *Companies' Creditors Arrangement Act* ("CCAA"), obtaining a stay of proceedings to allow it time to reorganize its financial affairs. One of the debtor company's outstanding debts at the commencement of the reorganization was an amount of unremitted Goods and Services Tax ("GST") payable to the Crown. Section 222(3) of the *Excise Tax Act* ("ETA") created a deemed trust over unremitted GST, which operated despite any other enactment of Canada except the *Bankruptcy and Insolvency Act* ("BIA"). However, s. 18.3(1) of the CCAA provided that any statutory deemed trusts in favour of the Crown did not operate under the CCAA, subject to certain exceptions, none of which mentioned GST.

Pursuant to an order of the CCAA chambers judge, a payment not exceeding \$5 million was approved to the debtor company's major secured creditor, Century Services. However, the chambers judge also ordered the debtor company to hold back and segregate in the Monitor's trust account an amount equal to the unremitted GST pending the outcome of the reorganization. On concluding that reorganization was not possible, the debtor company sought leave of the court to partially lift the stay of proceedings so it could make an assignment in bankruptcy under the BIA. The Crown moved for immediate payment of unremitted GST to the Receiver General. The chambers judge denied the Crown's motion, and allowed the assignment in bankruptcy. The Court of Appeal allowed the appeal on two grounds. First, it reasoned that once reorganization efforts had failed, the chambers judge was bound under the priority scheme provided by the ETA to allow payment of unremitted GST to the Crown and had no discretion under s. 11 of the CCAA to continue the stay against the Crown's claim. Second, the Court of Appeal concluded that by ordering the GST funds segregated in the Monitor's trust account, the chambers judge had created an express trust in favour of the Crown.

Held (Abella J. dissenting): The appeal should be allowed.

Per McLachlin C.J. and Binnie, LeBel, Deschamps, Charron, Rothstein and Cromwell JJ.: The apparent conflict between s. 222(3) of the ETA and s. 18.3(1) of the CCAA can be resolved through an interpretation that properly recognizes the history of the CCAA, its function amidst the body of insolvency legislation enacted by

La compagnie débitrice a déposé une requête sous le régime de la *Loi sur les arrangements avec les créanciers des compagnies* (« LACC ») et obtenu la suspension des procédures dans le but de réorganiser ses finances. Parmi les dettes de la compagnie débitrice au début de la réorganisation figurait une somme due à la Couronne, mais non versée encore, au titre de la taxe sur les produits et services (« TPS »). Le paragraphe 222(3) de la *Loi sur la taxe d'accise* (« LTA ») crée une fiducie réputée visant les sommes de TPS non versées. Cette fiducie s'applique malgré tout autre texte législatif du Canada sauf la *Loi sur la faillite et l'insolvabilité* (« LFI »). Toutefois, le par. 18.3(1) de la LACC prévoyait que, sous réserve de certaines exceptions, dont aucune ne concerne la TPS, les fiducies réputées établies par la loi en faveur de la Couronne ne s'appliquaient pas sous son régime.

Le juge siégeant en son cabinet chargé d'appliquer la LACC a approuvé par ordonnance le paiement à Century Services, le principal créancier garanti du débiteur, d'une somme d'au plus cinq millions de dollars. Toutefois, il a également ordonné à la compagnie débitrice de retenir un montant égal aux sommes de TPS non versées et de le déposer séparément dans le compte en fiducie du contrôleur jusqu'à l'issue de la réorganisation. Ayant conclu que la réorganisation n'était pas possible, la compagnie débitrice a demandé au tribunal de lever partiellement la suspension des procédures pour lui permettre de faire cession de ses biens en vertu de la LFI. La Couronne a demandé par requête le paiement immédiat au receveur général des sommes de TPS non versées. Le juge siégeant en son cabinet a rejeté la requête de la Couronne et autorisé la cession des biens. La Cour d'appel a accueilli l'appel pour deux raisons. Premièrement, elle a conclu que, après que la tentative de réorganisation eut échoué, le juge siégeant en son cabinet était tenu, en raison de la priorité établie par la LTA, d'autoriser le paiement à la Couronne des sommes qui lui étaient dues au titre de la TPS, et que l'art. 11 de la LACC ne lui conférait pas le pouvoir discrétionnaire de maintenir la suspension de la demande de la Couronne. Deuxièmement, la Cour d'appel a conclu que, en ordonnant la ségrégation des sommes de TPS dans le compte en fiducie du contrôleur, le juge siégeant en son cabinet avait créé une fiducie expresse en faveur de la Couronne.

Arrêt (la juge Abella est dissidente) : Le pourvoi est accueilli.

La juge en chef McLachlin et les juges Binnie, LeBel, Deschamps, Charron, Rothstein et Cromwell : Il est possible de résoudre le conflit apparent entre le par. 222(3) de la LTA et le par. 18.3(1) de la LACC en les interprétant d'une manière qui tienne compte adéquatement de l'historique de la LACC, de la fonction de cette loi parmi

Parliament and the principles for interpreting the *CCAA* that have been recognized in the jurisprudence. The history of the *CCAA* distinguishes it from the *BIA* because although these statutes share the same remedial purpose of avoiding the social and economic costs of liquidating a debtor's assets, the *CCAA* offers more flexibility and greater judicial discretion than the rules-based mechanism under the *BIA*, making the former more responsive to complex reorganizations. Because the *CCAA* is silent on what happens if reorganization fails, the *BIA* scheme of liquidation and distribution necessarily provides the backdrop against which creditors assess their priority in the event of bankruptcy. The contemporary thrust of legislative reform has been towards harmonizing aspects of insolvency law common to the *CCAA* and the *BIA*, and one of its important features has been a cutback in Crown priorities. Accordingly, the *CCAA* and the *BIA* both contain provisions nullifying statutory deemed trusts in favour of the Crown, and both contain explicit exceptions exempting source deductions deemed trusts from this general rule. Meanwhile, both Acts are harmonious in treating other Crown claims as unsecured. No such clear and express language exists in those Acts carving out an exception for GST claims.

When faced with the apparent conflict between s. 222(3) of the *ETA* and s. 18.3(1) of the *CCAA*, courts have been inclined to follow *Ottawa Senators Hockey Club Corp. (Re)* and resolve the conflict in favour of the *ETA*. *Ottawa Senators* should not be followed. Rather, the *CCAA* provides the rule. Section 222(3) of the *ETA* evinces no explicit intention of Parliament to repeal *CCAA* s. 18.3. Where Parliament has sought to protect certain Crown claims through statutory deemed trusts and intended that these deemed trusts continue in insolvency, it has legislated so expressly and elaborately. Meanwhile, there is no express statutory basis for concluding that GST claims enjoy a preferred treatment under the *CCAA* or the *BIA*. The internal logic of the *CCAA* appears to subject a GST deemed trust to the waiver by Parliament of its priority. A strange asymmetry would result if differing treatments of GST deemed trusts under the *CCAA* and the *BIA* were found to exist, as this would encourage statute shopping, undermine the *CCAA*'s remedial purpose and invite the very social ills that the statute was enacted to avert. The later in time enactment of the more general s. 222(3) of the *ETA* does not require application of the doctrine of implied repeal to the earlier and more specific s. 18.3(1) of the *CCAA* in the circumstances of this case. In any event,

l'ensemble des textes adoptés par le législateur fédéral en matière d'insolvabilité et des principes d'interprétation de la *LACC* reconnus dans la jurisprudence. L'historique de la *LACC* permet de distinguer celle-ci de la *LFI* en ce sens que, bien que ces lois aient pour objet d'éviter les coûts sociaux et économiques liés à la liquidation de l'actif d'un débiteur, la *LACC* offre plus de souplesse et accorde aux tribunaux un plus grand pouvoir discrétionnaire que le mécanisme fondé sur des règles de la *LFI*, ce qui rend la première mieux adaptée aux réorganisations complexes. Comme la *LACC* ne précise pas ce qui arrive en cas d'échec de la réorganisation, la *LFI* fournit la norme de référence permettant aux créanciers de savoir s'ils ont la priorité dans l'éventualité d'une faillite. Le travail de réforme législative contemporain a principalement visé à harmoniser les aspects communs à la *LACC* et à la *LFI*, et l'une des caractéristiques importantes de cette réforme est la réduction des priorités dont jouit la Couronne. Par conséquent, la *LACC* et la *LFI* contiennent toutes deux des dispositions neutralisant les fiducies réputées établies en vertu d'un texte législatif en faveur de la Couronne, et toutes deux comportent des exceptions expresses à la règle générale qui concernent les fiducies réputées établies à l'égard des retenues à la source. Par ailleurs, ces deux lois considèrent les autres créances de la Couronne comme des créances non garanties. Ces lois ne comportent pas de dispositions claires et expresses établissant une exception pour les créances relatives à la TPS.

Les tribunaux appelés à résoudre le conflit apparent entre le par. 222(3) de la *LTA* et le par. 18.3(1) de la *LACC* ont été enclins à appliquer l'arrêt *Ottawa Senators Hockey Club Corp. (Re)* et à trancher en faveur de la *LTA*. Il ne convient pas de suivre cet arrêt. C'est plutôt la *LACC* qui énonce la règle applicable. Le paragraphe 222(3) de la *LTA* ne révèle aucune intention explicite du législateur d'abroger l'art. 18.3 de la *LACC*. Quand le législateur a voulu protéger certaines créances de la Couronne au moyen de fiducies réputées et voulu que celles-ci continuent de s'appliquer en situation d'insolvabilité, il l'a indiqué de manière explicite et minutieuse. En revanche, il n'existe aucune disposition législative expresse permettant de conclure que les créances relatives à la TPS bénéficient d'un traitement préférentiel sous le régime de la *LACC* ou de la *LFI*. Il semble découler de la logique interne de la *LACC* que la fiducie réputée établie à l'égard de la TPS est visée par la renonciation du législateur à sa priorité. Il y aurait une étrange asymétrie si l'on concluait que la *LACC* ne traite pas les fiducies réputées à l'égard de la TPS de la même manière que la *LFI*, car cela encouragerait les créanciers à recourir à la loi la plus favorable, minerait les objectifs réparateurs de la *LACC* et risquerait de favoriser les maux sociaux que l'édition de ce texte législatif visait justement à

recent amendments to the *CCAA* in 2005 resulted in s. 18.3 of the Act being renumbered and reformulated, making it the later in time provision. This confirms that Parliament's intent with respect to GST deemed trusts is to be found in the *CCAA*. The conflict between the *ETA* and the *CCAA* is more apparent than real.

The exercise of judicial discretion has allowed the *CCAA* to adapt and evolve to meet contemporary business and social needs. As reorganizations become increasingly complex, *CCAA* courts have been called upon to innovate. In determining their jurisdiction to sanction measures in a *CCAA* proceeding, courts should first interpret the provisions of the *CCAA* before turning to their inherent or equitable jurisdiction. Noteworthy in this regard is the expansive interpretation the language of the *CCAA* is capable of supporting. The general language of the *CCAA* should not be read as being restricted by the availability of more specific orders. The requirements of appropriateness, good faith and due diligence are baseline considerations that a court should always bear in mind when exercising *CCAA* authority. The question is whether the order will usefully further efforts to avoid the social and economic losses resulting from liquidation of an insolvent company, which extends to both the purpose of the order and the means it employs. Here, the chambers judge's order staying the Crown's GST claim was in furtherance of the *CCAA*'s objectives because it blunted the impulse of creditors to interfere in an orderly liquidation and fostered a harmonious transition from the *CCAA* to the *BIA*, meeting the objective of a single proceeding that is common to both statutes. 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 *BIA* proceedings, but no gap exists between the two statutes because they operate in tandem and creditors in both cases look to the *BIA* scheme of distribution to foreshadow how they will fare if the reorganization is unsuccessful. The breadth of the court's discretion under the *CCAA* is sufficient to construct a bridge to liquidation under the *BIA*. Hence, the chambers judge's order was authorized.

prévenir. Le paragraphe 222(3) de la *LTA*, une disposition plus récente et générale que le par. 18.3(1) de la *LACC*, n'exige pas l'application de la doctrine de l'abrogation implicite dans les circonstances de la présente affaire. En tout état de cause, par suite des modifications apportées récemment à la *LACC* en 2005, l'art. 18.3 a été reformulé et renuméroté, ce qui en fait la disposition postérieure. Cette constatation confirme que c'est dans la *LACC* qu'est exprimée l'intention du législateur en ce qui a trait aux fiducies réputées visant la TPS. Le conflit entre la *LTA* et la *LACC* est plus apparent que réel.

L'exercice par les tribunaux de leurs pouvoirs discrétionnaires a fait en sorte que la *LACC* a évolué et s'est adaptée aux besoins commerciaux et sociaux contemporains. Comme les réorganisations deviennent très complexes, les tribunaux chargés d'appliquer la *LACC* ont été appelés à innover. Les tribunaux doivent d'abord interpréter les dispositions de la *LACC* avant d'invoquer leur compétence inhérente ou leur compétence en equity pour établir leur pouvoir de prendre des mesures dans le cadre d'une procédure fondée sur la *LACC*. À cet égard, il faut souligner que le texte de la *LACC* peut être interprété très largement. La possibilité pour le tribunal de rendre des ordonnances plus spécifiques n'a pas pour effet de restreindre la portée des termes généraux utilisés dans la *LACC*. L'opportunité, la bonne foi et la diligence sont des considérations de base que le tribunal devrait toujours garder à l'esprit lorsqu'il exerce les pouvoirs conférés par la *LACC*. Il s'agit de savoir si l'ordonnance contribuera utilement à la réalisation de l'objectif d'éviter les pertes sociales et économiques résultant de la liquidation d'une compagnie insolvable. Ce critère s'applique non seulement à l'objectif de l'ordonnance, mais aussi aux moyens utilisés. En l'espèce, l'ordonnance du juge siégeant en son cabinet qui a suspendu l'exécution des mesures de recouvrement de la Couronne à l'égard de la TPS contribuait à la réalisation des objectifs de la *LACC*, parce qu'elle avait pour effet de dissuader les créanciers d'entraver une liquidation ordonnée et favorisait une transition harmonieuse entre la *LACC* et la *LFI*, répondant ainsi à l'objectif — commun aux deux lois — qui consiste à avoir une seule procédure. Le passage de la *LACC* à la *LFI* peut exiger la levée partielle d'une suspension de procédures ordonnée en vertu de la *LACC*, de façon à permettre l'engagement des procédures fondées sur la *LFI*, mais il n'existe aucun hiatus entre ces lois étant donné qu'elles s'appliquent de concert et que, dans les deux cas, les créanciers examinent le régime de distribution prévu par la *LFI* pour connaître la situation qui serait la leur en cas d'échec de la réorganisation. L'ampleur du pouvoir discrétionnaire conféré au tribunal par la *LACC* suffit pour établir une passerelle vers une liquidation opérée sous le régime de la *LFI*. Le juge siégeant en son cabinet pouvait donc rendre l'ordonnance qu'il a prononcée.

No express trust was created by the chambers judge's order in this case because there is no certainty of object inferable from his order. Creation of an express trust requires certainty of intention, subject matter and object. At the time the chambers judge accepted the proposal to segregate the monies in the Monitor's trust account there was no certainty that the Crown would be the beneficiary, or object, of the trust because exactly who might take the money in the final result was in doubt. In any event, no dispute over the money would even arise under the interpretation of s. 18.3(1) of the *CCAA* established above, because the Crown's deemed trust priority over GST claims would be lost under the *CCAA* and the Crown would rank as an unsecured creditor for this amount.

Per Fish J.: The GST monies collected by the debtor are not subject to a deemed trust or priority in favour of the Crown. In recent years, Parliament has given detailed consideration to the Canadian insolvency scheme but has declined to amend the provisions at issue in this case, a deliberate exercise of legislative discretion. On the other hand, in upholding deemed trusts created by the *ETA* notwithstanding insolvency proceedings, courts have been unduly protective of Crown interests which Parliament itself has chosen to subordinate to competing prioritized claims. In the context of the Canadian insolvency regime, deemed trusts exist only where there is a statutory provision creating the trust and a *CCAA* or *BIA* provision explicitly confirming its effective operation. The *Income Tax Act*, the *Canada Pension Plan* and the *Employment Insurance Act* all contain deemed trust provisions that are strikingly similar to that in s. 222 of the *ETA* but they are all also confirmed in s. 37 of the *CCAA* and in s. 67(3) of the *BIA* in clear and unmistakable terms. The same is not true of the deemed trust created under the *ETA*. Although Parliament created a deemed trust in favour of the Crown to hold unremitted GST monies, and although it purports to maintain this trust notwithstanding any contrary federal or provincial legislation, it did not confirm the continued operation of the trust in either the *BIA* or the *CCAA*, reflecting Parliament's intention to allow the deemed trust to lapse with the commencement of insolvency proceedings.

L'ordonnance du juge siégeant en son cabinet n'a pas créé de fiducie expresse en l'espèce, car aucune certitude d'objet ne peut être inférée de cette ordonnance. La création d'une fiducie expresse exige la présence de certitudes quant à l'intention, à la matière et à l'objet. Lorsque le juge siégeant en son cabinet a accepté la proposition que les sommes soient détenues séparément dans le compte en fiducie du contrôleur, il n'existait aucune certitude que la Couronne serait le bénéficiaire ou l'objet de la fiducie, car il y avait un doute quant à la question de savoir qui au juste pourrait toucher l'argent en fin de compte. De toute façon, suivant l'interprétation du par. 18.3(1) de la *LACC* dérogée précédemment, aucun différend ne saurait même exister quant à l'argent, étant donné que la priorité accordée aux réclamations de la Couronne fondées sur la fiducie réputée visant la TPS ne s'applique pas sous le régime de la *LACC* et que la Couronne est reléguée au rang de créancier non garanti à l'égard des sommes en question.

Le juge Fish : Les sommes perçues par la débitrice au titre de la TPS ne font l'objet d'aucune fiducie réputée ou priorité en faveur de la Couronne. Au cours des dernières années, le législateur fédéral a procédé à un examen approfondi du régime canadien d'insolvabilité, mais il a refusé de modifier les dispositions qui sont en cause dans la présente affaire. Il s'agit d'un exercice délibéré du pouvoir discrétionnaire de légiférer. Par contre, en maintenant, malgré l'existence des procédures d'insolvabilité, la validité de fiducies réputées créées en vertu de la *LTA*, les tribunaux ont protégé indûment des droits de la Couronne que le Parlement avait lui-même choisi de subordonner à d'autres créances prioritaires. Dans le contexte du régime canadien d'insolvabilité, il existe une fiducie réputée uniquement lorsqu'une disposition législative crée la fiducie et qu'une disposition de la *LACC* ou de la *LFI* confirme explicitement l'existence de la fiducie. La *Loi de l'impôt sur le revenu*, le *Régime de pensions du Canada* et la *Loi sur l'assurance-emploi* renferment toutes des dispositions relatives aux fiducies réputées dont le libellé offre une ressemblance frappante avec celui de l'art. 222 de la *LTA*, mais le maintien en vigueur des fiducies réputées créées en vertu de ces dispositions est confirmé à l'art. 37 de la *LACC* et au par. 67(3) de la *LFI* en termes clairs et explicites. La situation est différente dans le cas de la fiducie réputée créée par la *LTA*. Bien que le législateur crée en faveur de la Couronne une fiducie réputée dans laquelle seront conservées les sommes recueillies au titre de la TPS mais non encore versées, et bien qu'il prétende maintenir cette fiducie en vigueur malgré les dispositions à l'effet contraire de toute loi fédérale ou provinciale, il ne confirme pas l'existence de la fiducie dans la *LFI* ou la *LACC*, ce qui témoigne de son intention de laisser la fiducie réputée devenir caduque au moment de l'introduction de la procédure d'insolvabilité.

Per Abella J. (dissenting): Section 222(3) of the *ETA* gives priority during *CCAA* proceedings to the Crown's deemed trust in unremitted GST. This provision unequivocally defines its boundaries in the clearest possible terms and excludes only the *BIA* from its legislative grasp. The language used reflects a clear legislative intention that s. 222(3) would prevail if in conflict with any other law except the *BIA*. This is borne out by the fact that following the enactment of s. 222(3), amendments to the *CCAA* were introduced, and despite requests from various constituencies, s. 18.3(1) was not amended to make the priorities in the *CCAA* consistent with those in the *BIA*. This indicates a deliberate legislative choice to protect the deemed trust in s. 222(3) from the reach of s. 18.3(1) of the *CCAA*.

The application of other principles of interpretation reinforces this conclusion. An earlier, specific provision may be overruled by a subsequent general statute if the legislature indicates, through its language, an intention that the general provision prevails. Section 222(3) achieves this through the use of language stating that it prevails despite any law of Canada, of a province, or "any other law" other than the *BIA*. Section 18.3(1) of the *CCAA* is thereby rendered inoperative for purposes of s. 222(3). By operation of s. 44(f) of the *Interpretation Act*, the transformation of s. 18.3(1) into s. 37(1) after the enactment of s. 222(3) of the *ETA* has no effect on the interpretive queue, and s. 222(3) of the *ETA* remains the "later in time" provision. This means that the deemed trust provision in s. 222(3) of the *ETA* takes precedence over s. 18.3(1) during *CCAA* proceedings. While s. 11 gives a court discretion to make orders notwithstanding the *BIA* and the *Winding-up Act*, that discretion is not liberated from the operation of any other federal statute. Any exercise of discretion is therefore circumscribed by whatever limits are imposed by statutes other than the *BIA* and the *Winding-up Act*. That includes the *ETA*. The chambers judge in this case was, therefore, required to respect the priority regime set out in s. 222(3) of the *ETA*. Neither s. 18.3(1) nor s. 11 of the *CCAA* gave him the authority to ignore it. He could not, as a result, deny the Crown's request for payment of the GST funds during the *CCAA* proceedings.

La juge Abella (dissidente) : Le paragraphe 222(3) de la *LTA* donne préséance, dans le cadre d'une procédure relevant de la *LACC*, à la fiducie réputée qui est établie en faveur de la Couronne à l'égard de la TPS non versée. Cette disposition définit sans équivoque sa portée dans des termes on ne peut plus clairs et n'exclut que la *LFI* de son champ d'application. Les termes employés révèlent l'intention claire du législateur que le par. 222(3) l'emporte en cas de conflit avec toute autre loi sauf la *LFI*. Cette opinion est confortée par le fait que des modifications ont été apportées à la *LACC* après l'édition du par. 222(3) et que, malgré les demandes répétées de divers groupes, le par. 18.3(1) n'a pas été modifié pour aligner l'ordre de priorité établi par la *LACC* sur celui de la *LFI*. Cela indique que le législateur a délibérément choisi de soustraire la fiducie réputée établie au par. 222(3) à l'application du par. 18.3(1) de la *LACC*.

Cette conclusion est renforcée par l'application d'autres principes d'interprétation. Une disposition spécifique antérieure peut être supplantée par une loi ultérieure de portée générale si le législateur, par les mots qu'il a employés, a exprimé l'intention de faire prévaloir la loi générale. Le paragraphe 222(3) accomplit cela de par son libellé, lequel précise que la disposition l'emporte sur tout autre texte législatif fédéral, tout texte législatif provincial ou « toute autre règle de droit » sauf la *LFI*. Le paragraphe 18.3(1) de la *LACC* est par conséquent rendu inopérant aux fins d'application du par. 222(3). Selon l'alinéa 44f) de la *Loi d'interprétation*, le fait que le par. 18.3(1) soit devenu le par. 37(1) à la suite de l'édition du par. 222(3) de la *LTA* n'a aucune incidence sur l'ordre chronologique du point de vue de l'interprétation, et le par. 222(3) de la *LTA* demeure la disposition « postérieure ». Il s'ensuit que la disposition créant une fiducie réputée que l'on trouve au par. 222(3) de la *LTA* l'emporte sur le par. 18.3(1) dans le cadre d'une procédure fondée sur la *LACC*. Bien que l'art. 11 accorde au tribunal le pouvoir discrétionnaire de rendre des ordonnances malgré les dispositions de la *LFI* et de la *Loi sur les liquidations*, ce pouvoir discrétionnaire demeure assujéti à l'application de toute autre loi fédérale. L'exercice de ce pouvoir discrétionnaire est donc circonscrit par les limites imposées par toute loi autre que la *LFI* et la *Loi sur les liquidations*, et donc par la *LTA*. En l'espèce, le juge siégeant en son cabinet était donc tenu de respecter le régime de priorités établi au par. 222(3) de la *LTA*. Ni le par. 18.3(1), ni l'art. 11 de la *LACC* ne l'autorisaient à en faire abstraction. Par conséquent, il ne pouvait pas refuser la demande présentée par la Couronne en vue de se faire payer la TPS dans le cadre de la procédure introduite en vertu de la *LACC*.

the company or its creditors usually seek to have the debtor's assets liquidated under the applicable provisions of the *BIA* or to place the debtor into receivership. As discussed in greater detail below, the key difference between the reorganization regimes under the *BIA* and the *CCAA* is that the latter offers a more flexible mechanism with greater judicial discretion, making it more responsive to complex reorganizations.

[15] As I will discuss at greater length below, the purpose of the *CCAA* — Canada's first reorganization statute — is to permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets. Proposals to creditors under the *BIA* serve the same remedial purpose, though this is achieved through a rules-based mechanism that offers less flexibility. Where reorganization is impossible, the *BIA* may be employed to provide an orderly mechanism for the distribution of a debtor's assets to satisfy creditor claims according to predetermined priority rules.

[16] Prior to the enactment of the *CCAA* in 1933 (S.C. 1932-33, c. 36), practice under existing commercial insolvency legislation tended heavily towards the liquidation of a debtor company (J. Sarra, *Creditor Rights and the Public Interest: Restructuring Insolvent Corporations* (2003), at p. 12). The battering visited upon Canadian businesses by the Great Depression and the absence of an effective mechanism for reaching a compromise between debtors and creditors to avoid liquidation required a legislative response. The *CCAA* was innovative as it allowed the insolvent debtor to attempt reorganization under judicial supervision outside the existing insolvency legislation which, once engaged, almost invariably resulted in liquidation (*Reference re Companies' Creditors*

accepté par ses créanciers et où la compagnie réorganisée poursuit ses activités au terme de la procédure engagée en vertu de la *LACC*. Enfin, dans le dernier scénario, la transaction ou l'arrangement échoue et la compagnie ou ses créanciers cherchent habituellement à obtenir la liquidation des biens en vertu des dispositions applicables de la *LFI* ou la mise sous séquestre du débiteur. Comme nous le verrons, la principale différence entre les régimes de réorganisation prévus par la *LFI* et la *LACC* est que le second établit un mécanisme plus souple, dans lequel les tribunaux disposent d'un plus grand pouvoir discrétionnaire, ce qui rend le mécanisme mieux adapté aux réorganisations complexes.

[15] Comme je vais le préciser davantage plus loin, la *LACC* — la première loi canadienne régissant la réorganisation — a pour objectif de permettre au débiteur de continuer d'exercer ses activités et, dans les cas où cela est possible, d'éviter les coûts sociaux et économiques liés à la liquidation de son actif. Les propositions faites aux créanciers en vertu de la *LFI* répondent au même objectif, mais au moyen d'un mécanisme fondé sur des règles et offrant moins de souplesse. Quand la réorganisation s'avère impossible, les dispositions de la *LFI* peuvent être appliquées pour répartir de manière ordonnée les biens du débiteur entre les créanciers, en fonction des règles de priorité qui y sont établies.

[16] Avant l'adoption de la *LACC* en 1933 (S.C. 1932-33, ch. 36), la liquidation de la compagnie débitrice constituait la pratique la plus courante en vertu de la législation existante en matière d'insolvabilité commerciale (J. Sarra, *Creditor Rights and the Public Interest: Restructuring Insolvent Corporations* (2003), p. 12). Les ravages de la Grande Dépression sur les entreprises canadiennes et l'absence d'un mécanisme efficace susceptible de permettre aux débiteurs et aux créanciers d'arriver à des compromis afin d'éviter la liquidation commandaient une solution législative. La *LACC* a innové en permettant au débiteur insolvable de tenter une réorganisation sous surveillance judiciaire, hors du cadre de la législation existante en matière d'insolvabilité qui, une fois entrée en jeu,

3.3 *Discretionary Power of a Court Supervising a CCAA Reorganization*

[57] Courts frequently observe that “[t]he CCAA is skeletal in nature” and does not “contain a comprehensive code that lays out all that is permitted or barred” (*Metcalfe & Mansfield Alternative Investments II Corp. (Re)*, 2008 ONCA 587, 92 O.R. (3d) 513, at para. 44, *per* Blair J.A.). Accordingly, “[t]he history of CCAA law has been an evolution of judicial interpretation” (*Dylex Ltd., Re* (1995), 31 C.B.R. (3d) 106 (Ont. Ct. (Gen. Div.)), at para. 10, *per* Farley J.).

[58] CCAA decisions are often based on discretionary grants of jurisdiction. The incremental exercise of judicial discretion in commercial courts under conditions one practitioner aptly describes as “the hothouse of real-time litigation” has been the primary method by which the CCAA has been adapted and has evolved to meet contemporary business and social needs (see Jones, at p. 484).

[59] Judicial discretion must of course be exercised in furtherance of the CCAA’s purposes. The remedial purpose I referred to in the historical overview of the Act is recognized over and over again in the jurisprudence. To cite one early example:

The legislation is remedial in the purest sense in that it provides a means whereby the devastating social and economic effects of bankruptcy or creditor initiated termination of ongoing business operations can be avoided while a court-supervised attempt to reorganize the financial affairs of the debtor company is made.

(*Elan Corp. v. Comiskey* (1990), 41 O.A.C. 282, at para. 57, *per* Doherty J.A., dissenting)

[60] Judicial decision making under the CCAA takes many forms. A court must first of all provide the conditions under which the debtor can attempt to reorganize. This can be achieved by

3.3 *Pouvoirs discrétionnaires du tribunal chargé de surveiller une réorganisation fondée sur la LACC*

[57] Les tribunaux font souvent remarquer que [TRADUCTION] « [l]a LACC est par nature schématique » et ne « contient pas un code complet énonçant tout ce qui est permis et tout ce qui est interdit » (*Metcalfe & Mansfield Alternative Investments II Corp. (Re)*, 2008 ONCA 587, 92 O.R. (3d) 513, par. 44, le juge Blair). Par conséquent, [TRADUCTION] « [l]’histoire du droit relatif à la LACC correspond à l’évolution de ce droit au fil de son interprétation par les tribunaux » (*Dylex Ltd., Re* (1995), 31 C.B.R. (3d) 106 (C. Ont. (Div. gén.)), par. 10, le juge Farley).

[58] Les décisions prises en vertu de la LACC découlent souvent de l’exercice discrétionnaire de certains pouvoirs. C’est principalement au fil de l’exercice par les juridictions commerciales de leurs pouvoirs discrétionnaires, et ce, dans des conditions décrites avec justesse par un praticien comme constituant [TRADUCTION] « la pépinière du contentieux en temps réel », que la LACC a évolué de façon graduelle et s’est adaptée aux besoins commerciaux et sociaux contemporains (voir Jones, p. 484).

[59] L’exercice par les tribunaux de leurs pouvoirs discrétionnaires doit évidemment tendre à la réalisation des objectifs de la LACC. Le caractère réparateur dont j’ai fait état dans mon aperçu historique de la Loi a à maintes reprises été reconnu dans la jurisprudence. Voici l’un des premiers exemples :

[TRADUCTION] La loi est réparatrice au sens le plus pur du terme, en ce qu’elle fournit un moyen d’éviter les effets dévastateurs, — tant sur le plan social qu’économique — de la faillite ou de l’arrêt des activités d’une entreprise, à l’initiation des créanciers, pendant que des efforts sont déployés, sous la surveillance du tribunal, en vue de réorganiser la situation financière de la compagnie débitrice.

(*Elan Corp. c. Comiskey* (1990), 41 O.A.C. 282, par. 57, le juge Doherty, dissident)

[60] Le processus décisionnel des tribunaux sous le régime de la LACC comporte plusieurs aspects. Le tribunal doit d’abord créer les conditions propres à permettre au débiteur de tenter une réorganisation.

matter, . . . subject to this Act, [to] make an order under this section” (*CCAA*, s. 11(1)). The plain language of the statute was very broad.

[68] In this regard, though not strictly applicable to the case at bar, I note that Parliament has in recent amendments changed the wording contained in s. 11(1), making explicit the discretionary authority of the court under the *CCAA*. Thus, in s. 11 of the *CCAA* as currently enacted, a court may, “subject to the restrictions set out in this Act, . . . make any order that it considers appropriate in the circumstances” (S.C. 2005, c. 47, s. 128). Parliament appears to have endorsed the broad reading of *CCAA* authority developed by the jurisprudence.

[69] The *CCAA* also explicitly provides for certain orders. Both an order made on an initial application and an order on subsequent applications may stay, restrain, or prohibit existing or new proceedings against the debtor. The burden is on the applicant to satisfy the court that the order is appropriate in the circumstances and that the applicant has been acting in good faith and with due diligence (*CCAA*, ss. 11(3), (4) and (6)).

[70] The general language of the *CCAA* should not be read as being restricted by the availability of more specific orders. However, the requirements of appropriateness, good faith, and due diligence are baseline considerations that a court should always bear in mind when exercising *CCAA* authority. Appropriateness under the *CCAA* is assessed by inquiring whether the order sought advances the policy objectives underlying the *CCAA*. The question is whether the order will usefully further efforts to achieve the remedial purpose of the *CCAA* — avoiding the social and economic losses resulting from liquidation of an insolvent company. I would add that appropriateness extends not only to the purpose of the order, but also to the means it employs. Courts should be mindful that chances for successful reorganizations are enhanced where participants achieve common ground and all

d’un intéressé, [. . .] sous réserve des autres dispositions de la présente loi [. . .] rendre l’ordonnance prévue au présent article » (*LACC*, par. 11(1)). Cette formulation claire était très générale.

[68] Bien que ces dispositions ne soient pas strictement applicables en l’espèce, je signale à ce propos que le législateur a, dans des modifications récentes, apporté au texte du par. 11(1) un changement qui rend plus explicite le pouvoir discrétionnaire conféré au tribunal par la *LACC*. Ainsi, aux termes de l’art. 11 actuel de la *LACC*, le tribunal peut « rendre [. . .] sous réserve des restrictions prévues par la présente loi [. . .] toute ordonnance qu’il estime indiquée » (L.C. 2005, ch. 47, art. 128). Le législateur semble ainsi avoir jugé opportun de sanctionner l’interprétation large du pouvoir conféré par la *LACC* qui a été élaborée par la jurisprudence.

[69] De plus, la *LACC* prévoit explicitement certaines ordonnances. Tant à la suite d’une demande initiale que d’une demande subséquente, le tribunal peut, par ordonnance, suspendre ou interdire toute procédure contre le débiteur, ou surseoir à sa continuation. Il incombe à la personne qui demande une telle ordonnance de convaincre le tribunal qu’elle est indiquée et qu’il a agi et continue d’agir de bonne foi et avec la diligence voulue (*LACC*, par. 11(3), (4) et (6)).

[70] La possibilité pour le tribunal de rendre des ordonnances plus spécifiques n’a pas pour effet de restreindre la portée des termes généraux utilisés dans la *LACC*. Toutefois, l’opportunité, la bonne foi et la diligence sont des considérations de base que le tribunal devrait toujours garder à l’esprit lorsqu’il exerce les pouvoirs conférés par la *LACC*. Sous le régime 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. Il s’agit donc de savoir si cette ordonnance contribuera utilement à la réalisation de l’objectif réparateur de la *LACC* — à savoir éviter les pertes sociales et économiques résultant de la liquidation d’une compagnie insolvable. J’ajouterais que le critère de l’opportunité s’applique non seulement à l’objectif de l’ordonnance, mais aussi aux moyens utilisés. Les tribunaux

stakeholders are treated as advantageously and fairly as the circumstances permit.

[71] It is well established that efforts to reorganize under the *CCAA* can be terminated and the stay of proceedings against the debtor lifted if the reorganization is “doomed to failure” (see *Chef Ready*, at p. 88; *Philip’s Manufacturing Ltd., Re* (1992), 9 C.B.R. (3d) 25 (B.C.C.A.), at paras. 6-7). However, when an order is sought that does realistically advance the *CCAA*’s purposes, the ability to make it is within the discretion of a *CCAA* court.

[72] The preceding discussion assists in determining whether the court had authority under the *CCAA* to continue the stay of proceedings against the Crown once it was apparent that reorganization would fail and bankruptcy was the inevitable next step.

[73] In the Court of Appeal, Tysoe J.A. held that no authority existed under the *CCAA* to continue staying the Crown’s enforcement of the GST deemed trust once efforts at reorganization had come to an end. The appellant submits that in so holding, Tysoe J.A. failed to consider the underlying purpose of the *CCAA* and give the statute an appropriately purposive and liberal interpretation under which the order was permissible. The Crown submits that Tysoe J.A. correctly held that the mandatory language of the *ETA* gave the court no option but to permit enforcement of the GST deemed trust when lifting the *CCAA* stay to permit the debtor to make an assignment under the *BIA*. Whether the *ETA* has a mandatory effect in the context of a *CCAA* proceeding has already been discussed. I will now address the question of whether the order was authorized by the *CCAA*.

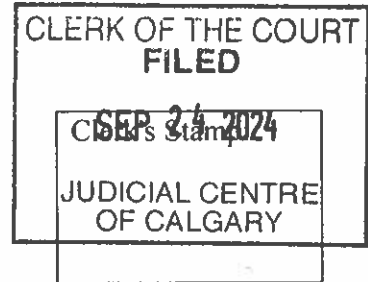
doivent se rappeler que les chances de succès d’une réorganisation sont meilleures lorsque les participants arrivent à s’entendre et que tous les intéressés sont traités de la façon la plus avantageuse et juste possible dans les circonstances.

[71] Il est bien établi qu’il est possible de mettre fin aux efforts déployés pour procéder à une réorganisation fondée sur la *LACC* et de lever la suspension des procédures contre le débiteur si la réorganisation est [TRADUCTION] « vouée à l’échec » (voir *Chef Ready*, p. 88; *Philip’s Manufacturing Ltd., Re* (1992), 9 C.B.R. (3d) 25 (C.A.C.-B.), par. 6-7). Cependant, quand l’ordonnance demandée contribue vraiment à la réalisation des objectifs de la *LACC*, le pouvoir discrétionnaire dont dispose le tribunal en vertu de cette loi l’habilite à rendre à cette ordonnance.

[72] L’analyse qui précède est utile pour répondre à la question de savoir si le tribunal avait, en vertu de la *LACC*, le pouvoir de maintenir la suspension des procédures à l’encontre de la Couronne, une fois qu’il est devenu évident que la réorganisation échouerait et que la faillite était inévitable.

[73] En Cour d’appel, le juge Tysoe a conclu que la *LACC* n’habilitait pas le tribunal à maintenir la suspension des mesures d’exécution de la Couronne à l’égard de la fiducie réputée visant la TPS après l’arrêt des efforts de réorganisation. Selon l’appelante, en tirant cette conclusion, le juge Tysoe a omis de tenir compte de l’objectif fondamental de la *LACC* et n’a pas donné à ce texte l’interprétation téléologique et large qu’il convient de lui donner et qui autorise le prononcé d’une telle ordonnance. La Couronne soutient que le juge Tysoe a conclu à bon droit que les termes impératifs de la *LTA* ne laissaient au tribunal d’autre choix que d’autoriser les mesures d’exécution à l’endroit de la fiducie réputée visant la TPS lorsqu’il a levé la suspension de procédures qui avait été ordonnée en application de la *LACC* afin de permettre au débiteur de faire cession de ses biens en vertu de la *LFI*. J’ai déjà traité de la question de savoir si la *LTA* a un effet contraignant dans une procédure fondée sur la *LACC*. Je vais maintenant traiter de la question de savoir si l’ordonnance était autorisée par la *LACC*.

TAB 7



COURT FILE NUMBER 2401-05179
COURT COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE OF CALGARY
IN THE MATTER OF THE COMPANIES'
CREDITORS ARRANGEMENT ACT, R.S.C.
1985, c. C-36, as amended

AND IN THE MATTER OF A PLAN OF
COMPROMISE OR ARRANGEMENT OF
ALPHABOW ENERGY LTD.

DOCUMENT

ADDRESS FOR SERVICE AND
CONTACT INFORMATION OF
PARTY FILING THIS
DOCUMENT:

ORDER (Claims Process)

BENNETT JONES LLP
Barristers and Solicitors
4500, 855 – 2nd Street S.W.
Calgary, Alberta T2P 4K7

Attention: Keely Cameron/ Sarah Aaron
Telephone No.: 403-298-3324/3177
Fax No.: 403-265-7219
Client File No.: 88323.6

**DATE ON WHICH ORDER WAS
PRONOUNCED:**

Friday, September 20, 2024

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

The Honourable Justice J. T. Neilson

LOCATION OF HEARING:

Edmonton Law Courts
1A Sir Winston Churchill Square
Edmonton, AB T5J 0R2

UPON the application of AlphaBow Energy Ltd. (the "**Applicant**" or "**AlphaBow**") pursuant to the Companies' Creditors Arrangement Act R.S.C. 1985, c. C-36 (the "**CCAA**") for an order approving a procedure for the determination of claims against the Applicant;

AND UPON having read the Application and the Fourth Affidavit of Ben Li sworn on September 9, 2024 (the “**Fourth Li Affidavit**”); the Third Report of the Monitor; **AND UPON** hearing counsel for the Applicant, and any other interested parties appearing at the application;

IT IS HEREBY ORDERED AND DECLARED THAT:

SERVICE

1. Service of notice of this Application and supporting documents is hereby deemed to be good and sufficient, the time for notice is hereby abridged to the time provided, and no other person is required to have been served with notice of this Application.

DEFINITIONS

2. Capitalized terms not defined herein have the meaning given to such terms in the Fourth Li Affidavit.
3. In this Order, unless stated otherwise:
 - (a) “Accepted Claim” means a Claim of a Claimant as finally accepted by the Monitor, or determined by the Court, in accordance with this Order;
 - (b) "Assumed Contracts" means any contracts assigned by AlphaBow and assumed by a purchaser pursuant to an approval and vesting order or other order of the court;
 - (c) "Business Day" means a day, other than a Saturday, Sunday or a statutory holiday, on which banks are generally open for business in Calgary, in the Province of Alberta, Canada;
 - (d) "Calendar Day" means a day, including Saturday, Sunday and any statutory holidays in the Province of Alberta, Canada;
 - (e) "Claim" means any right or claim of any Person that may be asserted or made in whole or in part against the Applicant, whether or not asserted or made, in

connection with any indebtedness, liability or obligation of any kind whatsoever, and any interest accrued thereon or costs payable in respect thereof, including without limitation, by reason of the commission of a tort (intentional or unintentional), by reason of any breach of contract or other agreement (oral or written), by reason of any breach of duty (including, without limitation, any legal, statutory, equitable or fiduciary duty) or by reason of any right of ownership of or title to property or assets or right to a trust or deemed trust (statutory, express, implied, resulting, constructive or otherwise), and whether or not any indebtedness, liability or obligation is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, unsecured, present or future, known or unknown, by guarantee, surety or otherwise, and whether or not any right or claim is executory or anticipatory in nature including, without limitation, any right or ability of any Person to advance a claim for contribution or indemnity or otherwise with respect to any matter, action, cause or chose in action whether existing at present or commenced in the future, which indebtedness, liability or obligation, and any interest accrued thereon or costs payable in respect thereof (A) is based in whole or in part on facts and events occurring prior to the Filing Date, (B) relates to a time period prior to the Filing Date, or (C) is a right or claim of any kind that would be a debt provable in bankruptcy within the meaning of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended had the Applicant become bankrupt on the Filing Date;

- (f) "Claimant" means any Person asserting a Claim, including but not limited to a Secured/Priority Claim, a Cure Cost Claim and a Restructuring Claim and includes without limitation the transferee or assignee of a Claim, Secured/Priority Claim, Cure Cost Claim or a Restructuring Claim transfer and recognized as a Claimant in accordance with paragraphs 25 or 26 hereof or a trustee, executor, liquidator, receiver, receiver and manager, or other Person acting on or behalf of or through such Person;
- (g) "Claims Bar Date" means 5:00 p.m. Calgary time on October 23, 2024, or any later

time or date ordered by the Court or agreed to between the Monitor and AlphaBow, acting reasonably;

- (h) "Claims Package" means the materials to be provided by the Monitor to Persons who may have a Claim, which materials shall include:
 - (i) In the case of a Known Claimant, a blank Proof of Claim and a Proof of Claim Instruction Letter, Notice of Revision or Disallowance and Notice of Dispute of Revision or Disallowance, and such other materials as the Applicant, in consultation with the Monitor, may consider appropriate; and
 - (ii) In the case of an Unknown Claimant, a blank Proof of Claim, and a Proof of Claim Instruction Letter, and such other materials as the Applicant or the Monitor may consider appropriate;
- (i) "Claims Procedure" means the procedures outlined in this Order, including the Schedules;
- (j) "Court" means the Court of King's Bench of Alberta in the Judicial Centre of Calgary;
- (k) "Cure Cost" means with respect to any Assumed Contract, being all of the Vendor's monetary defaults which are required to be paid or which become payable in the future to remedy all of the Vendor's monetary defaults under such Assumed Contract or required to secure a counterparty's or any other necessary Person's consent to the assignment of such Assumed Contract pursuant to its terms (including any deposits or other forms of security required by any Governmental Authority) or as may be required pursuant to an approval and vesting order, and includes any other fees and expenses required to be paid, or which become payable in the future, to a counterparty or any other Person in connection with the assignment of an Assumed Contract pursuant to its terms or applicable laws;
- (l) "Cure Cost Claim" means a Claim in respect of a Cure Cost;

- (m) "Director" means anyone who is or was or may be deemed to be or have been, whether by statute, operation of law or otherwise, a director or de facto director of the Applicant, in such capacity;
- (n) "Excluded Claim" means, without prejudice to the Applicant's right to seek amendments to this order, and subject to further order of the Court, and only for the purposes of this Claims Procedure:
 - (i) any Claim secured by the Administration Charge;
 - (ii) any other Claim secured by a Court-ordered charge in the CCAA Proceedings arising after the date of this Order;
 - (iii) any Claim arising under a contract entered into by the Applicant after the Filing Date;
- (o) "Filing Date" means April 26, 2024, the date on which the Applicant was granted an Initial Order in the CCAA Proceedings;
- (p) "Governmental Authority" means any domestic or foreign government, whether federal, provincial, state, territorial or municipal; and any governmental agency, ministry, department, tribunal, commission, bureau, board, court (including the Court) or other instrumentality exercising or purporting to exercise legislative, judicial, regulatory or administrative functions of, or pertaining to, government, having jurisdiction over AlphaBow or the matters referred to herein;
- (q) "Known Claimant" means:
 - (i) any Person who, based upon the books and records of the Applicant, was owed monies by the Applicant as of the Filing Date and which monies remain unpaid in whole or in part; and
 - (ii) any Person who, based upon the books and records of the Applicant, is a

party to a lease, contract, or other agreement or obligation of any of the Applicant which was restructured, disclaimed, resiliated, terminated, or breached by the Applicant between the Filing Date and the date of this Order;

- (r) "Monitor" means KSV Restructuring Inc.;
- (s) "Notice to Claimant" means a notice referred to in paragraph 13 hereof, substantially in the form attached as Schedule "A" hereto, delivered to a Claimant;
- (t) "Notice of Dispute of Revision or Disallowance" means the notice referred to in paragraph 19 hereof, substantially in the form attached as Schedule "E" hereto, which may be delivered to the Monitor by a Claimant disputing a Notice of Revision or Disallowance, with reasons for its dispute;
- (u) "Notice of Revision or Disallowance" means the notice referred to in paragraph 20 hereof, substantially in the form of Schedule "D" advising a Claimant that the Applicant has revised or rejected all or part of such Claimant's Claim set out in its Proof of Claim;
- (v) "Officer" means anyone who is or was, or may be deemed to be or have been, whether by statute, operation of law or otherwise, an officer or de facto officer of the Applicant;
- (w) "Person" is to be broadly interpreted and includes any individual, firm, corporation, limited or unlimited liability company, general or limited partnership, association, trust, unincorporated organization, joint venture, Governmental Entity or any agency, officer or instrumentality thereof or any other entity, wherever situate or domiciled, and whether or not having legal status;
- (x) "Post-Filing Claim" means the claim of any Person against AlphaBow that arose from the provision of authorized goods and services provided or otherwise incurred in the normal course of business on or following the Filing Date;

- (y) "Pre-Filing Claim" means the claim of any Person against AlphaBow that arose prior to the Filing Date;
- (z) "Proof of Claim" means the Proof of Claim referred to herein, substantially in the form attached as Schedule "B";
- (aa) "Proof of Claim Instruction Letter" means the instruction letter to Unknown Claimants, substantially in the form attached as Schedule "C" hereto, regarding the completion of a Proof of Claim by a Claimant and the claims procedure described herein;
- (bb) "Restructuring Claim" means any right of claim of any Person against any of the Applicants in connection with any indebtedness, liability or obligation of any kind whatsoever owed by any such Applicant to such Person arising out of the restructuring, disclaimer, repudiation, rescission or termination by such Applicant on or after the Filing Date of any contract, lease, other agreement or obligation whether written or oral and any Cure Cost Claim;
- (cc) "Secured/Priority Claim" means that portion of a Claim that is (i) secured by security validly charging or encumbering property or assets of the Applicant, (including statutory and possessory liens that create security interests) up to the value of such collateral, and (ii) duly and properly perfected in accordance with the relevant legislation in the appropriate jurisdiction as of the Filing Date;
- (dd) "Unknown Claimant" means a Claimant that is not a Known Claimant;
- (ee) "Unknown Claimant Claims Package" means a blank Proof of Claim and a Proof of Claim Instruction Letter, and such other materials as the Applicant or the Monitor may consider appropriate or desirable;
- (ff) "Vendor" means AlphaBow Energy Ltd.; and

(gg) "Website" means <https://www.ksvadvisory.com/experience/case/alphabow>.

GENERAL PROVISIONS

4. All references as to time herein shall mean local time in Calgary, Alberta, Canada, and any reference to an event occurring on a Business Day shall mean prior to 5:00 p.m. on such Business Day unless otherwise indicated herein.
5. All references to the word "including" shall mean "including without limitation".
6. All references to the singular herein include the plural, the plural include the singular, and any gender includes the other gender.
7. All Claims shall be denominated in Canadian dollars. Any Claims denominated in a foreign currency shall be converted to Canadian dollars utilizing the Bank of Canada's noon exchange rate in effect on the Filing Date.
8. Interest and penalties that would otherwise accrue after the Filing Date shall not be included in any Claims.
9. Copies of all forms delivered hereunder, as applicable, and determinations of Claims by the Court, as the case may be, shall be maintained by the Monitor and, subject to further order of the Court, the applicable Claimant will be entitled to have access thereto by appointment during normal business hours on written request to the Monitor or the Applicant.

MONITOR'S ROLE

10. The Monitor, in addition to its prescribed rights, duties, responsibilities and obligations under the CCAA, shall assist the Applicant in connection with the administration of the claim procedure provided for herein, and is hereby directed and empowered to take such other actions and fulfill such other roles as are contemplated by this Order or incidental thereto.

11. In carrying out the terms of this Order, the Monitor shall:
 - (a) have all of the protections given to it by the CCAA and any subsequent orders and extensions related thereto, and this Order, or as an officer of the Court, including the stay of proceedings in its favour;
 - (b) incur no liability or obligation as a result of the carrying out of the provisions of this Order, save and except for any gross negligence or willful misconduct on its part;
 - (c) be entitled to rely on the books and records of the Applicant and any information provided by the Applicant, all without independent investigation; and
 - (d) not be liable for any claims or damages resulting from any errors or omissions in such books, records or information, save and except for any gross negligence or willful misconduct on its part.

12. The Applicant and the Monitor are hereby authorized to use reasonable discretion as to the adequacy of compliance with respect to the manner in which forms delivered hereunder are completed and executed, and may, where they are satisfied that a Claim has been adequately proven, waive strict compliance with the requirements of this Order as to completion and execution of such forms and to request any further documentation from a Person that the Applicant or the Monitor may require in order to enable them to determine the validity of a Claim.

NOTICE OF CLAIMS

13. The Monitor shall send a Claims Package to each of the Known Claimants (or to the counsel of record for any such Known Claimants) by prepaid ordinary mail, courier, personal delivery, or electronic or facsimile transmission, as soon as reasonably practicable after the Court's approval of the Claims Procedure and shall post on the Monitor's Website a copy of this Claims Process Order and the Claims Package.

DISCLAIMERS AND RESILIATIONS

14. Any action taken by the Applicant to restructure, disclaim, resiliate, terminate or breach any contract, lease or other agreement, whether written or oral, must occur on or before the day that is fifteen (15) Calendar Days prior to the date of a scheduled meeting of Creditors, if any, or any adjournment thereof. Any notices of disclaimer or resiliation delivered after the date of this Order to Claimants in connection with the foregoing shall be accompanied by a Claims Package.

CLAIMS PROCEDURE FOR UNKNOWN CLAIMANTS

15. The Monitor shall, as soon as practicable after the date of this Claims Procedure Order, cause the Notice to Claimant to be published once in the Daily Oil Bulletin.
16. The Monitor shall send a Claims Package to any Unknown Claimant (or to counsel of record for such Unknown Claimant) upon request. Any such Unknown Claimant must return a completed Proof of Claim to the Monitor by no later than the Claims Bar Date.

CLAIMS BAR DATE, ADJUDICATION AND RESOLUTION OF CLAIMS

Barring of Claims

17. Any Claimant that does not return a Proof of Claim to the Monitor by the Claims Bar Date, unless otherwise ordered by the Court, shall:
 - (a) not be entitled to receive any distribution and in the case of Cure Costs shall be deemed to have abandoned any claims;
 - (b) not be entitled to any further notice in, and shall not be entitled to participate as a Claimant or creditor in, the CCAA Proceedings in respect of such Claim;
 - (c) be forever barred from making or enforcing any such Claim against any of the Applicant or any purchaser of the Applicant's assets, and all such Claims will be

forever extinguished and barred without any further act or notification by the Applicant; and

- (d) be forever barred from making or enforcing any such Claim as against any other Person who could claim contribution or indemnity from the Applicant, its Directors and Officers, or any of them and all such Claims will be forever extinguished and barred without any further act or notification by the Applicant.

Adjustment to Cure Cost Claims

- 18. For any Claimant that returns a Proof of Claim to the Monitor by the Claims Bar Date with respect to a contract that the Monitor determines may be an Assumed Contract, the Claimant is authorized to adjust, upon notice to the Monitor the quantum of any Cure Cost Claim made by the Claimant pursuant to this Claims Process for ongoing billings, billing adjustments and equalizations processed by such Claimant after the date of such Claimant's Proof of Claim, provided that such adjustments are made in accordance with the terms of the relevant agreements, commonly accepted accounting principles and the Claims Process. Nothing in this paragraph will limit the Monitor's ability to adjudicate claims including the adjustment to any Cure Cost Claim in accordance with Paragraph 19.

Adjudication of Claims

- 19. The Monitor, with the assistance of the Applicant, shall to the extent necessary for the completion of a transaction or distribution of proceeds review all applicable Proofs of Claim, if any, received by the Claims Bar Date and subsequent adjustments as set out in the immediately preceding paragraph, and shall accept the amount of each Claim set out therein for, or shall revise or reject the amount of each Claim by sending such Claimant a Notice of Revision or Disallowance. The Monitor and the Applicant may attempt to consensually resolve the classification or amount of any asserted Claim with the Claimant prior to accepting, revising or disallowing such Claim.
- 20. Any Claimant who intends to dispute a Notice of Revision or Disallowance sent pursuant

to the immediately preceding paragraph shall deliver a Notice of Dispute of Revision or Disallowance to the Monitor by no later than 5:00 p.m. on the date that is fourteen (14) Calendar Days after receipt of the Notice of Revision or Disallowance.

Resolution of Claims

21. Where a Claimant that receives a Notice of Revision or Disallowance pursuant to paragraph 19 above does not file a Notice of Dispute of Revision or Disallowance by the time set out in paragraph 20 above, the amount and classification of such Claimant's Claim shall be deemed to be as set out in the Notice of Revision or Disallowance.
22. In the event that the Monitor is unable to resolve a dispute regarding any Claim with a Claimant, the Claimant must file an Application with the Court for the resolution or adjudication of the Claim. Any such application must be filed in the Court and delivered to the Monitor and the Applicant no later than ten (10) Business Days after the Claimant has delivered a Notice of Dispute of Revision or Disallowance, failing which the amount and classification of such Claimant's Claim shall be deemed to be as set out in the Notice of Revision or Disallowance. Thereafter, the Court shall resolve the dispute and determine the amount and/or classification of the Claimant's Claim for determination of Cure Costs or voting and distribution purposes.

NOTICE OF TRANSFERS

23. If a Claimant or any subsequent holder of a Claim, who has been acknowledged by the Monitor, as the holder of the Claim, transfers or assigns that Claim to another Person, the Monitor shall not be obligated to give notice to or to otherwise deal with the transferee or assignee of the Claim as the holder of such Claim unless and until actual notice of transfer or assignment, together with satisfactory evidence of such transfer or assignment, has been delivered to the Monitor. Thereafter, such transferee or assignee shall, for all purposes hereof, constitute the holder of such Claim and shall be bound by notices given and steps taken in respect of such Claim in accordance with the provisions of this Order.

24. If a Claimant, or any subsequent holder of a Claim, who has been acknowledged by the Monitor as the holder of such, transfers or assigns the whole of such Claim to more than one Person or part of such Claim to another Person, such transfers or assignments shall not create separate Claims and such Claims shall continue to constitute and be dealt with as a single Claim notwithstanding such transfers or assignments. The Monitor shall not, in each case, be required to recognize or acknowledge any such transfers or assignments and shall be entitled to give notices to and otherwise deal with such Claim only as a whole and then only to and with the Person last holding such Claim provided such Claimant may, by notice in writing delivered to the Monitor, direct that subsequent dealings in respect of such Claim, but only as a whole, shall be dealt with by a specified Person and in such event such Person shall be bound by any notices given or steps taken in respect of such Claim with such Claimant in accordance with the provisions of this Order.

SERVICE AND NOTICE

25. The delivery of the Claims Package to each of the Known Claimants (or to the counsel of record for any such Known Claimants), the publication of the Notice to Unknown Claimants, in accordance with this Order, and the posting of this Order and the Claims Package on the Monitor's Website shall constitute good and sufficient service and delivery of notice of this Order and the Claims Bar Date on all Persons and no other notice or service need to be given or made.
26. The Monitor and the Applicant may, unless otherwise specified by this Order, serve and deliver any letters, notices or other documents contemplated by this Order and the Claims Procedure to Claimants, and any other interested Persons, by forwarding true copies thereof by prepaid ordinary mail, courier, personal delivery or electronic or digital transmission to such Persons (with copies to their counsel if applicable) at the address as last shown on the records of the Applicant or set out in such Person's Proof of Claim. Any such service or notice by courier, personal delivery or electronic or digital transmission shall be deemed to have been received: (i) if sent by ordinary mail, on the third Business Day after mailing within Alberta, the fifth Business Day after mailing within Canada (other than within Alberta), and the tenth Business Day after mailing internationally; (ii) if sent by courier or

personal delivery, on the next Business Day following dispatch; and (iii) if delivered by electronic or digital transmission by 5:00 p.m. on a Business Day, on such Business Day, and if delivered after 5:00 p.m. or other than on a Business Day, on the following Business Day.

27. Any notice or other communication (including Proofs of Claim) to be given under this Order by any Person to the Monitor shall be in writing in substantially the form, if any, provided for in this Order and will be sufficiently given only if delivered by prepaid registered mail, courier, personal delivery or electronic or digital transmission addressed to the following address and any such notice or other communication by a Person shall be deemed received only upon actual receipt thereof during normal business hours on a Business Day, or if delivered outside of a normal business hours, the next Business Day:

KSV Advisory Inc.
1165, 324 – 8th Avenue SW
Calgary, Alberta, Canada T2P 2Z2
Attention: Andrew Basi
Email: abasi@ksvadvisory.com

28. If during any period during which notices or other communications are being given pursuant to this Order a postal strike or postal work stoppage of general application should occur, such notices or other communications sent by ordinary mail and then not received shall not, absent further order of the Court, be effective and notices and other communications given hereunder during the course of any such postal strike or work stoppage of general application shall only be effective if given by courier, personal delivery or electronic or digital transmission in accordance with this Order.
29. In the event that this Order is later amended by further order of the Court, the Monitor shall post such further order on the Website and such posting shall constitute adequate notice of such amended claims procedure.

SET-OFF

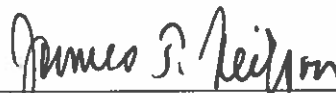
30. The Applicant may set-off (whether by way of legal, equitable or contractual set-off) against payments or other distributions to be made to any Claimant, any claims of any nature whatsoever that the Applicant may have against such Claimant, however, neither the failure to do so nor the allowance of any claim hereunder shall constitute a waiver or release by the Applicant of any such claim that the Applicant may have against such Claimant.

MISCELLANEOUS

31. Notwithstanding any other provision of this Order, the sending of Notices to Claimant and the solicitation of Proofs of Claim, and the filing by a Person of any Proof of Claim, shall not, for that reason only, grant any Person any standing in the CCAA Proceedings or rights under any Plan.
32. Nothing in this Order shall constitute or be deemed to constitute an allocation or assignment of Claims or Unaffected Claims by the Applicant into particular affected or unaffected classes for the purpose of a Plan and, for greater certainty, the treatment of Claims, or any other claims are to be subject to a Plan and the class or classes of creditors shall be subject to the terms of any proposed Plan or further Order of the Court.
33. This Court hereby requests the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or the United States, or in any other foreign jurisdiction, to give effect to this Order and to assist the Applicant, or any of them, the Monitor and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Applicant and to the Monitor, as an officer of the Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Applicant in any foreign proceeding, or to assist the Applicant and the Monitor and their respective agents in carrying out the terms of this Order.
34. This Order shall have full force and effect in all provinces and territories of Canada, outside

Canada and against all Persons against whom it may be enforceable.

35. The Applicant or the Monitor may from time to time apply to this Court to amend, vary, supplement or replace this Order or for advice and direction concerning the discharge of their respective powers and duties under this Order or the interpretation or application of this Order.



Justice of the Court of King's Bench of Alberta

SCHEDULE "A"

**IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C.
1985, c. C-36, as amended ("CCAA")**

**AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF
ALPHABOW ENERGY LTD. ("AlphaBow" or the "Applicant")**

NOTICE LETTER TO CLAIMANTS REGARDING CLAIMS PROCESS

RE: Notice of Claims Process & Claims Bar Date

This notice is published pursuant to the Order of the Honourable Justice C. M. Jones of the Court of King's Bench of Alberta, dated September 20, 2024 (the "**Claims Process Order**"), in the Applicant's proceedings under the *Companies' Creditors Arrangement Act*, RSC 1985, c C- 36, as amended. Pursuant to the Amended and Restated Initial Order dated April 26, 2024, KSV Restructuring Inc. was appointed as monitor of the Applicant (in such capacity, the "**Monitor**"), and pursuant to the Claims Process Order will, with the assistance of the Applicant, conduct a Claims Process with respect to Claims against the Applicant.

All capitalized terms used herein that are not otherwise defined have the meaning ascribed to them in the Claims Process Order.

The Claims Process Order, the Claims Package, a Proof of Claim form, and related materials can be accessed on the Monitor's Website at: <https://www.ksvadvisory.com/experience/case/alphabow>. Proof of Claim forms can also be obtained by contacting the Monitor at the address below and providing particulars as to your name, address, facsimile number and email address.

I. SUBMISSION OF PROOF OF CLAIM

Any Person who believes they have a Claim against the Applicant shall submit their Claim in a Proof of Claim form in accordance with the Claims Process Order.

All Claimants MUST submit their Proof of Claim to the Applicant and the Monitor no later than 5:00 p.m. MST on October 23, 2024 (the "Claims Bar Date").

Proofs of Claim MUST be submitted by prepaid registered mail, courier, personal delivery, or electronic or digital transmission addressed to the following address:

To the Applicant:

BENNETT JONES LLP
4500, 855 2 Street SW
Calgary, AB T2P 4K7

Attention: Keely Cameron (cameronk@bennettjones.com)
Sarah Aaron (aarons@bennettjones.com)

To the Monitor:

KSV RESTRUCTURING INC.
1165, 324 – 8th Avenue SW
Calgary, AB T2P 2Z2
Attention: Andrew Basi (abasi@ksvadvisory.com)
Ross Graham (rgraham@ksvadvisory.com)

CLAIMS WHICH ARE NOT RECEIVED BY THE MONITOR BY THE CLAIMS BAR DATE WILL BE FOREVER BARRED FROM MAKING OR ENFORCING ANY CLAIM AGAINST THE APPLICANT.

Additional information about these proceedings may be found on the Monitor's Website or may be obtained by contacting the Monitor directly at the address above.

Dated at the City of Calgary, in the Province of Alberta, this [date] of [month], [year].

KSV Restructuring Inc.,
in its capacity as Monitor of the Applicant,
and not its personal or corporate capacity.

SCHEDULE "B"

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, as amended ("CCAA")

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF ALPHABOW ENERGY LTD. ("AlphaBow")

PROOF OF CLAIM

Please carefully read the Order granted by the Court of King's Bench of Alberta (Commercial List) dated September 20, 2024 (the "Claims Process Order") and the enclosed Instruction Letter for completing this Proof of Claim. All capitalized terms used and not defined herein have the meaning ascribed to them in the Claims Procedure Order.

I. PARTICULARS OF CLAIMANT

1. Full Legal Name of Claimant:

_____ (the "Claimant")
(Full legal name is the name of the Claimant as of April 26, 2024 (the "Filing Date"), notwithstanding whether an assignment of a Claim, or a portion thereof, has occurred following such date)

2. Attention (Contact Person): _____

3. Email Address: _____

4. Telephone Number: _____

5. Fax Number: _____

6. Full Mailing Address of the Claimant:

7. Have you acquired this Claim by assignment?

Yes: No:

(If yes, attach documents evidencing assignment)

If yes, Full Legal Name of Original Claimant(s): _____

II. PROOF OF CLAIM

1. I _____
(Name of Claimant or authorized representative of the Claimant)

_____ do hereby certify:
(City and Province)

(a) I am (select **one**):

- the Claimant; **or**
- _____ of
(State Position or Title, if applicable)

(Name of Claimant or authorized representative of the Claimant)

(b) I have knowledge of all the circumstances connected with the Claim referred to below;

(c) I confirm that complete documentation in support of the Claim referred to below is attached;

(d) I confirm that my claim in in respect of (select all applicable) categories of claims:

- surface lease;
- municipal taxes;
- mineral leases;
- working interest participant claims (including claims under an operating agreement);
- other

(e) the Applicant is indebted to the Claimant as follows:¹

¹ All Claims denominated in foreign currency shall be converted to Canadian dollars at the Bank of Canada daily average exchange rate in effect on the Filing Date of April 26, 2024.

III. PRE-FILING PROOF OF CLAIM

Pre-Filing Claim Amount	Nature of Claim	Description of the land, license or agreement to which the claim relates	Value of Security Held (if any)
CAD\$			

IV. POST-FILING PROOF OF CLAIM

Restructuring Claim Amount	Nature of Claim	Description of the land, license or agreement to which the claim relates	Value of Security Held (if any)
CAD\$			

V. PARTICULARS OF CLAIM

The particulars of the undersigned's total Claim are attached.

(Please provide full particulars of the Claim and supporting documentation, including amount, description of transaction(s) or agreement(s) or legal breach(es) giving rise to the Claim, name of any guarantor(s) which has guaranteed the Claim, particulars and copies of any security and amount of Claim allocated thereto, date and number of all invoices, particulars of all credits, discounts, etc. claimed.)

VI. FILING OF CLAIM

For all Claims, this Proof of Claim **MUST** be received by the Monitor by **5:00pm (MT) on October 23, 2024** (the " Claims Bar Date").

This Proof of Claim shall be delivered in writing and **will be sufficiently given only if delivered by email**, or, if you are unable to deliver by email, on consent of the Monitor, by mail, courier, or personal delivery, addressed to:

To the Applicant:

BENNETT JONES LLP
4500, 855 2 Street SW
Calgary, AB T2P 4K7

Attention: Keely Cameron (cameronk@bennettjones.com)
Sarah Aaron (aarons@bennettjones.com)

To the Monitor:

KSV RESTRUCTURING INC.

1165, 324 – 8th Avenue SW

Calgary, AB T2P 2Z2

Attention: Andrew Basi (abasi@ksvadvisory.com)
Ross Graham (rgraham@ksvadvisory.com)

Any such notice or communication delivered by a Claimant shall be deemed to be received upon actual receipt thereof before 5:00pm (MT) on a Business Day or if delivered outside of normal business hours, the next Business Day.

PROOFS OF CLAIM MUST BE RECEIVED BY THE MONITOR BY THE CLAIMS BAR DATE OR YOUR CLAIM WILL BE FOREVER BARRED AND EXTINGUISHED.

DATED at _____ this _____ day of _____, 2024.

Signature of Claimant

SCHEDULE “C”

**IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C.
1985, c. C-36, as amended (“CCAA”)**

**AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF
ALPHABOW ENERGY LTD. (“AlphaBow”)**

INSTRUCTION LETTER

I. CLAIMS PROCEDURE

By Order of the Court of King’s Bench of Alberta (Commercial List) dated September 20, 2024 (the “**Claims Process Order**”), KSV Restructuring Inc., in its capacity as the Court-appointed monitor (in such capacity, the “**Monitor**”) of the Applicant, has been authorized, with the assistance of the Applicant, to conduct a claims procedure (the “**Claims Process**”) with respect to Claims against the Applicant. The Claims Process Order governs the filing and determination of all Claims against the Applicant.

Unless otherwise defined, all capitalized terms used herein shall have the meanings ascribed to them in the Claims Procedure Order.

The Claims Process Order, the Claims Package, a Proof of Claim form and related materials may be accessed from the Monitor’s Website at <https://www.ksvadvisory.com/experience/case/alphabow>.

This letter provides instructions for responding to or completing the Proof of Claim. Reference should be made to the Claims Process Order for a complete description of the Claims Procedure.

The Claims Procedure is intended for any Person with any Claims of any kind or nature whatsoever against the Applicant, whether liquidated, unliquidated, contingent or otherwise. Please review the Claims Process Order for the complete definitions of “**Claims**”, “**Claims Bar Date**” and “**Claimant**”.

All enquiries with respect to the Claims Process should be addressed to the Monitor at abasi@ksvadvisory.com or via the telephone (Phone: 1-587-287-2670), provided, however, that formal notices to the Monitor must be delivered as set out below.

II. CLAIMANTS SUBMITTING A PROOF OF CLAIM

If you believe that you have a Claim that you wish to assert against the Applicant, you **MUST** file a Proof of Claim with the Monitor.

All Proofs of Claim must be received by the Monitor **before 5:00 p.m. (MT) on October 23, 2024** (the "**Claims Bar Date**").

Any notice or communication required to be provided or delivered, including, for greater certainty, any Proof of Claim, shall be in writing in substantially the form, if any, provided for in the Claims Procedure Order and *will be sufficiently given only if delivered by email*, or, if a Claimant is unable to do so, and with the consent of the Monitor, by mail, courier, or personal delivery, addressed to:

To the Applicant:

BENNETT JONES LLP
4500, 855 2 Street SW
Calgary, AB T2P 4K7
Attention: Keely Cameron (cameronk@bennettjones.com)
Sarah Aaron (aarons@bennettjones.com)

To the Monitor:

KSV RESTRUCTURING INC.
1165, 324 – 8th Avenue SW
Calgary, AB T2P 2Z2
Attention: Andrew Basi (abasi@ksvadvisory.com)
Ross Graham (rgraham@ksvadvisory.com)

Any such notice or communication delivered by a Claimant shall be deemed to be received upon actual receipt thereof before 5:00 p.m. (MT) on a Business Day or if delivered outside of normal business hours, the next Business Day.

PROOFS OF CLAIM MUST BE RECEIVED BY THE MONITOR BY THE APPLICABLE CLAIMS BAR DATES OR THE CLAIM WILL BE FOREVER BARRED AND EXTINGUISHED.

All Claims denominated in foreign currency shall be converted to Canadian dollars at the Bank of Canada daily average exchange rate in effect on the Filing Date of April 26, 2024.

Additional Proof of Claim forms can be obtained by contacting the Monitor at the telephone number. In addition, Proofs of Claim and related materials may be accessed from the Monitor's Website at <https://www.ksvadvisory.com/experience/case/alphabow>.

IV. MONITOR CONTACT INFORMATION

All enquiries with respect to the Claims Procedure should be addressed to the Monitor as set out above.

DATED at Calgary, Alberta this _____ day of September, 2024.

KSV Restructuring Inc.,
solely in its capacity as Monitor of
the Applicant and not in its
personal capacity.

[Priority Claim/ Cure Cost Claim/ Restructuring Claim]		[Priority Claim/ Cure Cost Claim/ Restructuring Claim]	
--	--	--	--

IF YOU INTEND TO DISPUTE THIS NOTICE OF REVISION OR DISALLOWANCE, you shall, within fourteen (14) calendar days of the date of this Notice of Revision or Disallowance, deliver a Notice of Dispute in the form attached hereto in writing to the Applicant and the Monitor which will be sufficiently given only if delivered by email (in PDF format), or, if you are unable to deliver by email, with the Monitor's consent, by mail, courier or personal delivery addressed to:

To the Applicant:

BENNETT JONES LLP
 4500, 855 2 Street SW
 Calgary, AB T2P 4K7
 Attention: Keely Cameron (cameronk@bennettjones.com)
 Sarah Aaron (aarons@bennettjones.com)

To the Monitor:

KSV RESTRUCTURING INC.
 1165, 324 – 8th Avenue SW
 Calgary, AB T2P 2Z2
 Attention: Andrew Basi (abasi@ksvadvisory.com)
 Ross Graham (rgraham@ksvadvisory.com)

Any such notice or communication delivered by a Claimant shall be deemed to be received upon actual receipt thereof before 5:00 p.m. (MT) on a Business Day or if delivered outside of normal business hours, the next Business Day.

IF YOU FAIL TO TAKE ACTION WITHIN THE PRESCRIBED TIME PERIOD PURSUANT TO THE CLAIMS PROCEDURE ORDER, THIS NOTICE OF REVISION OR DISALLOWANCE WILL BE BINDING UPON YOU.

IF YOU AGREE WITH THIS NOTICE OF REVISION OR DISALLOWANCE, there is no need to file anything further with the Monitor.

DATED this _____ day of _____, 2024.

KSV Restructuring Inc.
solely in its capacity as Monitor of the
Applicant and not in its personal capacity.

SCHEDULE "E"

**IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C.
1985, c. C-36, as amended ("CCAA")**

**AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF
ALPHABOW ENERGY LTD. ("AlphaBow")**

NOTICE OF DISPUTE OF REVISION OR DISALLOWANCE

Reference #:

Pursuant to the Order of the Court of King's Bench of Alberta (Commercial List) dated September 20, 2024 (the "**Claims Process Order**"), I/we hereby give you notice of our intention to dispute the Notice of Revision or Disallowance dated _____ issued by KSV Restructuring Inc. in its capacity as Monitor of the Applicant in respect of my/our Claim.

All capitalized terms used and not defined in this Notice of Dispute of Revision or Disallowance shall have the meaning ascribed to them in the Claims Process Order.

I. PARTICULARS OF CLAIMANT

1. Full Legal Name of Claimant:

_____ (the "**Claimant**")
(Full legal name should be the name of the Claimant of the Applicant, notwithstanding whether an assignment of a Claim, or a portion thereof, has occurred following that date.)

2. Attention (Contact Person): _____

3. Email Address: _____

4. Telephone Number: _____

5. Fax Number: _____

6. Full Mailing Address of the Claimant:

7. Have you acquired this Claim by assignment?

Yes: No:

(If yes and not already provided, attach documents evidencing assignment)

If yes, Full Legal Name of Original Claimant(s): _____

II. REASONS FOR DISPUTE

Include the amount you are disputing any dispute against the revision of your status (unsecured, secured, or priority), if applicable. Please attach copies of all supporting documentation. You may also attach a separate schedule if more space is required.

DATED at _____ this _____ day of _____, 2024.

Signature of Claimant or its Authorized
Signatory

This Notice of Dispute must be delivered in writing to the Applicant and the Monitor and will be sufficiently given only if delivered by email (in PDF format), or, if you are unable to deliver by email, with the Monitor’s consent, by mail, courier or personal delivery addressed to:

To the Applicant:

BENNETT JONES LLP
4500, 855 2 Street SW
Calgary, AB T2P 4K7
Attention: Keely Cameron (cameronk@bennettjones.com)
Sarah Aaron (aarons@bennettjones.com)

To the Monitor:

KSV RESTRUCTURING INC.

1165, 324 – 8th Avenue SW

Calgary, AB T2P 2Z2

Attention: Andrew Basi (abasi@ksvadvisory.com)

Ross Graham (rgraham@ksvadvisory.com)

Any such notice or communication delivered by a Claimant shall be deemed to be received upon actual receipt thereof before 5:00 p.m. (MT) on a Business Day or if delivered outside of normal business hours, the next Business Day.

If a completed Notice of Dispute is not received by the Monitor by the dates set out in the Claims Procedure Order and described herein, YOU WILL BE FOREVER BARRED FROM DISPUTING THE CLASSIFICATION, AMOUNT OR NATURE OF YOUR CLAIM.

TAB 8

AC

801324

Clerk's Stamp:



COURT FILE NUMBER 2101-05019

COURT COURT OF QUEEN'S BENCH OF ALBERTA

JUDICIAL CENTRE CALGARY

APPLICANT: IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, as amended

AND IN THE MATTER OF THE COMPROMISE OR ARRANGEMENT OF COALSPUR MINES (OPERATIONS) LTD.

DOCUMENT **ORDER (Claims Process)**

CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT: **Osler, Hoskin & Harcourt LLP**
Barristers & Solicitors
Brookfield Place, Suite 2700
225 6 Ave SW
Calgary, AB T2P 1N2

Solicitors: Randal Van de Mosselaer / Emily Paplawski
Telephone: (403) 260-7000
Facsimile: (403) 260-7024
Email RVandemosselaer@osler.com / EPaplawski@osler.com
File Number: 1217428

DATE ON WHICH ORDER WAS PRONOUNCED: August 9, 2021

NAME OF JUDGE WHO MADE THIS ORDER: The Honourable Justice K. D. Yamauchi

LOCATION OF HEARING: Calgary, Alberta

UPON the application of **COALSPUR MINES (OPERATIONS) LTD.** (the "**Applicant**"), filed August 3, 2021; **AND UPON** reviewing the Affidavit of James Murphy, sworn August 2, 2021; **AND UPON** reading the Fifth Report of FTI Consulting Canada Inc. in its capacity as Monitor of the Applicant (the "**Monitor**"); **AND UPON** hearing from counsel for the

Applicant, the Monitor, and such other parties present; **AND UPON** reviewing the Amended and Restated Initial Order of the Honourable Madam Justice Shelley, granted May 6, 2021 (the “**Amended and Restated Initial Order**”); **IT IS HEREBY ORDERED AND DECLARED THAT:**

CAPITALIZED TERMS

1. Capitalized terms not otherwise defined herein shall have the meaning ascribed to them in the Claims Process attached as Schedule “A” hereto (the “**Claims Process**”).

APPROVAL OF CLAIMS PROCESS

2. The Claims Process is hereby approved, and the Monitor, in addition to its prescribed rights and obligations under the CCAA and the Amended and Restated Initial Order, with the assistance of the Applicant, is authorized and directed to implement the Claims Process and to take such other actions and fulfill such other roles as are contemplated by the Claims Process and this Claims Process Order.

3. The following forms, together with any necessary non-substantive amendments are hereby approved: Notice to Creditors (Schedule “B”), Proof of Claim (Schedule “C”), Notice of Revision or Disallowance (Schedule “D”), and Notice of Dispute (Schedule “E”).

CLAIMS BAR DATES

4. The Claims Bar Date of 5:00 pm on September 23, 2021 is hereby approved.

5. The Subsequent Claims Bar Date of the later of: (a) the Claims Bar Date; and (b) 5:00 pm (Mountain Time) on the day which is 15 days after the date on which the agreement in question was disclaimed or resiliated, is hereby approved.

6. Any Creditor who fails to deliver a Proof of Claim in respect of a Pre-Filing Claim or a Subsequent Claim, as the case may be, to the Monitor and the Applicant in accordance with this Claims Process Order and the Claims Process on or before the Claims Bar Date or the Subsequent Claims Bar Date, as applicable, shall:

- (a) be forever barred, estopped and enjoined from asserting or enforcing that Claim (or filing a Proof of Claim with respect to such Claim) against the Applicant, or its

current or former Directors or Officers, or any of them, and such Claim shall be forever barred and extinguished;

- (b) will not be permitted to vote at any Creditors' meeting on account of such Claim;
- (c) will not be entitled to receive further notice with respect to the Claims Process or these proceedings with respect to such Claim; and
- (d) will not be permitted to participate in any distribution under any Plan or otherwise on account of such Claim.

7. The publication of the Notice to Creditors, the posting of the Claims Package and this Claims Process Order on the Monitor's Website (<http://cfcanada.fticonsulting.com/coalspur>) and on the Caselines Filesite established in these proceedings, and the delivery to the Known Creditors of the Claims Package in accordance with the Claims Process and the requirements of this Claims Process Order, shall constitute good and sufficient service and delivery of (i) notice of this Claims Process Order, and (ii) the Claims Bar Date or Subsequent Claims Bar Date, as applicable, on all Persons who may be entitled to receive notice and who may wish to assert a Claim, and no other notice or service need be given or made and no other document or material need be sent to or served upon any Person in respect of this Claims Process Order.

FILING OF PROOFS OF CLAIM

8. A Proof of Claim shall be deemed filed in a timely manner only if delivered by registered mail, personal delivery, courier, email (in PDF format) or facsimile transmission so as to actually be received by the Monitor and the Applicant on or before the Claims Bar Date or the Subsequent Claims Bar Date, as applicable.

NOTICE OF TRANSFEREES

9. If any Creditor transfers or assigns the whole of its Claim to another Person, neither the Applicant nor the Monitor shall be required to give notice to or otherwise deal with the transferee or assignee of the Claim unless and until actual notice of transfer or assignment, together with satisfactory evidence of such transfer or assignment, has been delivered to the Applicant and the Monitor. Thereafter, such transferee or assignee shall, for all purposes hereof, constitute the holder

of such Claim and shall be bound by notices given and steps taken in respect of such Claim in accordance with the provisions of this Claims Process Order.

NOTICES AND COMMUNICATION

10. All references as to time herein shall mean local time in Calgary, Alberta, Canada, and any reference to an event occurring on a Business Day shall mean prior to 5:00 p.m. on such Business Day unless otherwise indicated herein, and any reference to an event occurring on a day that is not a Business Day shall mean the next following day that is a Business Day.

11. Except as otherwise provided herein, the Applicant and the Monitor may deliver any notice or other communication to be given under this Claims Process Order to Creditors or other interested Persons by forwarding true copies thereof by ordinary mail, courier, personal delivery, facsimile or email to such Creditors or Persons at the address last shown on the books and records of the Applicant. Any such service and delivery shall be deemed to have been received: (i) if sent by ordinary mail, on the third Business Day after mailing within Alberta, the fifth Business Day after mailing within Canada (other than within Alberta), and the tenth Business Day after mailing internationally; (ii) if sent by courier or personal delivery, on the next Business Day following dispatch; and (iii) if delivered by facsimile transmission or email by 5:00 p.m. on a Business Day, on such Business Day, and if delivered after 5:00 p.m. or other than on a Business Day, on the following Business Day.

12. Any notice or other communication to be given under this Claims Process Order by a Creditor to the Monitor or the Applicant shall be in writing in substantially the form, if any, provided for in this Claims Process Order and will be sufficiently given only if delivered by registered mail, courier, email (in PDF), personal delivery or facsimile transmission addressed to both the Applicant and Monitor as follows:

To the Monitor:

FTI Consulting Canada Inc.

In its capacity as the court appointed Monitor of Coalspur Mines (Operations) Ltd.

Attention: Hailey Liu

Suite 1610, 520 5th Avenue S.W.

Calgary, AB T2P 3R7

Email: Hailey.Liu@fticonsulting.com

Phone: 403.454.6040

Facsimile: 403.232.6116

To the Applicant:

Osler, Hoskin & Harcourt LLP

Attention: Elena Pratt

Brookfield Place, Suite 2700

225 6 Ave SW

Calgary, AB T2P 1N2

Email: epratt@osler.com

Phone: 403.260.7000

Facsimile: 403.260.7024

GENERAL

13. The Monitor, in consultation with the Applicant, is hereby authorized to use reasonable discretion as to the adequacy of compliance with respect to the manner in which any forms submitted or delivered hereunder are completed and executed and the time in which they are submitted and may, if satisfied that a Claim has been adequately proven, and in consultation with the Applicant, waive strict compliance with the requirements of the Claims Process and this Claims Process Order as to the completion, execution, and time of delivery of such forms.

14. In carrying out the terms of this Order, the Monitor: (i) shall have all of the protections given to it by the CCAA, the Amended and Restated Initial Order, any other orders of the Court in the CCAA proceedings, and this Order, or as an officer of the Court, including the stay of proceedings in its favour, (ii) shall incur no liability or obligation as a result of the carrying out of the provisions of this Order, other than in respect of its gross negligence or wilful misconduct; (iii) shall be entitled to rely on the books and records of the Applicant and any information provided by the Applicant, all without independent investigation; (iv) shall not be liable for any claims or damages resulting from any errors or omissions in such books, records or information, and (v) may seek such assistance as may be reasonably required to carry out its duties and obligations pursuant to this Order from the Applicant, including making such inquiries and obtaining such records and information as it deems appropriate in connection with the Claims Process.

15. The Applicant and its current and former shareholders, Officers, Directors, employees, agents and representatives shall fully cooperate with the Monitor in the exercise of its powers and discharge of its duties and obligations under this Order.

16. Notwithstanding the terms of this Claims Process Order, the Applicant or the Monitor may apply to this Court from time to time for such further order or orders as either one of them considers necessary or desirable to amend, supplement or replace the Claims Process or this Claims Process Order.



Justice of the Court of Queen's Bench of Alberta

SCHEDULE “A”

CLAIMS PROCESS

DEFINITIONS

1. For purposes of this Claims Process, the following terms shall have the following meanings:
 - (a) **“Applicant”** means Coalspur Mines (Operations) Ltd.
 - (b) **“Amended and Restated Initial Order”** means the Order of the Honourable Madam Justice Shelley granted on May 6, 2021 in these CCAA Proceedings.
 - (c) **“Business Day”** means a day, other than a Saturday or a Sunday on which banks are generally open for business in Calgary, Alberta.
 - (d) **“Caselines Filesite”** means the online filesite established by the Monitor for managing the pleadings and other relevant documents in these CCAA Proceedings and hosted on the canada.caselines.com website, as approved by the Order of the Honourable Madam Justice Romaine granted on June 16, 2021 in these CCAA Proceedings.
 - (e) **“CCAA”** means the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36, as amended.
 - (f) **“CCAA Proceedings”** means the proceedings commenced by the Applicant in Court of Queen's Bench of Alberta Action No. 2101-05019.
 - (g) **“Claim”** means (i) any indebtedness, liability or obligation of any kind that would be a claim provable within the meaning of section 2 of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3; and/or (ii) all Claims against current or former Directors or Officers of the Applicant, but excluding Excluded Claims. For greater certainty, a “Claim” shall include any right or claim of any Person arising prior to the Filing Date that may be asserted or made in whole or in part against the Applicant or its current or former Directors or Officers, whether or not asserted or made, in connection with any indebtedness, liability or obligation of any kind whatsoever, and any interest accrued thereon or costs payable in respect thereof, including without limitation, by reason of the commission of a tort (intentional or unintentional), by reason of any breach of contract or other agreement (oral or written), by reason of any breach of duty (including, without limitation, any legal, statutory, equitable or fiduciary duty) or by reason of any right of ownership of or title to property or assets or right to a trust or deemed trust (statutory, express, implied, resulting, constructive or otherwise), and whether or not any indebtedness, liability or obligation is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, unsecured, present, future, known or unknown, by guarantee, surety or otherwise and whether or not any right or claim is executory or anticipatory in nature, including without limitation, any right or ability of any Person to advance a claim

for contribution or indemnity or otherwise with respect to any matter, action, cause or chose in action, whether existing at present or commenced in the future.

- (h) **“Claims Bar Date”** means 5:00 p.m. on September 23, 2021.
- (i) **“Claims Package”** means the document package to be posted on the Monitor’s Website which shall include a copy of the Claims Process Order, the Notice to Creditors and a Proof of Claim and related instruction letter.
- (j) **“Claims Process”** means the procedures outlined herein in connection with the assertion of Claims against the Applicant and/or its current or former Directors or Officers.
- (k) **“Claims Process Order”** means the Order of the Honourable Mr. Justice K. D. Yamauchi granted on August 9, 2021 in these CCAA Proceedings approving the Claims Process.
- (l) **“Court”** means the Court of Queen's Bench of Alberta.
- (m) **“Creditor”** means any Person asserting a Claim against the Applicant or its current or former Directors or Officers.
- (n) **“Director”** means anyone who is or was or may be deemed to be or have been, whether by statute, operation of law or otherwise, a director or *de facto* director of the Applicant, in such capacity.
- (o) **“Dispute Package”** means, with respect to any Claim, a copy of the related Proof of Claim, Notice of Revision or Disallowance and Notice of Dispute.
- (p) **“Excluded Claims”** means (i) any Claim secured by a charge now or hereinafter granted by the Court in connection with these CCAA Proceeding, (ii) any Claim of a current or former Director or Officer of the Applicant for indemnification from the Applicant in relation to a Claim asserted against such Director or Officer under this Claims Process, (iii) the Regulatory Obligations owed or owing by the Applicant to any Regulator, including with respect to any financial security held by any Regulator in support of Regulatory Obligations; and (iv) Claims enumerated in sections 5.1(2) and 19(2) of the CCAA.
- (q) **“Filing Date”** means April 26, 2021.
- (r) **“Known Creditors”** means Creditors which the books and records of the Applicant disclose were owed money by the Applicant as of the Filing Date, which obligation remains unpaid in whole or in part.
- (s) **“Monitor”** means FTI Consulting Canada Inc. in its capacity as the Court-appointed Monitor of the Applicant and not in its personal or corporate capacity.
- (t) **“Notice of Dispute”** means the notice that may be delivered by a Creditor who has received a Notice of Revision or Disallowance disputing such Notice of Revision

or Disallowance, which notice shall be substantially in the form attached to the Claims Process Order as Schedule "E".

- (u) **“Notice of Revision or Disallowance”** means the notice that may be delivered to a Creditor revising or rejecting such Creditor's Claim as set out in its Proof of Claim in whole or in part, which notice shall be substantially in the form attached to the Claims Process Order as Schedule "D".
- (v) **“Notice to Creditors”** means the notice of the Claims Process to be published in the Globe and Mail, the Calgary Herald, the Edmonton Journal and the Hinton Voice and included as part of the Claims Package in accordance with the Claims Process in substantially the form attached to the Claims Process Order as Schedule "B".
- (w) **“Officer”** means anyone who is or was or may be deemed to be or have been, whether by statute, operation of law or otherwise, an officer or *de facto* officer of the Applicant, in such capacity.
- (x) **“Person”** shall be broadly interpreted and includes an individual, firm, partnership, joint venture, fund, limited liability company, unlimited liability company, association, trust, corporation, unincorporated association or organization, syndicate, committee, the government of a country or any political subdivision thereof, or any agency, board, tribunal, commission, bureau, or any other entity, howsoever designated or constituted, and the trustees, executors, administrators or other legal representatives of an individual.
- (y) **“Pre-Filing Claim”** means any Claim other than a Subsequent Claim.
- (z) **“Proof of Claim”** means the form to be completed and filed by a Creditor setting forth its Pre-Filing Claim or Subsequent Claim, which Proof of Claim shall be substantially in the form attached to the Claims Process Order as Schedule "C".
- (aa) **“Proven Claim”** means the amount, status and validity of a Pre-Filing Claim or Subsequent Claim of a Creditor as finally determined for voting and distribution purposes in accordance with this Claims Process. A Proven Claim will be "finally determined" in accordance with this Claims Process when: (i) the Claim has been accepted by the Monitor, in consultation with the Applicant, (ii) the applicable time period for filing a Notice of Dispute in response to a Notice of Revision or Disallowance has expired and no Notice of Dispute has been filed in accordance with this Claims Process, or (iii) the Court has made a determination with respect to the amount, status and/or validity of the Claim, and no appeal or application for leave to appeal therefrom shall have been taken or served on either party, or if any appeal or application for leave to appeal shall have been taken therefrom or served on either party, any and all such appeal or application shall have been dismissed, determined or withdrawn.
- (bb) **“Regulator”** means any person or body that has powers, duties or functions relating to the enforcement or administration of an Act of Parliament or of the legislature of

a province and includes a person or body that is prescribed to be a regulatory body for the purpose of the CCAA.

- (cc) **“Regulatory Obligation”** means any obligation owed or owing by the Applicant to any Regulator which includes, but is not limited to, any suspension, abandonment and/or reclamation obligations owed or owing by the Applicant to the Regulator, but excluding Royalties.
- (dd) **“Royalties”** means any royalties on coal production payable by the Applicant under the *Mines and Minerals Act*, RSA 2000, c M-17, the *Coal Royalty Regulation*, AR 295/1992, or other similar legislation and/or regulation.
- (ee) **“Subsequent Claim”** means any Claim arising after the Filing Date as a result of the disclaimer or resiliation after the Filing Date of any contract, lease, employment agreement or other arrangement or agreement of any nature whatsoever, whether oral or written, and any amending agreement related thereto.
- (ff) **“Subsequent Claims Bar Date”** means the later of: (i) the Claims Bar Date; and (ii) 5:00 p.m. on the day which is 15 days after the date on which the agreement in question was disclaimed or resiliated.
- (gg) **“Website”** means the website maintained by the Monitor located at <http://cfcanada.fticonsulting.com/coalspur>.

NOTICE OF CLAIMS PROCESS

2. The Monitor shall cause a letter to be sent to each Known Creditor by regular prepaid mail, fax, courier or email on or before August 13, 2021 enclosing the Notice to Creditors and a Proof of Claim with related instruction letter and advising: (i) of the Claims Process Order and the Claims Process set out therein, and (ii) that the Claims Package is available on the Monitor’s Website.
3. The Monitor shall cause the Notice to Creditors to be published in the Globe and Mail, the Calgary Herald, the Edmonton Journal and the Hinton Voice on or prior to August 16, 2021.
4. The Monitor shall cause the Claims Package to be posted on the Website and uploaded to the Caselines Filesite forthwith after the granting of the Claims Process Order.
5. To the extent any Creditor requests documents or information relating to the Claims Process prior to the Claims Bar Date or the Subsequent Claims Bar Date, as applicable, or if the Applicant or the Monitor become aware of any further Claims after the mailings contemplated in paragraph 2 above, the Monitor shall forthwith send such Creditor the documents required by paragraph 2, shall direct such Creditor to the Claims Package posted on the Website, or shall otherwise respond to the request for documents or information as the Monitor, in consultation with the Applicant, may consider appropriate in the circumstances.

6. Any notices of disclaimer or resiliation delivered after the date of this Order to any Person in connection with any action taken by Coalspur to restructure, disclaim, resiliate, terminate or breach any contract, lease or other agreement, whether written or oral, pursuant to the terms of the Amended and Restated Initial Order, shall be accompanied by a Claims Package.

FILING OF PROOFS OF CLAIM

7. Every Creditor asserting a Pre-Filing Claim against the Applicant or its current or former Directors or Officers in the Claims Process shall set out its aggregate Pre-Filing Claim in a written Proof of Claim (in the form attached to the Claims Process Order as Schedule “C”) and deliver that Proof of Claim to the Monitor and Applicant at the addresses contained therein so that such Proof of Claim is received by the Monitor and the Applicant by no later than the Claims Bar Date.
8. Every Creditor asserting a Subsequent Claim against the Applicant or its current or former Directors or Officers in the Claims Process shall set out its aggregate Subsequent Claim in a written Proof of Claim (in the form attached to the Claims Process Order as Schedule “C”) and deliver that Proof of Claim to the Monitor and Applicant at the addresses contained therein so that it is received by the Monitor and the Applicant by no later than the Subsequent Claims Bar Date.
9. Any Creditor who chooses to file a Proof of Claim is required to provide full particulars of the Claim and supporting documentation, including amount, description of transaction(s) or agreement(s) giving rise to the Claim, name of any guarantor(s) which have guaranteed the Claim, particulars and copies of any security and amount of Claim allocated thereto, date and number of invoices, particulars of all credits, discounts, etc, claimed. If a claim is made against any Directors and/or Officers, specify the applicable Director(s) and/or Officer(s) and the legal basis for the Claim against them.
10. Any Claim denominated in a foreign currency shall be converted to Canadian dollars at the Bank of Canada noon spot exchange rate as at the Filing Date (April 26, 2021). The Canadian Dollar/US Dollar rate of exchange on that date was C\$1.2412/US\$1.00.

DETERMINATION OF CLAIMS

11. The Applicant and the Monitor shall review each Proof of Claim received by the Claims Bar Date or Subsequent Claims Bar Date, as applicable, and the Monitor, in consultation with the Applicant, shall accept, revise or disallow each Claim.
12. Prior to accepting, revising or disallowing a Claim, the Monitor may, in consultation with the Applicant, attempt to consensually resolve any dispute regarding the classification and/or amount of any Claim with the applicable Creditor.
13. If the Monitor, in consultation with the Applicant, accepts the Claim as specified in the relevant Proof of Claim, then such Claim shall be a Proven Claim for voting and/or distribution purposes.

NOTICE OF REVISION OR DISALLOWANCE

14. If the Monitor, in consultation with the Applicant, determines to revise or disallow a Claim, the Monitor shall send a Notice of Revision or Disallowance to the Creditor, in the form attached to the Claims Process Order as Schedule “D”.

NOTICE OF DISPUTE

15. Any Creditor who wishes to dispute the classification or amount of its Claim as set forth in a Notice of Revision or Disallowance shall, by no later than 5:00 p.m. on the day that is ten (10) Business Days after the date on which the Notice of Revision or Disallowance is deemed to be received under the Claims Process Order:
 - (a) deliver a Notice of Dispute in the form attached to the Claims Process Order as Schedule “E”; and
 - (b) file and serve an application with the Court supported by an affidavit setting out the basis for the dispute, which application must be returnable within thirty (30) days, or such further or other date as the Court may direct or the Monitor, in consultation with the Applicant, may agree in writing.
16. Any Creditor who fails to deliver a Notice of Dispute and file an application with the Court by the deadlines set forth in paragraph 15 shall be deemed to accept the classification and amount of its Claim as set forth in the applicable Notice of Revision or Disallowance, and such revised Claim shall constitute a Proven Claim for all purposes.

RESOLUTION OF CLAIMS

17. Upon receipt of a Notice of Dispute, the Monitor may, in consultation with the Applicant, attempt to consensually resolve the classification and/or amount of the Claim with the applicable Creditor. If the Monitor and the Creditor consensually resolve the classification and amount of the Claim, in consultation with the Applicant, such revised Claim will constitute a Proven Claim for all purposes.
18. Where the value of a Creditor’s Claim has not been finally determined by the Court by the date of any Creditors’ meeting, the Monitor, in consultation with the Applicant, shall either:
 - (a) accept the Creditor’s determination of the value of the Claim as set out in the applicable Notice of Dispute only for the purposes of voting and conduct the vote of the Creditors on that basis, subject to final determination of the Creditor’s Claim by the Court, and in such instance, the Monitor shall record separately the value of such Creditor’s Claim and whether such Creditor voted in favour of, or against, any Plan;
 - (b) adjourn the Creditors’ meeting until a final determination of the Claim is made; or
 - (c) deal with the matter as the Court may otherwise direct or as the Monitor, the Applicant and the Creditor may otherwise agree.

Schedule “B”

NOTICE TO CREDITORS

(Claims Process)

On April 26, 2021, Coalspur Mines (Operations) Ltd. (the “**Applicant**”) received protection under the *Companies’ Creditors Arrangement Act* (the “**CCAA**”) by order of the Court of Queen’s Bench of Alberta (the “**Court**”) in Action No. 2101-05019. FTI Consulting Canada Inc. was appointed monitor (the “**Monitor**”).

On August 9, 2021, the Court granted a further order prescribing a process by which the identity and status of all persons holding Claims against the Applicant and/or its current or former Directors or Officers, and the net amounts of such Claims, will be established for purposes of the CCAA Proceedings (the “**Claims Process Order**”). A copy of the Claims Process Order may be viewed at <http://cfcanada.fticonsulting.com/coalspur>.

Any creditor having a Pre-Filing Claim against the Applicant (including its current or former Directors or Officers) arising prior to April 26, 2021, of any nature whatsoever, including an unsecured, secured, contingent or unliquidated Claim, must send a Proof of Claim in the prescribed form to the Monitor, with a copy to the Applicant, to be received by the Monitor and the Applicant by no later than 5:00 p.m. (Mountain Time) on September 23, 2021 (the “Claims Bar Date”).

Any creditor having a Subsequent Claim against the Applicant arising after April 26, 2021, as a result of a disclaimer or resiliation by the Applicant of any contract, lease, employment agreement or other arrangement or agreement, must send a Proof of Claim in the prescribed form to the Monitor, with a copy to the Applicant, to be received by the Monitor and the Applicant by the later of: (i) the Claims Bar Date; and (ii) 5:00 p.m. (Mountain Time) on the day which is 15 days after the date on which the agreement in question was disclaimed or resiliated (the “Subsequent Claims Bar Date”).

Any creditor who chooses to file a Proof of Claim is required to provide full particulars of the Claim and supporting documentation, including amount, description of transaction(s) or agreement(s) giving rise to the Claim, name of any guarantor(s) which have guaranteed the Claim, particulars and copies of any security and amount of Claim allocated thereto, date and number of invoices, particulars of all credits, discounts, etc, claimed. If a Claim is made against any Directors and/or Officers, specify the applicable Director(s) and/or Officer(s) and the legal basis for the Claim against them.

All Proofs of Claim, together with the required supporting documentation, must be sent to the Monitor and the Applicant by registered mail, courier, email (in PDF), personal delivery or facsimile transmission addressed to:

To the Monitor:

FTI Consulting Canada Inc.

In its capacity as the court appointed Monitor
of Coalspur Mines (Operations) Ltd.

Attention: Hailey Liu

Suite 1610, 520 5th Avenue S.W.

Calgary, AB T2P 3R7

Email: Hailey.Liu@fticonsulting.com

Phone: 403.454.6040

Facsimile: 403.232.6116

To the Applicant:

Osler, Hoskin & Harcourt LLP

Attention: Elena Pratt

Brookfield Place, Suite 2700

225 6 Ave SW

Calgary, AB T2P 1N2

Email: epratt@osler.com

Phone: 403.260.7000

Facsimile: 403.260.7024

Copies of the Proof of Claim form and further information regarding the Claims Process may be downloaded at <http://cfcanda.fticonsulting.com/coalspur>.

PROOFS OF CLAIM WHICH ARE NOT RECEIVED BY THE CLAIMS BAR DATE OR THE SUBSEQUENT CLAIMS BAR DATE, AS APPLICABLE, WILL BE BARRED AND EXTINGUISHED FOREVER.

If you have any questions regarding the Claims Process Order, the Claims Process, or the process or timelines for providing a Proof of Claim, please contact the Monitor at 1-833-768-1171 or Coalspur@fticonsulting.com.

Dated _____, 2021 in Calgary, Alberta.

FTI Consulting Canada Inc. in its capacity as
Monitor of Coalspur Mines (Operations) Ltd.

Per:

Schedule "C"
PROOF OF CLAIM

For all Pre-Filing Claims and/or Subsequent Claims relating to Coalspur Mines (Operations) Ltd. and/or its current or former Directors or Officers

(See Reverse for Instructions)

Regarding the claim of _____ (referred to in this form as "**the creditor**"). (name of creditor)

All notices or correspondence regarding this claim to be forwarded to the creditor at the following address:

Telephone: _____ Fax: _____

Email: _____

Have you acquired this Claim by assignment? If yes, if not already provided, attach documents evidencing assignment.

Yes: No: (if yes, attach documents evidencing assignment)

If Yes, Full Legal Name of Original Creditor(s): _____

I, _____ residing in the _____
(name of person signing claim) (city, town, etc.)

of _____ in the province of _____
(name of city, town, etc.)

Do hereby certify that:

1. I am the creditor

or

I am _____ of the creditor.
(if an officer or employee of the company, state position or title)

2. I have knowledge of all the circumstances connected with the Claim referred to in this form.

- 3. I have a Pre-Filing Claim
or
 I have a Subsequent Claim

(Claims in a foreign currency are to be converted to Canadian Dollars at the Bank of Canada noon spot exchange rate as at April 26, 2021. The Canadian Dollar/US Dollar rate of exchange on that date was C\$1.2412/US\$1.00.)

4. _____ [specify Applicant or name of applicable Director and/or Officer] was, (as at April 26, 2021 in respect of a Pre-Filing Claim **OR** after April 26, 2021 in respect of a Subsequent Claim), and still is indebted to the creditor in the sum of \$ _____ CAD as shown by the statement of account attached hereto and marked **Schedule "A"**. Pre-Filing Claims should not include the value of goods and/or services supplied after April 26, 2021. If a creditor's claim is to be reduced by deducting any counter claims and/or claims to set-off to which the Applicant is entitled and/or amounts associated with the return of equipment and/or assets by the Applicant, please specify.

5. The statement of account must specify the vouchers or other evidence in support of the claim including the date and location of the delivery of all services and materials. Any claim for interest must be supported by contractual documentation evidencing the entitlement to interest.

- 6. A. **Unsecured claim.** \$ _____. In respect to the said debt, the creditor does not and has not held any assets as security.
- B. **Secured claim.** \$ _____. In respect of the said debt, the creditor holds assets valued at \$ _____ as security:

*Provide full particulars of the Claim, including amount, description of transaction(s) or agreement(s) giving rise to the Claim, name of any guarantor(s) which have guaranteed the Claim, particulars and copies of any security and amount of Claim allocated thereto, date and number of invoices, particulars of all credits, discounts, etc, claimed. If a claim is made against any Directors and/or Officers, specify the applicable Director(s) and/or Officer(s) and the legal basis for the Claim against them. Attach all supporting documents as **Schedule "B"**.*

Dated at _____, this _____ day of _____, 2021.
(Insert city)

Witness

(signature of individual completing the form)

Must be signed and witnessed

Instructions for Completing Proof of Claim Forms

In completing the attached form, your attention is directed to the notes on the form and to the following requirements. Unless otherwise defined, all capitalized terms used herein shall have the meaning given to those terms in the Claims Process.

Proof of Claim:

1. The form must be completed by an individual and not by a corporation. If you are acting for a corporation or other person, you must state the capacity in which you are acting, such as, "Credit Manager", "Treasurer", "Authorized Agent", etc., and the full legal name of the party you represent.
2. The person signing the form must have knowledge of the circumstances connected with the claim.
3. A Statement of Account containing details of the Claim, and if applicable, the amount due in respect of property claims, must be attached and marked Schedule "A".
4. The Proof of Claim must clearly specify the amount of the Claim and, if in a foreign currency, must be converted to Canadian dollars at the Bank of Canada noon spot exchange rate as at the Filing Date (April 26, 2021). The Canadian Dollar/US Dollar rate of exchange on that date was C\$1.2412/US\$1.00.
5. The Proof of Claim must provide full particulars of the Claim, including amount, description of transaction(s) or agreement(s) giving rise to the Claim, name of any guarantor(s) which have guaranteed the Claim, particulars and copies of any security and amount of Claim allocated thereto, date and number of invoices, particulars of all credits, discounts, etc, claimed. If a claim is made against any Directors and/or Officers, specify the applicable Director(s) and/or Officer(s) and the legal basis for the Claim against them.
6. Any amounts claimed as interest should be clearly noted as being for interest.
7. The form must indicate whether the Claim is a Pre-Filing Claim or a Subsequent Claim. Pre-Filing Claims should not include the value of goods and/or services arising after April 26, 2021.
8. The nature of the claim must be indicated by ticking the type of claim which applies:

Ticking (A) indicates the claim is unsecured;

Ticking (B) indicates the claim is secured, such as a mortgage, lease, or other security interest, and the value at which the creditor assesses the security must be inserted, together with the basis of valuation. Details of each item of security held should be attached as Schedule "B" and submitted with a copy of the chattel mortgage, conditional sales contract, security agreement, etc.
9. The person signing the form must insert the place and date in the space provided, and the signature must be witnessed.

The completed Proof of Claim and all supporting documentation must be sent on or before the Claims Bar Date (September 23, 2021) or the Subsequent Claims Bar Date (the later of: (i) the Claims Bar Date; and (ii) 5:00 p.m. (Mountain Time) on the day which is 15 days after the date on which the agreement in question was disclaimed or resiliated), to both the Applicant and the Monitor at:

To the Monitor:

FTI Consulting Canada Inc.

In its capacity as the court appointed Monitor of Coalspur Mines (Operations) Ltd.

Attention: Hailey Liu

Suite 1610, 520 5th Avenue S.W.

Calgary, AB T2P 3R7

Email: Hailey.Liu@fticonsulting.com

Phone: 403.454.6040

Facsimile: 403.232.6116

To the Applicant:

Osler, Hoskin & Harcourt LLP

Attention: Elena Pratt

Brookfield Place, Suite 2700

225 6 Ave SW

Calgary, AB T2P 1N2

Email: epratt@osler.com

Phone: 403.260.7000

Facsimile: 403.260.7024

Additional information regarding Coalspur Mines (Operations) Ltd. and the CCAA process, as well as copies of claims documents may be obtained at <http://cfcanada.fticonsulting.com/coalspur>.

If there are any questions in completing the Proof of Claim, please contact the Monitor at 1-833-768-1171 or Coalspur@fticonsulting.com.

Any Claim not delivered to the Monitor and the Applicant at the above noted addresses by the Claims Bar Date or the Subsequent Claims Bar Date, as applicable, will, unless otherwise ordered by the Court of Queen's Bench of Alberta, be barred and extinguished and may not thereafter be advanced against the Applicant and/or its current or former Directors and Officers.

Schedule “D”

NOTICE OF REVISION OR DISALLOWANCE

**Regarding Claims Against Coalspur Mines (Operations) Ltd.
and/or its Directors or Officers**

Claim Reference Number: _____

To: _____
(Name of Creditor)

Defined terms not defined in this Notice of Revision or Disallowance have the meaning ascribed in the Order of the Court of Queen’s Bench of Alberta, dated August 9, 2021 (the “**Claims Process Order**”). All dollar values contained herein are in Canadian dollars unless otherwise noted.

Pursuant to the Claims Process Order, FTI Consulting Canada Inc., in its capacity as Court-appointed Monitor of the Applicant, hereby gives you notice that it has reviewed your Proof of Claim in conjunction with the Applicant and has revised or disallowed your Claim. Subject to further dispute by you in accordance with the Claims Process Order, your Claim will be allowed as follows:

Amount Allowed by Monitor:

	Proof of Claim Amount	Voting	Distribution	Allowed as Secured	Allowed as Unsecured
Pre-filing Claim	\$ _____	\$ _____	\$ _____		
Subsequent Claim	\$ _____	\$ _____	\$ _____		
Director and/or Officer Claim	\$ _____	\$ _____	\$ _____		

REASON(S) FOR THE REVISION OR DISALLOWANCE:

If you intend to dispute this Notice of Revision or Disallowance, you must **within ten (10) Business Days** after the date on which this Notice of Revision or Disallowance is deemed to be received under the Claims Process Order:

- 1) deliver a Notice of Dispute in the form enclosed to the Monitor and the Applicant; and
- 2) file and serve an application with the Court supported by an affidavit setting out the basis for the dispute, which application must be returnable within thirty (30) days, or such further or other date as the Court may direct or the Monitor, in consultation with the Applicant, may agree in writing

by prepaid registered mail, personal delivery, courier, facsimile, or electronic mail to the addresses below:

To the Monitor:

FTI Consulting Canada Inc.

In its capacity as the court appointed Monitor
of Coalspur Mines (Operations) Ltd.
Attention: Hailey Liu

Suite 1610, 520 5th Avenue S.W.
Calgary, AB T2P 3R7

Email: Hailey.Liu@fticonsulting.com

Phone: 403.454.6040

Facsimile: 403.232.6116

To the Applicant:

Osler, Hoskin & Harcourt LLP

Attention: Elena Pratt

Brookfield Place, Suite 2700
225 6 Ave SW

Calgary, AB T2P 1N2

Email: epratt@osler.com

Phone: 403.260.7000

Facsimile: 403.260.7024

IF YOU FAIL TO FILE YOUR DISPUTE NOTICE WITHIN TEN (10) BUSINESS DAYS OF THE DATE YOU RECEIVED (OR ARE DEEMED TO HAVE RECEIVED) THIS NOTICE OF REVISION OR DISALLOWANCE, THE VALUE OF YOUR CLAIM WILL BE DEEMED TO BE ACCEPTED AS FINAL AND BINDING AS SET OUT IN THIS NOTICE OF REVISION OR DISALLOWANCE.

DATED this _____ day of _____, 2021.

Schedule "E"

DISPUTE NOTICE

**Regarding Claims Against Coalspur Mines (Operations) Ltd.
and/or its Directors or Officers**

Claim Reference Number _____

Particulars of Creditor:

Full Legal Name of Creditor (include trade name, if different):

(the "Creditor").

Full Mailing Address of the Creditor:

Other Contact Information of the Creditor:

Telephone Number: _____

Email Address: _____

Facsimile Number: _____

Attention (Contact Person): _____

Dispute of Revision or Disallowance of Claim for Voting and/or Distribution Purposes:

The Creditor hereby disagrees with the value and/or classification of its Claim as set out in the Notice of Revision or Disallowance and asserts a Claim as follows:

		<u>Amount Allowed by Monitor for:</u>		<u>Amount claimed by Creditor:</u>	
		<u>Voting</u>	<u>Distribution</u>	<u>Voting</u>	<u>Distribution</u>
Pre-Filing Claim				Pre-Filing Claim	
		\$ _____	\$ _____	\$ _____	\$ _____
Subsequent Claim				Subsequent Claim	
		\$ _____	\$ _____	\$ _____	\$ _____
Director and/or Officer Claim				Director and/or Officer Claim	
		\$ _____	\$ _____	\$ _____	\$ _____

Date of Notice of Revision or Disallowance: _____

REASONS FOR THE DISPUTE:

You must include a list of reasons as to why you are disputing your Claim(s) as set out in the Notice of Revision or Disallowance. Please continue on additional pages if required. Please note you are required to attach to this Dispute Notice all relevant supporting documentation on which you rely in support of your Claim(s).

SERVICE OF DISPUTE NOTICES

If you intend to dispute a Notice of Revision or Disallowance, you must **within ten (10) Business Days** after the date on which the Notice of Revision or Disallowance is deemed to be received under the Claims Process Order:

- 1) deliver this Notice of Dispute to the Monitor and the Applicant; and

- 2) file and serve an application with the Court supported by an affidavit setting out the basis for the dispute, which application must be returnable within thirty (30) days, or such further or other date as the Court may direct or the Monitor in consultation with the Applicant, may agree in writing,

by prepaid registered mail, personal delivery, courier, facsimile, or electronic mail to the addresses below:

To the Monitor:

FTI Consulting Canada Inc.
 In its capacity as the court appointed Monitor of Coalspur Mines (Operations) Ltd.
 Attention: Hailey Liu
 Suite 1610, 520 5th Avenue S.W.
 Calgary, AB T2P 3R7
 Email: Hailey.Liu@fticonsulting.com
 Phone: 403.454.6040
 Facsimile: 403.232.6116

To the Applicant:

Osler, Hoskin & Harcourt LLP
 Attention: Elena Pratt
 Brookfield Place, Suite 2700
 225 6 Ave SW
 Calgary, AB T2P 1N2
 Email: epratt@osler.com
 Phone: 403.260.7000
 Facsimile: 403.260.7024

IF YOU:

- 1. **FAIL TO DELIVER YOUR DISPUTE NOTICE; OR**
- 2. **FAIL TO SERVE THE MONITOR AND THE APPLICANT WITH AN APPLICATION AND AFFIDAVIT;**

WITHIN TEN (10) BUSINESS DAYS AFTER RECEIPT (OR DEEMED RECEIPT) OF THE NOTICE OF REVISION OR DISALLOWANCE, THE VALUE OF YOUR CLAIM FOR VOTING AND DISTRIBUTION PURPOSES WILL BE DEEMED TO BE AS SET OUT IN THE NOTICE OF REVISION OR DISALLOWANCE AND SUCH DETERMINATION WILL BE FINAL AND BINDING IN ALL RESPECTS.

DATED this _____ day of _____, 2021.

Name of Creditor: _____

 Witness

Per: _____
 Name:
 Title:
 (please print)

TAB 9

PP

COURT FILE NUMBER 2401-02664
COURT COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE CALGARY



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

AND IN THE MATTER OF THE COMPROMISE OR ARRANGEMENT OF LYNX AIR HOLDINGS CORPORATION and 1263343 ALBERTA INC. dba LYNX AIR

DOCUMENT **ORDER (D&O CLAIMS PROCESS)**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT **OSLER, HOSKIN & HARCOURT LLP**
Barristers & Solicitors
Brookfield Place, Suite 2700
225 6 Ave SW
Calgary, AB T2P 1N2

Solicitors: Randal Van de Mosselaer / Julie Treleaven
Telephone: (403) 260-7000 / 7048
Email: RVandemosselaer@osler.com / JTreleaven@osler.com
File Number: 1246361

DATE ON WHICH ORDER WAS PRONOUNCED: June 28, 2024

LOCATION WHERE ORDER WAS PRONOUNCED: Calgary, Alberta

JUSTICE WHO MADE THIS ORDER: The Honourable B. E. C. Romaine

UPON the application of Lynx Air Holdings Corporation and 1263343 Alberta Inc. dba Lynx (collectively, the "**Applicants**"); **AND UPON** reading the Affidavit of Micheal Woodward sworn June 19, 2024; **AND UPON** reading the Fifth Report of FTI Consulting Canada Inc. (the "**Monitor**"); **AND UPON** hearing from counsel for the Applicants, counsel for the Monitor, and any other interested party; **AND UPON** being satisfied that the Applicants have acted and continue to act in good faith and with due diligence and that circumstances exist that make this Order appropriate;

IT IS HEREBY ORDERED AND DECLARED THAT:

SERVICE

1. The time for service of this application is hereby abridged and deemed good and sufficient and this application is properly returnable today, and no other person other than those persons served is entitled to service of this application.

DEFINITIONS

2. Any capitalized term used and not defined herein shall have the meaning ascribed thereto in the Amended and Restated Initial Order granted in these proceedings by the Honourable Justice Whitting on March 1, 2024 (“**ARIO**”).
3. For purposes of this Order, the following terms shall have the following meanings:
 - (a) “**Accepted Claim**” means a D&O Claim of a Claimant as finally accepted by the Monitor, or determined by the Court, in accordance with this Order;
 - (b) “**Business Day**” means a day, other than a Saturday, Sunday or a statutory holiday, on which banks are generally open for business in Calgary, Alberta;
 - (c) “**Claimant**” means a Person asserting a D&O Claim against any of the Directors or Officers;
 - (d) “**Claims Bar Date**” means 5:00 p.m. (prevailing Calgary time) on August 15, 2024;
 - (e) “**Claims Procedure**” means the procedure outlined in this Order, including Schedules attached hereto;
 - (f) “**Court**” means the Court of King’s Bench of Alberta;
 - (g) “**Director**” means anyone who is or was or may be deemed to be or have been, whether by statute, operation of law or otherwise, a director or *de facto* director of either of the Applicants, in such capacity;
 - (h) “**D&O Claim**” means: (i) any right or claim of any Person that may be asserted or made in whole or in part against one or more of the Directors or Officers that relates

to a claim for which such Directors or Officers are by law liable to pay in their capacity as Directors or Officers; or (ii) any right or claim of any Person that may be asserted or made in whole or in part against one or more Directors or Officers, in that capacity, whether or not asserted or made, in connection with any indebtedness, liability or obligation of any kind whatsoever, and any interest accrued thereon or costs payable in respect thereof, including by reason of the commission of a tort (intentional or unintentional), by reason of any breach of contract or other agreement (oral or written), by reason of any breach of duty (including any legal, statutory, equitable or fiduciary duty) or by reason of any right of ownership of or title to property or assets or right to a trust or deemed trust (statutory, express, implied, resulting, constructive or otherwise), and whether or not any indebtedness, liability or obligation is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, unsecured, perfected, unperfected, present or future, known or unknown, by guarantee, surety or otherwise, and whether or not any right or claim is executory or anticipatory in nature, including any right or ability of any Person to advance a claim for contribution or indemnity from any such Directors or Officers or otherwise with respect to any matter, action, cause or chose in action, whether existing at present or commenced in the future, which indebtedness, liability or obligation, and any interest accrued thereon or costs payable in respect thereof; and in respect of (i) and (ii) above is: (A) is based in whole or in part on facts existing prior to the Claims Bar Date, or (B) relates to a time period prior to the Claims Bar Date;

- (i) **“Notice to Claimants”** means the notice for publication by the Monitor substantially in the form attached hereto as Schedule “A”;
- (j) **“Notice of Dispute”** means a notice delivered to the Monitor by a Claimant disputing a Notice of Revision or Disallowance, which notice shall be substantially in the form attached hereto as Schedule “D”;

- (k) **“Notice of Revision or Disallowance”** means a notice delivered by the Monitor informing a Claimant that the Monitor has revised or disallowed such Claimant’s D&O Claim, which notice shall be substantially in the form attached hereto as Schedule “C”;
- (l) **“Officer”** means anyone who is or was or may be deemed to be or have been, whether by statute, operation of law or otherwise, an officer or *de facto* officer of either of the Applicants, in such capacity;
- (m) **“Person”** means any individual, partnership, firm, joint venture, trust, entity, corporation, unincorporated organization, union, pension plan administrator, pension plan regulator, governmental authority, ministry or agency, regulatory body, labour board, employee, legal representative or litigation guardian, or other association, or similar entity, howsoever designated or constituted;
- (n) **“Proof of Claim”** means the proof of claim referred to herein to be filed by Claimants in connection with any D&O Claim, substantially in the form attached as Schedule “B”, which shall include all supporting documentation in respect of such D&O Claim; and
- (o) **“Monitor’s Website”** means <http://cfcanada.fticonsulting.com/lynxair/>.

4. All references as to time herein shall mean local time in Calgary, Alberta and any references to an event occurring on a Business Day shall mean prior to 5:00 p.m. on such Business Day unless otherwise indicated herein.

5. The Monitor is authorized to use reasonable discretion as to the adequacy of compliance with respect to the manner in which any forms delivered hereunder are completed and executed and the time in which they are submitted and may, where it is satisfied that a D&O Claim has been adequately filed or accepted, waive strict compliance with the requirements of this Claims Procedure as to completion and execution of such forms.

NOTICE TO CLAIMANTS

6. The Notice to Claimants is hereby approved.

7. The Monitor shall cause the Notice to Claimants to be posted on the Monitor's Website, no later than 5:00 p.m. on July 2, 2024.
8. The Monitor shall cause the Notice to Claimants to be published once in the Globe and Mail (National Edition) no later than 5:00 p.m. on July 5, 2024.
9. The Claims Procedure and forms of Proof of Claim, Notice of Revision or Disallowance and Notice of Dispute are hereby approved. Notwithstanding the foregoing, the Monitor, may from time to time, make minor non-substantive changes to the forms as may be necessary or desirable.
10. The publication of the Notice to Claimants, in accordance with this Order, and the posting of this Order on the Monitor's Website shall constitute good and sufficient service and delivery of notice of this Order and the Claims Bar Date on all Persons and no other notice or service need to be given or made.

DEADLINE FOR FILING A D&O CLAIM PROOF OF CLAIM

11. Any Person that intends to assert a D&O Claim shall deliver a Proof of Claim to the Monitor in accordance with paragraphs 21 and 22 herein, together with all relevant supporting documentation in respect of such D&O Claim, so that such Proof of Claim is received by the Monitor by no later than the Claims Bar Date.
12. Any Person who does not deliver a Proof of Claim in accordance with this Order to the Monitor by the Claims Bar Date shall be forever barred from asserting or enforcing such unasserted D&O Claim against any of the Directors and Officers and/or against the Property, and the Directors and Officers shall not have any liability whatsoever in respect of, and shall be released and discharged from, any and all such unasserted D&O Claims, and all such unasserted D&O Claims shall be forever extinguished, barred, and discharged as against the Property and the Directors and Officers without any further act or notification.

DETERMINATION OF D&O CLAIMS

13. The Monitor and any applicable Directors and Officers, shall review each Proof of Claim that is received by the Claims Bar Date and may accept, revise or disallow all or any part of the D&O Claim. At any time, the Monitor may request additional information from the Claimant with respect to any D&O Claim.

14. The Monitor and any applicable Directors and Officers, may attempt to consensually resolve the classification or amount of any asserted D&O Claim with the Claimant prior to accepting, revising or disallowing such D&O Claim.

15. If the Monitor and the Directors and Officers named in such D&O Claim, determines to revise or disallow a D&O Claim, the Monitor shall send a Notice of Revision or Disallowance to the Claimant. The failure by the Monitor to send a Notice of Revision or Disallowance shall not result in any D&O Claim being accepted or being deemed to be accepted.

16. If a Claimant disputes the disallowance or revision of its D&O Claim as set forth in a Notice of Revision or Disallowance and such Claimant intends to contest the Notice of Revision or Disallowance then such Claimant shall deliver a Notice of Dispute so that such Notice of Dispute is received by the Monitor by no later than 5:00 p.m. on the day which is fifteen days after the date the Notice of Revision or Disallowance is deemed to be received by the Claimant pursuant to paragraphs 21 and 23 herein or such later date as the Monitor may agree in writing or the Court may order.

17. Any Claimant who fails to deliver a Notice of Dispute to the Monitor by the deadline set forth in paragraph 16 shall be deemed to accept the amount of its D&O Claim as set out in the Notice of Revision or Disallowance and the D&O Claim as set out in the Notice of Revision or Disallowance shall constitute an Accepted Claim (or, if the D&O Claim is disallowed in full in the Notice of Revision or Disallowance, the applicable Claimant shall be deemed to accept such disallowance and the D&O Claim shall be deemed to be fully disallowed); and any D&O Claim, or any portion thereof, that is disallowed pursuant to a Notice of Revision or Disallowance and in respect of which no Notice of Dispute is received by the Monitor by the deadline set forth in paragraph 16 hereof, shall be forever extinguished, barred, discharged and released as against the Property and as against the Directors and Officers without any further act or notification.

18. A Claimant who has delivered a Notice of Dispute and who intends to continue to dispute the Notice of Revision or Disallowance must, within ten (10) Business Days of delivery of such Notice of Dispute, file an application with the Court seeking determination of the D&O Claim, which application shall be returnable within seven (7) Business Days of the filing of the application. Any Claimant who fails to file an application in accordance with this paragraph 18 shall: (i) be deemed to accept the amount of its D&O Claim as set out in the Notice of Revision or Disallowance and the D&O Claim as set out in the Notice of Revision or Disallowance shall constitute an Accepted Claim (or, if the D&O Claim is disallowed in full in the Notice of Revision or Disallowance, the applicable Claimant shall be deemed to accept such disallowance and the D&O Claim shall be deemed to be fully disallowed), and (ii) any D&O Claim, or any portion thereof, that is disallowed pursuant to a Notice of Revision or Disallowance and in respect of which no application is filed by the deadline set forth in this paragraph 18 shall be forever extinguished, barred, discharged and released as against the Property and as against the Directors and Officers without any further act or notification.

NOTICE OF TRANSFERS

19. If a Claimant or any subsequent holder of a D&O Claim, who has been acknowledged by the Monitor, as the holder of the D&O Claim, transfers or assigns that D&O Claim to another Person, the Monitor shall not be obligated to give notice to or to otherwise deal with the transferee or assignee of the D&O Claim as the holder of such D&O Claim unless and until actual notice of transfer or assignment, together with satisfactory evidence of such transfer or assignment, has been delivered to the Monitor. Thereafter, such transferee or assignee shall, for all purposes hereof, constitute the holder of such D&O Claim and shall be bound by notices given and steps taken in respect of such D&O Claim in accordance with the provisions of this Order.

20. If a Claimant or any subsequent holder of a D&O Claim, who has been acknowledged by the Monitor, as the holder of the D&O Claim, transfers or assigns the whole of such D&O Claim to more than one Person or part of such D&O Claim to another Person, such transfers or assignments shall not create separate D&O Claims and such D&O Claims shall continue to constitute and be dealt with as a single D&O Claim notwithstanding such transfers or assignments. The Monitor shall not, in each case, be required to recognize or acknowledge any such transfers or assignments and shall be entitled to give notices to and to otherwise deal with such D&O Claim

only as a whole and then only to and with the Person last holding such D&O Claim, provided such Person or Claimant may, by notice in writing delivered to the Monitor, direct that subsequent dealings in respect of such D&O Claim, but only as a whole, shall be dealt with by a specified Person and in such event such Person shall be bound by any notices given or steps taken in respect of such D&O Claim with such Claimant in accordance with the provisions of this Order.

GENERAL

21. Any notice or communication required to be delivered pursuant to the terms of this Order shall be in writing and may be delivered by email or electronic transmission, personal delivery, courier or, as necessary, by prepaid mail to such Persons at the physical or electronic address, as applicable, last shown on the books and records of the Applicants or set out in such Claimant's Proof of Claim. Any such service and delivery shall be deemed to have been received: (i) if sent by ordinary mail, on the third Business Day after mailing within Alberta, the fifth Business Day after mailing within Canada (other than within Alberta), and the tenth Business Day after mailing internationally; (ii) if sent by courier or personal delivery, on the next Business Day following dispatch; and (iii) if delivered by facsimile transmission or email by 5:00 p.m. on a Business Day, on such Business Day and if delivered after 5:00 p.m. or other than on a Business Day, on the following Business Day.

22. Any document, notification or notice required to be delivered to the Monitor under this Claims Procedure shall be delivered to:

FTI Consulting Canada Inc.
In its capacity as Monitor of Lynx Air Holdings Corporation and
1263343 Alberta Inc. dba Lynx Air
Suite 1610
Calgary, AB T2P 3R7
Attention: Brett Wilson
Email: lynxair@fticonsulting.com

23. In the event that the day on which any notice or communication required to be delivered pursuant to the Claims Procedure is not a Business Day then such notice or communication shall be required to be delivered on the next Business Day.

24. The Monitor and any applicable Directors and Officers are authorized to enter into settlement negotiations with a Claimant at any stage of the Claims Procedure and to enter into agreements with Claimants resolving the value of their D&O Claims.

25. This Order shall have full force and effect in all provinces and territories in Canada.

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

27. This Order and all of its provisions are effective as of the date of this Order.



Justice of the Court of King's Bench of Alberta

SCHEDULE "A"

This claims process has only called for D&O Claims and NOT general claims against the Lynx entities. DO NOT file a claim if it does not meet the definition of a D&O Claim in the D&O Claims Procedure Order

NOTICE OF D&O CLAIMS PROCEDURE AND D&O CLAIMS BAR DATE

NOTICE IS HEREBY GIVEN that, pursuant to an order of the Court of King's Bench of Alberta dated June 28, 2024 (the "**D&O Claims Procedure Order**") a claims process has been commenced for the purpose of identifying and determining certain claims against the Directors and Officers of the Applicants (Lynx Air Holdings Corporation and 1263343 Alberta Inc. dba Lynx). All capitalized terms in this Notice are defined in the D&O Claims Procedure Order, a copy of which can be found on the website of the Monitor, FTI Consulting Canada Inc. at <http://cfcanada.fticonsulting.com/lynxair/>.

PLEASE TAKE NOTICE that this D&O claims process only addresses certain claims against the Directors and Officers of the Applicants, defined as D&O Claims in the D&O Claims Procedure Order. Any Person who believes that it has a D&O Claim against a Director or Officer of the Applicants should send a Proof of Claim to the Monitor to be received **by the Monitor by 5:00 p.m. local Calgary time on August 15, 2024 (the "Claims Bar Date")**.

D&O CLAIMS WHICH ARE NOT RECEIVED BY THE CLAIMS BAR DATE WILL BE BARRED AND EXTINGUISHED FOREVER.

Claimants who require a Proof of Claim form may access these forms at the Monitor's website at <http://cfcanada.fticonsulting.com/lynxair/> or they may contact the Monitor (Attention: Brett Wislon, Telephone: 1-833-738-7742, Email: lynxair@fticonsulting.com) to obtain a claims package.

Claimants should file their Proof of Claim with the Monitor by mail, email, courier or hand delivery, so that the Proof of Claim is actually received by the Monitor by the Claims Bar Date at the address below.

Address of the Monitor

FTI Consulting Canada Inc.
In its capacity as Monitor of Lynx Air Holdings Corporation and
1263343 Alberta Inc. dba Lynx Air
Suite 1610
Calgary, AB T2P 3R7
Attention: Brett Wilson
Email: lynxair@fticonsulting.com

SCHEDULE "B"

PROOF OF D&O CLAIM

**IN RESPECT OF CLAIMS AGAINST THE DIRECTORS AND OFFICERS OF
LYNX AIR HOLDINGS CORPORATION AND 1263343 ALBERTA INC. DBA LYNX
(TOGETHER, THE "APPLICANTS")**

PARTICULARS OF D&O CLAIM CLAIMANT

Full Legal Name of Claimant: _____ (the "Claimant").
(Full legal or Corporate name should be the name of the original Claimant.)

Full Mailing Address of the Claimant:

Telephone Number of Claimant: _____ *

Facsimile Number of Claimant: _____ *

Attention (Contact Person): _____ *

Email Address: _____ *

Has the D&O Claim been sold or assigned by Claimant to another party?

Yes___ No___ (If yes please complete section D)

PROOF OF D&O CLAIM:

I, _____ [Name of Claimant or Representative of the Claimant],
do hereby certify:

that I am (please check one):

_____ the Claimant; or

_____ hold the following position of _____ the Claimant

and have personal knowledge of all the circumstances connected with the D&O Claim described herein;

PARTICULARS OF D&O CLAIM:

Name of the Director/Officer and the amount for each Director/Officer which owes the amount claimed:

Director/Officer	Amount¹
•	\$ _____
•	\$ _____
•	\$ _____
•	\$ _____

Description of transaction, agreement or event giving rise or relating to the D&O Claim:

If the D&O Claim is contingent or unliquidated, state the basis and provide evidence upon which the D&O Claim has been valued:

¹ Please specify currency if not in Canadian dollars.

IF CLAIMANTS REQUIRE ADDITIONAL SPACE, PLEASE ATTACH A SCHEDULE HERETO. CLAIMANTS SHOULD ALSO PROVIDE COPIES OF ALL RELEVANT DOCUMENTATION OR AGREEMENTS.

PROVIDE ALL PARTICULARS OF THE CLAIM AND SUPPORTING DOCUMENTATION, INCLUDING AMOUNT AND DESCRIPTION OF TRANSACTION(S), AGREEMENT(S) OR LEGAL BREACH(ES) GIVING RISE TO THE CLAIM.

PARTICULARS OF ASSIGNEE(S) (IF ANY):

Full Legal Name of Assignee(s) of the D&O Claim (if all or a portion of the Claim has been sold). If there is more than one assignee, please attach separate sheets with the following information:

(the "Assignee(s)")

Amount of Total D&O Claim Assigned \$ _____

Amount of Total D&O Claim Not Assigned \$ _____

Total Amount of D&O Claim \$ _____
(should equal "Total D&O Claim" as entered on Section B)

Full Mailing Address of Assignee(s):

Telephone Number of Assignee(s): _____

Facsimile Number of Assignee(s): _____

Email address of Assignee(s): _____

Attention (Contact Person): _____

FILING OF CLAIMS:

The duly completed Proof of D&O Claim together with supporting documentation must be returned and received by the Monitor, no later than 5:00 pm local Calgary time on August 15, 2024, to the following email address or address:

Failure to file your Proof of D&O Claim by such date will result in your claim being forever extinguished and barred and you will be prohibited from making or enforcing a D&O Claim against each of the Applicants or the Directors or Officers.

This Proof of D&O Claim must be delivered by email, personal delivery, courier or prepaid mail at the following address:

Address of the Monitor:

FTI Consulting Canada Inc.
In its capacity as Monitor of Lynx Air Holdings Corporation and
1263343 Alberta Inc. dba Lynx Air
Suite 1610
Calgary, AB T2P 3R7
Attention: Brett Wilson
Email: lynxair@fticonsulting.com

DATED at _____ this _____ day of _____, 2024.

(Signature of Witness)

(Signature of individual completing this form)

(Please print name)

(Please print name)

SCHEDULE “C”

NOTICE OF REVISION OR DISALLOWANCE

IN RESPECT OF CLAIMS AGAINST THE DIRECTORS AND OFFICERS OF LYNX AIR HOLDINGS CORPORATION AND 1263343 ALBERTA INC. DBA LYNX (TOGETHER, THE “APPLICANTS”)

TO: [insert name and address of Claimant]

FROM: FTI Consulting Canada Inc., in its capacity as Monitor of Lynx Air Holdings Corporation and 1263343 Alberta Inc. dba Lynx

CLAIM REFERENCE NO. _____

Terms not otherwise defined in this Notice have the meaning ascribed to them in the order of the Court of King’s Bench of Alberta dated June 28, 2024 (the “**D&O Claims Procedure Order**”). You can obtain a copy of the Claims Procedure Order on the Monitor’s website at <http://cfcanada.fticonsulting.com/lynxair/> or by contacting the Monitor as set out below.

This Notice of Revision or Disallowance is issued pursuant to the Claims Procedure Order.

The Monitor, has reviewed your D&O Claim, as set out in your **Proof of Claim** and hereby gives you notice that is has revised or rejected your D&O Claim as follows:

Claim Against Director/Officer	Amount Per Proof of Claim	Disallowed Amount	Allowed Amount
	\$ _____	\$ _____	\$ _____
	\$ _____	\$ _____	\$ _____
	\$ _____	\$ _____	\$ _____
TOTAL	\$ _____	\$ _____	\$ _____

REASONS FOR DISALLOWANCE:

If you do not agree with this Notice of Revision or Disallowance please take notice of the following:

If you intend to dispute a Notice of Revision or Disallowance, you must:

(by 5:00 p.m. local Toronto time on the day which is fifteen (15) days after the delivery of this Notice of Revision or Disallowance or such later date as the Court may order, deliver a Notice of Dispute by email, courier, personal delivery or prepaid mail to the Monitor at the address indicated herein. The form of Notice of Dispute is attached to this Notice; and

(within ten (10) Business Days of delivery of the Notice of Dispute, file an application with the Court seeking determination of the value and/or status of the D&O Claim, which application shall be returnable within seven (7) Business Days of the filing of the application.

If you do not deliver a Notice of Dispute and file an application seeking determination of your D&O Claim in accordance with the terms of the Claims Procedure Order, your Claim shall be deemed to be as set out in this Notice of Revision or Disallowance.

Address for Service of Dispute Notices:

Address of the Monitor

FTI Consulting Canada Inc.
In its capacity as Monitor of Lynx Air Holdings Corporation and
1263343 Alberta Inc. dba Lynx Air
Suite 1610
Calgary, AB T2P 3R7
Attention: Brett Wilson
Email: lynxair@fticonsulting.com

IF YOU FAIL TO TAKE ACTION WITHIN THE PRESCRIBED TIME PERIOD, TIDS NOTICE OF REVISION OR DISALLOWANCE WILL BE BINDING UPON YOU.

Dated at _____ this _____ day of _____, 2023.

FTI Consulting Canada Inc.
in its capacity as Court-Appointed Monitor of Lynx
Air Holdings Corporation and 1263343 Alberta Inc.
dba Lynx

Per: _____

SCHEDULE “D”

NOTICE OF DISPUTE

**IN RESPECT OF CLAIMS AGAINST LYNX AIR HOLDINGS CORPORATION AND
1263343 ALBERTA INC. DBA LYNX
(TOGETHER, THE “APPLICANTS”)**

Pursuant to the Order of the Court of King’s Bench of Alberta dated June 28, 2024 we hereby give you notice of our intention to dispute the Notice of Revision or Disallowance issued by FTI Consulting Canada Inc. in its capacity as Court-Appointed Monitor of Lynx Air Holdings Corporation and 1263343 Alberta Inc. dba Lynx

A. PARTICULARS OF CLAIMANT

Full Legal Name of Claimant: _____

Claim Reference No.: _____

Full Mailing Address of the Claimant:

Telephone Number of Claimant: _____ *

Facsimile Number of Claimant: _____ *

Email Address: _____ *

Attention (Contact Person): _____ *

**PARTICULARS OF ORIGINAL CLAIMANT FROM WHOM YOU ACQUIRED
CLAIM, IF APPLICABLE:**

Have you acquired this Claim by assignment? Yes No

(if yes, attach documents evidencing assignment)

Full Legal Name of original Claimant (s): _____

DISPUTE:

We hereby disagree with the value or classification of our D&O Claim as set out in the Notice of Revision or Disallowance:

Director/Officer	Claim per Notice of Revision or Disallowance	Claim per Claimant
	\$ _____	\$ _____
	\$ _____	\$ _____
	\$ _____	\$ _____
	\$ _____	\$ _____
Total Claim	\$ _____	\$ _____

IF CLAIMANTS REQUIRE ADDITIONAL SPACE PLEASE ATTACH A SCHEDULE HERETO. CLAIMANTS SHOULD ALSO PROVIDE COPIES OF ALL RELEVANT AGREEMENTS.

PROVIDE ALL PARTICULARS OF THE CLAIM AND SUPPORTING DOCUMENTATION, INCLUDING AMOUNT AND DESCRIPTION OF TRANSACTION(S), AGREEMENT(S) OR LEGAL BREACH(ES) GIVING RISE TO THE CLAIM.

REASONS FOR DISPUTE:

(Provide full particulars of the D&O Claim and supporting documentation, including amount, description of transaction(s) or agreement(s) giving rise to the Claim.

THIS FORM AND SUPPORTING DOCUMENTATION TO BE RETURNED BY EMAIL, COURIER, PERSONAL SERVICE OR PREPAID MAIL TO THE MONITOR AT THE ADDRESS INDICATED HEREIN AND TO BE RECEIVED BY 5:00 P.M. LOCAL TORONTO TIME ON THE DAY WHICH IS FIFTEEN (15) DAYS AFTER THE DATE OF DELIVERY OF THE NOTICE OF REVISION OR DISALLOWANCE, OR SUCH LATER DATE AS THE COURT MAY ORDER.

IN ADDITION TO THE DELIVERY OF THIS NOTICE OF DISPUTE, WITHIN TEN (10) BUSINESS DAYS OF DELIVERY OF THE NOTICE OF DISPUTE, YOU ARE REQUIRED TO FILE AN APPLICATION WITH THE COURT SEEKING DETERMINATION OF THE VALUE AND/OR STATUS OF THE D&O CLAIM, WHICH APPLICATION SHALL BE RETURNABLE WITHIN SEVEN (7) BUSINESS DAYS OF THE FILING OF THE APPLICATION.

Address for Service of Dispute Notices:

Address of the Monitor:

FTI Consulting Canada Inc.
In its capacity as Monitor of Lynx Air Holdings Corporation and
1263343 Alberta Inc. dba Lynx Air
Suite 1610
Calgary, AB T2P 3R7
Attention: Brett Wilson
Email: lynxair@fticonsulting.com

TAB 10

ESTATE NUMBER 25-2906009
COURT COURT OF KING'S BENCH OF ALBERTA
IN BANKRUPTCY AND INSOLVENCY
JUDICIAL CENTRE CALGARY



IN THE MATTER OF THE NOTICE OF
INTENTION TO MAKE A PROPOSAL OF
GOLDENKEY OIL INC.

DOCUMENT **ORDER (CLAIMS PROCESS)**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT
McCarthy Tétrault LLP
Suite 4000, 421 - 7th Avenue S.W.
Calgary AB T2P 4K9
Attention: Sean Collins / Pantelis Kyriakakis / Nathan Stewart / Erinn Wilson
Phone: 403-260-3531 / 3536 / 3534 / 3682
Fax: 403-260-3501
Email: scollins@mccarthy.ca / pkyriakakis@mccarthy.ca / nstewart@mccarthy.ca / erinnwilson@mccarthy.ca

DATE ON WHICH ORDER WAS PRONOUNCED: April 13, 2023
NAME OF JUDGE WHO MADE THIS ORDER: Justice M. J. Lema
LOCATION OF HEARING: Edmonton, Alberta

UPON the Amended Application of Goldenkey Oil Inc. (the "**Debtor**"), filed on April 3, 2023 (the "**Application**"); **AND UPON** having read Affidavit #1 of James Dai, sworn on February 17, 2023 (the "**First Dai Affidavit**"), Affidavit #2 of James Dai, sworn on April 3, 2023 (the "**Second Dai Affidavit**"), the First Report of PricewaterhouseCoopers Inc., in its capacity as the proposal trustee (the "**Proposal Trustee**") of the Debtor, dated February 23, 2023 (the "**Proposal Trustee's First Report**"), and the Second Report of the Proposal Trustee, dated April 6, 2023 (the "**Proposal Trustee's Second Report**"); **AND UPON** having read the Brief of Law and Argument of the Debtor; **AND UPON** having read the Affidavit #1 of Shougen Song, sworn on February 23, 2023 and the Affidavit #2 of Shougen Song, sworn on April 6, 2023; **AND UPON** having read the Brief of Argument of Indepth Energy Inc.; **AND UPON** having read the Affidavit of Service of Katie Hynne, sworn on April 11, 2023 (the "**Service Affidavit**"); **AND UPON** hearing counsel for the Debtor, counsel for the Proposal Trustee, counsel for Baytech Energy Investment Inc., counsel for Indepth Energy Inc., counsel for Alberta Energy Regulator, counsel for the Shell Companies (as defined in the First Dai Affidavit), counsel to Qiping Men

Professional Services Ltd., et al., counsel to LJ Resources Co., Ltd., and counsel present for any other parties;

IT IS HEREBY ORDERED AND DECLARED THAT:

DEFINED TERMS

1. Capitalized terms used herein and not otherwise defined shall have the meanings ascribed thereto in the Claims Process attached as Appendix "A" hereto (the "**Claims Process**").

APPROVAL OF CLAIMS PROCESS

2. The Claims Process for determining any and all Claims in respect of the Debtor is hereby approved, and the Proposal Trustee is authorized and directed to implement the Claims Process.

3. The form of Instruction Letter, Proof of Claim, Notice of Revision or Disallowance, and Newspaper Notice, all as set forth in the attached Appendix "B", Appendix "C", Appendix "D", and Appendix "E", respectively, are hereby approved.

CLAIMS BAR DATE

4. Any Creditor that has a Claim against the Debtor and has not, as of the Claims Bar Date, submitted a Proof of Claim to the Proposal Trustee in respect of such Claim, in accordance with the Claims Process, shall be forever barred, estopped and enjoined from asserting such Claim against the Debtor, and all such Claims shall be forever extinguished, from and after the Claims Bar Date, unless otherwise ordered by this Court.

5. Notwithstanding paragraphs 2 and 4 of this Order and subject to any further Order of this Court in connection with the Application, to the extent the claims of Indepth Energy Inc., as and against the Debtor, as set out or otherwise contemplated in Alberta Court of King's Bench Action No. 170-12190 (collectively, the "**Indepth Claims**"), are to be determined in accordance with the within Claims Process, then Indepth Energy Inc. shall be granted an extension to the Claims Bar Date, to file a Proof of Claim in connection with the Indepth Claims, equal to the number of days from the date of this Order up to and including the date that any order is pronounced in respect of the Application which concerns the severance or determination of the

Indepth Claims. For clarity, nothing in this paragraph 5 shall affect or alter, in any way, any requirements or obligations of any Known Creditors or Persons who wish to assert any Claim against the Debtor, other than the Indepth Claims.

NOTICE OF TRANSFEREES

6. If a Creditor or any subsequent holder of a Claim who has been acknowledged by the Proposal Trustee as the holder of the Claim transfers or assigns that Claim to another Person, the Proposal Trustee shall not be required to give notice to or to otherwise deal with the transferee or assignee of the Claim as the holder of such Claim, unless and until actual notice of transfer or assignment, together with satisfactory evidence of such transfer or assignment, has been delivered to the Proposal Trustee. Thereafter, such transferee or assignee shall, for all purposes under this Order and the Claims Process, constitute the holder of such Claim and shall be bound by notices given and steps taken in respect of such Claim in accordance with the provisions of the Claims Process.

7. If a Creditor or any subsequent holder of a Claim who has been acknowledged by the Proposal Trustee as the holder of the Claim transfers or assigns the whole of such Claim to more than one Person or part of such Claim to another Person or Persons, such transfers or assignments shall not create separate Claims and such Claims shall continue to constitute and be dealt with as a single Claim, notwithstanding such transfers or assignments. The Proposal Trustee shall not, in each such case, be required to recognize or acknowledge any such transfers or assignments and shall be entitled to give notices to and to otherwise deal with such Claim only as a whole and then only to and with the Person last holding such Claim, provided such Creditor may, by notice in writing delivered to the Proposal Trustee, direct that subsequent dealings in respect of such Claim, but only as a whole, shall be dealt with by a Person specified by the Creditor and, in such event, such Person shall be bound by any notices given or steps taken in respect of such Claim with such Creditor in accordance with the provisions of the Claims Process.

NOTICE AND COMMUNICATION

8. Except as otherwise provided herein, the Proposal Trustee may deliver any notice or other communication to be given under this Order to Creditors or other interested Persons by forwarding true copies thereof by ordinary mail, courier, personal delivery, facsimile or email to such Creditors or Persons at the address last shown on the books and records of the Debtor,

and any such notice by courier, personal delivery, facsimile or email shall be deemed to be received on the next Business Day following the date of forwarding thereof, or, if sent by ordinary mail on the third Business Day after mailing within Alberta, the fifth Business Day after mailing within Canada, and the tenth Business Day after mailing internationally.

9. Any notice or other communication to be given under this Order, by a Creditor to the Proposal Trustee, shall be in writing in substantially the form, if any, provided for in this Order and the Claims Process, and will be sufficiently given only if delivered by registered mail, courier, email (in PDF format), personal delivery or facsimile transmission and addressed to:

PricewaterhouseCoopers Inc.
Suncor Energy Centre
111 - 5th Avenue SW, Suite 3100, East Tower
Calgary, AB T2P 5L3

Attention: Paul Darby
Email: paul.j.darby@pwc.com
Fax: 403-781-1825

With a copy to:

Fasken Martineau DuMoulin LLP
350 - 7 Ave. S.W., Suite 3400
Calgary, AB T2P 3N9

Attention: Robyn Gurofsky
Email: RGurofsky@fasken.com
Fax: 403-261-9469

10. In the event that the day on which any notice or communication required to be delivered pursuant to the Claims Process is not a Business Day, then such notice or communication shall be required to be delivered on the next Business Day.

GENERAL

11. The Proposal Trustee is authorized to use reasonable discretion as to the adequacy of compliance with respect to the manner in which Proofs of Claim are submitted, completed and executed and may, if satisfied that a Claim has been adequately proven, waive strict compliance with the requirements of the Claims Process and this Order as to the submission, completion and execution of Proofs of Claim.

12. References in this Order to the singular shall include the plural, references to the plural shall include the singular and to any gender shall include the other gender.

13. Notwithstanding the terms of this Order, the Proposal Trustee may apply to this Court from time to time for such further order or orders as it considers necessary or desirable to amend, supplement or modify the Claims Process or this Order, and the Proposal Trustee, the Debtor, and any other interested Person are hereby authorized to apply to this Court from time to time to seek directions with respect to any matter in connection with or related to the Claims Process.

14. Service of this Order on the Service List (as defined in the Service Affidavit) by email, facsimile, registered mail, courier, or personal delivery shall constitute good and sufficient service of this Order, and no Persons, other than those on the Service List (as defined in the Service Affidavit), are entitled to be served with a copy of this Order. Service is deemed to be effected the next business day following the transmission or delivery of such documents.

15. The Proposal Trustee shall post a copy of this Order on its website at: www.pwc.com/ca/goldenkey.

16. Service of this Order on any party not attending this Application is hereby dispensed with.



J.C.C.K.B.A.

**APPENDIX "A" TO CLAIMS PROCESS ORDER
CLAIMS PROCESS**

DEFINITIONS

1. For purpose of this Claims Process the following terms shall have the following meanings:

- (a) "**BIA**" means the *Bankruptcy and Insolvency Act* (Canada), as amended;
- (b) "**Business Day**" means a day, other than a Saturday or a Sunday, on which banks are generally open for business in Calgary, Alberta;
- (c) "**Claim**" means a claim provable in bankruptcy, as defined in the BIA;
- (d) "**Claims Bar Date**" means 5:00 p.m. (Mountain Time) on May 16, 2023 or such other date as may be ordered by the Court;
- (e) "**Claims Package**" means the document package which shall include the Instruction Letter, a Proof of Claim, and such other materials as the Proposal Trustee considers necessary or appropriate;
- (f) "**Claims Process**" means the procedures outlined herein in connection with the assertion of any Claim against the Debtor;
- (g) "**Claims Process Order**" means the Order pronounced by Justice M.J. Lema of the Court on April 13, 2023, approving this Claims Process;
- (h) "**Court**" means the Court of King's Bench of Alberta;
- (i) "**Creditor**" means any Person asserting a Claim against the Debtor as of the Filing Date;
- (j) "**Debtor**" means Goldenkey Oil Inc.;
- (k) "**Filing Date**" means January 29, 2023;
- (l) "**Instruction Letter**" means the letter providing instructions on the completion of a Proof of Claim, which letter shall be substantially in the form attached to the Claims Process Order as Appendix "**B**";

- (m) **“Known Creditors”** means Creditors which the books and records of the Debtor disclose as having a Claim against the Debtor as of the Filing Date;
- (n) **“Newspaper Notice”** means the notice of the Claims Process to be published in certain publications in accordance with the Claims Process, which notice shall be in substantially the form attached to the Claims Process Order as Appendix **“E”**;
- (o) **“Notice of Revision or Disallowance”** means the form sent by the Proposal Trustee revising or disallowing a Proof of Claim submitted by any Person, which notice shall be substantially in the form attached to the Claims Process Order as Appendix **“D”**;
- (p) **“Person”** shall be broadly interpreted and includes an individual, firm, partnership, joint venture, venture capital fund, limited liability company, unlimited liability company, association, trust, corporation, unincorporated association or organization, syndicate, committee, the government of a country or any political subdivision thereof, or any agency, board, tribunal, commission, bureau, instrumentality or department of such government or political subdivision, or any other entity, however designated or constituted, and the trustees, executors, administrators, or other legal representatives of any individual;
- (q) **“Proof of Claim”** means the form setting forth a Creditor’s Claim, which Proof of Claim shall be substantially in the form attached to the Claims Process Order as Appendix **“C”**;
- (r) **“Proposal Trustee”** means PricewaterhouseCoopers Inc., in its capacity as the proposal trustee of the Debtor, and not in its personal or corporate capacity;
- (s) **“Proven Claim”** means the quantum and classification of the Claim of a Creditor as finally determined in accordance with the Claims Process, provided that a Proven Claim will be “finally determined” in accordance with the Claims Process when: (i) it has been accepted by the Proposal Trustee; (ii) the applicable time period for challenging a Notice of Revision or Disallowance issued by the Proposal Trustee has expired and the Creditor has not taken the steps required by this Claims Process to challenge such Notice or Revision as Disallowance; or (iii) any court of competent jurisdiction has made a determination with respect to

the classification and quantum of the Claim and no appeal or motion for leave to appeal therefrom shall have been taken or served on either party, or if any appeal(s) or motion(s) for leave to appeal or further appeal shall have been taken therefrom or served on either party, any and all such appeal(s) or motion(s) shall have been dismissed, determined or withdrawn;

- (t) **"Website"** means the website established by the Proposal Trustee and located at www.pwc.com/ca/goldenkey;

NOTICE OF CLAIMS PROCESS

2. The Proposal Trustee shall cause a Claims Package to be sent to each Known Creditor by regular prepaid mail, courier, facsimile or email on or prior to April 21, 2023.
3. The Proposal Trustee shall cause the Newspaper Notice to be published in the Daily Oil Bulletin and the BOE Report, and any other publication the Proposal Trustee considers advisable, on or prior to April 21, 2023;
4. The Proposal Trustee shall cause the Claims Package to be posted on the Website on or prior to April 18, 2023.
5. The Proposal Trustee shall cause a copy of a Proof of Claim to be sent to any Person requesting such material as soon as practicable.

PERSONS ASSERTING A CLAIM

6. Subject to paragraph 5 of the Claims Process Order, any Known Creditors or Persons who wish to assert a Claim against the Debtor shall, on or before the Claims Bar Date, send a completed Proof of Claim to the Proposal Trustee setting out the classification and quantum of such Claim along with all other information and documentation contemplated by the Proof of Claim form.
7. Any Known Creditor or Person who fails to comply with Paragraph 6 of this Claims Process shall be forever barred, enjoined and estopped from asserting such Claim against the Debtor, and such Claim shall be forever extinguished, from and after the Claims Bar Date, except as otherwise may be ordered by the Court.

RESOLUTION OF CLAIMS

8. The Proposal Trustee shall review any Proof of Claim that is submitted to it on or before the Claims Bar Date and, subject to the terms of this Claims Process, may accept, revise or disallow the Proof of Claim.

9. The Proposal Trustee may attempt to consensually resolve the classification or quantum of any Proof of Claim submitted by any Person prior to the Proposal Trustee accepting, revising or disallowing such Proof of Claim.

10. In the event that the Proposal Trustee elects to accept the quantum and classification of the Claim as set forth in the Proof of Claim, the Creditor shall have a Proven Claim in the quantum and with the classification specified in the Proof of Claim submitted by that Person.

11. In the event that the Proposal Trustee elects to revise or disallow the Proof of Claim, the Proposal Trustee shall send a Notice of Revision or Disallowance to the Creditor that submitted such Proof of Claim, setting out the revision or disallowance of the Proof of Claim and a brief statement of the reasons therefor.

12. Any Person who wishes to dispute a Notice of Revision or Disallowance received from the Proposal Trustee shall, within fifteen (15) days of receipt of the Notice of Revision or Disallowance from the Proposal Trustee, file an application with the Court for the determination of its Claim.

13. Any Person who receives a Notice of Revision or Disallowance from the Proposal Trustee and who fails to comply with Paragraph 12 of this Claims Process shall be deemed to have accepted the classification and quantum of its Claim as set forth in the Notice of Revision or Disallowance, shall have a Proven Claim in the quantum and with the classification specified in the Notice of Revision or Disallowance and shall be forever barred, enjoined and estopped from challenging the classification and quantum of its Claim as set forth in the Notice of Revision or Disallowance delivered to it by the Proposal Trustee, except as otherwise may be ordered by the Court.

CURRENCY OF CLAIMS

14. Any Claim set out in a Proof of Claim shall be denominated in Canadian dollars, failing which such Claim shall be converted to and shall constitute obligations in Canadian dollars, and

such calculation will be effected using the noon spot rate of the Bank of Canada as of the date of the Claims Process Order.

**APPENDIX "B" TO CLAIMS PROCESS ORDER
INSTRUCTION LETTER FOR CLAIMS PROCESS OF GOLDENKEY OIL INC. (THE
"DEBTOR")**

NOTICE TO CREDITORS OF THE DEBTOR

TO: [NAME AND ADDRESS OF KNOWN CREDITOR]

On January 29, 2023, the Debtor filed a Notice of Intention to Make a Proposal ("**NOI**") under subsection 50.4(1) of the *Bankruptcy and Insolvency Act* and PricewaterhouseCoopers Inc. (the "**Proposal Trustee**") was appointed as Proposal Trustee of the Debtor.

On April 13, 2023 the Court of King's Bench of Alberta (the "**Court**") granted an order prescribing a process by which the identity and status of all creditors of the Debtor and the amounts of their claims will be established for the purposes of the Debtor's NOI proceedings (the "**Claims Process Order**"). A copy of the Claims Process Order may be viewed at www.pwc.com/ca/goldenkey. All capitalized terms used herein and not otherwise defined shall have the meaning ascribed to them in the Claims Process Order.

Pursuant to the Claims Process Order, the Proposal Trustee is to send a notice to each Known Creditor of the Debtor (this "**Notice to Creditor**") by April 21, 2023.

IF YOU WISH TO ASSERT A CLAIM AGAINST THE DEBTOR, YOU MUST TAKE THE STEPS OUTLINED BELOW.

The Claims Process Order provides that any Known Creditor of Person who wishes to assert a Claim must complete and forward to the Proposal Trustee, a completed Proof of Claim on or before 5:00 pm (MST) on May 16, 2023. Any Person who fails to comply with these requirements shall be forever barred, enjoined and estopped from asserting such Claims against the Debtor, and such Claims shall be forever extinguished, except as may otherwise may be ordered by the Court.

Claims not proven in accordance with the procedures set out above shall, except as may otherwise be ordered by the Court, be deemed to be forever barred and may not thereafter be advanced against the Debtor.

If you have any questions regarding the claims process or the attached materials, please contact Dana Gaspar of PricewaterhouseCoopers Inc. at 403-509-7500 or dana.gaspar@pwc.com.

Dated the ____ day of _____, 2023.

**PricewaterhouseCoopers Inc., in its
capacity as Proposal Trustee of Goldenkey
Oil Inc. and not in its personal or corporate
capacity**

Per: _____
Name:
Title:

**APPENDIX "C" TO CLAIMS PROCESS ORDER
PROOF OF CLAIM AGAINST GOLDENKEY OIL INC. GOLDENKEY OIL INC. (THE
"DEBTOR")**

For Claims Arising On or Before January 29, 2023
(See Reverse for Instructions)

Regarding the claim of _____ (referred to in this form as "the creditor")
(name of creditor)

All notices or correspondence regarding this claim to be forwarded to the creditor at the following address:

Telephone: _____ Fax: _____

I, _____ residing in the _____
(name of person signing claim) (city, town, etc.)

of _____ in the Province of _____
(name of city, town, etc.)

Do hereby certify that:

1. I am the creditor

OR I am _____ of the
creditor.
(if an officer or employee of the company, state position or title)

2. I have knowledge of all the circumstances connected with the claim referred to in this form.

3.A The debtor was, as at January 29, 2023 and still is indebted to the creditor in the sum of \$ _____ as shown by the statement of account attached hereto and marked Schedule "A". Claims should **not** include the value of goods and/or services supplied or claims arising after January 29, 2023. If a creditor's claim is to be reduced by deducting any counter claims to which the Debtor is entitled and/or amounts associated with the return of equipment and/or assets by the Debtor, please specify.

The statement of account must specify the vouchers or other evidence in support of the claim including the date and location of the delivery of all services and materials. Any claim for interest must be supported by

contractual documentation evidencing the entitlement to interest.

- B The indebtedness referred to in paragraph 4.A is in the following currency:
- Canadian Dollars
 - United States Dollars
- 4.A **Unsecured claim.** \$ _____. In respect to the said debt, the creditor does not and has not since January 29, 2023, held any assets of the Debtor as security.
- B **Secured claim.** \$ _____. In respect of the said debt, the creditor holds assets of the Debtor valued at \$ _____ as security:

Provide full particulars of security, including the date on which the security was given and the value at which the creditor assesses the security together with the basis of valuation, and attach a copy of the security documents as Schedule "B".

Dated at _____, this _____ day of _____, 2023.

Witness

Must be signed and witnessed

Instructions for Completing Proof of Claim Forms

In completing the attached form, your attention is directed to the notes on the form and to the following requirements:

Proof of Claim:

The form must be completed by an individual and not by a corporation. If you are acting for a corporation or other person, you must state the capacity in which you are acting, such as, "Credit Manager", "Treasurer", "Authorized Agent", etc., and the full legal name of the party you represent.

The person signing the form must have knowledge of the circumstances connected with the claim.

A. A Statement of Account containing details of secured and unsecured claims, and if applicable, of the amount due in respect of property claims, and must be attached and marked Schedule "A". Claims should not include the value of goods and/or services arising after January 29, 2023. It is necessary that all creditors indicate the date and location of the delivery of all goods and/or services. Any amounts claimed as interest should be clearly noted as being for interest.

B. Tick the appropriate currency.

The nature of the claim must be indicated by ticking the type of claim which applies. e.g. –

Ticking (A) indicates the claim is unsecured;

Ticking (B) indicates the claim is secured, such as a mortgage, lease or other security interest, and the value at which the creditor assesses the security must be inserted, together with the basis of valuation. Details of each item of security held should be attached as Schedule "B" and submitted with a copy of the chattel mortgage, conditional sales contract, security agreement, etc.;

A creditor may have separate claims in different categories, in which case a separate claim form must be submitted for each claim.

The person signing the form must insert the place and date in the space provided, and the signature must be witnessed.

Send a copy of the completed Proof of Claim, which must be received by 5:00 pm (MST) on May 16, 2023, to the Proposal Trustee at the below addresses:

PricewaterhouseCoopers Inc.
111 - 5th Avenue SW, Suite 3100, East Tower
Calgary, AB T2P 5L3

Attention: Paul Darby
Email: paul.j.darby@pwc.com
Fax: 403-781-1825

Additional information regarding the Debtor's proceedings, as well as copies of claims documents may be obtained at www.pwc.com/ca/goldenkey. If there are any questions in completing the Proof of Claim, please contact Dana Gaspar of PricewaterhouseCoopers Inc. at 403-509-7500 or dana.gaspar@pwc.com.

**APPENDIX "D" TO CLAIMS PROCESS ORDER
NOTICE OF REVISION OR DISALLOWANCE FOR CLAIMS AGAINST GOLDENKEY OIL
INC. (THE "DEBTOR")**

NOTICE OF REVISION OR DISALLOWANCE

TO: [NAME AND ADDRESS OF CREDITOR]

DATE:

PROOF OF CLAIM NO:

Take notice that PricewaterhouseCoopers Inc. was appointed the proposal trustee of the Debtor (the "**Proposal Trustee**"), and the Proposal Trustee, in such capacity and not in its personal or corporate capacity, has reviewed the Proof of Claim you submitted against the Debtor, as part of the Debtor's Claims Process pursuant to the order issued by the Court of King's Bench of Alberta on April 13, 2023 (the "**Claims Process Order**"). All capitalized terms used herein and not otherwise defined shall have the meaning ascribed to them in the Claims Process Order.

The Proposal Trustee has revised your Proof of Claim as follows:

Classification: _____

Quantum: _____

The basis for the Proposal Trustee's determination regarding your Proof of Claim includes the following:

IF YOU WISH TO DISPUTE THE REVISION OR DISALLOWANCE OF YOUR CLAIM AS SET FORTH HEREIN YOU MUST TAKE THE STEPS OUTLINED BELOW.

The Claims Process Order provides that if you disagree with the revision or disallowance of your Claim as set out in this Notice of Revision or Disallowance, you must, within fifteen (15) days of receipt of this Notice of Revision or Disallowance from the Proposal Trustee, file an application before the Court of King's Bench of Alberta for the determination of your Claim. If you fail to file an application before the Court of King's Bench of Alberta for the determination of your Claim in the timeframe specified herein you shall be deemed to have accepted the classification and quantum of your Claim as set forth in this Notice of Revision or Disallowance, shall have a Proven Claim in the quantum and with the classification specified in this Notice of Revision or Disallowance and shall be forever barred, enjoined and estopped from challenging the

classification and quantum of the Claim, as set forth in this Notice of Revision or Disallowance, except as otherwise may be ordered by the Court.

If you have any questions regarding the claims process or the attached materials, please contact Dana Gaspar of PricewaterhouseCoopers Inc. at 403-509-7500 or dana.gaspar@pwc.com

Dated the ____ day of _____, 2023.

PricewaterhouseCoopers Inc., in its capacity as Proposal Trustee of Goldenkey Oil Inc. and not in its personal or corporate capacity

Per: _____
Name:
Title:

**APPENDIX "E" TO CLAIMS PROCESS ORDER
NEWSPAPER NOTICE**

NOTICE TO CREDITORS OF GOLDENKEY OIL INC.

On January 29, 2023, Goldenkey Oil Inc. (the "**Debtor**") filed a Notice of Intention to Make a Proposal ("**NOI**") under subsection 50.4(1) of the *Bankruptcy and Insolvency Act* and PricewaterhouseCoopers Inc. (the "**Proposal Trustee**") was appointed as proposal trustee of the Debtor.

On April 13, 2023, the Court of King's Bench of Alberta (the "**Court**") granted an order establishing a process by which the identity and status of all creditors of the Debtor and the amounts of their claims would be established for purposes of the Debtor's NOI proceedings (the "**Claims Process Order**"). A copy of the Claims Process Order may be viewed at www.pwc.com/ca/goldenkey, or may be obtained by contacting Dana Gaspar of PricewaterhouseCoopers Inc. at 403-509-7500 or dana.gaspar@pwc.com.

Pursuant to the Claims Process Order the Proposal Trustee was required, by April 21, 2023, to send a notice to each known creditor of the Debtor (the "**Notice to Creditor**").

ANY CREDITOR WHO WISHES TO ASSERT A CLAIM AGAINST THE DEBTOR MUST FILE A PROOF OF CLAIM WITH THE PROPOSAL TRUSTEE IN THE PRESCRIBED FORM BEFORE 5:00 PM (MST) ON May 16, 2023. CLAIMS NOT PROVEN IN ACCORDANCE WITH THESE PROCEDURES SHALL BE DEEMED TO BE FOREVER BARRED AND EXTINGUISHED, AND MAY NOT BE ADVANCED AGAINST THE DEBTOR, EXCEPT AS MAY BE OTHERWISE ORDERED BY THE COURT.

Any creditor who chooses to file a Proof of Claim is required to provide whatever supporting documentation they may have, such as contracts, bonds, investment forms, cancelled cheques, bills of sale, receipts, or invoices in support of their claim, as at January 29, 2023.

All claims must be made in the prescribed "Proof of Claim" form together with the required supporting documentation and be received by the Proposal Trustee on or before the Claims Bar Date, being 5:00 pm (MST) on May 16, 2023.

The prescribed "Proof of Claim" form may be found at www.pwc.com/ca/goldenkey or can otherwise be obtained by contacting:

PricewaterhouseCoopers Inc.
111 - 5th Avenue SW, Suite 3100, East Tower
Calgary, AB T2P 5L3

Attention: Dana Gaspar

Email: dana.gaspar@pwc.com
Phone: 403-509-7500
Fax: 403-781-1825

TAB 11

CITATION: Laurentian University of Sudbury, 2021 ONSC 3885
COURT FILE NO.: CV-21-00656040-00CL
DATE: 2021-05-31

SUPERIOR COURT OF JUSTICE - ONTARIO

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

**AND IN THE MATTER OF A PLAN OF COMPROMISE OR
ARRANGEMENT OF LAURENTIAN UNIVERSITY OF
SUDBURY**

BEFORE: Chief Justice G.B. Morawetz

COUNSEL: *D.J. Miller, Mitch W. Grossell and Derek Harland*, for the Applicant

Ashley Taylor, Elizabeth Pillon and Ben Muller, for the Court-appointed Monitor
Ernst & Young Inc

Vern W. DaRe, for the DIP Lender

Aryo Shalviri and Jules Monteyne, for the Royal Bank of Canada

Stuart Brotman and Dylan Chochla, for the Toronto Dominion Bank

George Benchetrit, for the Bank of Montreal

Peter J. Osborne, for the Board of Governors

Joseph Bellissimo and Natalie Levine, for Huntington University

Andrew Hatnay, Demetrios Yiokaris, for Thorneloe University

Alex MacFarlane and Lydia Wakulowsky, for Northern Ontario School of Medicine

Mark G. Baker and Andre Luzhetskyy, for Laurentian University Students' General
Association

Guneev Bhinder, for the Canada Foundation for Innovation

André Claude, for the University of Sudbury

Tracey Henry, for Laurentian University Staff Union (LUSU)

Charlie Sinclair, Counsel for Laurentian University Faculty Association (LUFA)

HEARD: May 28, 2021

ENDORSEMENT

[1] Laurentian University (“Laurentian” or the “Applicant”) brings this motion seeking the following two orders:

- (a) an Order appointing Mr. Louis (Lou) Pagnutti as Chief Redevelopment Officer (“CRO”) of Laurentian and approving the terms of his engagement; and
- (b) an Order approving the claims process proposed by the Applicant and the Monitor to identify the universe of potential claims that may exist against the Applicant, in order to allow the Applicant and the Monitor to address such claims in contemplation and formulation of a Plan of Compromise or Arrangement (the “Plan”).

[2] The Applicant also requests an amendment to para. 36 of the Amended and Restated Initial Order to increase the maximum amount of fees and disbursements of the Board of Governors’ (the “Board”) independent counsel (“Board Counsel”) that is permitted to be paid by the Applicant from \$250,000, plus HST, to a maximum amount of \$500,000, plus HST.

[3] The evidentiary basis for the requested relief is set out in the affidavit of Dr. Robert Haché, sworn May 21, 2021, and in the Fourth Report of the Monitor dated May 27, 2021.

Appointment of CRO

[4] The Applicant is of the view that the appointment of the CRO will minimize the disruption to the operations of the Applicant. The CRO will provide strategic guidance in assisting with the Applicant’s restructuring and will also support the Applicant’s senior leadership team, including the President and Vice-Chancellor.

[5] The Applicant is of the view that the CRO will provide a fresh perspective and assist the Applicant in moving to a financially sustainable and successful future.

[6] A proposed engagement letter indicates that the compensation to the CRO is at an hourly rate of \$650 per hour (up to a maximum of 80 hours each month). There is no additional “success fee” component to the CRO’s compensation.

[7] The Monitor has reviewed the proposed fees and disbursements set out in the CRO Engagement Letter and believes them to be fair and reasonable in the circumstances.

[8] The proposed appointment of the CRO is supported by the Laurentian University Faculty Association, Laurentian University Staff Union, the Board and the DIP Lender.

of such claims could result in significant delay to the resolution of such claims.

- (g) The above factors are likely to make the Claims Process more expensive and inefficient.

[24] TD Bank supports the making of a Claims Process Order at this time but submits that, in the circumstances, the process should contemplate disclosure and consultation by the Monitor with the Pre-filing Lenders.

[25] TD Bank submits that Laurentian and the Monitor have acknowledged that material claims will be submitted, some of which claims are unliquidated and/or contingent and may be subject to a bona fide dispute - both with respect to liability and quantum. The consensual resolution of such claims will bear directly on the likelihood of success of any Plan.

[26] TD Bank further submits that its proposed change is reasonable and appropriate in the circumstances and will create a fair and transparent process which furthers the remedial objectives of the CCAA. Further, this proposal does not give a consent or veto right to any creditor with respect to acceptance or compromise of any claim.

[27] Based upon information available to TD Bank at the time its factum was issued, the total quantum of claims is unknown but can reasonably be expected to include: (a) the claims of the Pre-filing Lenders; (b) claims of current and former employees; (c) claims of the federated universities arising from the termination and disclaimer of their agreements with Laurentian; (d) potential claims arising from the pension-related claim; and (e) claims of other creditors with pre-filing and restructuring claims.

[28] TD Bank anticipates many of these claims will be for significant amounts, will be complex, and will engage multiple legal and valuation issues. The acceptance or settlement of these claims will bear directly on the entitlements of the creditors under and in respect of any Plan.

[29] TD Bank submits that the transparency and consultation that it seeks to import into the Claims Process will enhance the likelihood of a viable Plan.

Analysis

[30] The broad remedial objectives of the CCAA are to facilitate a restructuring rather than a liquidation of assets. The objective of a restructuring will most likely be achieved where stakeholders are treated as advantageously and fairly as the circumstances permit (see *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379 at paras. 15-19, 56-66 and 70 (“*Century Services*”)).

[31] A claims process is an essential component of any plan and it is necessary and appropriate that the claims process furthers the remedial objective of the CCAA (*Timminco Limited, Re*, 2014 ONSC 3393 at para. 41).

[32] A claims process order must be carefully drafted so as to ensure that the process by which claims are determined is both fair and reasonable to all stakeholders, including those who will be directly affected by the acceptance of other claims (*Steels Industrial Products Ltd. (Re)*, 2012 BCSC 1501 at para. 38 (“*Steels*”).

[33] TD Bank submits that its proposal is consistent with the entitlements of creditors under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (“BIA”) to review proofs of claim filed by others and to seek an order from the court expunging or reducing a proof of claim accepted by a trustee. TD Bank points out that such entitlements are available to creditors under the BIA in both bankruptcy and commercial proposal proceedings and to the extent possible, aspects of insolvency law that are common to the BIA and CCAA should be harmonized. The examples provided by TD Bank are BIA, ss. 26, 37, 66, 126 and 135(5); see also *Century Services* at para. 24.

[34] TD Bank references the following cases as examples where the disclosure and involvement of certain parties has been incorporated into the claims process. These cases are *Crystallex International Corp., Re*, 2012 ONSC 6812; *Target Canada Co.* (11 June 2015), Toronto, CV-15-10832-00CL (Ont. S.C.) at para. 30; *Carillion Canada Holdings Inc.* (6 July 2018), Toronto, CV-18-590812-00CL (Ont. S.C.); and *Steels* at para. 13.

[35] TD Bank acknowledges there are no set rules in the CCAA which govern the Claims Process. I agree with this statement.

[36] The facts underlining each of the cases relied upon by TD Bank needs to be taken into account. *Crystallex* had been a bitterly fought proceeding extending nearly 10 years. *Target Canada* was a liquidation proceeding from the outset. *Carillion* was also a liquidating CCAA process, as was *Steels*. Suffice to say, there are considerable differences in how a supervising judge will approach a liquidating CCAA in contrast to a CCAA proceeding leading to an operational restructuring. For this reason, the cases referred to by TD Bank are of limited assistance.

[37] In an operational restructuring, it is necessary to consider the timelines. From the outset, Laurentian has proceeded on the basis that it intends to remain in operation. Laurentian has stressed that it is essential that these proceedings be completed as soon as possible. The proceedings cannot be completed without the Claims Process being finalized. I am concerned that the TD Bank proposals could delay the Claims Process from being completed on a timely basis.

[38] The proposal to establish Consultation Parties is problematic. Under the TD Bank proposal, the Pre-filing Lenders are involved in the consultation process as are such other stakeholders as the Monitor deems appropriate. The TD Bank proposal affects claims in excess of \$5 million. In the context of this proceeding, a \$5 million claim is a significant claim. I am hard-pressed to think of a situation where such a claimant would not be deemed an appropriate Consultation Party. I am given to understand that there might be in the range of 15 or so claims over \$5 million. If each claimant or a substantial majority of these claimants is deemed to be a Consultation Party, the sheer size of the group would impede its mandate and progress. The process will cease to be efficient and effective in resolving issues.

TAB 12

Court of King's Bench of Alberta

Citation: Mantle Materials Group, Ltd (Re), 2024 ABKB 19

Date: 20240110
Docket: B201 965622; 2301 16114
Registry: Calgary

In the Matter of the Bankruptcy and Insolvency Act,
RSC 1985 c B-3, as Amended

-and-

In the Matter of the Bankruptcy of
Mantle Materials Group Ltd

In the Matter of the Companies' Creditors Arrangement Act,
RSC 1985, c C-36, as Amended

-and-

In the Matter of the Compromise or Arrangement
of Mantle Materials Group, Ltd and RLF Canada Holdings Ltd

Reasons for Decision
of the
Associate Chief Justice
D.B. Nixon

I. Introduction

[1] This is an application by Mantle Materials Group, Ltd. (“**Mantle**”) to convert their action under the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 (the “**BIA**”) to a proceeding under the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 (the “**CCA**”). The conversion

[52] Mantle submitted that the stay of proceedings should also be extended to RLF Canada. Mantle argues that this is necessary because the management of RLF Canada is the same as the management of Mantle.

[53] Pathward National Association (“**Pathward**”) is a secured creditor of Mantle. Pathward has filed court proceedings against RLF Canada.

[54] Mantle asserts that if Pathward is able to exercise remedies against the shares of Mantle, it would divert time and attention of Mantle’s management to respond to those remedies. Furthermore, Mantle argues that this would undermine Mantle’s ability to address its reclamation obligations. As a result, Mantle argues the extension of the stay of proceedings to RLF Canada is appropriate in the circumstances.

[55] This is opposed by Travelers and Pathward. To support their position they highlight the wording of section 11.04 of the CCAA, which reads as follows:

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

[56] To further support their position, Travelers and Pathward reference the decision of Justice Dario in *Northern Transportation Company Limited (Re)* [“*Northern Transportation*”] and James D. Gage and Trevor Curtis’s “Staying Guarantees by Non-Debtors and Section 11.04 of the CCAA”, 2022 20th *Annual Review of Insolvency Law* [“**2022 ARIL Paper**”] to argue it would be inappropriate in the present case to extend the stay of proceedings to RLF Canada.

[57] The 2022 ARIL Paper acknowledges that the proper interpretation of section 11.04 of the CCAA has been the subject of varying interpretive approaches, from the narrow to the broad, for what is implied by the exception. I note that in *Northern Transportation* at paragraph 101, the decision leaves open that in certain exceptional circumstances it would be appropriate to grant a stay of proceedings that might appear contrary to section 11.04 of the CCAA.

[58] Of particular note is the conclusion in the 2022 ARIL Paper (at page 64) that:

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

[59] The critical fact in this case are the existing reclamation obligations. Given the judicial direction issued in *Redwater*, the outstanding work associated with those reclamation obligations must be given priority. That environmental responsibility constitutes an exception which must be recognized in these circumstances.

[60] Based on my review of evidence and my analysis of the law, I find it is appropriate to extend the stay of proceedings to RLF Canada. I make this determination because, as highlighted

TAB 13

CITATION: McEwan Enterprises Inc., 2021 ONSC 6453
COURT FILE NO.: CV-21-00669445-00CL
DATE: 2021-10-01

SUPERIOR COURT OF JUSTICE - ONTARIO

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF MCEWAN ENTERPRISES INC.

BEFORE: Chief Justice G.B. Morawetz

COUNSEL: *Robert J. Chadwick, Caroline Descours, and Trish Barrett* for the Applicant

Sean Zweig and Joshua Foster, for the Monitor

Virginie Gauthier, for The Cadillac Fairview Corporation Limited

HEARD and DETERMINED: September 28, 2021

REASONS RELEASED: October 1, 2021

ENDORSEMENT

1. The initial hearing of this matter took place on September 28, 2021. At the conclusion of the hearing, I granted an Initial Order with reasons to follow. These are the reasons.

A. OVERVIEW

2. McEwan Enterprises Inc. (“MEI”) is a full-service restaurant, catering, gourmet grocery and events company (the “Business”) based in the Greater Toronto Area (the “GTA”). MEI was founded in 1987 by Mark McEwan, who leads the development, preparation and delivery of the culinary aspects of the Business.

3. Capitalized terms used but not defined herein have the meanings given to such terms in the Affidavit of Dennis Mark McEwan sworn September 27, 2021 (the “McEwan Affidavit”).

4. MEI brings this application for an initial order (the “Initial Order”) under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the “CCAA”). Counsel to MEI submits that the principal objectives of these CCAA proceedings are to ensure the ongoing operations of the McEwan Group for the benefit of its many stakeholders and to effectuate a restructuring of MEI and its Business. As part of its restructuring efforts pursuant to these CCAA proceedings, MEI intends to seek to complete the sale and transfer of the Business pursuant to the proposed Transaction (as defined below).

those requirements. The question is whether it is appropriate for the court to exercise its jurisdiction.

36. MEI believes that the issuance of a newspaper notice and the public posting of a list of individual creditors and their claims will not serve to provide any material benefit to the relevant parties, who are intended to not be impacted by these CCAA proceedings, and will add unnecessary costs. MEI believes that a notice issued by MEI to its creditors will be a more efficient and less disruptive means of notifying such parties in these circumstances.

37. I have not been persuaded that it is appropriate or necessary, in these circumstances to deviate from the notice provisions prescribed by the CCAA.

38. CCAA proceedings are public proceedings. The Supreme Court, in the recent decision *Sherman Estate v. Donovan*, 2021 SCC 25 at paras. 37-38, confirmed that court proceedings are presumptively open to the public. It seems to me that, absent extenuating circumstances, any attempt to limit the publication of CCAA proceedings by altering the prescribed notice provisions is not consistent with the open court presumption which must be respected.

39. It is necessary to recognize that it is MEI that is seeking court protection from its creditors and has resorted to the CCAA to achieve its objectives. It does not lie with MEI to alter the notice provisions to suit its purposes.

40. The CCAA sets out notice provisions, which I do not consider to be onerous. Further, the costs associated with a newspaper notice are, in my view, inconsequential when one considers the assets and liabilities of MEI.

41. However, in an effort to eliminate any possible confusion surrounding the publication of individuals whose claims are expected to be unaffected in these proceedings, I have authorized minor adjustments to the notice provisions which are reflected in the signed order.

Extending the Stay of Proceedings to the Non-Filing Parties

42. Courts have the authority under the broad jurisdiction granted under Sections 11 and 11.02 of the CCAA and the Court's inherent jurisdiction to grant a stay of proceedings in favour of third parties that are not themselves applicants in a CCAA proceeding. (See: CCAA, Sections 11 and 11.02(1); *Tamerlane Ventures Inc., Re*, 2013 ONSC 5461 at para. 21 [*Tamerlane*]; *Laurentian University of Sudbury, Re*, 2021 ONSC 659 at para. 39 [*Laurentian*]; and *Lehndorff, supra* at paras. 5, 16, 21; BOA, Tab 3).

43. The Court has considered the following non-exhaustive list of factors in determining whether to extend a stay of proceedings to non-applicant third parties:

- (a) the business and operations of the third party was significantly intertwined and integrated with those of the debtor company;

- (b) extending the stay to the third party would help maintain stability and value during the CCAA process;
- (c) not extending the stay to the third party would have a negative impact on the debtor company's ability to restructure, potentially jeopardizing the success of the restructuring and the continuance of the debtor company;
- (d) if the debtor company is prevented from concluding a successful restructuring with its creditors, the economic harm would be far-reaching and significant;
- (e) failure of the restructuring would be even more harmful to customers, suppliers, landlords and other counterparties whose rights would otherwise be stayed under the third party stay;
- (f) if the restructuring proceedings are successful, the debtor company will continue to operate for the benefit of all of its stakeholders, and its stakeholders will retain all of its remedies in the event of future breaches by the debtor company or breaches that are not related to the released claims; and
- (g) the balance of convenience favours extending the stay to the third party. (See: *JTI-Macdonald, supra* at para. 15; *Laurentian, supra* at para. 40; *Cinram, supra* at para. 37 and Sch. C at paras. 63-64; *Lehndorff, supra* at para. 21).

44. MEI submits that it is appropriate to extend the Stay of Proceedings to the Non-Filing Parties given:

- (a) Mr. McEwan has granted certain personal guarantees, indemnities and/or security in respect of certain of MEI's obligations, and the McEwan Subsidiary holds MEI's interests in the ONE Restaurant Partnership, an important part of the overall Business of MEI;
- (b) if any enforcement proceedings were commenced against any of the Non-Filing Parties, it would cause significant disruption to MEI, would have a detrimental effect on MEI's restructuring efforts, and there could be a significant erosion of value to the Business to the detriment of all stakeholders; and
- (c) the obligations which Mr. McEwan has guaranteed, indemnified and/or secured are not anticipated to be impacted by the CCAA proceedings and would be assumed as part of the proposed Transaction, thus MEI believes there would be no prejudice in granting the requested extension of the Stay of Proceedings.

45. I accept that the extension of the Stay of Proceedings in favour of the Non-Filing Parties is appropriate in these circumstances while MEI works to implement a restructuring of the Business, including the proposed Transaction, for the benefit of its many stakeholders.

46. MEI is also seeking approval of the Administration Charge in respect of certain administrative costs of these proceedings and the Directors' Charge in respect of the

TAB 14

Court of Appeal for Ontario,
Laskin, Cronk and Blair JJ.A.
August 18, 2008

Debtor and creditor -- Companies' Creditors Arrangement Act
-- Companies' Creditors Arrangement Act permitting inclusion of
third-party releases in plan of compromise or arrangement to be
sanctioned by court where those releases are reasonably
connected to proposed restructuring -- Companies' Creditors
Arrangement Act, R.S.C. 1985, c. C-36.

In response to a liquidity crisis which threatened the
Canadian market in Asset Backed Commercial Paper ("ABCP"), a
creditor-initiated Plan of Compromise and Arrangement was
crafted. The Plan called for the release of third parties from
any liability associated with ABCP, including, with certain
narrow exceptions, liability for claims relating to fraud. The
"double majority" required by s. 6 of the Companies'
Creditors Arrangement Act ("CCAA") approved the Plan. The
respondents sought court approval of the Plan under s. 6 of the
CCAA. The application judge made the following findings: (a)
the parties to be released were necessary and essential to the
restructuring; (b) the claims to be released were rationally
related to the purpose of the Plan and necessary for it; (c)
the Plan could not succeed without the releases; (d) the
parties who were to have claims against them released were
contributing in a tangible and realistic way to the Plan; and
(e) the Plan would benefit not only the debtor companies but
creditor noteholders generally. The application judge
sanctioned the Plan. The appellants were holders of ABCP notes
who opposed the Plan. On appeal, they argued that the CCAA does

not permit a release of claims against third parties and that the releases constitute an unconstitutional confiscation of private property that is within the exclusive domain of the provinces under s. 92 of the Constitution Act, 1867.

Held, the appeal should be dismissed.

On a proper interpretation, the CCAA permits the inclusion of third-party releases in a plan of compromise or arrangement to be sanctioned by the court where those releases are reasonably connected to the proposed restructuring. That conclusion is supported by (a) the open-ended, flexible character of the CCAA itself; (b) the broad nature of the term "compromise or arrangement" as used in the CCAA; and (c) the express statutory effect of the "double majority" vote and court sanction which render the plan binding on all creditors, including those unwilling to accept certain portions of it. The first of these signals a flexible approach to the application of the CCAA in new and evolving situations, an active judicial role in its application and interpretation, and a liberal approach to interpretation. The second provides the entre to negotiations between the parties [page514] affected in the restructuring and furnishes them with the ability to apply the broad scope of their ingenuity to fashioning the proposal. The latter afford necessary protection to unwilling creditors who may be deprived of certain of their civil and property rights as a result of the process.

While the principle that legislation must not be construed so as to interfere with or prejudice established contractual or proprietary rights -- including the right to bring an action -- in the absence of a clear indication of legislative intention to that effect is an important one, Parliament's intention to clothe the court with authority to consider and sanction a plan that contains third-party releases is expressed with sufficient clarity in the "compromise or arrangement" language of the CCAA coupled with the statutory voting and sanctioning mechanism making the provisions of the plan binding on all creditors. This is not a situation of impermissible "gap-filling" in the case of legislation severely affecting property rights; it is a question of finding meaning in the language of the Act itself.

Interpreting the CCAA as permitting the inclusion of third-party releases in a plan of compromise or arrangement is not unconstitutional under the division-of-powers doctrine and does not contravene the rules of public order pursuant to the Civil Code of Quebec. The CCAA is valid federal legislation under the federal insolvency power, and the power to sanction a plan of compromise or arrangement that contains third-party releases is embedded in the wording of the CCAA. The fact that this may interfere with a claimant's right to pursue a civil action or trump Quebec rules of public order is constitutionally immaterial. To the extent that the provisions of the CCAA are inconsistent with provincial legislation, the federal legislation is paramount.

The application judge's findings of fact were supported by the evidence. His conclusion that the benefits of the Plan to the creditors as a whole and to the debtor companies outweighed the negative aspects of compelling the unwilling appellants to execute the releases was reasonable.

Cases referred to

Steinberg Inc. c. Michaud, [1993] J.Q. no 1076, 42 C.B.R. (5th) 1, 1993 CarswellQue 229, 1993 CarswellQue 2055, [1993] R.J.Q. 1684, J.E. 93-1227, 55 Q.A.C. 297, 55 Q.A.C. 298, 41 A.C.W.S. (3d) 317 (C.A.), not folld

Canadian Airlines Corp. (Re), [2000] A.J. No. 771, 2000 ABQB 442, [2000] 10 W.W.R. 269, 84 Alta. L.R. (3d) 9, 265 A.R. 201, 9 B.L.R. (3d) 41, 20 C.B.R. (4th) 1, 98 A.C.W.S. (3d) 334 (Q.B.); NBD Bank, Canada v. Dofasco Inc. (1999), 46 O.R. (3d) 514, [1999] O.J. No. 4749, 181 D.L.R. (4th) 37, 127 O.A.C. 338, 1 B.L.R. (3d) 1, 15 C.B.R. (4th) 67, 47 C.C.L.T. (2d) 213, 93 A.C.W.S. (3d) 391 (C.A.); Pacific Coastal Airlines Ltd. v. Air Canada, [2001] B.C.J. No. 2580, 2001 BCSC 1721, 19 B.L.R. (3d) 286, 110 A.C.W.S. (3d) 259 (S.C.); Stelco Inc. (Re) (2005), 78 O.R. (3d) 241, [2005] O.J. No. 4883, 261 D.L.R. (4th) 368, 204 O.A.C. 205, 11 B.L.R. (4th) 185, 15

(a) the open-ended, flexible character of the CCAA itself, (b) the broad nature of the term "compromise or arrangement" as used in the Act, and (c) the express statutory effect of the "double-majority" vote and court sanction which render the plan binding on all creditors, including [page525] those unwilling to accept certain portions of it. The first of these signals a flexible approach to the application of the Act in new and evolving situations, an active judicial role in its application and interpretation, and a liberal approach to that interpretation. The second provides the entre to negotiations between the parties affected in the restructuring and furnishes them with the ability to apply the broad scope of their ingenuity in fashioning the proposal. The latter afford necessary protection to unwilling creditors who may be deprived of certain of their civil and property rights as a result of the process.

[44] The CCAA is skeletal in nature. It does not contain a comprehensive code that lays out all that is permitted or barred. Judges must therefore play a role in fleshing out the details of the statutory scheme. The scope of the Act and the powers of the court under it are not limitless. It is beyond controversy, however, that the CCAA is remedial legislation to be liberally construed in accordance with the modern purposive approach to statutory interpretation. It is designed to be a flexible instrument and it is that very flexibility which gives the Act its efficacy: *Canadian Red Cross Society (Re)*, [1998] O.J. No. 3306, 5 C.B.R. (4th) 299 (Gen. Div.). As Farley J. noted in *Dylex Ltd. (Re)*, [1995] O.J. No. 595, 31 C.B.R. (3d) 106 (Gen. Div.), at p. 111 C.B.R., "[t]he history of CCAA law has been an evolution of judicial interpretation".

[45] Much has been said, however, about the "evolution of judicial interpretation" and there is some controversy over both the source and scope of that authority. Is the source of the court's authority statutory, discerned solely through application of the principles of statutory interpretation, for example? Or does it rest in the court's ability to "fill in the gaps" in legislation? Or in the court's inherent jurisdiction?

[46] These issues have recently been canvassed by the

TAB 15

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Quest University Canada (Re)*,
2020 BCSC 1845

Date: 20201126
Docket: S200586
Registry: Vancouver

In the Matter of the **COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C.**
1985, c. C-36, as amended

- and -

In the Matter of the **SEA TO SKY UNIVERSITY ACT, S.B.C. 2002, c. 54**

- and -

In the Matter of **A PLAN OF COMPROMISE AND ARRANGEMENT OF QUEST
UNIVERSITY CANADA**

Petitioner

Before: The Honourable Madam Justice Fitzpatrick

Reasons for Judgment (Claims Process / Meeting Orders / Break Up Fee)

Counsel for the Petitioner:	J.R. Sandrelli T. Jeffries
Counsel for the Monitor PricewaterhouseCoopers Inc.:	V.L. Tickle
Counsel for Primacorp Ventures Inc.:	P. Rubin G. Umbach
Counsel for RCM Capital Management Ltd. and SESA-BC Holdings Ltd.:	K. Jackson
Counsel for Southern Star Developments Ltd.:	P. Reardon K. Strong
Counsel for Vanchorverve Foundation:	C.D. Brousson
Counsel for Halladay Education Group:	D. Lawrenson

Counsel for Capilano University:	K. Mak
Counsel for Confidential Party (Development Partner #1):	G. Barr R. McKenna
Counsel for Quest University Faculty Union:	J. Sanders
Counsel for Bank of Montreal:	S.A. Poisson
Counsel for Her Majesty The Queen In Right of Province of British Columbia and the Ministry of Advanced Education Skills and Training:	A. Welch
Counsel for 1114586 B.C. Ltd.:	K.E. Siddall
Counsel for Association for the Advancement of Scholarship:	L. Hiebert
Place and Date of Hearing:	Vancouver, B.C. November 3, 2020
Place and Date of Decision with Written Reasons to Follow:	Vancouver, B.C. November 3, 2020
Place and Date of Written Reasons:	Vancouver, B.C. November 26, 2020

- e) Provide Quest with a \$20 million secured credit facility.

[19] All of the transaction documents are in settled form and the signed documents are in escrow. Primacorp and Quest are working towards a closing date in late December 2020.

CLAIMS PROCESS

[20] The remedial objective of the CCAA is to facilitate a restructuring of a debtor company. Section 11 of the CCAA imbues the supervising judge with a broad statutory authority to make such orders as are appropriate toward achieving that objective: *Bul River Mineral Corporation (Re)*, 2014 BCSC 1732 at para. 29 (“*Bul River #2*”).

[21] Establishing a claims process toward determining claims to be advanced under the CCAA is a recognized step in proceedings across Canada: *ScoZinc Ltd. (Re)*, 2009 NSSC 136 at para. 23; and *Bul River #2* at paras. 31-32.

[22] In *Timminco Limited (Re)*, 2014 ONSC 3393 at paras. 41–44, Regional Senior Justice Morawetz (as he then was) discussed “first principles” from the CCAA in relation to claims process orders and the establishment of a claims bar date. He stated:

[41] It is also necessary to return to first principles with respect to claims-bar orders. The CCAA is intended to facilitate a compromise or arrangement between a debtor company and its creditors and shareholders. For a debtor company engaged in restructuring under the CCAA, which may include a liquidation of its assets, it is of fundamental importance to determine the quantum of liabilities to which the debtor and, in certain circumstances, third parties are subject. It is this desire for certainty that led to the development of the practice by which debtors apply to court for orders which establish a deadline for filing claims.

[23] Quest submits that a claims process is necessary to enable it to implement a plan and close the Primacorp transaction.

[24] Quest indicates that there are five secured creditors holding approximately \$30.7 million in debt. Quest estimates that there are 446 unsecured creditors holding

TAB 16

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT,

R.S.C. 1985, C-36. AS AMENDED

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR
ARRANGEMENT OF CANWEST GLOBAL COMMUNICATIONS CORP. AND THE
OTHER APPLICANTS LISTED ON SCHEDULE "A"

BEFORE: PEPALL J.

COUNSEL: *Lyndon Barnes, Edward Sellers and Jeremy Dacks* for the Applicants
Alan Merskey for the Special Committee of the Board of Directors
David Byers and Maria Konyukhova for the Proposed Monitor, FTI Consulting
Canada Inc.
Benjamin Zarnett and Robert Chadwick for Ad Hoc Committee of Noteholders
Edmond Lamek for the Asper Family
Peter H. Griffin and Peter J. Osborne for the Management Directors and Royal
Bank of Canada
Hilary Clarke for Bank of Nova Scotia,
Steve Weisz for CIT Business Credit Canada Inc.

REASONS FOR DECISION

Relief Requested

[1] Canwest Global Communications Corp. ("Canwest Global"), its principal operating subsidiary, Canwest Media Inc. ("CMI"), and the other applicants listed on Schedule "A" of the Notice of Application apply for relief pursuant to the *Companies' Creditors Arrangement Act*.¹ The applicants also seek to have the stay of proceedings and other provisions extend to the following partnerships: Canwest Television Limited Partnership ("CTLP"), Fox Sports World Canada Partnership and The National Post Company/La Publication National Post ("The National Post Company"). The businesses operated by

¹ R.S.C. 1985, c. C. 36, as amended

[26] Secondly, the required statement of projected cash-flow and other financial documents required under section 11(2) of the CCAA have been filed.

(b) Stay of Proceedings

[27] Under section 11 of the CCAA, the Court has broad jurisdiction to grant a stay of proceedings and to give a debtor company a chance to develop a plan of compromise or arrangement. In my view, given the facts outlined, a stay is necessary to create stability and to allow the CMI Entities to pursue their restructuring.

(b) Partnerships and Foreign Subsidiaries

[28] The applicants seek to extend the stay of proceedings and other relief to the aforementioned partnerships. The partnerships are intertwined with the applicants' ongoing operations. They own the National Post daily newspaper and Canadian free-to-air television assets and certain of its specialty television channels and some other television assets. These businesses constitute a significant portion of the overall enterprise value of the CMI Entities. The partnerships are also guarantors of the 8% senior subordinated notes.

[29] While the CCAA definition of a company does not include a partnership or limited partnership, courts have repeatedly exercised their inherent jurisdiction to extend the scope of CCAA proceedings to encompass them. See for example *Re Lehndorff General Partners Ltd.*⁵; *Re Smurfit-Stone Container Canada Inc.*⁶; and *Re Calpine Canada Energy Ltd.*⁷. In this case, the partnerships carry on operations that are integral and closely interrelated to the business of the applicants. The operations and obligations of the partnerships are so intertwined with those of the applicants that irreparable harm would ensue if the requested stay were not granted. In my view, it is just and convenient to grant the relief requested with respect to the partnerships.

⁵ (1993), 9 B.L.R. (2d) 275.

⁶ [2009] O.J. No. 349.

⁷ (2006), 19 C.B.R. (5th) 187.

[30] Certain applicants are foreign subsidiaries of CMI. Each is a guarantor under the 8% senior subordinated notes, the CIT credit agreement (and therefore the DIP facility), the intercompany notes and is party to the support agreement and the Use of Cash Collateral and Consent Agreement. If the stay of proceedings was not extended to these entities, creditors could seek to enforce their guarantees. I am persuaded that the foreign subsidiary applicants as that term is defined in the affidavit filed are debtor companies within the meaning of section 2 of the CCAA and that I have jurisdiction and ought to grant the order requested as it relates to them. In this regard, I note that they are insolvent and each holds assets in Ontario in that they each maintain funds on deposit at the Bank of Nova Scotia in Toronto. See in this regard *Re Cadillac Fairview*⁸ and *Re Global Light Telecommunications Ltd.*⁹

(c) DIP Financing

[31] Turning to the DIP financing, the premise underlying approval of DIP financing is that it is a benefit to all stakeholders as it allows the debtors to protect going-concern value while they attempt to devise a plan acceptable to creditors. While in the past, courts relied on inherent jurisdiction to approve the terms of a DIP financing charge, the September 18, 2009 amendments to the CCAA now expressly provide jurisdiction to grant a DIP financing charge. Section 11.2 of the Act states:

(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.

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

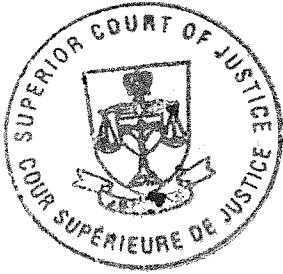
⁸ (1995), 30 C.B.R. (3d) 29.

⁹ (2004), 33 B.C.L.R. (4th) 155.

TAB 17

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE MR.) FRIDAY, THE 30TH
JUSTICE HAINEY) DAY OF NOVEMBER, 2018



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 FORME DEVELOPMENT GROUP INC.
AND THE OTHER COMPANIES LISTED ON SCHEDULE "A"
HERETO

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

INITIAL ORDER

THIS APPLICATION, made by Forme Development Group Inc. and those other parties listed on Schedule "A" (collectively, the "**Applicants**"), pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**") was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the affidavit of Yuan Hua Wang sworn November 5, 2018 and the Exhibits thereto (the "**Wang Affidavit**"), the affidavit of Katie Parent sworn November 6, 2018 and the Exhibit thereto (the "**Parent Affidavit**"), and on reading the consent of KSV Kofman Inc. ("**KSV**") to act as the Monitor (in such capacity, the "**Monitor**"), and upon reading the pre-filing report of KSV dated November 6, 2018 (the "**Report**"), in its capacity as Proposal Trustee and the proposed Monitor, the supplemental report of KSV dated November 7, 2018 (the "**Supplemental Report**"), the second supplemental report of KSV dated November 7, 2018 (the

“**Second Supplemental Report**”), and the third supplemental report of KSV dated November 29, 2018 (the “**Third Supplemental Report**”), and on hearing the submissions of counsel for the Applicants, the proposed Monitor and those other parties present, no one appearing for any other party although duly served as appears from the affidavits of service of Katie Parent sworn November 6, 2018, November 7, 2018 and November 29, 2018.

SERVICE

1. **THIS COURT ORDERS** that the time for service of each of the Notice of Application, the Application Record, the Parent Affidavit, the Report, the Supplemental Report, the Second Supplemental Report and the Third Supplemental Report is hereby abridged and validated so that this Application is properly returnable today and hereby dispenses with further service thereof.

APPLICATION

2. **THIS COURT ORDERS AND DECLARES** that the Applicants are companies to which the CCAA applies.

3. **THIS COURT ORDERS AND DECLARES** that the proposal proceedings (the “**Proposal Proceedings**”) of each of 9500 Dufferin Development Inc. (Estate No. 31-2438977), 250 Danforth Development Inc. (Estate No. 31-2439433), 3310 Kingston Development Inc. (Estate No. 31-2439448) and 1296 Kennedy Development Inc. (Estate No. 31-2439440) (collectively the “**NOI Entities**”) commenced under Part III of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the “**BIA**”), be taken up and continued under the CCAA and that the provisions of Part III of the BIA shall have no further application to the NOI Entities.

TITLE OF PROCEEDINGS

4. **THIS COURT ORDERS** that the title of proceedings in this matter be amended as follows:

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 FORME DEVELOPMENT GROUP INC., 3310 KINGSTON DEVELOPMENT INC., 1296 KENNEDY DEVELOPMENT INC., 1326 WILSON DEVELOPMENT INC., 376 DERRY DEVELOPMENT INC., 9500 DUFFERIN DEVELOPMENT INC., 4439 JOHN DEVELOPMENT INC., 5507 RIVER DEVELOPMENT INC. and 2358825 ONTARIO LTD.

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

PLAN OF ARRANGEMENT

5. **THIS COURT ORDERS** that, subject to paragraph 24 of this Order, the Applicants shall have the authority to file and may, subject to further order of this Court, file with this Court a plan or plans of compromise or arrangement (hereinafter referred to as the “**Plan**” or “**Plans**”).

POSSESSION OF PROPERTY AND OPERATIONS

6. **THIS COURT ORDERS** that the Applicants shall remain in possession and control of their current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate including all proceeds thereof (including, without limitation, those properties listed on Schedule “B” hereto, the “**Property**”). Subject to further Order of this Court, the Applicants shall continue to carry on business in a manner consistent with the preservation of their business (the “**Business**”) and Property. The Applicants are authorized and empowered to continue to retain and employ the employees, consultants, agents, experts, accountants, counsel and such other persons (collectively “**Assistants**”) currently retained or employed by them, with liberty to retain such further Assistants as they deem reasonably necessary or desirable in the ordinary course of business or for the carrying out of the terms of this Order. For greater certainty, the retention of TD Cornerstone Commercial Realty Inc. (“**TD**”) is hereby approved substantially on the terms of the listing agreement appended to the Third Supplemental Report.

7. **THIS COURT ORDERS** that the Applicants shall be entitled but not required to pay the following expenses whether incurred prior to or after this Order:

- (a) all outstanding and future wages, salaries, employee and pension benefits, vacation pay and expenses payable on or after the date of this Order, in each case incurred in the ordinary course of business and consistent with existing compensation policies and arrangements; provided that no such amounts shall be paid to Mr. Wang (as defined below) or any known relative of Mr. Wang without further Order of this Court; and
- (b) subject to paragraph 30 below, the fees and disbursements of any Assistants retained or employed by the Applicants in respect of these proceedings, at their standard rates and charges.

8. **THIS COURT ORDERS** that, except as otherwise provided to the contrary herein, the Applicants shall be entitled but not required to pay all reasonable expenses incurred by the Applicants in carrying on the Business in the ordinary course after this Order, and in carrying out the provisions of this Order, which expenses shall include, without limitation:

- (a) all expenses and capital expenditures reasonably necessary for the preservation of the Property or the Business including, without limitation, payments on account of insurance, maintenance and security services; and
- (b) payment for goods or services actually supplied to the Applicants following the date of this Order.

9. **THIS COURT ORDERS** that the Applicants shall remit, in accordance with legal requirements, or pay:

- (a) any statutory deemed trust amounts in favour of the Crown in right of Canada or of any Province thereof or any other taxation authority which are required to be deducted from employees' wages, including, without limitation, amounts in respect of (i) employment insurance, (ii) Canada Pension Plan and (iii) income taxes;
- (b) all goods and services or other applicable sales taxes (collectively, "**Sales Taxes**") required to be remitted by the Applicants in connection with the sale of goods and services by the Applicants, but only where such Sales Taxes are accrued or collected

after the date of this Order, or where such Sales Taxes were accrued or collected prior to the date of this Order but not required to be remitted until on or after the date of this Order, and

- (c) any amount payable to the Crown in right of Canada or of any Province thereof or any political subdivision thereof or any other taxation authority in respect of municipal realty, municipal business or other taxes, assessments or levies of any nature or kind which are entitled at law to be paid in priority to claims of secured creditors and which are attributable to or in respect of the carrying on of the Business by the Applicants.

10. **THIS COURT ORDERS** that until a real property lease is disclaimed in accordance with the CCAA, the Applicants shall pay all amounts constituting rent or payable as rent under real property leases (including, for greater certainty, common area maintenance charges, utilities and realty taxes and any other amounts payable to the landlord under the lease) or as otherwise may be negotiated between the Applicants and the landlord from time to time (“**Rent**”), for the period commencing from and including the date of this Order, twice-monthly in equal payments on the first and fifteenth day of each month, in advance (but not in arrears). On the date of the first of such payments, any Rent relating to the period commencing from and including the date of this Order shall also be paid.

11. **THIS COURT ORDERS** that, except as specifically permitted herein, the Applicants are hereby directed, until further Order of this Court: (a) to make no payments of principal, interest thereon or otherwise on account of amounts owing by the Applicants to any of its creditors as of this date; (b) to grant no security interests, trust, liens, charges or encumbrances upon or in respect of any of its Property; and (c) to not grant credit or incur liabilities except in the ordinary course of the Business.

RESTRUCTURING

12. **THIS COURT ORDERS** that, subject to paragraph 24 of this Order, the Applicants shall, subject to such requirements as are imposed by the CCAA, have the right to:

- (a) permanently or temporarily cease, downsize or shut down any of its business or operations, and to dispose of redundant or non-material assets not exceeding, in the aggregate \$200,000, in any one or more transactions; and
- (b) terminate the employment of such of its employees or temporarily lay off such of its employees as it deems appropriate,

provided however, and without limiting the provisions of paragraphs 24 and 25, all disbursements shall require the advance consent of the Monitor, and all of the foregoing to permit the Applicants to proceed with an orderly restructuring of the Business (the “**Restructuring**”).

13. **THIS COURT ORDERS** that the Applicants shall provide each of the relevant landlords with notice of the Applicants’ intention to remove any fixtures from any leased premises at least seven (7) days prior to the date of the intended removal. The relevant landlord shall be entitled to have a representative present in the leased premises to observe such removal and, if the landlord disputes the Applicants’ entitlement to remove any such fixture under the provisions of the lease, such fixture shall remain on the premises and shall be dealt with as agreed between any applicable secured creditors, such landlord and the Applicants, or by further Order of this Court upon application by the Applicants on at least two (2) days notice to such landlord and any such secured creditors. If the Applicants disclaim the lease governing such leased premises in accordance with Section 32 of the CCAA, it shall not be required to pay Rent under such lease pending resolution of any such dispute (other than Rent payable for the notice period provided for in Section 32(5) of the CCAA), and the disclaimer of the lease shall be without prejudice to the Applicants’ claim to the fixtures in dispute.

14. **THIS COURT ORDERS** that if a notice of disclaimer is delivered pursuant to Section 32 of the CCAA, then (a) during the notice period prior to the effective time of the disclaimer, the landlord may show the affected leased premises to prospective tenants during normal business hours, on giving the Applicants and the Monitor 24 hours’ prior written notice, and (b) at the effective time of the disclaimer, the relevant landlord shall be entitled to take possession of any such leased premises without waiver of or prejudice to any claims or rights such landlord may have against the Applicants in respect of such lease or leased premises, provided that

nothing herein shall relieve such landlord of its obligation to mitigate any damages claimed in connection therewith.

NO PROCEEDINGS AGAINST THE APPLICANTS OR THE PROPERTY

15. **THIS COURT ORDERS** that until and including December 28, 2018 or such later date as this Court may order (the “**Stay Period**”), no proceeding or enforcement process in any court or tribunal (each, a “**Proceeding**”) shall be commenced or continued against or in respect of the Applicants or the Monitor, or affecting the Business or the Property, except with the written consent of the Applicants and the Monitor, or with leave of this Court, and any and all Proceedings currently under way against or in respect of the Applicants or affecting the Business or the Property are hereby stayed and suspended pending further Order of this Court. Notwithstanding the foregoing, no stay shall apply to Forme Development Group Inc. with respect to the enforcement of mortgages on properties not included in these CCAA proceedings.

16. **THIS COURT ORDERS** that during the Stay Period, except with the written consent of the Applicants and the Monitor, or with leave of this Court, no Proceedings shall be commenced or continued against or in respect of Yuan Hua Wang (“**Mr. Wang**”) or any of his current and future assets, businesses, undertakings and properties of every nature and kind whatsoever, and wherever situate including all proceeds thereof (collectively, the “**Wang Property**”), arising upon or as a result of any default under the terms of any document entered into in connection with any of Mr. Wang’s guarantees of any of the commitments or loans of any of the Applicants (collectively, the “**Wang Default Events**”). Without limitation, the operation of any provision of a contract or agreement between Mr. Wang and any other Person (as hereinafter defined) that purports to effect or cause a termination or cessation of any rights of Mr. Wang, or to accelerate, terminate, discontinue, alter, interfere with, repudiate, cancel, suspend, amend or modify such contract or agreement, in each case as a result of one or more Wang Default Events, is hereby stayed and restrained during the Stay Period.

NO EXERCISE OF RIGHTS OR REMEDIES

17. **THIS COURT ORDERS** that during the Stay Period, all rights and remedies of any individual, firm, corporation, governmental body or agency, or any other entities (all of the

foregoing, collectively being “Persons” and each being a “Person”) against or in respect of the Applicants or the Monitor, or affecting the Business or the Property, are hereby stayed and suspended except with the written consent of the Applicants and the Monitor, or leave of this Court, provided that nothing in this Order shall (i) empower the Applicants to carry on any business which the Applicants are not lawfully entitled to carry on, (ii) affect such investigations, actions, suits or proceedings by a regulatory body as are permitted by Section 11.1 of the CCAA, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of a claim for lien.

18. THIS COURT ORDERS that during the Stay Period, all rights and remedies of any Person against or in respect of Mr. Wang, or affecting the Wang Property, as a result of a Wang Default Event are hereby stayed and suspended except with the written consent of the Applicants and the Monitor, or leave of this Court, provided that nothing in this Order shall (i) empower Mr. Wang to carry on any business which Mr. Wang is not lawfully entitled to carry on, (ii) affect such investigations, actions, suits or proceedings by a regulatory body as are permitted by Section 11.1 of the CCAA, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of a claim for lien.

NO INTERFERENCE WITH RIGHTS

19. THIS COURT ORDERS that during the Stay Period, no Person shall discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of or held by the Applicants, except with the written consent of the Applicants and the Monitor, or leave of this Court.

20. THIS COURT ORDERS that during the Stay Period, no Person shall discontinue, fail to honour, alter, interfere with repudiate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of or held by any other party as a result of a Wang Default Event, except with the written consent of the Applicants and the Monitor, or leave of this Court.

CONTINUATION OF SERVICES

21. **THIS COURT ORDERS** that during the Stay Period, all Persons having oral or written agreements with the Applicants or statutory or regulatory mandates for the supply of goods and/or services, including without limitation all computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation services, utility or other services to the Business or the Applicants, are hereby restrained until further Order of this Court from discontinuing, altering, interfering with or terminating the supply of such goods or services as may be required by the Applicants, and that the Applicants shall be entitled to the continued use of its current premises, telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case that the normal prices or charges for all such goods or services received after the date of this Order are paid by the Applicants in accordance with normal payment practices of the Applicants or such other practices as may be agreed upon by the supplier or service provider and each of the Applicants and the Monitor, or as may be ordered by this Court.

NON-DEROGATION OF RIGHTS

22. **THIS COURT ORDERS** that, notwithstanding anything else in this Order, no Person shall be prohibited from requiring immediate payment for goods, services, use of lease or licensed property or other valuable consideration provided on or after the date of this Order, nor shall any Person be under any obligation on or after the date of this Order to advance or re-advance any monies or otherwise extend any credit to the Applicants. Nothing in this Order shall derogate from the rights conferred and obligations imposed by the CCAA.

PROCEEDINGS AGAINST DIRECTORS AND OFFICERS

23. **THIS COURT ORDERS** that during the Stay Period, and except as permitted by subsection 11.03(2) of the CCAA, no Proceeding may be commenced or continued against any of the former, current or future directors or officers of the Applicants with respect to any claim against the directors or officers that arose before the date hereof and that relates to any obligations of the Applicants whereby the directors or officers are alleged under any law to be liable in their capacity as directors or officers for the payment or performance of such

obligations, until a compromise or arrangement in respect of the Applicants, if one is filed, is sanctioned by this Court or is refused by the creditors of the Applicants or this Court.

APPOINTMENT OF MONITOR

24. **THIS COURT ORDERS** that KSV Kofman Inc. is hereby appointed pursuant to the CCAA as the Monitor, an officer of this Court, to monitor the business and financial affairs of the Applicants with the powers and obligations set out in the CCAA or set forth herein and that the Applicants and its shareholders, officers, directors, and Assistants shall not take any steps with respect to the Applicants, the Business or the Property save and except at the direction of the Monitor pursuant to paragraph 25 of this Order, and shall co-operate fully with the Monitor in the exercise of its powers and discharge of its obligations and provide the Monitor with the assistance that is necessary to enable the Monitor to adequately carry out the Monitor's functions.

25. **THIS COURT ORDERS** that the Monitor, in addition to its prescribed rights and obligations under the CCAA, is hereby directed and empowered to:

- (a) cause the Applicants, or any one or more of them, to exercise rights under and observe its obligations under this Order;
- (b) cause the Applicants to perform such functions or duties as the Monitor considers necessary or desirable in order to facilitate or assist the Applicants in dealing with the Property;
- (c) monitor the Applicants' receipts and disbursements, and if necessary or convenient, in the Monitor's sole discretion, take control of the Applicants' receipts and disbursements;
- (d) report to this Court at such times and intervals as the Monitor may deem appropriate with respect to matters relating to the Property, the Business, and such other matters as may be relevant to the proceedings herein;
- (e) if applicable, reporting to the DIP Lender (as defined below) on a basis to be agreed with the DIP Lender;

- (f) report to and advise mortgagees and other stakeholders of the Applicants as to the status of the sale process and, to the extent requested by mortgagees, convene a bi-weekly conference call with mortgagees, to report on the status of the Property;
- (g) advise the Applicants in its preparation of the Applicants' cash flow statements;
- (h) borrow funds in accordance with the terms of this Order;
- (i) conduct and carry out a sale process or sales processes for all of the Applicants' Property in accordance with the sale process described in the Third Supplemental Report and retain or consult with the agents, consultants or other parties;
- (j) propose or cause the Applicants to propose one or more Plans in respect of the Applicants or any one or more of them;
- (k) provide any consents that are contemplated by this Order;
- (l) assist the Applicants, to the extent required by the Applicants, with the holding and administering of creditors' or shareholders' meetings for voting on the Plan;
- (m) have full and complete access to the Property, including the premises, books, records, data, including data in electronic form, and other financial documents of the Applicants, to the extent that is necessary to adequately assess the Applicants' business and financial affairs or to perform its duties arising under this Order;
- (n) be at liberty to engage independent legal counsel or such other persons as the Monitor deems necessary or advisable respecting the exercise of its powers and performance of its obligations under this Order; and
- (o) perform such other duties as are required by this Order or by this Court from time to time.

26. **THIS COURT ORDERS** that the Monitor shall not take possession of the Property and shall not, by fulfilling its obligations hereunder, be deemed to have taken or maintained possession or control of the Business or the Property, or any part thereof and that nothing in this

Order, or anything done in pursuance of the Monitor's duties and powers under his Order, shall deem the Monitor to occupy or to take control, care, charge, possession or management (separately and/or collectively, "**Possession**") of any of the Property that might be environmentally contaminated, might be a pollutant or a contaminant, or might cause or contribute to a spill, discharge, release or deposit of a substance contrary to any federal, provincial or other law respecting the protection, conservation, enhancement, remediation or rehabilitation of the environment or relating to the disposal of waste or other contamination including, without limitation, the *Canadian Environmental Protection Act*, the *Ontario Environmental Protection Act*, the *Ontario Water Resources Act*, or the *Ontario Occupational Health and Safety Act* and regulations thereunder (the "**Environmental Legislation**"), provided however that nothing herein shall exempt the Monitor from any duty to report or make disclosure imposed by applicable Environmental Legislation. The Monitor shall not, as a result of this Order or anything done in pursuance of the Monitor's duties and powers under this Order, be deemed to be in Possession of any of the Property within the meaning of any Environmental Legislation, unless it is actually in possession.

27. **THIS COURT ORDERS** that without limiting the provisions herein, each employee of an Applicant shall remain an employee of that Applicant until such time as the applicable Applicant may terminate the employment of such employee. Nothing in this Order shall, in and of itself, cause the Monitor to be liable for any employee-related liabilities or duties, including, without limitation, wages, severance pay, termination pay, vacation pay and pension or benefit amounts, as applicable.

28. **THIS COURT ORDERS** that that the Monitor shall provide any creditor of the Applicants and the DIP Lender (if applicable) with information provided by the Applicants in response to reasonable requests for information made in writing by such creditor addressed to the Monitor. The Monitor shall not have any responsibility or liability with respect to the information disseminated by it pursuant to this paragraph. In the case of information that the Monitor has been advised by the Applicants is confidential, the Monitor shall not provide such information to creditors unless otherwise directed by this Court or on such terms as the Monitor and the Applicants may agree.

29. **THIS COURT ORDERS** that, in addition to the rights and protections afforded the Monitor under the CCAA or as an officer of this Court, the Monitor shall incur no liability or obligation as a result of its appointment or the carrying out of the provisions of this Order, save and except for any gross negligence or wilful misconduct on its part. Nothing in this Order shall derogate from the protections afforded the Monitor by the CCAA or any applicable legislation.

30. **THIS COURT ORDERS** that the Monitor, counsel to the Monitor and counsel to the Applicants shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges, by the Applicants as part of the costs of these proceedings. The Applicants' counsel, the Monitor and the Monitor's counsel shall be entitled to invoice on a monthly or other periodic basis in their discretion provided that such fees and disbursements shall be paid out of sale proceeds of the Property in accordance with the priority set out below.

31. **THIS COURT ORDERS** that the Monitor and its legal counsel shall pass their accounts from time to time, and for this purpose the accounts of the Monitor and its legal counsel are hereby referred to a judge of the Commercial List of the Ontario Superior Court of Justice.

32. **THIS COURT ORDERS** that, as security for their professional fees and disbursements incurred at their standard rates and charges, both before and after the making of this Order in respect of these proceedings ("**Administration Fees**"), the Monitor, counsel to the Monitor and the Applicants' counsel shall be entitled to the benefit of and are hereby granted a charge (the "**Administration Charge**") on all of the Applicants' Property on the following terms:

- (a) the maximum amount of the Administration Charge per Property shall only be for security of the applicable Administration Fees that constitute Property Specific Costs (as defined below) for that particular Property and any pro rata portion of General Costs (as defined below) attributable to such Property in accordance with paragraph 34(b) below; and
- (b) the Administration Charge shall automatically attach to any Property that is unencumbered or not fully secured.

33. **THIS COURT ORDERS** that the Administration Charge shall rank in priority to all security interests, trusts, deemed trusts, liens, charges and encumbrances, claims of secured

creditors, statutory or otherwise (collectively, “**Encumbrances**”) in favour of any Person, other than (a) any first mortgagee on a Property (in respect of the first mortgage registered on the Property only); (b) the DIP Lender’s Charge (as defined below, and to the extent applicable); and (c) the second mortgagee on the Property owned by 2358825 Ontario Ltd. (1483 Birchmount Road).

FUNDING

34. **THIS COURT ORDERS** that these CCAA Proceedings shall be funded in the following manner:

- (a) With respect to costs related to a specific Property (a “**Property Specific Cost**”),
 - (i) the first mortgagee on such Property will have the right (but not the obligation) to fund such amount as an advance under its mortgage at an interest rate accruing at a rate that is the higher of (i) the applicable rate under its mortgage; and (ii) 9.5% per annum, calculated in arrears;
 - (ii) if the first mortgagee does not fund such amount, the second mortgagee will have the right (but not the obligation) to fund such amount as an advance under its mortgage at an interest rate accruing at a rate that is the of the higher of (i) the applicable rate under its mortgage; and (ii) 9.5% per annum, calculated in arrears. The amount advanced will have a first-ranking super-priority charge over the applicable Property only. If necessary, this process will continue until all mortgagees on a Property have been given the opportunity to fund;
 - (iii) where no mortgagee funds such amount, the Monitor shall draw such amount on the Standby DIP (defined below);
- (b) with respect to costs not specific to a particular Property (“**General Costs**”) in an amount up to \$400,000 in the aggregate, if there is not sufficient funding through the Applicant’s cash on hand or cash immediately available generated by the sale of any Properties (after repayment of all known debts):
 - (i) each first mortgagee shall have the right (but not the obligation) to fund its pro-rated estimated share of such funding based on the principal amount of its first mortgage as an advance under its mortgage at an interest rate accruing at a rate that is the of the higher of (i) the applicable rate under its mortgage; and (ii) 9.5% per annum, calculated in arrears;

- (ii) if the first mortgagee does not fund such amount, the second mortgagee will have the right (but not the obligation) to fund such amount as an advance under its mortgage at an interest rate accruing at a rate that is the higher of (i) the applicable rate under its mortgage; and (ii) 9.5% per annum, calculated in arrears. The amount advanced will have a first-ranking super-priority charge over the applicable Property only. If necessary, this process will continue until all mortgagees on a Property have been given the opportunity to fund;
- (iii) where no mortgagee funds such amount, the Monitor shall draw such amount on the Standby DIP.

35. **THIS COURT ORDERS** that the Monitor shall be at liberty and it is hereby empowered to cause any Applicant to borrow by way of a revolving credit or otherwise (the “**Standby DIP**”) from such lender as it may arrange in accordance with paragraph 34 (whether an existing mortgagee or otherwise, a “**DIP Lender**”), such monies from time to time as it may consider necessary or desirable to fund Project Specific Costs and General Costs in accordance with paragraph 34.

36. **THIS COURT ORDERS** that the Monitor is at liberty and authorized to issue certificates substantially in the form annexed as Schedule “C” hereto (the “**DIP Certificates**”) for any amount borrowed pursuant to paragraph 35 and, for greater certainty, each DIP Certificate shall indicate the Property to be charged and the amount to be charged pursuant to the DIP Certificate.

37. **THIS COURT ORDERS** that any DIP Lender shall be entitled to the benefit of and is hereby granted a fixed and specific charge on the Property identified in a DIP Certificate (the “**DIP Lender's Charge**”) as security for the payment of the principal amount set out in any DIP Certificate, together with interest and charges thereon, in priority to all security interests, trusts, liens, charges and encumbrances, statutory or otherwise, in favour of any Person, including, without limitation, the Administration Charge, provided however, that the amount of any DIP Lender’s Charge shall attach only to the Property identified in a DIP Certificate with respect to that borrowing.

38. **THIS COURT ORDERS** that the monies from time to time borrowed pursuant to paragraph 35 and any and all DIP Certificates evidencing the same or any part thereof shall rank

on a *pari passu* basis per Property, unless otherwise agreed to by the holders of any prior issued DIP Certificates.

VALIDITY OF CHARGES CREATED BY THIS ORDER

39. **THIS COURT ORDERS** that the filing, registration or perfection of the Administration Charge and DIP Lender's Charge (collectively, the "**Charges**") shall not be required, and that the Charges shall be valid and enforceable for all purposes, including as against any right, title or interest filed, registered, recorded or perfected subsequent to the Charges coming into existence, notwithstanding any such failure to file, register, record or perfect.

40. **THIS COURT ORDERS** that except as otherwise expressly provided for herein, or as may be approved by this Court, the Applicants shall not grant any Encumbrances over any Property that rank in priority to, or *pari passu* with, any of the Charges, unless the Applicants also obtain the prior written consent of the beneficiaries of the applicable Charges or further Order of this Court.

41. **THIS COURT ORDERS** that the Charges shall not be rendered invalid or unenforceable and the rights and remedies of the chargees entitled to the benefit of the Charges (collectively, the "**Chargees**") thereunder shall not otherwise be limited or impaired in any way by (a) the pendency of these proceedings and the declarations of insolvency made herein or by the Proposal Proceedings and the declarations of insolvency made therein; (b) any application(s) for bankruptcy order(s) issued pursuant to BIA, or any bankruptcy order made pursuant to such applications; (c) the filing of any assignments for the general benefit of creditors made pursuant to the BIA; (d) the provisions of any federal or provincial statutes; or (e) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of Encumbrances, contained in any existing loan documents, lease, sublease, offer to lease or other agreement (collectively, an "**Agreement**") which binds the Applicants, and notwithstanding any provision to the contrary in any Agreement:

- (a) neither the creation of the Charges nor the execution, delivery, perfection, registration or performance in connection thereof shall create or be deemed to constitute a breach by the Applicants of any Agreement to which it is a party;

- (b) the payments made by the Applicants pursuant to this Order and the granting of the Charges, do not and will not constitute preferences, fraudulent conveyances, transfers at undervalue, oppressive conduct, or other challengeable or voidable transactions under any applicable law.

42. **THIS COURT ORDERS** that any Charge created by this Order over leases of real property in Canada shall only be a Charge in the Applicants' interest in such real property leases.

SALE PROCESS

43. **THIS COURT ORDERS** that the sale process (the "Sale Process"), as described in Section 3.0 of the Third Supplemental Report be and is hereby approved.

44. **THIS COURT ORDERS** that the Monitor and TD be and are hereby authorized and directed to perform their obligations under and in accordance with the Sale Process, and to take such further steps as they consider necessary or desirable in carrying out the Sale Process as described in the Third Supplemental Report, subject to prior approval of this Court being obtained before completion of any transactions under the Sale Process.

45. **THIS COURT ORDERS** that without limiting the terms of the Sale Process as set out in the Third Supplemental Report, to the extent that a mortgagee will not be paid in cash in full through bids received through the Sale Process, such mortgagee will be entitled to credit bid its indebtedness and purchase the Property over which it has a mortgage provided that such mortgagee pays any prior ranking indebtedness in full in cash (or such other arrangement to which a prior ranking creditor may in its sole discretion agree).

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

47. **THIS COURT ORDERS** that in connection with the Sale Process and pursuant to clause 7(3)(c) of the *Personal Information and Electronic Documents Act* (Canada), the Monitor, the Applicants and TD are authorized and permitted to disclose personal information of identifiable individuals to prospective purchasers or offerors and to their advisors, but only to the extent desirable or required to negotiate and attempt to complete one or more transactions (each, a "**Transaction**"). Each prospective purchaser or offeror to whom such information is disclosed shall maintain and protect the privacy of such information and shall limit the use of such information to its evaluation of the Transaction, and if it does not complete a Transaction, shall: (i) return all such information to the Monitor, the Applicants or TD, as applicable; (ii) destroy all such information; or (iii) in the case of such information that is electronically stored, destroy all such information to the extent it is reasonably practical to do so. The transacting party with respect to any Property shall be entitled to continue to use the Personal Information provided to it, and related to the Property purchased, in a manner which is in all material respects identical to the prior use of such information by the Applicants, and shall return all other personal information to the Monitor, the Applicants, or TD, as applicable, or ensure that all other personal information is destroyed.

48. **THIS COURT ORDERS** that to the extent there is equity available in any project of the Applicants (each of the projects is set out in Section 3.0(3) of the Report) after payment of all debts, fees and costs owing or incurred in respect of that project (in each case, the "**Project Equity**"), each mortgagee of that project will be entitled to receive in cash an amount equal to 10% of the principal amount of its mortgage prior to any payment to the project's shareholder (the "**Equity Kicker**"); provided that to the extent there is insufficient Project Equity to pay the Equity Kicker in full, each such mortgagee shall be entitled to its *pro-rata* share of the Equity Kicker based on the principal amount of its mortgage; and further provided that any mortgagee with a collateral mortgage will be entitled to collect its Equity Kicker in respect of any Property where it has a mortgage, provided that (i) in no event will such mortgagee receive in the aggregate an Equity Kicker that is greater than 10% of the principal amount of its mortgage owed by the primary mortgagor, and (ii) the advances it provided were used either for the property subject to the mortgage or for another property in the same project.

SERVICE AND NOTICE

49. **THIS COURT ORDERS** that the Monitor shall (i) without delay, publish in the Globe and Mail (National Edition) a notice containing the information prescribed under the CCAA, (ii) within five days after the date of this Order, (A) make this Order publicly available in the manner prescribed under the CCAA, (B) send, in the prescribed manner, a notice to every known creditor who has a claim against the Applicants of more than \$1,000, and (C) prepare a list showing the names and addresses of those creditors and the estimated amounts of those claims, and make it publicly available in the prescribed manner, all in accordance with Section 23(1)(a) of the CCAA and the regulations made thereunder.

50. **THIS COURT ORDERS** that the E-Service Protocol of the Commercial List (the “**Protocol**”) is approved and adopted by reference herein and, in this proceeding, the service of documents made in accordance with the Protocol (which can be found on the Commercial List website at <http://www.ontariocourts.ca/scj/practice/practice-directions/toronto/e-service-protocol/>) shall be valid and effective service. Subject to Rule 17.05 this Order shall constitute an order for substituted service pursuant to Rule 16.04 of the Rules of Civil Procedure. Subject to Rule 3.01(d) of the Rules of Civil Procedure and paragraph 21 of the Protocol, service of documents in accordance with the Protocol will be effective on transmission. This Court further orders that a Case Website shall be established in accordance with the Protocol with the following URL ‘<http://www.ksvadvisory.com/insolvency-cases/forme-development-group/>’.

51. **THIS COURT ORDERS** that if the service or distribution of documents in accordance with the Protocol is not practicable, the Applicants and the Monitor are at liberty to serve or distribute this Order, any other materials and orders in these proceedings, any notices or other correspondence, by forwarding true copies thereof by prepaid ordinary mail, courier, personal delivery or facsimile transmission to the Applicants’ creditors or other interested parties at their respective addresses as last shown on the records of the Applicants and that any such service or distribution by courier, personal delivery or facsimile transmission shall be deemed to be received on the next business day following the date of forwarding thereof, or if sent by ordinary mail, on the third business day after mailing.

GENERAL

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

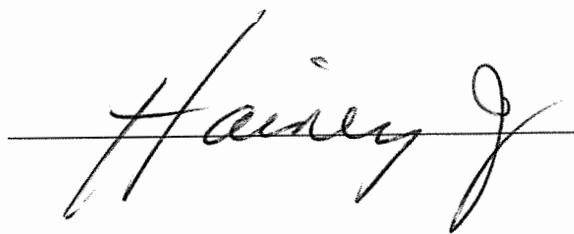
53. **THIS COURT ORDERS** that nothing in this Order shall prevent the Monitor from acting as an interim receiver, a receiver, a receiver and manager, or a trustee in bankruptcy of the Applicants, the Business or the Property.

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

55. **THIS COURT ORDERS** that each of the Applicants and the Monitor be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order, and that the Monitor is authorized and empowered to act as a representative in respect of the within proceedings for the purpose of having these proceedings recognized in a jurisdiction outside Canada.

56. **THIS COURT ORDERS** that any interested party (including the Applicants and the Monitor) may apply to this Court to vary or amend this Order on not less than seven (7) days notice to any other party or parties likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

57. **THIS COURT ORDERS** that this Order and all of its provisions are effective as of 12:01 a.m. Eastern Standard/Daylight Time on the date of this Order.

A handwritten signature in cursive script, reading "Hainey J.", written over a horizontal line.

ENTERED AT / INSCRIT À TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO:

NOV 30 2018

PER / PAR: RW

Schedule "A" – List of Applicants

3310 Kingston Development Inc.

1296 Kennedy Development Inc.

1326 Wilson Development Inc.

376 Derry Development Inc.

5507 River Development Inc.

4439 John Development Inc.

9500 Dufferin Development Inc.

2358825 Ontario Ltd.

SCHEDULE "B" – LIST OF PROPERTIES

Block 55 - Dairy Dr., Toronto, ON (PIN 06449-0741)
Block 53 - Bamblett Dr., Toronto, ON (PIN 06449-0739)
Block 54 - Bamblett Dr., Toronto, ON (PIN 06449-0740)
3314 Kingston Rd., Toronto, ON
1296 Kennedy Rd., Toronto, ON
1326 Wilson Ave, Toronto, ON
1328 Wilson Ave, Toronto, ON
376 Derry Rd. W., Mississauga, ON
4439 John St., Niagara Falls, ON
4407 John St., Niagara Falls, ON
4413 John St., Niagara Falls, ON
4427 John St., Niagara Falls, ON
5507 River Rd. Niagara Falls, ON
5471 River Rd., Niagara Falls, ON
5491 River Rd., Niagara Falls, ON
9500 Dufferin St., Maple, ON
1483 Birchmount Rd., Toronto, ON

SCHEDULE "C" – FORM OF DIP CERTIFICATE

CERTIFICATE NO. _____

AMOUNT \$ _____

AFFECTED PROPERTY _____ (the "**Charged Property**")

1. THIS IS TO CERTIFY that KSV Kofman Inc., the monitor (the "**Monitor**") in the CCAA proceedings of Forme Development Group Inc. and certain of its affiliates (the "**Applicants**") appointed by Order of the Ontario Superior Court of Justice (Commercial List) (the "**Court**") dated the ___ day of _____, 2018 (the "**Initial Order**") made in an action having Court file number CV-18-608313-00CL, has received as such Monitor from the holder of this certificate (the "**DIP Lender**") the principal sum of \$ _____.

2. The principal sum evidenced by this certificate is payable on demand by the Lender with interest thereon calculated and compounded monthly not in advance on the first day of each month after the date hereof at a notional rate of _____ per annum equal.

3. Such principal sum with interest thereon is, by the terms of the Order, together with the principal sums and interest thereon of all other certificates issued by the Monitor pursuant to the Initial Order or to any further order of the Court, a charge upon the Charged Property which charge shall have the priority set out in the Initial Order.

4. All sums payable in respect of principal and interest under this certificate are payable at the main office of the Lender at Toronto, Ontario.

5. Until all liability in respect of this certificate has been terminated, no certificates creating charges ranking or purporting to rank in priority to this certificate on the Charge Property shall be issued by the Monitor to any person other than the holder of this certificate without the prior written consent of the holder of this certificate.

6. The charge securing this certificate shall operate so as to permit the Monitor to deal with the Charged Property as authorized by the Initial Order and as authorized by any further or other order of the Court.

7. The Monitor does not undertake, and it is not under any personal liability, to pay any sum in respect of which it may issue certificates under the terms of the Order.

DATED the _____ day of _____, 20__.

KSV KOFMAN INC., solely in its capacity
as Monitor in the CCAA proceedings of Forme
Development Group Inc. and the other parties
therein, and not in its personal capacity

Per: _____

Name:

Title:

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 FORME
DEVELOPMENT GROUP INC. AND THE OTHER COMPANIES LISTED ON SCHEDULE
"A" HERETO

Court File No. CV-18-608313-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(Commercial List)

Proceeding commenced at Toronto

INITIAL ORDER

GOLDMAN SLOAN NASH & HABER LLP
480 University Avenue, Suite 1600
Toronto, Ontario M5G 1V2
Fax: 416-597-6477

Mario Forte (LSUC#: 27293F)
Tel: 416.597.6477
Email: forte@gsnh.com

Jennifer Stam (LSUC#: 46735J)
Tel: 416.597.5017
Email: stam@gsnh.com

Lawyers for the Applicants

TAB 18

CITATION: Lydian International Limited (Re), 2019 ONSC 7473
COURT FILE NO.: CV-19-00633392-00CL
DATE: 2019-12-24

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

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

**AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGMENT OF
LYDIAN INTERNATIONAL LIMITED, LYDIAN CANADA VENTURES
CORPORATION AND LYDIAN U.K. CORPORATION LIMITED**

Applicants

BEFORE: Chief Justice Geoffrey B. Morawetz

COUNSEL: *Elizabeth Pillon, Sanja Sopic, and Nicholas Avis*, for the Applicants

Pamela Huff, for Resource Capital Fund VI L.P.

Alan Merskey, for OSISKO Bermuda Limited

D.J. Miller, for Alvarez & Marsal Canada Inc. proposed Monitor

David Bish, for ORION Capital Management

Bruce Darlington, for ING Bank N.V./ABS Svensk Exportkredit (publ)

HEARD and DETERMINED: December 23, 2019

REASONS RELEASED: December 24, 2019

ENDORSEMENT

Introduction

[1] Lydian International Limited (“Lydian International”), Lydian Canada Ventures Corporation (“Lydian Canada”) and Lydian UK Corporation Limited (“Lydian UK”, and collectively, the “Applicants”) apply for creditor protection and other relief under the *Companies’ Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (“CCAA”). The Applicants seek an initial order, substantially in the form attached to the application record. No party attending on the motion opposed the requested relief.

[31] In my view, this is consistent with the objectives of the amendments which include the requirement for “participants in an insolvency proceeding to act in good faith” and “improving participation of all players”. It may also result in more meaningful comeback hearings.

[32] It is against this backdrop that the requested relief at the initial hearing should be scrutinized so as to ensure that it is restricted to what is reasonably necessary for the continued operations of the debtor company during the initial stay period.

[33] For the reasons that follow, I conclude that it is appropriate to grant a s. 11.02 order in respect of the Applicants.

[34] I am satisfied that Lydian Canada meets the CCAA definition of “company” and is eligible for CCAA protection.

[35] I have also considered whether the foreign incorporated companies are “companies” pursuant to the CCAA. Such entities must satisfy the disjunctive test of being an “incorporated company” either “having assets or doing business in Canada”.

[36] In *Cinram International Inc., (Re)*, 2012 ONSC 3767, 91 C.B.R. (5th) 46, I stated that the threshold for having assets in Canada is low and that holding funds in a Canadian bank account brings a foreign corporation within the definition of “company” under the CCAA.

[37] In this case, both Lydian International and Lydian UK meet the definition of “company” because both corporations have assets in and do business in Canada.

[38] In my view the Applicants are each “debtor companies” under the CCAA. The Applicants are insolvent and have liabilities in excess of \$5 million. I am satisfied that the Applicants are eligible for CCAA protection.

[39] The Applicants seek to extend the stay to Lydian Armenia, Lydian Holdings, Lydian Resources Armenia Limited and Lydian US. I am satisfied that, in the circumstances, it is appropriate to grant an order that extends the stay to the Non-Applicant Parties. The stay is intended to stabilize operations in the Lydian Group. This finding is consistent with CCAA jurisprudence: see e.g., *Sino-Forest Corporation (Re)*, 2012 ONSC 2063, at paras. 5, 18, and 31; *Canwest Global Communications Corp. (Re)* (2009), 59 C.B.R. (5th) 72 (Ont. S.C.); and *Target Canada Co. (Re)*, 2015 ONSC 303, 22 C.B.R. (6th) 323, at paras. 49-50.

[40] I am also satisfied that it is appropriate to appoint A & M as monitor pursuant to the provisions of s. 11.7 of the CCAA.

[41] With respect to whether Ontario is the appropriate venue for this proceeding, Lydian Canada’s registered head office is located in Toronto and its registered and records offices are located in Vancouver. In my view, Ontario has jurisdiction over Lydian Canada. The registered head offices for Lydian International and Lydian UK are in Jersey and the UK respectively, however, both entities have assets in Ontario, those being funds on deposit with the Bank of Nova Scotia in Toronto. Further, it seems to me that both Lydian International and Lydian UK

TAB 19

Court of Queen's Bench of Alberta

Citation: Northern Transportation Company Limited (Re), 2016 ABQB 522

Date: 20160922
Docket: 1601 05256
Registry: Calgary

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

And In the Matter of a Plan of Arrangement of Northern Transportation Company Limited

**Memorandum of Decision
of the
Honourable Madam Justice C. Dario**

[1] This action arises due to a delay in payments by the Applicant Northern Transportation Company Limited (“**NTCL**”) to the respondent ITB Marine Group Ltd. (“**ITB**”) owing pursuant to a Charter Party and Equipment Lease Agreement (“**Lease Agreement**”). Under the Lease Agreement, NTCL charters 19 vessels and related assets (collectively, the “**Assets**”) primarily located in the Northwest Territories to service remote communities. ITB treats the delay in payment as a default under the Lease Agreement. It seeks to enforce its rights under the Lease Agreement and a related purchase agreement (“**Purchase Agreement**”) between the parties, requiring NTCL to make immediate payment of the balance of the purchase price for the Assets. NorTerra Inc. (“**NorTerra**”), the 100% owner of voting shares in NTCL, entered into letter agreements with ITB in which NorTerra agreed to be jointly and severally responsible for the payment of the monthly lease payments and also for the balance of the purchase price in the event of a default by NTCL.

[2] ITB notified both NorTerra and NTCL of the event of default and its intent to enforce its rights. NTCL paid the outstanding monthly lease payments within 10 days of such notice and argues it made the delayed payments within the grace period as set out in the Lease Agreement. ITB continues to consider the delayed payments an event of default. While the parties were engaged in contractually mandated dispute resolution, NTCL came under *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 (“**CCAA**”) protection.

[3] The Assets are central to NTCL's operations; NTCL argues that ITB's enforcement of its contractual remedy – requiring NorTerra to make immediate payment of the balance of the purchase price - would defeat the purpose of the protection afforded by the *CCAA*.

recourse against and payment from NTCL”. It has done so and clearly cannot take further steps against NTCL during the CCAA stay.

[99] In conclusion, this Court is concerned that in allowing enforcement of the present claim against NorTerra, the secured lenders that have granted a limited forbearance agreement in favor of NorTerra may enforce their security should NorTerra be unable to pay, the result of which could possibly fully frustrate the purpose of the CCAA protection granted to NTCL in this case. Given NTCL, NorTerra and the parent entity IDC’s roles in providing essential products to remote Northern communities, the consequence of a disorderly wind down or failure to restructure could negatively affect many people. It is not possible, however, based on the information in front of this Court to know whether payment of the purchase price as guaranteed would cause such a result.

[100] While the potential consequences of not extending the CCAA protection in this case is troubling and possibly even devastating to NTCL and all associated parties for which the plan of arrangement pertains, the consequences of neutralizing a related company guarantee when the debtor seeks CCAA protection (and without more information) is far more troubling. Such a determination could significantly negatively impact the ability of entities to obtain necessary financing with the assistance of a parent or related company guarantee.

[101] I am not prepared to foreclose fully the possibility that this Court could exercise its inherent jurisdiction in exceptional cases to ensure that the intent and purpose of the CCAA proceedings are not frustrated. Sufficient evidence to establish the presence of such circumstances is however not present in this case for the Court to take such extraordinary measures in light of the clear wording of s.11.04.

Conclusion

[102] In conclusion, I find that there was a breach of the Lease Agreement, which triggers payment by NTCL (or NorTerra as its guarantor) of the balance of the purchase price for the Assets under the Purchase Agreement.

[103] I do not find that the right of reinstatement applies in this case. The BC PPSA provisions apply, and the default has not been remedied. It is not be appropriate for the Court to exercise its discretion to relieve the debtor of the consequences of its default in this case.

[104] Similarly, this is not an appropriate case in which the Court should grant an order reinstating the lease.

[105] Finally, the Court is not able in in this case to extend the stay of proceedings to NorTerra in respect of this one contract.

[106] As such, NTCL’s application is dismissed.

TAB 20

CITATION: Sino-Forest Corporation (Re), 2012 ONSC 2063
COURT FILE NO.: CV-12-9667-00CL
DATE: 20120402

SUPERIOR COURT OF JUSTICE – ONTARIO

(COMMERCIAL LIST)

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF SINO-FOREST CORPORATION, Applicant

BEFORE: MORAWETZ J.

COUNSEL: Robert W. Staley, Kevin Zych, Derek J. Bell and Jonathan Bell, for the Applicant

E. A. Sellers for the Sino Forest Corporation Board of Directors

Derrick Tay and Jennifer Stam for the Proposed Monitor, FTI Consulting Canada, Inc.

R. J. Chadwick, B. O'Neill and C. Descours for the Ad Hoc Noteholders

M. Starnino for counsel in the Ontario class action

P. Griffin for Ernst & Young

Jim Grout and Hugh Craig for the Ontario Securities Commission

Scott Bomhof for Credit Suisse, TD and the underwriter defendants in the Canadian class action

HEARD: MARCH 30, 2012

ENDORSED: MARCH 30, 2012

REASONS: APRIL 2, 2012

ENDORSEMENT

[25] As noted above, following arm's-length negotiations between SFC and the Ad Hoc Noteholders, the parties entered into a Support Agreement which provides that SFC will pursue a CCAA plan on the terms set out in the Support Agreement in order to implement the agreed upon restructuring transaction.

APPLICATION OF THE CCAA

[26] SFC is a corporation continued under the CBCA and is a "company" as defined in the CCAA.

[27] SFC also takes the position that it is a "debtor company" within the meaning of the CCAA. A "debtor company" includes a company that is insolvent.

[28] The issued and outstanding convertible and senior notes of SFC total approximately \$1.8 billion. The waiver agreements with respect to SFC's defaults under the senior notes expire on April 30, 2012. Mr. Martin contends that, but for the Support Agreement, which requires SFC to pursue a CCAA plan, the indenture trustees under the notes would be entitled to accelerate and enforce the rights of the Noteholders as soon as April 30, 2012. As such, SFC contends that it is insolvent as it is "reasonably expected to run out of liquidity within a reasonable proximity of time" and would be unable to meet its obligations as they come due or continue as a going concern. See *Re Stelco* [2004] O.J. No. 1257 at para. 26; leave to appeal to C.A. refused [2004] O.J. No. 1903; leave to appeal to S.C.C. refused [2004] S.C.C.A. No. 336; and *ATB Financial v. Metcalfe and Mansfield Alternative Investments II Corp.*, [2008] O.J. No. 1818 (S.C.J.) at paras. 12 and 32.

[29] For the purposes of this application, I accept that SFC is a "debtor company" within the meaning of the CCAA and is insolvent; and, as a CBCA company that is insolvent with debts in excess of \$5 million, SFC meets the statutory requirements for relief under the CCAA.

[30] The required financial information, including cash-flow information, has been filed.

[31] I am satisfied that it is appropriate to grant SFC relief under the CCAA and to provide for a stay of proceedings. FTI Consulting Canada, Inc., having filed its Consent to act, is appointed Monitor.

THE ADMINISTRATION CHARGE

[32] SFC has also requested an Administration Charge. Section 11.52 of the CCAA provides the court with the jurisdiction to grant an Administration Charge in respect of the fees and expenses of FTI and other professionals.

TAB 21

SUPREME COURT OF NOVA SCOTIA
Citation: ScoZinc Ltd. (Re), 2009 NSSC 136

Date: 20090403
Docket: Hfx No.305549
Registry: Halifax

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 ScoZinc
Ltd.

Applicant

Judge: The Honourable Justice Duncan R. Beveridge

Heard: April 3, 2009 in Halifax, Nova Scotia

**Written Reasons of
Oral Decision:** April 28, 2009

Counsel: John G. Stringer, Q.C., and Mr. Ben R. Durnford, for the
applicant
Robert MacKeigan, Q.C., for Grant Thornton

[21] Under the *Bankruptcy and Insolvency Act* the Trustee is the designated gatekeeper who first determines whether a Proof of Claim submitted by a creditor is valid. The trustee may admit the claim or disallow it in whole or in part (s.135(2) *BIA*). A creditor who is dissatisfied with a decision by the trustee may appeal to a judge of the Bankruptcy Court.

[22] In contrast, the *CCAA* does not set out the procedure beyond the language in s.12. The language only accomplishes two things. The first is that the debtor company can agree on the amount of a secured or unsecured claim; and secondly, if there is a disagreement, then on application of either the company or the creditor, the amount shall be determined by the court on “summary application”.

[23] The practice has arisen for the court to create by order a claims process that is both flexible and expeditious. The Monitor identifies, by review of the debtor’s records, all potential claimants and sends to them a claim package. To ensure that all creditors come forward and participate on a timely basis, there is a provision in the claims process order requiring creditors to file their claims by a fixed date. If they do not, subject to further relief provided by the claims process order, or by the court, the creditor’s claim is barred.

[24] If the Monitor disagrees with the claim, and the disagreement cannot be resolved, then a claimant can present its case to a claims officer who is usually given the power to adjudicate disputed claims, with the right of appeal to a judge of the court overseeing the *CCAA* proceedings.

[25] The establishment of a claims process utilizing the monitor and or a claims officer by court order appears to be a well accepted practice (See for example *Federal Gypsum Co., (Re)* 2007 NSSC 384; *Olympia & York Developments Ltd. (Re)* (1993), 17 C.B.R. (3d) 1 (Ont. S.C.J.); *Air Canada, (Re)* (2004) 2 C.B.R. (5th) 23 (Ont.S.C.J.); *Triton Tubular Components v. Steelcase Inc.*, [2005] O.J. No. 3926 (Ont.S.C.J.); *Muscletech Research & Development Inc., (Re)*, [2006] O.J. No. 4087 (Ont.S.C.J.); *Pine Valley Mining Corp., (Re)* 2008 BCSC 356; *Blue Range Resource Corp., Re* 2000 ABCA 285; *Carlen Transport Inc. v. Juniper Lumber Co. (Monitor of)* (2001), 21 C.B.R. (4th) 222 (N.B.Q.B.).)

[26] I could find no reported case that doubt the authority of the court to create a claims process. Kenneth Kraft in his article “The *CCAA* and the Claims Bar Process”, (2000), 13 Commercial Insolvency Reporter 6, endorsed the utilization

TAB 22

Editor's Note: Corrigendum released on December 3, 2012. Original judgment has been corrected with text of corrigendum appended.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Steels Industrial Products Ltd. (Re)*,
2012 BCSC 1501

Date: 20121011
Docket: S122514
Registry: Vancouver

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

And

**In the Matter of a Plan of Compromise or Arrangement of
0487826 B.C. Ltd., formerly known as Steels Industrial Products Ltd.**

Petitioner

**Corrected Judgment: The text of the judgment was corrected at paragraph 28
where changes were made on December 3, 2012.**

Before: The Honourable Madam Justice Fitzpatrick

Reasons for Judgment

Counsel for the Petitioner:	D.E. Gruber
Counsel for the Monitor, McMillan LLP:	P.J. Reardon
Counsel for S.I.P. Holdings Ltd. and Fama Holdings Ltd.:	D. Hyndman
Counsel for Henry Company Canada Inc. and Stone Industries Inc.:	J. McLean, Q.C.
Place and Date of Hearing:	Vancouver, B.C. September 19, 2012
Place and Date of Judgment:	Vancouver, B.C. October 11, 2012

provide the necessary backup so that other creditors may fully understand these claims and determine whether they are valid.

[35] To a large extent, the submissions made by Steels/the CRO, S.I.P. Holdings and Fama Holdings amount to them saying “trust the auditors” and “trust me”. Despite this, the Disputing Creditors continue to harbour concerns and I think justifiably so.

[36] We are therefore at the stage where, despite some efforts, the parties have failed to advance a better understanding of these related party claims through the provision of further information and documentation. The Disputing Creditors’ position is, in any event, that a forensic accountant, such as Mr. Cheevers, will be required to fully review the matter.

[37] Under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (“BIA”), the claims process is undertaken by a trustee in bankruptcy. Pursuant to s. 135, a trustee is required to examine every proof of claim and may require further evidence in support of a claim prior to determining, valuing or disallowing a claim. The cost of that review is borne by the estate as a whole since it is intended to benefit the body of creditors.

[38] Similar issues often arise in CCAA proceedings where counsel and the Court must be mindful of issues that may arise in relation to the determination of claims in that proceeding. There are no set rules, but care must be taken in the drafting of the claims process order to ensure that the process by which claims are determined is fair and reasonable to all stakeholders, including those who will be directly affected by the acceptance of other claims. In *Winalta Inc. (Re)*, 2011 ABQB 399, Madam Justice Topolniski stated that “[p]ublic confidence in the insolvency system is dependent on it being fair, just and accessible”.

[39] Many CCAA proceedings provide for an independently run claims process (for example, by the monitor), the cost of which again would be borne by the general body of creditors: see for example, *Pine Valley Mining Corp. (Re)*, 2008 BCSC 356.

TAB 23

In the Matter of the Companies' Creditors Arrangement Act,
R.S.C. 1985, c. C-36, as amended and in the Matter of a
Proposed Plan of Compromise or Arrangement with respect to
Stelco Inc., and other Applicants listed in Schedule "A"
Application under the Companies' Creditors Arrangement Act,
R.S.C. 1985, c. C-36 as amended

[Indexed as: Stelco Inc. (Re)]

[* Editor's note: Schedule "A" was not attached to
the copy received from the Court and therefore is not
included in the judgment.]

75 O.R. (3d) 5
[2005] O.J. No. 1171
Docket: M32289

Court of Appeal for Ontario,
Goudge, Feldman and Blair JJ.A.
March 31, 2005

Corporations -- Directors -- Removal of directors --
Jurisdiction of court to remove directors -- Restructuring
supervised by court under Companies' Creditors Arrangement Act
-- Supervising judge erring in removing directors based on
apprehension that directors would not act in best interests of
corporation -- In context of restructuring, court not having
inherent jurisdiction to remove directors -- Removal of
directors governed by normal principles of corporate law and
not by court's authority under s. 11 of Companies' Creditors
Arrangement Act to supervise restructuring -- Companies'
Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 11.

Debtor and creditor -- Arrangements -- Removal of directors
-- Jurisdiction of court to remove directors -- Restructuring
supervised by court under the Companies' Creditors Arrangement

Act -- Supervising judge erring in removing directors based on apprehension that directors would not act in best interests of corporation - In context of restructuring, court not having inherent jurisdiction to remove directors -- Removal of directors governed by normal principles of corporate law and not by court's authority under s. 11 of Companies' Creditors Arrangement Act to supervise restructuring -- Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 11.

On January 29, 2004, Stelco Inc. ("Stelco") obtained protection from creditors under the Companies' Creditors Arrangement Act ("CCAA"). Subsequently, while a restructuring under the CCAA was under way, Clearwater Capital Management Inc. ("Clearwater") and Equilibrium Capital Management Inc. ("Equilibrium") acquired a 20 per cent holding in the outstanding publicly traded common shares of Stelco. Michael Woollcombe and Roland Keiper, who were associated with Clearwater and Equilibrium, asked to be appointed to the Stelco board of directors, which had been depleted as a result of resignations. Their request was supported by other shareholders who, together with Clearwater and Equilibrium, represented about 40 per cent of the common shareholders. On February 18, 2005, the Board acceded to the request and Woollcombe and Keiper were appointed to the Board. On the same day as their appointments, the board of directors began consideration of competing bids that had been received as a result of a court-approved capital raising process that had become the focus of the CCAA restructuring.

The appointment of Woollcombe and Keiper to the Board incensed the employees of Stelco. They applied to the court to have the appointments set aside. The employees argued that there was a reasonable apprehension that Woollcombe [page6] and Keiper would not be able to act in the best interests of Stelco as opposed to their own best interests as shareholders. Purporting to rely on the court's inherent jurisdiction and the discretion provided by the CCAA, on February 25, 2005, Farley J. ordered Woollcombe and Keiper removed from the Board.

Woollcombe and Keiper applied for leave to appeal the order of Farley J. and if leave be granted, that the order be set

aside on the grounds that (a) Farley J. did not have the jurisdiction to make the order under the provisions of the CCAA, (b) even if he did have jurisdiction, the reasonable apprehension of bias test had no application to the removal of directors, (c) he had erred in interfering with the exercise by the Board of its business judgment in filling the vacancies on the Board, and (d) in any event, the facts did not meet any test that would justify the removal of directors by a court.

Held, leave to appeal should be granted, and the appeal should be allowed.

The appeal involved the scope of a judge's discretion under s. 11 of the CCAA, in the context of corporate governance decisions made during the course of the plan negotiating and approval process of the CCAA. In particular, it involved the court's power, if any, to make an order removing directors under s. 11 of the CCAA. The order to remove directors could not be founded on inherent jurisdiction. Inherent jurisdiction is a power derived from the very nature of the court as a superior court of law, and it permits the court to maintain its authority and to prevent its process from being obstructed and abused. However, inherent jurisdiction does not operate where Parliament or the legislature has acted and, in the CCAA context, the discretion given by s. 11 to stay proceedings against the debtor corporation and the discretion given by s. 6 to approve a plan which appears to be reasonable and fair supplanted the need to resort to inherent jurisdiction. A judge is generally exercising the court's statutory discretion under s. 11 of the Act when supervising a CCAA proceeding. The order in this case could not be founded on inherent jurisdiction because it was designed to supervise the company's process, not the court's process.

The issue then was the nature of the court's power under s. 11 of the CCAA. The s. 11 discretion is not open-ended and unfettered. Its exercise was guided by the scheme and object of the Act and by the legal principles that govern corporate law issues. What the court does under s. 11 is establish the boundaries of the playing field and act as a referee in the process. The company's role in the restructuring, and that of

its stakeholders, is to work out a plan or compromise that a sufficient percentage of creditors will accept and the court will approve and sanction. In the course of acting as referee, the court has authority to effectively maintain the status quo in respect of an insolvent company while it attempts to gain the approval of its creditors for the proposed compromise or arrangement which will be to the benefit of both the company and its creditors. The court is not entitled to usurp the role of the directors and management in conducting what are in substance the company's restructuring efforts. The corporate activities that take place in the course of the workout are governed by the legislation and legal principles that normally apply to such activities. The court is not catapulted into the shoes of the board of directors or into the seat of the chair of the board when acting in its supervisory role in the restructuring.

The matters relating to the removal of directors did not fall within the court's discretion under s. 11. The fact that s. 11 did not itself provide the authority for a CCAA judge to order the removal of directors, however, did not mean that the supervising judge was powerless to make such an order. Section 20 of the CCAA offered a gateway to the oppression remedy and other provisions of the Canada [page7] Business Corporations Act, R.S.C. 1985, c. C-44 ("CBCA") and similar provincial statutes. The powers of a judge under s. 11 of the CCAA may be applied together with the provisions of the CBCA, including the oppression remedy provisions of that statute.

Court removal of directors is an exceptional remedy and one that is rarely exercised in corporate law. In determining whether directors have fallen foul of their obligations, more than some risk of anticipated misconduct is required before the court can impose the extraordinary remedy of removing a director from his or her duly elected or appointed office. The evidence in this case was far from reaching the standard for removal, and the record would not support a finding of oppression, even if one had been sought. The record did not support a finding that there was a sufficient risk of misconduct to warrant a conclusion of oppression. Further, Farley J.'s borrowing the administrative law notion of

apprehension of bias was foreign to the principles that govern the election, appointment and removal of directors and to corporate governance considerations in general. There was nothing in the CBCA or other corporate legislation that envisaged the screening of directors in advance for their ability to act neutrally, in the best interests of the corporation, as a prerequisite for appointment. The issue to be determined was not whether there was a connection between a director and other shareholders or stakeholders, but rather whether there was some conduct on the part of the director that would justify the imposition of a corrective sanction. An apprehension of bias approach did not fit this sort of analysis.

For these reasons, Farley J. erred in declaring the appointment of Woollcombe and Keiper as directors of Stelco of no force and effect, and the appeal should be allowed.

Cases referred to

Alberta Pacific Terminals Ltd. (Re), [1991] B.C.J. No. 1065, 8 C.B.R. (3d) 99 (S.C.); Algoma Steel Inc. (Re), [2001] O.J. No. 1943, 147 O.A.C. 291, 25 C.B.R. (4th) 194 (C.A.); Algoma Steel Inc. v. Union Gas Ltd. (2003), 63 O.R. (3d) 78, [2003] O.J. No. 71, 39 C.B.R. (4th) 5 (C.A.), revg in part [2001] O.J. No. 5046, 30 C.B.R. (4th) 163 (S.C.J.); Babcock & Wilcox Canada Ltd. (Re) [2000] O.J. No. 786, 18 C.B.R. (4th) 157, 5 B.L.R. (3d) 75 (S.C.J.); Baxter Student Housing Ltd. v. College Housing Co-operative Ltd., [1976] 2 S.C.R. 475, 57 D.L.R. (3d) 1, 5 N.R. 515, [1976] 1 W.W.R. 1, 20 C.B.R. (N.S.) 240; Blair v. Consolidated Enfield Corp., [1995] 4 S.C.R. 5, [1995] S.C.J. No. 29, 25 O.R. (3d) 480n, 128 D.L.R. (4th) 73, 187 N.R. 241, 24 B.L.R. (2d) 161; Brant Investments Ltd. v. KeepRite Inc. (1991), 3 O.R. (3d) 289, [1991] O.J. No. 683, 45 O.A.C. 320, 80 D.L.R. (4th) 161, 1 B.L.R. (2d) 225 (C.A.); Catalyst Fund General Partner I Inc. v. Hollinger Inc., [2004] O.J. No. 4722, 1 B.L.R. (4th) 186 (S.C.J.); Chef Ready Foods Ltd. v. Hongkong Bank of Canada, [1990] B.C.J. No. 2384, 51 B.C.L.R. (2d) 84, [1991] 2 W.W.R. 136, 4 C.B.R. (3d) 311 (C.A.); Clear Creek Contracting Ltd. v. Skeena Cellulose Inc. [2003] B.C.J. No. 1335, 43 C.B.R. (4th) 187, 2003 BCCA 344, 13 B.C.L.R. (4th) 236 (C.A.); Country Style Foods Services Inc.

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

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

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

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

[38] I do not mean to suggest that inherent jurisdiction can never apply in a CCAA context. The court retains the ability to

TAB 24

CITATION: Target Canada Co. (Re), 2015 ONSC 303
COURT FILE NO.: CV-15-10832-00CL
DATE: 2015-01-16

SUPERIOR COURT OF JUSTICE - ONTARIO

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR
ARRANGEMENT OF TARGET CANADA CO., TARGET CANADA
HEALTH CO., TARGET CANADA MOBILE GP CO., TARGET CANADA
PHARMACY (BC) CORP., TARGET CANADA PHARMACY (ONTARIO)
CORP., TARGET CANADA PHARMACY CORP., TARGET CANADA
PHARMACY (SK) CORP., and TARGET CANADA PROPERTY LLC.

BEFORE: Regional Senior Justice Morawetz

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

Jay Swartz, for the Target Corporation

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

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

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

HEARD and ENDORSED: January 15, 2015

REASONS: January 16, 2015

ENDORSEMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

TAB 25

CITATION: Timminco Limited (Re), 2012 ONSC 506
COURT FILE NO.: CV-12-9539-00CL
DATE: 20120202

SUPERIOR COURT OF JUSTICE – ONTARIO

(COMMERCIAL LIST)

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

RE: **IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT
OF TIMMINCO LIMITED AND BÉCANCOUR SILICON INC., Applicants**

BEFORE: **MORAWETZ J.**

COUNSEL: **A. J. Taylor, M. Konyukhova and K. Esaw, for the Applicants**

**D.W. Ellickson, for Communications, Energy and Paperworkers' Union of
Canada**

C. Sinclair, for United Steelworkers' Union

K. Peters, for AMG Advance Metallurgical Group NV

M. Bailey, for Superintendent of Financial Services (Ontario)

S. Weisz, for FTI Consulting Canada Inc.

A. Kauffman, for Investissement Quebec

HEARD: **January 12, 2012**

RELEASED: **January 16, 2012**

REASONS: **February 2, 2012**

ENDORSEMENT

[1] This motion was heard on January 12, 2012. On January 16, 2012, the following endorsement was released:

[42] It seems apparent that the position of the unions' is in direct conflict with the Applicants' positions.

[43] The position being put forth by counsel to the CEP and USW is clearly stated and is quite understandable. However, in my view, the position of the CEP and the USW has to be considered in the context of the practical circumstances facing the Timminco Entities. The Timminco Entities are clearly insolvent and do not have sufficient reserves to address the funding requirements of the pension plans.

[44] Counsel to the Applicants submits that without the relief requested, the Timminco Entities will be deprived of the services being provided by the beneficiaries of the charges, to the company's detriment. I accept the submissions of counsel to the Applicants that it is unlikely that the advisors will participate in the CCAA proceedings unless the Administration Charge is granted to secure their fees and disbursements. I also accept the evidence of Mr. Kalins that the role of the advisors is critical to the efforts of the Timminco Entities to restructure. To expect that the advisors will take the business risk of participating in these proceedings without the security of the charge is neither reasonable nor realistic.

[45] Likewise, I accept the submissions of counsel to the Applicants to the effect that the directors and officers will not continue their service without the D&O Charge. Again, in circumstances such as those facing the Timminco Entities, it is neither reasonable nor realistic to expect directors and officers to continue without the requested form of protection.

[46] It logically follows, in my view, that without the assistance of the advisors, and in the anticipated void caused by the lack of a governance structure, the Timminco Entities will be directionless and unable to effectively proceed with any type or form of restructuring under the CCAA.

[47] The Applicants argue that the CCAA overrides any conflicting requirements of the QSPPA and the BPA.

[48] Counsel submits that the general paramountcy of the CCAA over provincial legislation was confirmed in *ATB Financial v. Metcalf & Mansfield Alternative Investment II Corp.*, (2008), 45 C.B.R. (5th) 163 (Ont. C.A.) at para. 104. In addition, in *Nortel Networks Corporation (Re)*, the Court of Appeal held that the doctrine of paramountcy applies either where a provincial and a federal statutory position are in conflict and cannot both be complied with, or where complying with the provincial law will have the effect of frustrating the purpose of the federal law and therefore the intent of Parliament. See *Nortel Networks Corporation (Re)*, (2009), 59 C.B.R. (5th) 23 (Ont. C.A.).

[49] It has long been stated that the purpose of the CCAA is to facilitate the making of a compromise or arrangement between an insolvent debtor company and its creditors, with the purpose of allowing the business to continue. As the Court of Appeal for Ontario stated in *Stelco Inc., (Re)* (2005), 75 O.R. (3d) 5, at para. 36:

In the CCAA context, Parliament has provided a statutory framework to extend protection to a company while it holds its creditors at bay and attempts to negotiate a compromised plan of arrangement that will enable it to emerge and continue as a viable economic entity, thus benefiting society and the company in the long run, along with the company's creditors, shareholders, employees and other stakeholders. The s. 11 discretion is the engine that drives this broad and flexible statutory scheme...

[50] Further, as I indicated in *Nortel Networks Corporation (Re)*, (2009), 55 C.B.R. (5th) 229 (Ont. S.C.J.), this purpose continues to exist regardless of whether a company is actually restructuring or is continuing operations during a sales process in order to maintain maximum value and achieve the highest price for the benefit of all stakeholders. Based on this reasoning, the fact that Timminco has not provided any plan for restructuring at this time does not change the analysis.

[51] The Court of Appeal in *Indalex Ltd. (Re)* (2011), 75 C.B.R. (5th) 19 (Ont. C.A.) confirmed the CCAA court's ability to override conflicting provisions of provincial statutes where the application of the provincial legislation would frustrate the company's ability to restructure and avoid bankruptcy. The Court stated, *inter alia*, as follows (beginning at paragraph 176):

The CCAA court has the authority to grant a super-priority charge to DIP lenders in CCAA proceedings. I fully accept that the CCAA judge can make an order granting a super-priority charge that has the effect of overriding provincial legislation, including the PBA. ...

...

What of the contention that recognition of the deemed trust will cause DIP lenders to be unwilling to advance funds in CCAA proceedings? It is important to recognize that the conclusion I have reached does not mean that a finding of paramountcy will never be made. That determination must be made on a case by case basis. There may well be situations in which paramountcy is invoked and the record satisfies the CCAA judge that application of the provincial legislation would frustrate the company's ability to restructure and avoid bankruptcy.

[52] The Timminco Entities seek approval to suspend Special Payments in order to maintain sufficient liquidity to continue operations for the benefit of all stakeholders, including employees and pensioners. It is clear that based on the January 2 forecast, as modified by the Second Report, the Timminco Entities have insufficient liquidity to make the Special Payments at this time.

[53] Counsel to the Timminco Entities submits that where it is necessary to achieve the objective of the CCAA, the court has the jurisdiction to make an order under the CCAA granting, in the present case, super priority over the Encumbrances for the Administration Charge and the D&O Charge, even if such an order conflicts with, or overrides, the QSPPA or the PBA.

TAB 26

CITATION: Timminco Limited (Re), 2014 ONSC 3393
COURT FILE NO.: CV-12-9539-00CL
DATE: 2014-07-07

SUPERIOR COURT OF JUSTICE - ONTARIO

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR
ARRANGEMENT OF TIMMINCO LIMITED AND BÉCANCOUR SILICON
INC.

BEFORE: Regional Senior Justice Morawetz

COUNSEL: *Jane Dietrich* and *Kate Stigler*, for the Board of Directors, except John Walsh

Kenneth D. Kraft, for Chubb Insurance Company of Canada

James C. Orr, for St. Clair Pennyfeather, Plaintiff in the Class Action

Maria Konyukhova, for Timminco Entities

Robert Staley, for John Walsh

Linc Rogers, for the Monitor

HEARD: July 22, 2013

SUPPLEMENTARY WRITTEN SUBMISSIONS RECEIVED MARCH 2014

ENDORSEMENT

Introduction

[1] On May 14, 2009, Kim Orr Barristers PC, counsel to the representative plaintiff Mr. St. Clair Pennyfeather ("Plaintiff's Counsel"), initiated the proposed class action (the "Class Action"), which names as defendants Timminco Limited ("Timminco"), a third party, Photon Consulting LLC, and certain of the directors and officers of Timminco, (the "Directors").

[2] The Class Action focusses on alleged public misrepresentations that Timminco possessed a proprietary metallurgical process that provided a significant cost advantage in manufacturing solar grade silicon for use in manufacturing solar cells.

[3] Mr. Pennyfeather alleges that the representations were first made in March 2008, after which the shares of Timminco gained rapidly in value to more than \$18 per share by June 5,

[41] It is also necessary to return to first principles with respect to claims-bar orders. The CCAA is intended to facilitate a compromise or arrangement between a debtor company and its creditors and shareholders. For a debtor company engaged in restructuring under the CCAA, which may include a liquidation of its assets, it is of fundamental importance to determine the quantum of liabilities to which the debtor and, in certain circumstances, third parties are subject. It is this desire for certainty that led to the development of the practice by which debtors apply to court for orders which establish a deadline for filing claims.

[42] Adherence to the claims-bar date becomes even more important when distributions are being made (in this case, to secured creditors), or when a plan is being presented to creditors and a creditors' meeting is called to consider the plan of compromise. These objectives are recognized by s. 12 of the CCAA, in particular the references to "voting" and "distribution".

[43] In such circumstances, stakeholders are entitled to know the implications of their actions. The claims-bar order can assist in this process. By establishing a claims-bar date, the debtor can determine the universe of claims and the potential distribution to creditors, and creditors are in a position to make an informed choice as to the alternatives presented to them. If distributions are being made or a plan is presented to creditors and voted upon, stakeholders should be able to place a degree of reliance in the claims bar process.

[44] Stakeholders in this context can also include directors and officers, as it is not uncommon for debtor applicants to propose a plan under the CCAA that compromises certain claims against directors and officers. In this context, the provisions of s. 5.1 of the CCAA must be respected.

[45] In the case of Timminco, there have been distributions to secured creditors which are not the subject of challenge. The Class Action claim is subordinate in ranking to the claims of the secured creditors and has no impact on the distributions made to secured creditors. Further, there is no CCAA plan. There will be no compromise of claims against directors and officers. I accept that at the outset of the CCAA proceedings there may very well have been an intention on the part of the debtor to formulate a CCAA plan and further, that plan may have contemplated the compromise of certain claims against directors and officers. However, these plans did not come to fruition. What we are left with is to determine the consequence of failing to file a timely claim in these circumstances.

[46] In the circumstances of this case, i.e., in the absence of a plan, the purpose of the claims bar procedure is questionable. Specifically, in this case, should the claims bar procedure be used to determine the Class Action?

[47] In my view, it is not the function of the court on this motion to determine the merits of Mr. Pennyfeather's claim. Rather, it is to determine whether or not the claims-bar order operates as a bar to Mr. Pennyfeather being able to put forth a claim. It does not act as such a bar.

[48] It seems to me that CCAA proceedings should not be used, in these circumstances, as a tool to bar Mr. Pennyfeather from proceeding with the Class Action claim. In the absence of a CCAA proceeding, Mr. Pennyfeather would be in position to move forward with the Class Action in the usual course. On a principled basis, a claims bar order in a CCAA proceeding,

TAB 27

In the Court of Appeal of Alberta

Citation: Wiebe v Weinrich Contracting Ltd, 2020 ABCA 396

Date: 20201109
Docket: 1903-0139-AC
Registry: Edmonton

Between:

Roy Wiebe and Parkland Aerospace Corp

Appellants
(Defendants)

- and -

Weinrich Contracting Ltd

Respondent
(Plaintiff)

- and -

**Parkland Airport Development Corporation, Deloitte Restructuring Inc,
and 2155734 Alberta Ltd**

Not Parties to the Appeal

The Court:

**The Honourable Mr. Justice Peter Martin
The Honourable Madam Justice Ritu Khullar
The Honourable Madam Justice Dawn Pentelchuk**

Memorandum of Judgment

Appeal from the Order by
The Honourable Mr. Justice S.D. Hillier
Dated the 17th day of April, 2019
Filed the 14th day of June, 2019

(Docket: 1603-20319; 1603-12839)

[*Century Services*]. Farley J in *Lehndorff General Partner Ltd, Re*, 17 CBR (3d) 24, 1993 CarswellOnt 183 at para 5 (Ont Gen Div [Commercial List]), expressed a similar view:

It seems to me that the purpose of the statute is to enable insolvent companies to carry on business in the ordinary course or otherwise deal with their assets so as to enable plan of compromise or arrangement to be prepared, filed and considered by their creditors and the court. In the interim, a judge has great discretion under the CCAA to make order so as to effectively maintain the status quo in respect of an insolvent company while it attempts to gain the approval of its creditors for the proposed compromise or arrangement which will be to the benefit of both the company and its creditors.

[27] In furtherance of these remedial objectives, the CCAA provides “broad and flexible authority” permitting a court to make a wide range of orders necessary to support a company’s reorganization. All insolvency proceedings in Canada are based on the single proceeding model, described by Professor Wood in *Bankruptcy and Insolvency Law*, 2nd ed (Toronto: Irwin Law, 2009):

They all provide a collective proceeding that supersedes the usual civil process available to creditors to enforce their claims. The creditors’ remedies are collectivized in order to prevent the free-for-all that would otherwise prevail if creditors were permitted to exercise their remedies. In the absence of a collective process, each creditor is armed with the knowledge that if they do not strike hard and swift to seize the debtor’s assets, they will be beat out by other creditors. [pp. 2-3]

[28] To achieve this, the CCAA expressly provided, as at the relevant time, that a court may issue and extend a stay of proceedings against the debtor company while a compromise is sought:

11.02(1) A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 30 days,

(a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

[29] Stays of proceedings against the debtor company are common and are included in the initial commercial template order in CCAA proceedings in Alberta.¹

[30] The CCAA has been described as “skeletal in nature”; that is, legislation not “contain[ing] a comprehensive code that lays out all that is permitted or barred”: *Metcalf & Mansfield Alternative Investments II Corp (Re)*, 2008 ONCA 587, 92 OR (3d) 513, at para 44, *per* Blair JA). Thus, decisions of the court are frequently based on discretionary grants of jurisdiction grounded in the broad language of s 11 of the CCAA:

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 [emphasis added].

[31] This broad and flexible authority means a high degree of deference is afforded to a supervising judge making a discretionary decision in the CCAA context. An appellate court may intervene if there was an error in principle or the discretion was exercised unreasonably: *9354-9186 Québec inc v Callidus Capital Corp*, 2020 SCC 10 at para 53 [*Callidus*]. It may also intervene if there was a breach of procedural fairness, if the breach had a negative impact on affected parties’ rights: *Sun Indalex Finance, LLC v United Steelworkers*, 2013 SCC 6, [2013] 1 SCR 271 at paras 73-74 (*per* Deschamps J) and paras 275-276 (*per* LeBel J, dissenting, but not on whether the duty of procedural fairness applies to CCAA proceedings).

[32] While the CCAA provides no express authority to grant a stay of proceedings against third parties other than the debtor company, such orders are quite common. Orders have also been granted *releasing* claims against third parties as part of approving a plan of arrangement. In short, “[c]ases support the view that third-party rights may be affected by a stay order”: *Luscar Ltd v Smoky River Coal Limited*, 1999 ABCA 179, 237 AR 326 at para 60. If it is just and convenient

¹ Available here: <https://albertacourts.ca/qb/areas-of-law/commercial/templates-and-forms>. See appellants’ factum at paras 62, 65.

TAB 28

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

*James D Gage and Trevor Courtis**

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

Persons obligated under letter of credit or guarantee

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

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

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

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

² *Ibid*, s 11.04.

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

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

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

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

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

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

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

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

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

1. Letters of Credit and Guarantees

A letter of credit is, generally speaking, an instrument that is typically issued by a bank upon the instructions of the debtor company for the benefit of a third-party beneficiary, such as a supplier, landlord or other creditor of the debtor company.³

A letter of credit is generally considered an autonomous or standalone obligation in that it typically contemplates that the creditor may make a demand and obtain payment directly from the issuing bank upon the satisfaction of the conditions for payment set out in the letter of credit, whether or not the debtor company has failed to make any payment.⁴

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

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

³ Lazar Sarna, *Letters of Credit: The Law and Current Practice* (Toronto: Carswell, 2020) (looseleaf updated 2020, release 5) at § 1:1.

⁴ *Ibid* at § 5:1.

⁵ Kevin Patrick McGuinness, *The Law of Guarantee*, 3rd ed (Toronto: LexisNexis Canada, 2013) at § 2.1.

⁶ *Ibid* at § 2.4.

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

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

2. CCAA Jurisdiction Interpreted Broadly

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

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

⁷ For example, letters of credit can include a requirement that the creditor provide notice to the debtor before it can make a demand against the issuer under the letter of credit. Guarantees can provide the creditor with direct recourse to the guarantor without first having to seek satisfaction from the debtor.

⁸ *Nareerux Import Co v Canadian Imperial Bank of Commerce*, 2009 ONCA 764 at para 48.

⁹ *Ibid* at para 49.

¹⁰ *Century Services Inc v Canada (Attorney General)*, 2010 SCC 60 at paras 57–58 [*Century Services*].

¹¹ *Companies' Creditors Arrangement Act*, RSC 1970, c C-25. This contains the CCAA, *supra* note 1, s 11 as it appeared before 25 April 1997.

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

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

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

¹² *Ibid*, s 11 [emphasis added].

¹³ See eg, *Chef Ready Foods Ltd v Hongkong Bank of Canada*, 4 CBR (3d) 311, 1990 CarswellBC 394 at para 25 (WL Can) (CA); *Quintette Coal Ltd v Nippon Steel Corp*, 2 CBR (3d) 303, 1990 CarswellBC 384 at para 17 (WL Can) (CA); *Re Lehndorff General Partner Ltd*, 17 CBR (3d) 24, 1993 CarswellOnt 183 (WL Can) at paras 10–16 (Ont Ct (Gen Div)) [*Lehndorff*].

¹⁴ Madam Justice Georgina R Jackson and Dr Janis Sarra, "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters" in Janis P Sarra, ed, *Annual Review of Insolvency Law 2007* (Toronto: Carswell, 2008) [Jackson and Sarra].

¹⁵ *Skeena Cellulose Inc v Clear Creek Contracting Ltd*, 2003 BCCA 344 at para 46; *Re Stelco Inc*, 75 OR (3d) 5, 2005 CanLII 8671 at paras 33, 36 (Ont CA) [*Stelco*] (concept began to take hold following the decisions of the British Columbia and Ontario appellate courts); Jackson and Sarra, *supra* note 14, cited in *Century Services*, *supra* note 10 at para 65 (concept became entrenched following citation of landmark article on topic by the Supreme Court of Canada).

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

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

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

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

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

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

¹⁶ *Lehndorff*, *supra* note 13 at para 16.

¹⁷ *Re Woodward’s Ltd*, 17 CBR (3d) 236, 1993 CarswellBC 530 (WL Can) (CA) [*Woodward’s*].

¹⁸ *Ibid* at para 12.

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

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

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

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

¹⁹ *Ibid.*

²⁰ *Ibid* at para 26.

²¹ *Meridian Developments Inc v Toronto Dominion Bank*, 27 ACWS (2d) 97, 1984 CarswellAlta 973 at paras 35, 44 (WL Can) (QB).

²² *Woodward’s*, *supra* note 17 at para 18.

²³ *Ibid* at para 26.

trustee to call on the letters of credit.²⁴ On the other hand, the trust agreement applicable to Canada Trust did not have any prerequisite steps involving the debtor company, so Canada Trust was not similarly stayed from calling on the letters of credit by an order made under section 11.²⁵

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

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

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

²⁴ *Ibid* at para 25.

²⁵ *Ibid* at para 24.

²⁶ *Ibid* at para 31.

²⁷ *Ibid* at paras 40, 44–45.

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

4. Guarantees: Unclear Whether Stay Is Available

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

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

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

²⁸ Michael B Rotszain and Kenneth D Kraft, "Landlords and Leases in Bankruptcy and Insolvency Act and Companies' Creditors Arrangement Act Reorganizations" (1994) IIC-Art 1994-5 at para 68.

²⁹ *Re Keddy Motor Inns Ltd*, 107 NSR (2d) 419, 1991 CarswellINS 651 (WL Can) (SC (TD)) [*Keddy*].

³⁰ *Ibid* at para 2.

³¹ *Ibid* at para 14. See also *Re Fairview Industries Ltd*, 109 NSR (2d) 8, 1991 CarswellINS 34 at para 11 (WL Can) (SC (TD)); *Browne v Southern Canada Power Co*, 23 CBR 131, 1941 CarswellQue 14 at para 21 (WL Can) (KB (CA)); *Guardian Trust Co v Gaglardi*, 64 DLR (4th) 351, 1989 CanLII 5211 at para 39 (BCSC).

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

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

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

³² *Horowitz v Sprackman*, 63 ACWS (3d) 1010, 1996 CarswellOnt 2758 (Ct J (Gen Div)).

³³ *Ibid* at para 15. See also *Re Quintette Coal Ltd*, 7 CBR (3d) 165, 1991 CarswellBC 488 (SC).

³⁴ Alex Zimmerman and Douglas Knowles, “Developments and Trends in the Companies’ Creditors Arrangement Act” (Paper delivered at the Insolvency Institute of Canada, Barrie, 20–22 October 1991) at 28.

II. 1997–2009: SECTION 11.2 OF THE CCAA

1. Development of the Restriction

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

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

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

Stays of Proceedings:

...

³⁵ *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 [*BIA*].

³⁶ Bill C-22, *An Act to amend the Bankruptcy Act and to amend the Income Tax Act in consequence thereof*, 3rd Sess, 34th Parl, 1992, cl 92.

³⁷ Stanley J Kershman, Office of the Superintendent of Bankruptcy Canada, “Working Groups of the Bankruptcy and Insolvency Advisory Committee” (1993) 13:3 *Insolvency Bulletin* at 342, online: <https://publications.gc.ca/collections/collection_2009/ic/RG36-4-13-3.pdf>.

³⁸ *Ibid* at 346.

³⁹ Office of the Superintendent of Bankruptcy Canada, “Companies’ Creditors Arrangement Act” (1996) 16:3 *Insolvency Bulletin* at 51, online: <https://publications.gc.ca/collections/collection_2009/ic/RG36-4-16-3E.pdf>.

⁴⁰ *Ibid*.

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

Amendments to both the *BIA* and *CCAA* were developed by the federal government based on the BIAC's recommendations and were introduced in Parliament as Bill C-22 on 4 March 1996.⁴² The addition of the restriction on stays against letters of credit and guarantees does not appear to have been the subject of any material discussion during any of the parliamentary debates or the proceedings before the House of Commons and Senate committees that reviewed Bill C-22. The provision does not appear to have been amended during the legislative process. The amendments were enacted into law and came into force on 25 April 1997.⁴³

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

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

No stay, etc. in certain cases

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

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

⁴¹ George F Redling, "Summary of Recommendations made by the Bankruptcy and Insolvency Advisory Committee: December 28, 1994" (Paper delivered at the Insolvency Institute of Canada's Sixth Annual General Meeting and Conference, White Point, Nova Scotia, 21–23 October 1995), at 10-5 [BIAC Recommendations].

⁴² Jacob Ziegel, "New and Old Challenges in Approaching Phase Three Amendments to Canada's Commercial Insolvency Laws" (2002) 37 *Can Bus LJ* 75 at 79.

⁴³ *An Act to Amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act and the Income Tax Act*, SC 1997, c 12, s 124 [*Amending Act*].

⁴⁴ *CCAA*, *supra* note 1, s 11.2 as it appeared between 25 April 1997 and 17 September 2009.

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

3. Scope of Exception Is Immediately Questioned

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

There seems to exist, however, certain ambiguity in the wording of the CCAA amendment provisions with respect to letters of credit and guarantees (new section 11.2). The provision provides that there will be no stay with respect to a person who is obligated under a “letter of credit or guarantee”. The French text uses the phrase “*des lettres de crédit ou de garantie*” (emphasis added). It may be that a stay order may only be prohibited in the case of a “letter of credit” or a “letter of guarantee”, but that a stay could otherwise be ordered with respect to a guarantee (*cautionnement* in French) which does not constitute a “letter of guarantee”.

We consider the restriction to be a welcome step by Parliament to limit the extent to which orders made under the CCAA affect the relationship between creditors and third parties. We are uncertain, however, as to how broadly or narrowly the provisions will be interpreted.⁴⁶

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

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

⁴⁵ *Ibid*, s 11 as it appeared between 25 April 1997 and 17 September 2009.

⁴⁶ Max Mendelsohn and Arnold Cohen, “Commercial Arrangements under the BIA & CCAA Bill C-5 Amendments to the CCAA and BIA Proposals: A Small Step Forward” (Paper delivered at *Insolvency Law Reform: New Changes under Bill C-5*, Canadian Bar Association, 23 July 1997) at 5–6 [Mendelsohn and Cohen].

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

4. No Judicial Commentary Discussing the Scope of the Exception

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

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

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

⁴⁷ *Ibid* at 6.

⁴⁸ *Hydro-Québec c Meubles Dinec inc.*, 2006 QCCA 747.

⁴⁹ *Ibid* at paras 21–26.

⁵⁰ *Ontario v Canadian Airlines Corp.*, 2001 ABQB 983.

⁵¹ *Ibid* at para 23.

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

III. POST-2009: SECTION 11.04 OF THE CCAA

1. Development of the Reworded Restriction

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

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

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

⁵² *Ibid* at para 44(e). See also *Re Papiers Gaspésia inc*, 1 CBR (5th) 308, 2004 CarswellQue 1126 (WL can) at para 9 (Sup Ct).

⁵³ *Amending Act*, *supra* note 43, ss 114, 126.

⁵⁴ Canada, Marketplace Framework Policy Branch, *Report on the Operation and Administration of the Bankruptcy and Insolvency Act and the Companies’ Creditors Arrangement Act* (Ottawa: Industry Canada, 2002).

⁵⁵ Senate, Standing Committee on Banking, Trade and Commerce, *Debtors and Creditors. Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies’ Creditors Arrangement Act. Report of the Standing Committee on Banking, Trade and Commerce* (November 2003) (Chair: The Honourable Richard H Kroft).

⁵⁶ The Insolvency Institute of Canada Canadian Association of Insolvency and Restructuring Professionals Joint Task Force on Business Insolvency Law Reform, “Report” (15 March 2002),

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

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

The 2002–2005 Reform Reports informed the drafting of further significant reforms to the *BIA* and CCAA, which were introduced as Bill C-55 on 3 June 2005.⁵⁹ Bill C-55 was expedited through Parliament due to the Liberal minority government’s desire to have the bill approved before Parliament was dissolved. Only approximately six weeks elapsed between second reading of the bill in the House of Commons and it receiving royal assent.⁶⁰ In order to secure this speedy passage, the government undertook that the amendments would not be proclaimed into force until after the upcoming election.⁶¹ Parliament was dissolved on 29 November 2005, and the majority of the amendments to the CCAA were not, in fact, proclaimed into force until 18 September 2009.

online: *IIC*

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

⁵⁷ The Insolvency Institute of Canada Canadian Association of Insolvency and Restructuring Professionals Joint Task Force on Business Insolvency Law Reform, “Supplemental Report” (30 June 2005), online: *IIC*

<https://www.insolvency.ca/en/iicresources/resources/JTF_SupplementalReport_ReformProposals_2005.pdf>.

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

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

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

⁶¹ Jacob Ziegel, “Bill C-55 and Canada’s Insolvency Law Reform Process” (2006) 43 Can Bus LJ 76 at 77.

2. The Reworded Restriction in Section 11.04 of the CCAA

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

No stay, etc. in certain cases

11.2 No order may be made under **section 11** staying or restraining any action, suit or proceeding against a person, *other than a debtor company in respect of which an application has been made under this Act*, who is obligated under a letter of credit or guarantee in relation to the company.⁶²

Persons obligated under letter of credit or guarantee

11.04 No order made under **section 11.02** has affect on any action, suit or proceeding against a person, *other than the company in respect of whom the order is made*, who is obligated under a letter of credit or guarantee in relation to the company.⁶³

The language of the provision was changed in three ways:

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

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

⁶³ *Ibid*, s 11.04 as it has appeared since 18 September 2009 [emphasis added].

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

The reform is a technical amendment to re-order provisions of this Act, correct cross-referencing and correct for grammatical error.

The current section refers to an order made in respect of a company, which has made an application under this Act. Because of reforms to section 11 and 11.02, it was necessary to amend the language of the section to refer to “the company in respect of whom the order is made.” The language changes do not affect the provision’s effect.⁶⁵

3. No Consistent Interpretation of Section 11.04 in Case Law

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

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

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

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

⁶⁴ Industry Canada, “Bill C-55: clause by clause analysis (cl00908)” (Ottawa, 2007) [“2007 Briefing Book”].

⁶⁵ *Ibid*, cl 128, s 11.04 [emphasis added].

⁶⁶ *Re Northern Transportation Company Limited*, 2016 ABQB 522 [*Northern Transportation*].

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

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

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

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

⁶⁷ *Ibid* at para 69.

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

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

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

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

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

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

⁶⁸ *Ibid* at paras 78, 91.

⁶⁹ *Ibid* at para 79.

⁷⁰ *Ibid* at para 100.

⁷¹ *Ibid* at para 101.

⁷² *Ibid* at para 101.

⁷³ *Arrangement relatif à Charles Morissette inc*, 2014 QCCS 385 [*Morissette*].

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

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

iii. Stays extended to guarantees without section 11.04 being discussed

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

⁷⁴ *Ibid* at para 35.

⁷⁵ *Ibid* at paras 19–24. While both the *BIA*, *supra* note 35, s 179, and the CCAA, *supra* note 1, s 11.04, were amended as part of the 2009 amendments, those amendments did not introduce or alter the use of the words “surety” and “guarantee”, which were introduced at different times. Section 179 of the *BIA* had referred to a surety since at least 1985, and section 11.04 of the CCAA was not adopted (in its prior form and location in section 11.2) until 1997. The Court in *Northern Transportation*, *supra* note 66 at para 95, expressed doubt about the correctness of the interpretation in *Morissette* that the restriction in section 11.04 did not include a surety but found that the obligation in that case was not a suretyship, so *Morissette* did not apply.

⁷⁶ *Ibid* at paras 32–38. See also *Arrangement relatif à Magasin Laura (PV) inc/Laura’s Shoppe (PV) Inc*, 2015 QCCS 4716 (where the Court applied a similar restriction in section 11.03(2) of the CCAA that prevents stays from being extended to personal guarantees given by directors). The Court held that while section 11.03(2) did not provide it with the statutory jurisdiction to extend the stay to personal guarantees, it could grant that relief under its general jurisdiction if it was appropriate to do so. The Court concluded that it was not appropriate to do so in that case.

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

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

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

⁷⁷ *McEwan Enterprises Inc*, 2021 ONSC 6453 [*McEwan*].

⁷⁸ *Ibid* at paras 43–45.

⁷⁹ *Re Canwest Global Communications Corp*, 59 CBR (5th) 72, 2009 CanLII 55114 (WL Can) at paras 28–30 (Ont Sup Ct) [*Canwest*].

⁸⁰ *Re Cinram International Inc*, 2012 ONSC 3767 at paras 61–65 [*Cinram*].

⁸¹ *Re Sino-Forest Corp*, 2012 ONSC 2063 at paras 26–29.

- *Re Tamerlane Ventures Inc*: The stay of proceedings was extended to a US subsidiary of the debtor company that had guaranteed the debtor company's secured loans⁸²
- *Re Forme Development Group Inc*: The stay of proceedings was extended to personal guarantees granted by the director, founder and sole shareholder of the debtor company.⁸³
- *Re Lydian International Limited*: The stay of proceedings was extended to numerous affiliates that had guaranteed certain obligations under loans or gold and silver streaming agreements.⁸⁴
- *Re Boreal Capital Partners Ltd*: The stay of proceedings was extended to an affiliated partnership that had guaranteed the indebtedness of the applicants.⁸⁵

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

4. Non-Derogation Provisions in Model Initial Orders

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

⁸² *Re Tamerlane Ventures Inc*, 2013 ONSC 5461 at para 21 [*Tamerlane*].

⁸³ *Re Forme Development Group Inc* (30 November 2018), Toronto CV-18-608313-00CL (Ont Sup Ct [Comm List]), Initial Order at para 18.

⁸⁴ *Re Lydian International Limited*, 2019 ONSC 7473 at para 39.

⁸⁵ *Re Boreal Capital Partners Ltd* (3 December 2021), Toronto CV-21-00672654-00CL (Ont Sup Ct [Comm List]), Amended and Restated Initial Order at para 12.

⁸⁶ See, eg, *Re Laurentian University of Sudbury*, 2021 ONSC 659 at para 39 [*Laurentian*]. See also *Cinram supra* note 80 at para 64.

⁸⁷ Ontario Superior Court of Justice, “Companies’ Creditors Arrangement Act Initial Order Form” (21 January 2014), online: <<https://www.ontariocourts.ca/scj/files/forms/com/intitial-order-CCAA-EN.doc>> at para 18 [Ontario Model Initial Order] [emphasis added]; Supreme Court of British Columbia, “Model Companies’ Creditors Arrangement Act Initial Order” (1 August 2015), online: <https://www.bccourts.ca/supreme_court/practice_and_procedure/practice_directions/civil/CCAA_Model_Initial_Order.docx> at para 20 [BC Model Initial Order] [emphasis added].

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

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

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

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

IV. INTERPRETING SECTION 11.04

1. Modern Approach to Statutory Interpretation

Statutory interpretation is not founded on the wording of the legislation alone.⁹⁰

The modern purposive approach to statutory interpretation contemplates that “the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act,

⁸⁸ Ontario Model Initial Order *supra* note 87 at 18, n 6; BC Model Initial Order *supra* note 87 at 18, n 18 [emphasis added].

⁸⁹ Court of King’s Bench of Alberta, “Alberta Template CCAA Initial Order” (January 2019), online: <[https://www.albertacourts.ca/docs/default-source/qb/cal01---2470918-v2-ccaa-order-\(alberta\)---jakr-markup.docx?sfvrsn=ed86ad80_4](https://www.albertacourts.ca/docs/default-source/qb/cal01---2470918-v2-ccaa-order-(alberta)---jakr-markup.docx?sfvrsn=ed86ad80_4)> at para 18.

⁹⁰ *Re Rizzo & Rizzo Shoes Ltd*, [1998] 1 SCR 27, 1998 CanLII 837 at para 21 (SCC).

and the intention of Parliament.”⁹¹ This purposive approach is “the crucial tool for construing skeletal legislation such as the CCAA.”⁹²

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

2. Interpreting the CCAA: General Principles

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

⁹¹ *Ibid.*

⁹² *Re US Steel Canada Inc*, 2016 ONCA 662 at para 45.

⁹³ Ruth Sullivan, *The Construction of Statutes*, 7th ed (Markham: Lexis Nexis Canada, 2022) at § 3.02(1) [Sullivan], citing *Canadian Pacific Air Lines Ltd v Canadian Air Line Pilots Assn*, [1993] 3 SCR 724 at 735, 1993 CanLII 31 (SCC).

⁹⁴ *Ibid* at § 3.01(3).

⁹⁵ *Century Services*, *supra* note 10 at paras 15, 70. See also 9354-9186 *Québec inc v Callidus Capital Corp*, 2020 SCC 10 at paras 40–41 [*Callidus*].

⁹⁶ *Callidus*, *supra* note 95 at paras 40, 42; *Re Kerr Interior Systems Ltd*, 2011 ABQB 214 at para 23.

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

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

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

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

3. Considering a Narrow Interpretation of Section 11.04

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

⁹⁷ *Stelco*, *supra* note 15 at para 32; *Interpretation Act*, RSC 1985, c I-21, s 12.

⁹⁸ *Re Metcalfe & Mansfield Alternative Investments II Corp*, 2008 ONCA 587 at para 44 [citations omitted], citing *Re Dylex Ltd*, 31 CBR (3d) 106, 1995 CanLII 7370 at para 10 (Ont Sup Ct (Gen Div)).

⁹⁹ *Re Canadian Airlines Corp*, 19 CBR (4th) 1, 2000 CarswellAlta 622 at para 13 (QB).

¹⁰⁰ *Stelco*, *supra* note 15 at para 36.

¹⁰¹ *Callidus*, *supra* note 95 at para 67.

¹⁰² *Sproule v Nortel Networks Corporation*, 2009 ONCA 833 at para 17, aff’g 55 CBR (5th) 68, 2009 CarswellOnt 3583 at para 66 (Sup Ct [Comm List]).

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

i. Reading section 11.04 together with section 11.02

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

Persons obligated under letter of credit or guarantee

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

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

Stays, etc. — initial application

11.02 (1) A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 10 days,

(a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

Stays, etc. — other than initial application

(2) A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

¹⁰³ CCAA, *supra* note 1, s 11.04.

(a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

[...]

Restriction

(4) Orders doing anything referred to in subsection (1) or (2) may only be made under this section.¹⁰⁴

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

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

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

¹⁰⁴ *Ibid*, s 11.02 [emphasis added].

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

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

There has been some divergence in the case law since that time around the source of the CCAA court's jurisdiction to issue third-party stays. Some cases have held that third-party stays are grounded in section 11,¹⁰⁶ while other cases have indicated they can be grounded in both sections 11 and 11.02.¹⁰⁷ Some have continued to rely on inherent jurisdiction,¹⁰⁸ and some have even relied on all three potential sources of jurisdiction.¹⁰⁹

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

Where a party seeks an order relating to a matter that falls within the supervising judge's purview, and for which there is no CCAA provision conferring more specific jurisdiction, s. 11 necessarily is the provision of first resort in anchoring jurisdiction.¹¹⁰

This rule is supported by the fact that many of the restrictions on the CCAA court's jurisdiction refer solely to orders made under section 11.02.¹¹¹ By defaulting to an interpretation that orders are made under section 11 and not section 11.02 unless they are stays against the debtor company, the applicability of these restrictions will be narrowed, which will maximize the flexibility provided to the CCAA court to facilitate the achievement of the CCAA's objectives.

¹⁰⁵ *Ibid*, s 11.

¹⁰⁶ *Re Pacific Exploration & Production Corp*, 2016 ONSC 5429 at para 26; *Re JTI-Macdonald Corp*, 2019 ONSC 1625 at para 14.

¹⁰⁷ *Re Target Canada Co*, 2015 ONSC 303 at para 45 [*Target*]; *Laurentian*, *supra* note 85 at para 39; *Montréal (City) v Deloitte Restructuring Inc*, 2021 SCC 53 at para 65.

¹⁰⁸ *Tamerlane*, *supra* note 82 at para 21; *Re 4519922 Canada Inc*, 2015 ONSC 124 at para 37.

¹⁰⁹ *McEwan*, *supra* note 77 at para 42.

¹¹⁰ *Callidus*, *supra* note 95 at para 68.

¹¹¹ See, eg, CCAA, *supra* note 1, ss 11.04, 11.08, 11.1.

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

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

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

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

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

¹¹² Sullivan, *supra* note 93 at § 23.02(2).

¹¹³ *Ibid* at § 23.02(3).

¹¹⁴ CCAA, *supra* note 1, s 11.2 as it appeared between 25 April 1997 and 17 September 2009.

¹¹⁵ Mendelsohn and Cohen, *supra* note 46 at 6.

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

iv. Consistent with majority of case law

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

v. Potential inconsistency with legislative history

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

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

¹¹⁶ Sullivan, *supra* note 93 at § 23.03(1)(a).

¹¹⁷ Luc Morin and Arad Mojtahedi, “Catch Me If You Can: Third Party Releases Under the Companies’ Creditors Arrangement Act” in Jill Corraini & the Honourable D Blair Nixon, eds, *Annual Review of Insolvency Law*, 19th ed, 2021 CanLII Docs 13544.

¹¹⁸ BIAC Recommendations, *supra* note 41 at 10-5 [emphasis added].

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

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

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

The intention of the reform is to codify existing practice.

Currently, the courts read subsection 11(1) to grant them the power to make any order it considers appropriate in order to facilitate a restructuring despite that section only referring to stay orders.

This provision will allow the court to make orders, other than stay orders, that may be necessary or appropriate in respect of the restructuring. The authority to order a stay has been included in section 11.02 of the reform.¹²⁰

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

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

¹¹⁹ 2007 Briefing Book, *supra* note 64, cl 128, s 11.04.

¹²⁰ *Ibid*, cl 128, s 11 [emphasis added].

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

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

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

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

¹²¹ *Ibid*, cl 128, s 11.02(4) [emphasis added].

¹²² See, eg, *Re Canada 3000 Inc*, 2006 SCC 24 at para 59; *Bell Canada v Canada (Attorney General)*, 2019 SCC 66 at para 54; *Kinsel v Canada (Minister of Citizenship and Immigration)*, 2014 FCA 126 at para 63.

¹²³ *Saskatchewan (Attorney General) v Lemare Lake Logging Ltd*, 2015 SCC 53 at para 59.

¹²⁴ *Ebrahim v Canada (Minister of Citizenship and Immigration)*, 2002 CanLII 47164 at para 20 (IRB).

¹²⁵ *Re Sino-Forest Corp*, 2012 ONCA 816.

¹²⁶ *Ibid* at paras 51–52.

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

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

vi. Impacts on reliability of letters of credit and guarantees

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

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

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

¹²⁷ 2007 Briefing Book, *supra* note 64, cl 128, s 11.02.

¹²⁸ *Keddy*, *supra* note 29 at para 13; *Northern Transportation*, *supra* note 66 at para 100.

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

4. Considering a Broad Interpretation of Section 11.04

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

i. Remedial purpose of the CCAA

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

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

ii. Narrow interpretations have been applied to other restrictions

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

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

grant stays of proceedings with respect to eligible financial contracts,¹³⁰ regulatory proceedings¹³¹ and payment for goods and services provided to the debtor company post-filing.¹³² It would be anomalous if a broad interpretation were given to section 11.04.

iii. A broad interpretation could extend the restriction beyond guarantees

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

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

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

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

¹³⁰ *Re Blue Range Resource Corp*, 2000 ABCA 239 at para 39. See also *Re Calpine Canada Energy Ltd*, 2006 ABQB 153 at para 24 [*Calpine*].

¹³¹ *Re Northstar Aerospace Inc*, 2012 ONSC 4423 at para 51.

¹³² *Re Smith Brothers Contracting Ltd*, 53 BCLR (3d) 264, 1998 CanLII 3844 at para 41 (BCSC); *Royal Bank of Canada v Cow Harbour Construction Ltd*, 2012 ABQB 59 at para 20 *Re Quest University Canada*, 2020 BCSC 921 at para 54.

¹³³ Sullivan, *supra* note 93 at § 10.03(2).

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

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

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

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

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

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

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

¹³⁴ CCAA, *supra* note 1, s 2(1) “company”; *Lehndorff*, *supra* note 13 at para 15.

¹³⁵ There is at least one decision that has held that, in the context of a limited partnership, it is unnecessary to extend the stay of proceedings to the partnership where the general partner is a debtor company: *Asset Engineering LP v Forest & Marine Financial Limited Partnership*, 2009 BCCA 319 at para 20. However, the general practice has remained to seek a third-party stay with respect to partnerships.

¹³⁶ *Canwest*, *supra* note 79 at para 29; *Calpine*, *supra* note 130 at paras 33–34; *Re Boreal Capital Partners Ltd et al*, 2021 ONSC 7802 at paras 18–19.

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

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

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

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

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

5. Considering the Standalone Interpretation of Section 11.04

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

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

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

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

¹³⁹ *Target*, *supra* note 107.

¹⁴⁰ *Re Target Canada Co*, 2015 ONSC 303 at paras 74–77 (for the factum of the applicants).

¹⁴¹ *Target*, *supra* note 107 at paras 49–50.

V. CONCLUSION

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

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

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