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| COURT | COURT OF KING'S BENCH OF ALBERTA |
| JUDICIAL CENTRE | CALGARY |
| | IN THE MATTER OF AN APPLICATION UNDER SECTION 243 OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c. B-3, AS AMENDED;<br><br>AND IN THE MATTER OF AN APPLICATION UNDER SECTION 13(2) OF THE *JUDICATURE ACT,* R.S.A 2000 J-2 |
| APPLICANTS | TRAFIGURA CANADA LIMITED and SIGNAL ALPHA C4 LIMITED |
| RESPONDENT | SPICELO LIMITED |
| DOCUMENT | **BENCH BRIEF OF THE APPLICANTS,**<br>**Trafigura Canada Limited and Signal Alpha C4 Limited** |
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**Hearing via Webex before the Honourable Justice Gill**
**presiding on the Edmonton Commercial List, on March 25, 2024 and March 26, 2024,**
**each day commencing at 2:00 p.m.**

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## I. INTRODUCTION

1. Trafigura Canada Limited ("**Trafigura**") and Signal Alpha C4 Limited ("**Signal**" and collectively, the "**Lenders**") submit this Bench Brief in support of their Originating Application for (i) the Appointment of a Receiver over the property, assets and undertakings of Spicelo Limited ("**Spicelo**") pursuant to the *Bankruptcy and Insolvency Act*[1] (the "**BIA**") and *Judicature Act*[2], and (ii) the appointment of Grant Thornton Limited ("**GT**") as Receiver (together, the "**Receivership Order**").

2. This Bench Brief is also submitted in opposition to the competing Application by Spicelo (among others) to (i) extend Spicelo's stay period under the *Companies' Creditors Arrangement Act*[3] ("**CCAA**"), and (ii) to grant Alvarez & Marsal Canada Inc. ("**A&M**"), in its capacity as Monitor, enhanced powers with respect to Spicelo (the "**Enhanced Powers**").

3. The Lenders are the only secured creditors of Spicelo. The Lenders' secured interest arises from a Loan Agreement dated July 21, 2022 (the "**Loan Agreement**"), in which the Lenders advanced USD$35,869,565.21 (the "**Loan**") to Griffon Partners Operation Corp. ("**GPOC**") to purchase certain oil and gas assets. As security for payment and performance of GPOC's obligations under the Loan Agreement, a total of seven corporate guarantees were entered into with Griffon Partners Capital Management Ltd. ("**GPCM**"), Griffon Partners Holding Corp. ("**GPHC**"), Spicelo Limited ("**Spicelo**"), Stellion Limited ("**Stellion**"), 2437801 Alberta Ltd. ("**2437801**"), 2437799 Alberta Ltd. ("**2437799**"), and 2437815 Alberta Ltd. ("**2437815**") (collectively, the "**Guarantors**", each, a "**Guarantor**", and collectively with GPOC, the "**Debtors**").

4. In the case of Spicelo, a Limited Recourse Guarantee and Securities Pledge Agreement dated July 21, 2022 (the "**Share Pledge**"), was entered into with respect to certain shares (the "**Pledged Shares**") in the capital of Greenfire Resources Ltd. ("**Greenfire**") owned by Spicelo. In the event of default on the Loan Agreement, the Lenders are entitled to call upon the Share Pledge as a separate and distinct obligation and have the contractual right to seek the appointment of a receiver.

5. On November 1, 2022, GPOC defaulted on the Loan Agreement by failing to meet mandatory amortization payments. After several months of failed negotiations, on August 16, 2023, the Lenders sent formal demands for repayment to the Debtors concurrent with notices to enforce security pursuant to Section 244 of the BIA.

6. Shortly thereafter, the Debtors filed Notices of Intention to Make a Proposal ("**NOI Proceedings**") under the BIA on August 25, 2023. The NOI Proceedings were then extended three times on the

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[1] *Bankruptcy and Insolvency Act,* RSC 1985, c B-3 [BIA]. **[TAB 1]**
[2] *Judicature Act,* RSA 2000, c J-2. **[TAB 2]**
[3] RSC 1985, c C-36 [CCAA]. **[TAB 3]**

hope that the Debtors would be able to procure a viable restructuring or sale proposal through a sales and investment solicitation process ("**SISP**") that would see the Lenders paid out in full. Despite receiving these extensions, the Debtors ultimately conceded that they would not be able to conclude the SISP and make a proposal prior to the expiry of the six-month limitation period on February 24, 2024 (the "**Proposal Period**").

7. On February 7, 2024, this Court granted an order which converted the NOI Proceedings into proceedings under the CCAA and appointed A&M as Monitor for the Debtors (the "**CCAA Proceedings**"). The Court also (i) dismissed an application by the Debtors to provide the Enhanced Powers to A&M, and (ii) dismissed an application by the Lenders to appoint a receiver over Spicelo. In each case, the Court determined that the applications were premature because a definitive Final Bid (as defined in the SISP) had not been selected.[4]

8. A successful bid under the SISP was selected on February 22, 2024 (the "**Successful Bid**"). The Successful Bid does not include the Pledged Shares, nor is it sufficient to fully repay the Lenders. It is clear that liquidation of the Pledged Shares is the only way the Lenders will be repaid in full.

9. For this reason, the Lenders now seek the appointment of the Receiver over Spicelo on an urgent basis. The Pledged Shares must be liquidated forthwith to prevent further erosion to the Lenders' security and to mitigate the shortfall that has occurred because of the Successful Bid. For these reasons, and those set out in more detail below, the Lenders request that the Receivership Order be granted.

## II. STATEMENT OF FACTS

### A. The Parties

10. The Lenders are the largest and primary secured creditors of GPOC, GPCM and GPHC. The Lenders also have a priority secured interest in Stellion, 2437801, 2437799, and 2437815 which are holding companies, and each legally or beneficially owned by one of the four directors of GPOC.[5] GPOC, GPCM, GPHC, Stellion, 2437801, 2437799, and 2437815 are collectively referred to as the "**Griffon Corporate Family**".

11. GPOC is a small oil and gas company with a few producing assets in the Viking formation in Saskatchewan (the "**GPOC Assets**").[6] GPOC operates the GPOC Assets through a small group of contractors.

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[4] Affidavit of Matthieu Milandri, sworn March 18, 2024 [Milandri Affidavit], Exhibit G at p 5 line 25 to p 6 line 12.
[5] *Ibid* at paras 4-7.
[6] *Ibid*.

12. Other than GPOC, the Griffon Corporate Family are all holding companies with no significant assets other than shares in GPOC. Only one of the Guarantors holds assets of any value – Spicelo.[7]

13. Spicelo is unrelated to the other debtors and does not form part of the Griffon Corporate Family.[8] Spicelo does not have employees nor carry on any active business operations.[9] Other than the Lenders, Spicelo has no other proven creditors in these insolvency proceedings.[10]

14. Spicelo's only asset is 1,125,002 common shares in the capital of Greenfire Resources Inc. (which are pending to be exchanged for 5,499,506 shares in the capital of Greenfire Resources Ltd. (before and after such exchange being referred to as the "**Pledged Shares**"), a publicly traded company on the New York Stock Exchange ("**NYSE**").[11] The Pledged Shares are also entitled to a special dividend in the pre-tax amount of USD $6,600,000 (the "**Special Dividend**").[12]

15. The Pledged Shares and Special Dividend have significant value. As of March 15, 2024, the combined value of the Pledged Shares and associated special dividend in the after-tax amount of $5,600,000 is approximately USD$33,537,490.48 (USD$27,937,490.48 for the Pledged Shares; USD$5,600,000 post withholding tax for the Special Dividend) or CAD$45,411,942.05.[13]

**B. The Security and Indebtedness**

16. On July 21, 2022, the Lenders entered into the Loan Agreement pursuant to which the Lenders agreed to loan the sum of USD$35,869,565.21 to GPOC (the "**Loan**") to fund the acquisition of the GPOC Assets from Tamarack Valley Energy Ltd. ("**Tamarack**") (the "**Transaction**"). The Transaction was fully financed by the Lenders and by the subordinate secured creditor, Tamarack, with the shareholders of GPOC contributing no cash equity to the Transaction.[14]

17. As the GPOC Assets were insufficient to fully collateralize the Loan, the Lenders received a security package that included the Share Pledge from Spicelo with respect to the Pledged Shares and the Special Divided.[15]

18. The Loan Agreement went into default within four months of its advance.[16] After several attempts to work with the Debtors, including allowing time for potential refinancing efforts and after proposing a forbearance agreement, on August 16, 2023, the Lenders issued formal demands for repayment

[7] *Ibid*.
[8] *Ibid* at para 5.
[9] *Ibid* at para 7.
[10] *Ibid*.
[11] *Ibid* at para 6.
[12] *Ibid* at paras 9-10.
[13] *Ibid* at para 10.
[14] *Ibid* at para 8.
[15] *Ibid* at para 9.
[16] *Ibid* at para 11.

from the Debtors (the "**Demands**") concurrently with notices to enforce security pursuant to section 244 of the BIA (the "**Section 244 Notices**").[17]

19. As of March 1, 2024, the Lenders were owed the following amounts:

    (a) the original principal amount, accrued interest and fees equalling USD$39,512,590.96; and

    (b) legal fees, costs, expenses and other charges which are due and payable pursuant to the terms of the Loan Agreement (collectively, the "**Indebtedness**").[18]

20. The Lenders represent 100% of the proven creditors of Spicelo.[19]

**C. NOI and CCAA Proceedings**

21. GPOC and the Guarantors, including Spicelo, filed the NOI Proceedings on August 25, 2023. In accordance with the BIA, the Debtors were required to make a Proposal to their creditors within 6 months – the latest date being February 26, 2024 (the "**Proposal Period**").

22. Since October 18, 2023, GPOC and the Guarantors have been engaged in a SISP to sell the GPOC Assets. The Pledged Shares were not offered for sale in this process, but instead offered up as part of collateral package in the event there was a bidder willing to do a full refinancing of GPOC's debt.

23. As it became apparent that the SISP process would not be concluded prior to the expiry of the Proposal Period, the Debtors made an application to continue the NOI Proceedings under the CCAA (the "**CCAA Application**"). On February 7, 2024, the Honourable Justice Johnston granted the CCAA Application and acknowledged in her reasons for decision that these proceedings were "now a liquidating filing".[20]

24. At the CCAA Application, the Lenders brought an application for the appointment of a Receiver of Spicelo, and the Debtors brought an application to grant Enhanced Powers to A&M. Both applications were dismissed by the Court on the basis that a Successful Bid had not yet been selected under the SISP, so there was some uncertainty in the process and to what extent, if any, the Pledged Shares would be included in that bid.[21]

25. At the CCAA Application, the Lenders did consent to an extension of the CCAA Proceedings for GPOC to allow the SISP to conclude. However, further delays have occurred, and definitive

[17] *Ibid* at para 12.
[18] *Ibid* at para 13.
[19] *Ibid* at para 7.
[20] *Ibid*, Exhibit G at p 5 line 11.
[21] *Ibid* at para 18.

documents have not yet been signed. The SISP process deadlines have again been extended and on March 6, 2024, the Lenders again agreed to consent to an order extending the CCAA Proceeding for GPOC to April 17, 2024.[22]

26. The CCAA Proceedings for Spicelo were extended to March 26, 2024 only, in order to enable the Lenders and Spicelo to make competing applications for the appointment of a Receiver versus the granting of Enhanced Powers to A&M as monitor once the terms of the Successful Bid were better known.[23]

27. A Successful Bid under the SISP was selected on February 22, 2024. The Successful Bid does not include the Pledged Shares, nor is it sufficient fully repay the Indebtedness.[24]

**D. The Sub-Agency Agreement**

28. GLAS America LLC (the "**Collateral Agent**") is collateral agent for the Lenders in relation to the Loan and the collateral pledged thereunder. The Collateral Agent was engaged pursuant to the terms of the Loan Agreement and an Intercreditor Agreement dated July 21, 2022 (the "**Intercreditor Agreement**"), the terms of which were acknowledged and agreed to by GPOC.[25]

29. The Share Pledge provides that the Collateral Agent is entitled to seek repayment from Spicelo as a separate and distinct obligation and, in the event of non-payment by Spicelo, is entitled to seek enforcement via the Pledged Shares and Special Dividend. The Share Pledge allows the Collateral Agent to, *inter alia,* appoint a receiver to take enforcement steps with respect to the Pledged Shares and Special Dividend.[26]

30. The Loan Agreement at Section 9.10 provides as follows:

    (a) that the Collateral Agent may assign its rights and duties thereunder to the Lenders without the prior written consent of, or prior written notice to GPOC;

    (b) that the Collateral Agent may perform any and all of its duties and exercise its rights and powers under the Loan Agreement or through any Credit Document, including the Share Pledge, by or through any one or more sub agents appointed by the Collateral Agent; and

    (c) in the event that the Collateral Agent appoints a sub-agent to carry out its duties the sub-agent shall have an independent right of action to enforce such rights, benefits and

[22] *Ibid* at para 19.
[23] *Ibid* at para 20.
[24] *Ibid* at para 16.
[25] *Ibid* at para 21.
[26] *Ibid* at para 22.

privileges directly and without the consent or joinder of any person against any or all of the Credit Parties, including Spicelo.[27]

31. On March 18, 2024, Trafigura and the Collateral Agent entered into a Sub-Agency Agreement with respect to all enforcement steps under the Share Pledge. The Collateral Agent and Lenders have determined that the most efficient and cost-effective manner to enforce the Share Pledge is to assign such right to Trafigura on behalf of the Lenders, given their familiarity with these proceedings and lack of involvement of the Collateral Agent to date.[28]

**E. The Lenders' Deteriorating Position**

32. Since the commencement of these proceedings in August 2023, the value of the Pledged Shares has fluctuated from a high of $10.10 USD/share (upon listing September 21, 2023) to a low of $4.72 USD/share (December 20, 2023). On March 15, 2024, the closing price of the Pledged Shares was $5.08USD/share.[29] These fluctuations have raised concerns that the Lenders may become under secured, should the price of the Pledged Shares fall even further.[30]

33. Currently, the Pledged Shares are subject to a Lock Up Agreement whereby certain corporate holders of the Greenfire shares are restricted from selling such shares until, *inter alia,* at least March 18, 2024. It is the Lender's belief, based on past experience, that the increased market liquidity which will occur as a result of the expiration of the Lock Up Agreement, could depress the share value for the Pledged Shares, at least temporarily.[31]

34. Throughout these proceedings the Debtors and Proposal Trustee (now Monitor) have repeatedly alleged that the Lenders are overcollateralized and have downplayed the Lenders' concerns about their deteriorating position, in order to minimize their concerns as the legitimate fulcrum creditor.[32]

35. In contrast, the Lenders have repeatedly filed affidavits underlying their concerns with respect to deteriorating asset value, excessive delay, increasing risk profile based on commodity pricing and stock market fluctuations, and excessive professional fees, which have drained the cash which would otherwise still be sitting in GPOC's bank accounts for the benefit of secured creditors.[33]

36. Since August 2023, the nature of these proceedings has changed considerably, and the evidence no longer supports the view that the Lenders suffer no material risk of under collateralization. The Lenders believe that this process has been too slow, too lengthy, too expensive and has

[27] *Ibid* at para 24.
[28] *Ibid* at paras 23, 25.
[29] *Ibid* at para 34.
[30] *Ibid*.
[31] *Ibid* at para 35.
[32] *Ibid* at para 36.
[33] *Ibid* at para 37.

unnecessarily exposed the Lenders to risk. Further, the Lenders believe that their position is not being fairly considered or reflected in the Proposal Trustee's or Monitor's reports in this unduly protracted and, to date, unsuccessful liquidation process.[34]

## III. ISSUES

37. The issues to be determined by this Court are as follows:

(a) whether a receivership is the superior liquidation process for the Pledged Shares;

(b) whether it is appropriate to grant A&M the Enhanced Powers over the objections of the Lenders; and

(c) whether it is just and convenient that GT be appointed as Receiver over the property, assets and undertakings of Spicelo.

## IV. LAW AND ARGUMENT

### A. The circumstances favour the appointment of a Receiver over Spicelo's Property

38. The central issue in these applications is whether Spicelo should be permitted to carry out a liquidating CCAA in the face of a competing application by its sole secured creditor to appoint a Receiver. While these are oft competing applications, the case law does not demonstrate a consistent framework to be applied to determine which application should prevail. In *9354-9186 Quebec inc v Callidus Capital Corp*,[35] the Supreme Court of Canada noted that it remains an open question as to when courts ought to approve a liquidation under the CCAA as opposed to requiring parties to proceed under a receivership or BIA regime.[36] In the absence of a clear authority setting out the framework to be considered in such competing applications, the Lenders submit the appropriateness of either statute must depend on the facts and circumstances of each individual case.

39. In this case, the Lenders submit that the facts and circumstances do not support the extension of the CCAA Proceedings for Spicelo to liquidate the Pledged Shares under a "super monitor" appointment or otherwise. Any debtor-in-possession scenario which would allow Jonathan Klesch to retain control of the restructuring process is not acceptable to the Lenders. To date, these insolvency proceedings have been too long, too expensive and have not resulted in any liquidation of any kind. For this reason, the Lenders preference is to have a Receiver appointed of their choosing to control the liquidation process and ultimately liquidate the Pledged Shares.

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[34] *Ibid* at para 43.
[35] 2020 SCC 10. **[TAB 4]**
[36] *Ibid* at Footnote 3.

40. Having regard to the relevant case law dealing with competing receiverships and CCAA applications, the Lenders submit that the following circumstances weigh in favour of this Court granting the Receivership Order:

(a) The relationship between the Lenders and Spicelo and A&M has deteriorated, and the Lenders have no faith in the ability of A&M to facilitate the liquidation of the Pledged Shares in a value-maximizing or efficient manner. In *Alberta Treasury Branches v Tallgrass Energy Corp*[37] ("***Tallgrass***") the Court granted a secured lenders' application for a receivership relating to lost faith in management due to issues in valuation of oil and gas assets, discrepancies between cash flow projections and how the debtor's management was executing its alternative financing strategy.[38]

(b) The Lenders do not support the CCAA Proceeding and will not approve a plan or compromise. In *Callidus v Carcap*,[39] the Court considered the position of two major secured creditors who represented a considerable percentage of the debtors' creditors. In that case, neither creditor would support a plan of arrangement. On this basis, the Court declined to grant relief under the CCAA.[40] Similarly, in *Re Dondeb Inc*,[41] the Court declined to grant an initial CCAA over a receivership application because the Court was not satisfied that a successful plan could be developed that would receive approval in any meaningful fashion from the creditors.[42]

(c) The continuation of the CCAA Proceeding is unlikely to put Spicelo in a better position than it would be under a receivership proceeding. In *Re Shire International Real Estate Investments Ltd,*[43] the Court declined to extend a CCAA when the facts showed that continuation of the CCAA proceeding was unlikely to produce any result more attractive than foreclosure proceedings.[44] Indeed, once the GPOC Assets are sold under the SISP, there will be no source of funding in the CCAA estate left to fund the Spicelo liquidation, which will thus force Spicelo to apply for DIP financing, further priming the Lenders' secured position.

(d) The Lenders' primary secured position has been primed by excessive professional fees (~$2.7M) since the commencement of these insolvency proceedings in August 2023. In

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[37] 2013 ABQB 432 [*Tallgrass*]. **[TAB 5]**
[38] *Ibid* at paras 18-22.
[39] 2012 ONSC 163. **[TAB 6]**
[40] *Ibid* at para 61.
[41] 2012 ONSC 6087. **[TAB 7]**
[42] *Ibid* at paras 25-34.
[43] 2010 ABQB 84. **[TAB 8]**
[44] *Ibid* at paras 7-9.

*Affinity Credit Union 2013 v Vortex Drilling Ltd*,[45] the Court found that it would be inappropriate to grant an initial order where a sole-secured creditor would ultimately bear the risks and costs associated with the CCAA proceeding, and that a receivership would be more appropriate, especially where debtor-in-possession financing is projected to chip away at the creditor's security. The Court also considered lost faith in the debtor as factor weighing in favor of the appointment of a receiver.[46]

(e) The Lenders represent 100% of the proven claims of Spicelo and the Lenders favour a receivership over a liquidating CCAA. In *Tallgrass,* the Court took into account the fact that the secured creditors were the only parties with any economic interest in the debtors' company and that their preference was for a receivership to be granted over a liquidating CCAA.[47]

(f) The Lenders have a contractual right to appoint a receiver over Spicelo and by allowing Spicelo to continue with a debtor-in-possession proceeding unfairly disregards their interests as sole secured creditor and the rights they specifically bargained for. In *BCIMC Construction Fund Corporation et al v The Clover on Yonge Inc*,[48] the Court noted that forcing the secured creditors "to remain without control of the process is even more unfair when the contracts to which the Debtors agreed give the [secured creditors] the right to control the process through a receivership".[49]

(g) Spicelo is a holding company with no employees or active business operations. The Pledged Shares are a distinct asset class that have no relation to the GPOC Assets. There is no need for Spicelo to continue in the CCAA Proceedings to see through the finalization of the SISP.

41. The Lenders submit that the circumstances of this case clearly favour a receivership over the continuation of the CCAA Proceeding for Spicelo. The Lenders have a contractual right to control and liquidate the Pledged Shares pursuant to the Share Pledge and the Sub-Agency Agreement. Spicelo should no longer be able to evade enforcement proceedings by hiding behind the GPOC Assets now that a Successful Bid (which does not include the Pledged Shares) has been selected. For these reasons, the Lenders submit that the Receivership Order should be granted and the stay extension of the CCAA Proceeding for Spicelo be dismissed.

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[45] 2017 SKQB 228 [*Vortex*]. **[TAB 9]**
[46] *Ibid* at para 37.
[47] *Tallgrass*, *supra* note 37 at paras 15-16.
[48] 2020 ONSC 1953. **[TAB 10]**
[49] *Ibid* at para 71.

**B. The Enhanced Powers of the Monitor are improper in the circumstances**

42. Concurrent with its application to extend the CCAA Proceeding, Spicelo seeks an order granting A&M the Enhanced Powers. By the Debtors' own admission, the Enhanced Powers are "the exact same powers as a receiver" and would provide A&M the ability to liquidate the Pledged Shares to resolve the shortfall owing to the Lenders as a result of the Successful Bid.[50] In effect, Spicelo attempts to squeeze A&M into a "super monitor" role to retain control of the Pledged Shares while simultaneously depriving the Lenders of their contractual right to appoint a receiver of their choosing. This should not be allowed.

43. Section 23 of the CCAA sets forth the general powers that are granted to monitors in CCAA proceedings.[51] In recent years, courts have shown a willingness to grant certain "enhanced powers" to monitors to allow them to perform a "super monitor" function. However, the discretion to grant enhanced powers is not limitless and must be "exercised in a manner consistent with and directed toward the attainment of the objectives of the CCAA".[52] "Proceedings under the CCAA ought not to be used to short circuit realization process under the *Bankruptcy and Insolvency Act*".[53]

44. The Lenders submit that the "super monitor" role is not designed to replace a receivership under the BIA. The Lenders' contractual right to liquidate the Pledged Shares must supersede Spicelo's desire to control its own restructuring process. The Lenders specifically bargained for the right to liquidate the Pledged Shares in the event of default and Spicelo should be no longer be shielded by the CCAA Proceedings now that the Successful Bid has been chosen.

45. The Lenders have reviewed the case law cited by the Debtors in their March 18, 2024 brief in support of their application for Enhanced Powers and note that each of the cases cited are clearly distinguishable from the circumstances at hand. Most notably, in none of these cases was there opposition from the secured creditors:

    (a) In *Arrangement relatif à Bloom Lake General*,[54] the Court granted enhanced powers to the monitor after, pursuant to a plan of arrangement, the debtors had already liquidated all of their assets save for their equity interest in another company.[55] The enhanced powers were sought as the other company was blocking attempts to monetize the debtors' interest in furtherance of the plan of arrangement.[56] In this case, there was no opposition from the

[50] Affidavit of Daryl Stepanic sworn March 15, 2024 at paras 14-16.
[51] CCAA, *supra* note 3, s 23.
[52] *Ibid* at para 62.
[53] Luc Morin & Arad Mojtahedi, "In Search of a Purpose: The Rise of Super Monitors & Creditor-Driven *CCAA*s" (2019) 14 Annual Review of Insolvency Law, citing *Arrangement de MPECO Construction inc*, 2019 QCCS 297 at paras 34-35, 44-45. **[TAB 11]**
[54] 2021 QCCS 2946. **[TAB 12]**
[55] *Ibid* at para 3.
[56] *Ibid* at para 15.

secured creditors and the super monitor was being appointed at the end of the CCAA proceedings in order to deal with a residual matter for which there was no other method of dealing with.

(b) In *Ernst & Young Inc v Essar Global Fund Limited*,[57] a group of related companies was granted an initial order under the CCAA. A SISP process was commenced to sell of their business and property. The monitor became aware of a transaction prior to commencement of the insolvency proceedings that resulted in one of the debtors transferring one its most critical assets to a related party and becoming subject to certain restrictions on assignment.[58] The creditors were concerned about this transaction and the effect it would have on a potential restructuring transaction and applied for an order granting the monitor enhanced powers, namely to commence proceedings and make certain investigations pursuant to the oppression provisions of the Canada *Business Corporations Act*.[59] In this case, it was the creditors who brought the application for the enhanced powers. The Court noted that the restructuring faced an "insurmountable obstacle" if the oppression claim was not advanced.[60]

(c) In *Arrangement relatif à 9323-7055 Quebec inc (Aquadis International Inc)*,[61] the Court approved a plan of arrangement that gave the monitor enhanced powers to take legal proceedings on behalf of creditors of the debtor company.[62] The debtor company had sold defective faucets to various retailers who had then sold the faucets to consumers. Many consumers sought compensation from their insurers, who were then subrogated into the rights of the consumers. The insurers brought legal proceedings against the debtor and the aggregate of those claims exceeded the debtor's insurance coverage. The debtor filed a notice of intention to file a proposal under the BIA and later continued the proceedings under the CCAA. In accordance with the CCAA, all proceedings against the debtor and anyone else in the distribution chain, including the retailers, were stayed.[63] The monitor applied for enhanced powers allowing it to commence proceedings against the retailers in order to obtain maximum recovery for the creditors, namely the insurers.[64] In this case, the creditors were clearly not opposed to the granting of enhanced powers as it would allow

[57] 2017 ONCA 1014. **[TAB 13]**
[58] *Ibid* at para 46.
[59] *Ibid* at para 47.
[60] *Ibid* at para 124.
[61] 2020 QCCA 659. **[TAB 14]**
[62] *Ibid* at para 10.
[63] *Ibid* at para 19.
[64] *Ibid* at para 22.

for proceedings to be brought against the retailers (which were otherwise barred by the stay) and would allow for greater recovery.

(d) In *In the Matter of a Plan of Compromise or Arrangement of LoyaltyOne, Co*,[65] the Court approved the sale resulting out of a SISP and granted the monitor enhanced powers to "seek additional avenues of recovery for the remaining assets of the Applicant, to assist in the transition of the business, and to bring this CCAA proceeding to an efficient conclusion for the benefit of stakeholders."[66] Notably, there was "widespread support", including from the secured creditors, and there was "no opposition from any stakeholder."[67]

(e) In *Re Harte Gold Corp*,[68] the debtor applied for an approval and reverse vesting order involving the sale of its business and for an order extending the stay and expanding the monitor's powers to include new entities that were to be created for the purpose of implementing the proposed restructuring. In granting the enhanced powers, the Court noted that giving the monitor the power to administer the affairs of the new entities was necessary to complete the transaction.[69] The Court held that no creditor would be prejudiced by the enhanced powers and noted that there was "no opposition to the relief sought."[70]

46. In these cases, applications for enhanced powers were either brought on behalf of the creditors, with support of the creditors or, at the very least, without any creditor opposition. The Lenders are the sole secured creditor of Spicelo and are strongly opposed to the granting of Enhanced Powers to A&M. There is no precedent for this Court to appoint a super monitor in the face of opposition from a sole secured creditor who bears the greatest risk if the CCAA Proceeding is extended. As a result, Spicelo's application for Enhanced Powers should be denied and the Lenders' application to appoint a receiver must prevail.

**C. It is just and convenient to appoint a Receiver over Spicelo**

47. Considering the facts and circumstances relevant to this case, the Lenders submit that the appointment of a Receiver over the Property of Spicelo is just and convenient. Spicelo is separate and distinct from the other Debtors which form part of the Griffon Corporate Family. The Pledged Shares that have no relation to the GPOC Assets – they are a separate asset class that will have no impact on whether the SISP concludes or not.

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[65] (Endorsement) of Conway J. dated May 12, 2023 (Ont Sup Ct). **[TAB 15]**
[66] *Ibid* at para 13.
[67] *Ibid* at para 6.
[68] 2022 ONSC 653. **[TAB 16]**
[69] *Ibid* at para 92.
[70] *Ibid* at paras 1, 92.

48. This Court has the discretion to appoint a receiver pursuant to both section 243(1) of the BIA and section 13(2) of the *Judicature Act*. The primary source of jurisdiction is 243(1) of the BIA, which permits the appointment of a receiver over the property of an insolvent person if it is "just and convenient to do so".[71]

49. Although the BIA does not provide any factors to determine under what circumstances the appointment of a receiver would be "just or convenient", it is well-recognized that the purpose of the appointment of a receiver pursuant to section 243 of the BIA is to enhance and facilitate the preservation and realization of a debtor's assets for the benefit of all its creditors. In the case of Spicelo, the Lenders represent 100% of the proven creditor claims.

50. In *Paragon Capital Corporation Ltd v Merchants & Traders Assurance Co*,[72] Justice Romaine held that in analyzing whether a receiver is "just or convenient" the Court may consider the factors enumerated in *Bennett on Receiverships*. The applicability of those factors depends on the particular factual matrix. These factors include, *inter alia*:

    (a) the risk to the security holder taking into consideration the size of the debtor's equity in the assets and the need for protection or safeguarding of the assets while litigation takes place;

    (b) the nature of the property;

    (c) the fact that the creditor has the right to appoint a receiver under the documentation provided for the loan;

    (d) the likelihood of maximizing return to the parties; and

    (e) the risk of the secured lender suffering a sizeable deficiency;

    (f) the fact that the creditor has a contractual right to appoint a receiver;

    (g) the balance of convenience; and

    (h) the secured lender's good faith, commercial reasonableness and the equities.[73]

51. The existence of a contractual right to appoint a receiver in the loan agreement and related transaction documents is key and transforms the appointment of a receiver from something that is

[71] *Vortex*, *supra* note 45 at para 19.
[72] 2002 ABQB 430. **[TAB 17]**
[73] *Ibid* at para 27.

extraordinary to something that is done more as a matter of course, especially in cases in which the circumstances further such an appointment.[74] That is the case here.

52. While some authority indicates that the Court must apply the tripartite test for injunctive relief when considering a receivership application, these requirements are only mandatory when the applicant is not a security holder.[75]

53. In the present case, having regard to all the circumstances, the Lenders respectfully submit that it is both just and convenient for this Court to appoint a receiver over the Property of Spicelo for the following reasons:

(a) Spicelo is in default of its obligations under the Share Pledge;

(b) the Lenders are secured creditors and delivered Section 244 Notices and have met the procedural requirements to appoint a receiver;

(c) the Share Pledge allows the Collateral Agent to appoint of a receiver in the event of default and such right was validly assigned to Trafigura;

(d) the Debtors have been in default since November 2022 and the have been engaged in the SISP since October 18, 2023, providing more than sufficient time for the Debtors to consider any strategic options, but they have been unsuccessful in doing so;

(e) the Lenders have lost faith in the Debtors' ability to implement any strategic or restructuring alternative which would allow for the payment of the Indebtedness;

(f) the Lenders have, at all times, acted in good faith and have given the Debtors more than ample time to remedy the defaults;

(g) the immediate appointment of a receiver will allow for orderly realization of the Pledged Shares in the most efficient and value maximizing manner;

(h) the social and economic costs of liquidating the Pledged Shares are minimal based on the fact that they are Spicelo's only asset and Spicelo does not carry on any business, nor does it have any employees;

(i) the Pledged Shares are publicly traded on the NYSE and the Toronto Stock Exchange and do not require any special expertise to expose them to the market or find a potential buyer;

[74] *Elleway Acquisitions Ltd v Cruise Professionals Ltd*, 2013 ONSC 6866 at para 27. **[TAB 18]**
[75] *Alberta Treasury Branches v COGI Limited Partnership*, 2016 ABQB 43 at paras 16-17. **[TAB 19]**

(j) the Lenders are not constrained by any share restrictions in relation to the Pledged Shares, including the terms of the Lock Up Agreement, and as a result, a receiver is able to quickly realize on the Pledged Shares as part of a Court Order;

(k) there is no other acceptable process available to the Lenders that would enable them to adequately protect their interests;

(l) the Lenders' position as primary secured creditor is being unnecessarily primed by excessive professional fees, administrative charges and protracted delays;

(m) there is a risk of harm and losses to the Lenders such that they will suffer a shortfall if a Receiver is not appointed to liquidate the Pledged Shares because the Successful Bid is insufficient to fully repay the Lenders and definitive documents with respect to the GPOC Assets have not yet been finalized;

(n) the balance of convenience supports the appointment of a Receiver;

(o) the draft order sought by the Lenders is based on the Alberta model receivership order and the terms respecting the stay of proceedings and Receiver's charge are appropriate in the circumstances; and

(p) GT has consented to act as a receiver.

54. In addition to the foregoing reasons, the Lenders have met with GT and have created a preliminary plan to liquidate the Pledged Shares. The Lenders have been advised by GT that it is able to come up to speed quickly on this matter given the relatively simple nature of the assets being liquidated.[76] The Lenders are willing to fund the fees associated with a receivership through a Receiver's borrowing certificate but are not willing to fund the fees of A&M as super monitor. Once the GPOC Assets are sold, there will be no further source of funding for the CCAA Proceedings, and an application for DIP financing may have to be made. DIP financing will be unnecessary if a Receiver is appointed.

55. Finally, it is important to emphasize that what is being sought by the Lenders is the appointment of a receiver over Spicelo, not GPOC or any other member of the Griffon Corporate Family. It is not appropriate to continue lumping Spicelo together with the other Debtors. Additional professional fees and costs associated with the other Debtors' pursuit of restructuring and the SISP should not be borne by Spicelo's assets, namely the Pledged Shares. Though it is possible for these fees and

[76] Milandri Affidavit, *supra* note 4 at para 27.

costs to be allocated between the different Debtors, the whole exercise is unnecessary if a Receiver is appointed.

56. Considering the above circumstances, the Lenders respectfully submit that it is both just, convenient, and in the best interest of all stakeholders to appoint GT as Receiver over the Property of Spicelo in order to maximize recovery in an effective and efficient manner.

## V. CONCLUSION

57. For the foregoing reasons, it is respectfully submitted that it would be just, appropriate and reasonable in this case for the Court to exercise its discretion granted to it under the BIA and the *Judicature Act* to grant the Receivership Order and to dismiss the application made by Spicelo.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 18 DAY OF MARCH 2024.**

**STIKEMAN ELLIOTT LLP**

By: _____

Karen Fellowes, K.C.
Lawyer for the Applicants,
Trafigura Canada Limited and Signal Alpha C4 Limited

**TABLE OF AUTHORITIES**

| TAB | DOCUMENT |
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| 1 | *Bankruptcy and Insolvency Act,* RSC 1985, c B-3. |
| 2 | *Judicature Act,* RSA 2000, c J-2. |
| 3 | *Companies' Creditors Arrangement Act*, RSC 1985, c C-36. |
| 4 | *9354-9186 Quebec inc v Callidus Capital Corp*, 2020 SCC 10. |
| 5 | *Alberta Treasury Branches v Tallgrass Energy Corp*, 2013 ABQB 432. |
| 6 | *Callidus v Carcap*, 2012 ONSC 163. |
| 7 | *Re Dondeb Inc*, 2012 ONSC 6087. |
| 8 | *Re Shire International Real Estate Investments Ltd*, 2010 ABQB 84. |
| 9 | *Affinity Credit Union 2013 v Vortex Drilling Ltd*, 2017 SKQB 228. |
| 10 | *BCIMC Construction Fund Corporation et al v The Clover on Yonge Inc*, 2020 ONSC 1953. |
| 11 | Luc Morin & Arad Mojtahedi, "In Search of a Purpose: The Rise of Super Monitors & Creditor-Driven *CCAA*s" (2019) 14 Annual Review of Insolvency Law. |
| 12 | *Arrangement relatif à Bloom Lake General*, 2021 QCCS 2946. |
| 13 | *Ernst & Young Inc v Essar Global Fund Limited*, 2017 ONCA 1014. |
| 14 | *Arrangement relatif à 9323-7055 Quebec inc (Aquadis International Inc)*, 2020 QCCA 659. |
| 15 | *In the Matter of a Plan of Compromise or Arrangement of LoyaltyOne, Co*, (Endorsement) of Conway J. dated May 12, 2023 (Ont Sup Ct). |
| 16 | *Re Harte Gold Corp*, 2022 ONSC 653. |
| 17 | *Paragon Capital Corporation Ltd v Merchants & Traders Assurance Co*, 2002 ABQB 430. |
| 18 | *Elleway Acquisitions Ltd v Cruise Professionals Ltd*, 2013 ONSC 6866. |
| 19 | *Alberta Treasury Branches v COGI Limited Partnership*, 2016 ABQB 43. |

# TAB 1

CANADA

CONSOLIDATION

CODIFICATION

# Bankruptcy and Insolvency Act

# Loi sur la faillite et l'insolvabilité

R.S.C., 1985, c. B-3

L.R.C. (1985), ch. B-3

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province, if this Part is in force in the province immediately before that subsection comes into force, this Part applies in respect of the province.

R.S., 1985, c. B-3, s. 242; 2002, c. 7, s. 85; 2007, c. 36, s. 57.

s'appliquer à la province en cause, la présente partie s'applique à toute province dans laquelle elle était en vigueur à l'entrée en vigueur de ce paragraphe.

L.R. (1985), ch. B-3, art. 242; 2002, ch. 7, art. 85; 2007, ch. 36, art. 57.

## PART XI

# Secured Creditors and Receivers

### Court may appoint receiver

**243 (1)** Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:

**(a)** take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;

**(b)** exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or

**(c)** take any other action that the court considers advisable.

### Restriction on appointment of receiver

**(1.1)** In the case of an insolvent person in respect of whose property a notice is to be sent under subsection 244(1), the court may not appoint a receiver under subsection (1) before the expiry of 10 days after the day on which the secured creditor sends the notice unless

**(a)** the insolvent person consents to an earlier enforcement under subsection 244(2); or

**(b)** the court considers it appropriate to appoint a receiver before then.

### Definition of *receiver*

**(2)** Subject to subsections (3) and (4), in this Part, ***receiver*** means a person who

**(a)** is appointed under subsection (1); or

**(b)** is appointed to take or takes possession or control — of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a

## PARTIE XI

# Créanciers garantis et séquestres

### Nomination d'un séquestre

**243 (1)** Sous réserve du paragraphe (1.1), sur demande d'un créancier garanti, le tribunal peut, s'il est convaincu que cela est juste ou opportun, nommer un séquestre qu'il habilite :

**a)** à prendre possession de la totalité ou de la quasi-totalité des biens — notamment des stocks et comptes à recevoir — qu'une personne insolvable ou un failli a acquis ou utilisés dans le cadre de ses affaires;

**b)** à exercer sur ces biens ainsi que sur les affaires de la personne insolvable ou du failli le degré de prise en charge qu'il estime indiqué;

**c)** à prendre toute autre mesure qu'il estime indiquée.

### Restriction relative à la nomination d'un séquestre

**(1.1)** Dans le cas d'une personne insolvable dont les biens sont visés par le préavis qui doit être donné par le créancier garanti aux termes du paragraphe 244(1), le tribunal ne peut faire la nomination avant l'expiration d'un délai de dix jours après l'envoi de ce préavis, à moins :

**a)** que la personne insolvable ne consente, aux termes du paragraphe 244(2), à l'exécution de la garantie à une date plus rapprochée;

**b)** qu'il soit indiqué, selon lui, de nommer un séquestre à une date plus rapprochée.

### Définition de *séquestre*

**(2)** Dans la présente partie, mais sous réserve des paragraphes (3) et (4), ***séquestre*** s'entend de toute personne qui :

**a)** soit est nommée en vertu du paragraphe (1);

**b)** soit est nommément habilitée à prendre — ou a pris — en sa possession ou sous sa responsabilité, aux termes d'un contrat créant une garantie sur des biens, appelé « contrat de garantie » dans la présente partie,

# TAB 2


Province of Alberta

# JUDICATURE ACT

Revised Statutes of Alberta 2000
Chapter J-2

Current as of April 1, 2023

Office Consolidation



Alberta King's Printer
Suite 700, Park Plaza
10611 - 98 Avenue
Edmonton, AB T5K 2P7
Phone: 780-427-4952

E-mail: kings-printer@gov.ab.ca
Shop on-line at kings-printer.alberta.ca

**General jurisdiction**

**8** The Court in the exercise of its jurisdiction in every proceeding pending before it has power to grant and shall grant, either absolutely or on any reasonable terms and conditions that seem just to the Court, all remedies whatsoever to which any of the parties to the proceeding may appear to be entitled in respect of any and every legal or equitable claim properly brought forward by them in the proceeding, so that as far as possible all matters in controversy between the parties can be completely determined and all multiplicity of legal proceedings concerning those matters avoided.

RSA 1980 cJ-1 s8

**Province-wide jurisdiction**

**9** Each judge of the Court has jurisdiction throughout Alberta, and in all causes, matters and proceedings, other than those of the Court of Appeal, has and shall exercise all the powers, authorities and jurisdiction of the Court.

RSA 1980 cJ-1 s9

## Part 2
## Powers of the Court

**Relief against forfeiture**

**10** Subject to appeal as in other cases, the Court has power to relieve against all penalties and forfeitures and, in granting relief, to impose any terms as to costs, expenses, damages, compensation and all other matters that the Court sees fit.

RSA 1980 cJ-1 s10

**Declaration judgment**

**11** No proceeding is open to objection on the ground that a judgment or order sought is declaratory only, and the Court may make binding declarations of right whether or not any consequential relief is or could be claimed.

RSA 1980 cJ-1 s11

**Canadian law**

**12** When in a proceeding in the Court the law of any province or territory is in question, evidence of that law may be given, but in the absence of or in addition to that evidence the Court may take judicial cognizance of that law in the same manner as of any law of Alberta.

RSA 1980 cJ-1 s12

**Part performance**

**13(1)** Part performance of an obligation either before or after a breach thereof shall be held to extinguish the obligation

(a) when expressly accepted by a creditor in satisfaction, or

(b) when rendered pursuant to an agreement for that purpose though without any new consideration.

**(2)** An order in the nature of a mandamus or injunction may be granted or a receiver appointed by an interlocutory order of the Court in all cases in which it appears to the Court to be just or convenient that the order should be made, and the order may be made either unconditionally or on any terms and conditions the Court thinks just.

RSA 1980 cJ-1 s13

**Interest**

**14(1)** In addition to the cases in which interest is payable by law or may be allowed by law, when in the opinion of the Court the payment of a just debt has been improperly withheld and it seems to the Court fair and equitable that the party in default should make compensation by the payment of interest, the Court may allow interest for the time and at the rate the Court thinks proper.

**(2)** Subsection (1) does not apply in respect of a cause of action that arises after March 31, 1984.

RSA 1980 cJ-1 s15;1984 cJ-0.5 s10

**Equity prevails**

**15** In all matters in which there is any conflict or variance between the rules of equity and common law with reference to the same matter, the rules of equity prevail.

RSA 1980 cJ-1 s16

**Equitable relief**

**16(1)** If a plaintiff claims to be entitled

(a) to an equitable estate or right,

(b) to relief on an equitable ground

(i) against a deed, instrument or contract, or

(ii) against a right, title or claim whatsoever asserted by a defendant or respondent in the proceeding,

or

(c) to any relief founded on a legal right,

the Court shall give to the plaintiff the same relief that would be given by the High Court of Justice in England in a proceeding for the same or a like purpose.

**(2)** If a defendant claims to be entitled

# TAB 3

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

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**(d)** any further criteria, consistent with those set out in paragraphs (a) to (c), that are prescribed.

**d)** tous autres critères réglementaires compatibles avec ceux énumérés aux alinéas a) à c).

### Related creditors

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

1997, c. 12, s. 126; 2005, c. 47, s. 131; 2007, c. 36, s. 71.

### Créancier lié

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

1997, ch. 12, art. 126; 2005, ch. 47, art. 131; 2007, ch. 36, art. 71.

### Class — creditors having equity claims

**22.1** Despite subsection 22(1), creditors having equity claims are to be in the same class of creditors in relation to those claims unless the court orders otherwise and may not, as members of that class, vote at any meeting unless the court orders otherwise.

2005, c. 47, s. 131; 2007, c. 36, s. 71.

### Catégorie de créanciers ayant des réclamations relatives à des capitaux propres

**22.1** Malgré le paragraphe 22(1), les créanciers qui ont des réclamations relatives à des capitaux propres font partie d'une même catégorie de créanciers relativement à ces réclamations, sauf ordonnance contraire du tribunal, et ne peuvent à ce titre voter à aucune assemblée, sauf ordonnance contraire du tribunal.

2005, ch. 47, art. 131; 2007, ch. 36, art. 71.

## Monitors

### Duties and functions

**23 (1)** The monitor shall

**(a)** except as otherwise ordered by the court, when an order is made on the initial application in respect of a debtor company,

**(i)** publish, without delay after the order is made, once a week for two consecutive weeks, or as otherwise directed by the court, in one or more newspapers in Canada specified by the court, a notice containing the prescribed information, and

**(ii)** within five days after the day on which the order is made,

**(A)** make the order publicly available in the prescribed manner,

**(B)** send, in the prescribed manner, a notice to every known creditor who has a claim against the company of more than $1,000 advising them that the order is publicly available, 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;

**(b)** review the company's cash-flow statement as to its reasonableness and file a report with the court on the monitor's findings;

## Contrôleurs

### Attributions

**23 (1)** Le contrôleur est tenu :

**a)** à moins que le tribunal n'en ordonne autrement, lorsqu'il rend une ordonnance à l'égard de la demande initiale visant une compagnie débitrice :

**(i)** de publier, sans délai après le prononcé de l'ordonnance, une fois par semaine pendant deux semaines consécutives, ou selon les modalités qui y sont prévues, dans le journal ou les journaux au Canada qui y sont précisés, un avis contenant les renseignements réglementaires,

**(ii)** dans les cinq jours suivant la date du prononcé de l'ordonnance :

**(A)** de rendre l'ordonnance publique selon les modalités réglementaires,

**(B)** d'envoyer un avis, selon les modalités réglementaires, à chaque créancier connu ayant une réclamation supérieure à mille dollars les informant que l'ordonnance a été rendue publique,

**(C)** d'établir la liste des nom et adresse de chacun de ces créanciers et des montants estimés des réclamations et de la rendre publique selon les modalités réglementaires;

**b)** de réviser l'état de l'évolution de l'encaisse de la compagnie, en ce qui a trait à sa justification, et de déposer auprès du tribunal un rapport où il présente ses conclusions;

**(c)** make, or cause to be made, any appraisal or investigation the monitor considers necessary to determine with reasonable accuracy the state of the company's business and financial affairs and the cause of its financial difficulties or insolvency and file a report with the court on the monitor's findings;

**(d)** file a report with the court on the state of the company's business and financial affairs — containing the prescribed information, if any —

**(i)** without delay after ascertaining a material adverse change in the company's projected cash-flow or financial circumstances,

**(ii)** not later than 45 days, or any longer period that the court may specify, after the day on which each of the company's fiscal quarters ends, and

**(iii)** at any other time that the court may order;

**(d.1)** file a report with the court on the state of the company's business and financial affairs — containing the monitor's opinion as to the reasonableness of a decision, if any, to include in a compromise or arrangement a provision that sections 38 and 95 to 101 of the *Bankruptcy and Insolvency Act* do not apply in respect of the compromise or arrangement and containing the prescribed information, if any — at least seven days before the day on which the meeting of creditors referred to in section 4 or 5 is to be held;

**(e)** advise the company's creditors of the filing of the report referred to in any of paragraphs (b) to (d.1);

**(f)** file with the Superintendent of Bankruptcy, in the prescribed manner and at the prescribed time, a copy of the documents specified in the regulations;

**(f.1)** for the purpose of defraying the expenses of the Superintendent of Bankruptcy incurred in performing his or her functions under this Act, pay the prescribed levy at the prescribed time to the Superintendent for deposit with the Receiver General;

**(g)** attend court proceedings held under this Act that relate to the company, and meetings of the company's creditors, if the monitor considers that his or her attendance is necessary for the fulfilment of his or her duties or functions;

**(h)** if the monitor is of the opinion that it would be more beneficial to the company's creditors if proceedings in respect of the company were taken under the *Bankruptcy and Insolvency Act*, so advise the court without delay after coming to that opinion;

**c)** de faire ou de faire faire toute évaluation ou investigation qu'il estime nécessaire pour établir l'état des affaires financières et autres de la compagnie et les causes des difficultés financières ou de l'insolvabilité de celle-ci, et de déposer auprès du tribunal un rapport où il présente ses conclusions;

**d)** de déposer auprès du tribunal un rapport portant sur l'état des affaires financières et autres de la compagnie et contenant les renseignements réglementaires :

**(i)** dès qu'il note un changement défavorable important au chapitre des projections relatives à l'encaisse ou de la situation financière de la compagnie,

**(ii)** au plus tard quarante-cinq jours — ou le nombre de jours supérieur que le tribunal fixe — après la fin de chaque trimestre d'exercice,

**(iii)** à tout autre moment fixé par ordonnance du tribunal;

**d.1)** de déposer auprès du tribunal, au moins sept jours avant la date de la tenue de l'assemblée des créanciers au titre des articles 4 ou 5, un rapport portant sur l'état des affaires financières et autres de la compagnie, contenant notamment son opinion sur le caractère raisonnable de la décision d'inclure dans la transaction ou l'arrangement une disposition prévoyant la non-application à celle-ci des articles 38 et 95 à 101 de la *Loi sur la faillite et l'insolvabilité*, et contenant les renseignements réglementaires;

**e)** d'informer les créanciers de la compagnie du dépôt du rapport visé à l'un ou l'autre des alinéas b) à d.1);

**f)** de déposer auprès du surintendant des faillites, selon les modalités réglementaires, de temps et autre, une copie des documents précisés par règlement;

**f.1)** afin de défrayer le surintendant des faillites des dépenses engagées par lui dans l'exercice de ses attributions prévues par la présente loi, de lui verser, pour dépôt auprès du receveur général, le prélèvement réglementaire, et ce au moment prévu par les règlements;

**g)** d'assister aux audiences du tribunal tenues dans le cadre de toute procédure intentée sous le régime de la présente loi relativement à la compagnie et aux assemblées de créanciers de celle-ci, s'il estime que sa présence est nécessaire à l'exercice de ses attributions;

**h)** dès qu'il conclut qu'il serait plus avantageux pour les créanciers qu'une procédure visant la compagnie

**(i)** advise the court on the reasonableness and fairness of any compromise or arrangement that is proposed between the company and its creditors;

**(j)** make the prescribed documents publicly available in the prescribed manner and at the prescribed time and provide the company's creditors with information as to how they may access those documents; and

**(k)** carry out any other functions in relation to the company that the court may direct.

soit intentée sous le régime de la *Loi sur la faillite et l'insolvabilité*, d'en aviser le tribunal;

**i)** de conseiller le tribunal sur le caractère juste et équitable de toute transaction ou de tout arrangement proposés entre la compagnie et ses créanciers;

**j)** de rendre publics selon les modalités réglementaires, de temps et autres, les documents réglementaires et de fournir aux créanciers de la compagnie des renseignements sur les modalités d'accès à ces documents;

**k)** d'accomplir à l'égard de la compagnie tout ce que le tribunal lui ordonne de faire.

### Monitor not liable

**(2)** If the monitor acts in good faith and takes reasonable care in preparing the report referred to in any of paragraphs (1)(b) to (d.1), the monitor is not liable for loss or damage to any person resulting from that person's reliance on the report.

2005, c. 47, s. 131; 2007, c. 36, s. 72.

### Non-responsabilité du contrôleur

**(2)** S'il agit de bonne foi et prend toutes les précautions voulues pour bien établir le rapport visé à l'un ou l'autre des alinéas (1)b) à d.1), le contrôleur ne peut être tenu pour responsable des dommages ou pertes subis par la personne qui s'y fie.

2005, ch. 47, art. 131; 2007, ch. 36, art. 72.

### Right of access

**24** For the purposes of monitoring the company's business and financial affairs, the monitor shall have access to the company's property, including the premises, books, records, data, including data in electronic form, and other financial documents of the company, to the extent that is necessary to adequately assess the company's business and financial affairs.

2005, c. 47, s. 131.

### Droit d'accès aux biens

**24** Dans le cadre de la surveillance des affaires financières et autres de la compagnie et dans la mesure où cela s'impose pour lui permettre de les évaluer adéquatement, le contrôleur a accès aux biens de celle-ci, notamment les locaux, livres, données sur support électronique ou autre, registres et autres documents financiers.

2005, ch. 47, art. 131.

### Obligation to act honestly and in good faith

**25** In exercising any of his or her powers or in performing any of his or her duties and functions, the monitor must act honestly and in good faith and comply with the Code of Ethics referred to in section 13.5 of the *Bankruptcy and Insolvency Act*.

2005, c. 47, s. 131.

### Diligence

**25** Le contrôleur doit, dans l'exercice de ses attributions, agir avec intégrité et de bonne foi et se conformer au code de déontologie mentionné à l'article 13.5 de la *Loi sur la faillite et l'insolvabilité*.

2005, ch. 47, art. 131.

## Powers, Duties and Functions of Superintendent of Bankruptcy

## Attributions du surintendant des faillites

### Public records

**26 (1)** The Superintendent of Bankruptcy must keep, or cause to be kept, in the form that he or she considers appropriate and for the prescribed period, a public record of prescribed information relating to proceedings under this Act. On request, and on payment of the prescribed fee, the Superintendent of Bankruptcy must provide, or cause to be provided, any information contained in that public record.

### Registres publics

**26 (1)** Le surintendant des faillites conserve ou fait conserver, en la forme qu'il estime indiquée et pendant la période réglementaire, un registre public contenant des renseignements réglementaires sur les procédures intentées sous le régime de la présente loi. Il fournit ou voit à ce qu'il soit fourni à quiconque le demande tous renseignements figurant au registre, sur paiement des droits réglementaires.

# TAB 4

**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

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

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

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

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

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

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

# TAB 5

# Court of Queen's Bench of Alberta

**Citation: Alberta Treasury Branches v Tallgrass Energy Corp, 2013 ABQB 432**

**Date:** 20130806
**Docket:** 1301 08759; 1301 08497
**Registry:** Calgary



Between:

**Alberta Treasury Branches**

Plaintiff

- and -

**Tallgrass Energy Corp.**

Defendant

1301 08497

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

**And in the Matter of the *Alberta Business Corporation Act*, R.S.A. 2000, c. B-9, as amended**

-and-

**Tallgrass Energy Corp.**

Defendant

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**Reasons for Decision**
**of the**
**Honourable Madam Justice B.E. Romaine**

---

*Inducon Development Corp.*, 1991 CarswellOnt 219 referred to as the outline of a plan, what he called the "germ of a plan": para 14. I would add a further gloss on that phrase: there should be a germ of a reasonable and realistic plan, particularly if there is opposition from the major stakeholders most at risk in the proposed restructuring. As noted in *Inducon* at para 13, the CCAA is remedial, not preventative, and it should not be the "last gasp of a dying company". Unfortunately, Tallgrass appears to be at that desperate stage.

[15] While it is certainly true that the fundamental purpose of the CCAA is to permit a company to carry on business and where possible avoid the social and economic costs of liquidating its assets, this is a company with very few employees, a handful of independent contractors, and relatively minor unsecured debt. Tallgrass does not carry on a business that has broader community or social implications that may require greater flexibility from creditors. The major stakeholders here are the secured lenders who oppose the application, and the equity holders.

[16] The secured lenders submit that the restructuring options presented by Tallgrass are commercially unrealistic and unlikely to come to fruitation, that it is obvious that a liquidation of the assets will be the end result for this company, and that they have lost confidence in the management of Tallgrass to effect such a liquidation. They submit that, as they are likely the only parties with any economic interest in the company, their preference for a receivership over what would ultimately be a liquidating CCAA should be taken into account.

[17] I must agree that the restructuring options proposed by Tallgrass, while more detailed than the kind of general good intentions offered by the applicant in *Matco*, are not realistic or commercially reasonable. Specifically:

> 1. Tallgrass concedes that it has exhausted any chance of conventional financing after nearly a year of attempting to find a conventional lender to take out its existing secured debt, turning in early 2013 to what it calls non-traditional sources;
>
> 2. Company management decided in March of this year to pursue $100 million in non-traditional debt rather than merely retiring existing secured debt of $18 million. As noted by the secured lenders, it is unrealistic for a small public company with a market capitalization of approximately $800,000 and existing assets worth roughly $29 million, which has already encountered difficulties finding sources of funding to take out Toscana's subordinate position, to attempt to obtain $100 million in financing within a reasonable time frame. The unsatisfactory and uncertain results of approximately six months of effort in that regard must be analyzed carefully;
>
> 3. Tallgrass has obtained no firm commitments for refinancing. What it has been able to obtain is the following:

a) a letter dated July 23, 2013 from a financing broker that purports to be a "commitment letter". This "commitment" to lend $100 million states that the broker will source the finding through an unnamed "top 25 bank". It requires an upfront "bank guarantee fee" of $2 million. The letter provides that the broker shall have no liability to Tallgrass "under any theory of law or equity" for the failure of any transaction contemplated by the loan commitment letter . The secured lenders have pointed out the many unusual provisions of this letter, and ask, reasonably enough, why a "top 25 bank" would contemplate a loan of $100 million to Tallgrass in its present circumstances. Tallgrass management has had no direct discussion with any financial institution and is relying on assurances from the broker that the source of funding would be reputable.

This "commitment letter" lacks credibility. At any rate, Tallgrass is unable in its current financial state even to fund the $2 million bank guarantee fee necessary to take the proposal to a next step. This leads to the next proposal.

b) Tallgrass has obtained a letter from a friend of its CEO that indicates that he has obtained verbal commitments from Chinese investors in the amount of $10 million for the purpose of investing in the company, and that they are willing to fund the $2 million required by the above-noted proposal. The secured lenders note that this potential funding source has no track record or experience with respect to Canadian oil and gas assets, and that, even if the commitment became firm, the amount is insufficient to pay off existing indebtedness.

c) Tallgrass has identified a further option, a potential loan in the process of negotiations with a broker, not a source lender, that would involve the broker earning approximately $16 million in fees to find a source for a $100 million loan. This is an even softer proposal, with no real commitment. Tallgrass' CEO concedes in understatement that this would be "expensive funding".

[18] Given that these options are not commercially realistic, I must conclude that the secured lenders are correct in their view that this would likely be a liquidating CCAA. While this does not in itself preclude the use of the statute, the secured lenders object to Tallgrass management controlling the liquidation process under CCAA protection as they have lost faith in such management. The secured lenders have identified concerns about management's estimate of the value of Tallgrass' oil and gas assets, concerns about the effect of abandonment liabilities on realization values, and concerns about discrepancies between the Cost Flow Projections contained in the CCAA application as compared to those prepared by Grant Thornton. The secured lenders also have concerns with respect to how management is executing its alternate financing strategy, particularly its decision to pursue financing from the kind of sources it has identified, and what they feel is a lack of attention from senior management to realistic

alternatives and options. They are critical of management's decisions with respect to covering short-term liabilities in the course of these applications.

[19] Tallgrass submits that the opinions given by an officer of Toscana, Dean Jensen, on behalf of the secured lenders with respect to the value of its oil and gas assets should be given little weight as Mr. Jensen does not have the proper expertise to comment on the reserve reports. I take Mr. Jensen's comments to be the opinions of a banker experienced with loans in the oil and gas sector and with familiarity with reserve reports. What Mr. Jensen is really questioning is whether Tallgrass would be able to achieve a price for these assets equal to management's projections, and whether such projections are reliable. He thus questions whether the secured lenders are assured of recovery or whether they are at risk.

[20] The concern expressed by Mr. Jensen with respect to cost flow projections relates to whether the costs of a CCAA proceeding will be as projected by Tallgrass, and, again, a lack of confidence with respect to management's projections in that regard. While it appears that Mr. Jensen may have misunderstood some of the calculations, there remain unanswered questions about the projections.

[21] This is not a case where the secured lenders have acted precipitously, or where the debtor has not had a more than adequate opportunity to canvass the market for refinancing and restructuring options. This process has been ongoing for more than a year under Tallgrass management, which was not able to obtain take-out financing for Toscana's bridge loan, nor obtain sufficient financing to satisfy its licensee liability rating report requirements and provide funding necessary for further development activities. It is also clear that Tallgrass and its major secured stakeholders are in an adversarial mode, which does not bode well for an efficient or relatively inexpensive CCAA restructuring. Tallgrass was most likely a liquidating CCAA, and given the lack of confidence and the adversarial relationship between the company and the secured lenders at risk, I was not satisfied that a CCAA order would be appropriate in the circumstances. I dismissed Tallgrass' application.

[22] It thus followed that the secured lenders' application for a receivership order must succeed.

Heard on the 24th day of July, 2013.
**Dated** at the City of Calgary, Alberta this 6th day of August, 2013.

# TAB 6

**CITATION:** Callidus v. Carcap, 2012 ONSC 163
**COURT FILE NO.: CV-11-00009498-OOCL**
**DATE:** 20120105



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

**RE:** CALLIDUS CAPITAL CORPORATION, Applicant/Respondent by cross-application

**A N D:**

CARCAP INC. and CAR EQUITY LOANS CORP., Respondents/Applicants by cross-application

APPLICATION UNDER Section 243(1) of the *Bankruptcy and Insolvency Act,* R.S.C. 1985, c. B-3 and Section 101 of the *Courts of Justice Act,* R.S.O. 1990 c. C.43

**AND RE:** KAPTOR FINANCIAL INC. and CARCAP AUTO FINANCING, Applicants by cross-application

**AND:**

CALLIDUS CAPITAL CORPORATION, Respondent by cross-application

**BEFORE:** MESBUR J.

**COUNSEL:** Harvey G. Chaiton and George Benchetrit for the applicant/respondent by cross-application

Mel Solmon, Fred Tayar and Colby Linthwaite for the respondents and applicants by cross-application

Robb English for the Toronto Dominion Bank

A. Kaufman for proposed Receiver, BDO Canada Ltd.

Jennifer Imrie for Third Eye Capital

**HEARD:** December 14, 2011

the respondents cannot continue to operate without further deterioration in inventory of vehicles and the resulting deterioration in revenue.

[57] The respondents ask, what is the harm in letting them reorganize? While that is an interesting question, it is not the test. It seems to me this is nothing more than a last ditch effort on the respondents' part to stave off the inevitable. In *Re Marine Drive Properties Ltd.* [11] the court put a similar situation this way: "to put in bluntly, the Petitioners have sought *CCAA* protection to buy time to continue their attempts to raise new funding ... they need time to 'try to pull something out of the hat.'" Or, as Farley J. put it in *Re Inducon Development Corp.,* [12] "... *CCAA* is designed to be remedial; it is not however designed to be preventative. *CCAA* should not be the last gasp of a dying company; it should be implemented if it is to be implemented, at a stage prior to the death throe."

[58] Here, the respondents only brought their application after Callidus had brought its application for a receiver. The respondents knew in November that Callidus intended to seek a receiver. They waited until they had been served with the receivership application before launching their own effort to restructure. As a result, the cross-application for *CCAA* relief seems more a defensive tactic than a *bona fide* attempt to restructure. The respondents have no restructuring plan. They have no outline of a plan. They do not have even a "germ of a plan". Again, as the court said in *Inducon*:

> [W]hile it is desirable to have a formalized plan when applying, it must be recognized as a practical matter that there may be many instances where only an outline is possible. I think it inappropriate, absent most unusual and rare circumstances, not to have a plan outline at a minimum, in which case then I would think that there would be requisite for the germ of a plan.

[59] The respondents have been attempting to refinance for some time. They have failed to meet every deadline for payment they agreed to with Callidus as well as with the TD Bank. Even when I delayed the date for the receivership order to take effect in order to give the respondents time to complete a refinancing, they were unable to do so.

[60] The absence of even a "germ of a plan" militates against granting relief under the *CCAA.*

[61] Finally, in considering the question of whether to grant relief under the *CCAA,* I must also look at the position of the two major secured creditors. Neither will

[11] 2009 BCSC 145
[12] [1992] O.J. No. 8 (Gen. Div.)

support a plan of arrangement. They represent a considerable part of the respondents' creditors. I have no evidence any other creditors would support a plan, either. I see no merit in making an initial order and imposing a stay in circumstances where a plan of arrangement is most likely going to be defeated.

[62] Having considered all these factors, I decline to grant relief under the *CCAA.*

**Conclusion:**

[63] It is for these reasons I made the order I did on December 14, 2011.

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MESBUR J.

Released: 20120105

# TAB 7

**CITATION:** Dondeb Inc. (Re), 2012 ONSC 6087
**COURT FILE NO.:** CV-12-00009865-00CL
**DATE:** 20121122



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

| | | |
|---|---|---|
| **BETWEEN:** | ) | |
| | ) | |
| IN THE MATER OF THE *COMPANIES CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED | ) | *David P. Preger, Lisa S. Corne, Michael Weinczok*, for the Applicants |
| **- AND -** | ) | |
| IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT WITH RESPECT TO DONDEB INC. and the ADDITIONAL APPLICANTS LISTED ON SCHEDULE "A" HERETO (collectively, the "APPLICANTS") | ) | *Jeffrey J. Simpson, A. Ronson*, for Pace Savings & Credit Union Limited<br>*Gary Sugar*, for David Sugar, *et al*<br>*D.R. Rothwell*, for RMG Mortgage/MCAP Financial Corporation<br>*Harry Fogul*, for Regional Financial<br>*Robin Dodokin*, for Empire Life Insurance Co.<br>*Beverly Jusko, M.R. Kestenberg*, for TD Bank Canada Trust<br>*Roger Jaipargas*, for Faithlife Financial<br>*R.B. Bissell*, for Vector Financial Services Limited<br>*Jeffrey Larry*, for First Source Mortgage Corporation<br>*Douglas Langley*, for Virgin Venture Capital Corporation<br>*David Mende*, for Addenda Capital Inc.<br>*J. Dietrich, W. Rabinovitch*, for A. Farber & Partners Inc.<br>*M. Church*, for SEIU (Union) |
| Applicants | ) | |
| | ) | |

**HEARD:** October 11, 15, 17 and 18, 2012

**C. CAMPBELL J.**

## REASONS FOR DECISION

[1] The applicants seeking an Initial Order under the *Companies Creditors Arrangement Act* are a group of companies owned and controlled by or through the main holding company

| | |
|---|---|
| 1182689 Ontario Inc. | 31-1671611 |
| 2198392 Ontario Inc. | 31-1673260 |

hereby stayed and suspended pending further order of the court.

[25] The request for an Initial Order under the *CCAA* was dismissed for the simple reason that I was not satisfied that a successful plan could be developed that would receive approval in any meaningful fashion from the creditors. To a large extent, Mr. Dandy is the author of his own misfortune not just for the liquidity crisis in the first place but also for a failure to engage with creditors as a whole at an early date.

[26] In his last affidavit filed Mr. Dandy explained why certain properties were transferred into individual corporations to allow additional financing that would permit the new creditors access to those properties in the event of default. To a certain extent this was perceived by creditors as "robbing Peter to pay Paul" and led to the distrust and lack of confidence the vast majority of creditors exhibit. Had there been full and timely communication both the creditors and the court may have concluded that a *CCAA* plan could be developed.

[27] Under the proposed Initial Order the fees of the proposed monitor and of counsel to the debtor were an issue as well as leaving the debtor in possession with the cost that would entail.

[28] Counsel for each of the various creditors represented urged that their client's individual property should not be burdened with administrative expenses and professional fees not associated with that property.

[29] Counsel for the debtor advised that to the extent possible his client and the monitor would keep individual accounts. This proposal did not appease the opposing creditors who did agree that their clients could accept what was described as a "global" receiver and that the Farber firm would be acceptable as long as the receiver's charge was allocated on an individual property basis. In other words, the opposing creditors are prepared to accept the work of the professionals of the receiver but not fund the debtor or its counsel.

[30] The issue of the fees of Farber incurred todate in respect of preparation of the *CCAA* application was agreed between the opposing creditors, Farber and its counsel and are not an issue. Counsel for the debtor requested that the court consider a request for fees and costs on the part of the debtor. In order to give an opportunity for the parties to consider the details of such request and possible resolution the issue was deferred to a later date.

[31] Following further submissions on behalf of the debtor I advised the parties that in my view the conditions necessary for approval of an Initial *CCAA* Order were not met but that a comprehensive Receivership Order should achieve an orderly liquidation of most of the properties and protect the revenue from the operating properties with the hope of potential of some recovery of the debtor's equity.

[32] Counsel are to be commended for the effort and success in reaching agreement on the form of order acceptable to the court.

[33] The *CCAA* is a flexible instrument, which with judicial discretion, is capable of permitting restructuring, including in appropriate situations, liquidation.

[34] In my view the use of the *CCAA* for the purpose of liquidation must be used with caution when liquidation is the end goal, particularly when there are alternatives such as an overall less costly receivership that can accomplish the same overall goal.

C. CAMPBELL J.

**Released:** November 22, 2012

**Schedule "A"**

1. Dondeb Inc.
2. Ace Self Storage and Business Centre Inc.
3. 1182689 Ontario Inc.
4. King City Holdings Inc.
5. 1267818 Ontario Ltd.
6. 1281515 Ontario Inc.
7. 1711060 Ontario Ltd.
8. 2009031 Ontario Inc.
9. 2198392 Ontario Ltd.
10. 2338067 Ontario Inc.
11. Briarbrook Apartments Inc.
12. Guelph Financial Corporation

# TAB 8

# Court of Queen's Bench of Alberta

**Citation: Shire International Real Estate Investments Ltd. (Re), 2010 ABQB 84**

**Date:** 20100204
**Docket:** 0901 11866
**Registry:** Calgary



IN THE MATTER OF THE *Companies' Creditors Arrangements Act*, R.S.C. 1985, c. C-36, AS AMENDED, THE *Judicature Act*, R.S.A. 2000, c. J-2, AS AMENDED AND THE *Business Corporations Act*, R.S.A. 2000, c. B-9, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF SHIRE INTERNATIONAL REAL ESTATE INVESTMENTS LTD., SHIRE CAPITAL LTD., HALAMA GARDENS LLC, SHIRE ASSET MANAGEMENT LTD., WINN RIVER RESORT LTD., FOR MCMONEY PROPERTIES II LTD., HALAMA GARDENS LTD., MAPLES AND WHITE SANDS INVESTMENT LTD., FORT MCMONEY DEVELOPMENT LTD., TSEHUM HARBOUR LTD., BEARSPAW AT 144TH AVENUE LTD., BEARSPAW AT 144TH EQUITIES LTD., BEARSPAW AT 144TH BONDS INC., TSEHUM HARBOUR EQUITIES LTD., TSE HARBOUR BONDS LTD. and ORILLIA INVESTMENTS LTD., 0726028 B.C. LTD., 0475816 B.C. LTD. and BOSUN'S HOLDINGS LTD.

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**Reasons for Judgment**
**of the**
**Honourable Madam Justice C.A. Kent**

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[1] I granted a *CCAA* Order on August 29, 2009. The first comeback application was heard by another judge on October 8 2009. He extended the Order until December 8. 2009. Counsel for Shire, supported by the Monitor/Receiver of Shire seeks an extension to the Order, permission to draw on all of the DIP financing previously ordered and approval of a RFP Project Agreement with Foxbridge Asset Management Ltd.

[2] Shire is comprised of 21 companies involved in the land acquisition business. Their business was to purchase property, financed by way of mortgages and private investors. There are about 2800 private investors. At the time the original Order was granted, information about

the value of the properties was scant. The Monitor undertook an analysis of the companies' assets and liabilities and in its Third Report, provided his best estimate of the financial circumstances of Shire. It was the Monitor's conclusion that on a consolidated basis there was about $17,000,000 in excess of the secured debt. It was on the basis of that estimate that the October 8th order was granted. The October 8th Order contained more. In addition to extending the stay, the Chambers judge increased the DIP facility to $2.5 million and set priorities with respect to the DIP charge and other fees, including a receiver's charge of $250,000. Because of the apparent lack of confidence that investors had in Shire management, the Chambers judge ordered that the Monitor in the *CCAA* proceedings also become the receiver manager of Shire.

[3] Subsequent to granting the October 8th Order, the Monitor realized that there was an error in the Third Report such that the apparent equity on a consolidated basis was closer to $12 million. Counsel approached the Chambers judge to determine whether it was appropriate that he reconsider the matter to determine whether he would have made the same order. The Chambers judge determined that I should make the decision as part of the application to extend the stay.

[4] Also after the October 8th Order, Fisgard Capital Corporation who is a secured lender on one of the Shire properties obtained an order from another judge who lifted the stay of proceedings with respect to the companies in which Fisgard had an interest and declared that the DIP charge did not charge the properties held by those companies. He did that because there was no equity in the property. As well, two secured lenders of other properties appealed the October 8th Order. An application to stay the Order was refused. In applying the tripartite test, Madam Justice Paperny, like the October 8th Chambers judge was under the impression that there was $17 million of equity. Her decision indicates to me that her reason for denying the stay was because the risk to the secured lenders was minimal. The final fact which is important to note is that of the DIP facility approved, only the original $1 million has been advanced with the balance held in trust by counsel for the Monitor.

[5] Shire argues that the stay ought to be extended even though the amount of equity available is $12 million, not $17 million as originally thought. It acknowledges that much of the information on value is estimated. There has been no money available to obtained up-to-date appraisals because of the several legal proceedings in the past two months. It points out that there is now a plan or at least a schedule to put a plan into place. The RFP Plan is intended to find a candidate or candidates who would bid on the properties which would in turn maximize value for both the secured lenders and the private investors. The Monitor says that the process up to court approval of the successful bidder(s) would be completed by mid-March.

[6] Shire says that the RFP Plan is realistic and that because of the equity in the properties, the secured lenders are protected. Shire is supported in its application by counsel for 800 of the investors who have collectively advanced $70 million.

[7] There was vigorous opposition to Shire's application by several of the secured lenders. They argue that this is a liquidating *CCAA* and while sometimes a liquidating *CCAA* makes sense this is not an appropriate case. There is nothing about the properties in these companies that

would attract new investors. These are "bits and pieces" of land geographically spread out that do not lend themselves to being sold as a package. In these circumstances, there is nothing that makes *CCAA* proceedings more likely to achieve the best result for the most parties than allowing the foreclosure proceedings to run their course. They argue that there is no equity in the properties when you consider them on a consolidated basis. The reason for the lack of equity is that the amounts used by the Monitor as value for the property are too high because the information is out of date or otherwise suspect, there is no accounting for any unpaid taxes, liens or other expenses and no recognition that selling these properties would involve real estate commissions and other expenses. Further, they say that on an unconsolidated basis, there is no equity in some properties and those properties should not be primed with the DIP financing. They argue that the RFP Plan is no plan at all. It is at best a plan to make a plan and at worst is proposing to do things some of the secured lenders have been already doing in their foreclosure proceedings.

[8] The secured lenders cited several cases where *CCAA* proceedings have either been denied or the stay not extended, including Cliffs Over Maple Bay [2008] B.C.J. No. 1587 (BCCA), Encore Developments Inc. [2009] B.C.J. 62 (BCSC) and Octagon Properties Group Ltd. [2009] ABQB 500. Specifically addressing Octagon, a decision of this court, counsel said that the only difference between Octagon and Shire is the large number of private investors in Shire.

[9] Having regard to the objectives of the *CCAA*, the large number of unsecured investors is, or more properly, was an appropriate consideration in granting *CCAA* protection. However, that cannot trump the interests of secured creditors when the facts show that continuing *CCAA* proceedings is putting their security at risk. That is so particularly in circumstances where there is a strong likelihood that continuing *CCAA* proceedings will do nothing to enhance the value of the properties and thereby increase the potential for return to the investors. I find that this is the situation here. A realistic estimate of value indicates that the equity available may be approaching the amount of DIP financing, the plan is really not a plan and even as a plan, is unlikely to produce any result more attractive than foreclosure proceedings.

[10] In the result, I decline to extend the *CCAA* stay. With respect to the DIP financing, as I understand it, only $1 million has been advanced and that work done by the Monitor, his counsel and counsel for Shire in the last while has not been paid for. Those bills should not remain unpaid. While there may be instances where upon review of the original *ex parte* order causes the judge to conclude that the DIP should never have been granted because there was inaccurate information provided, that is not the case here. Rather, against the background of a large number of private investors, it was appropriate to grant the initial order to permit the Monitor to look at the state of affairs of Shire so that the court could determine if *CCAA* proceedings were appropriate. That has been done. It has not turned out well, but that does not mean that the professionals who assisted the court should not be paid.

# TAB 9

# QUEEN'S BENCH FOR SASKATCHEWAN

Citation: **2017 SKQB 228**

Date: **2017 07 24**
Docket: QBG 783 of 2017
Judicial Centre: Saskatoon

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COURT OF QUEEN'S BENCH FOR SASKATCHEWAN
IN BANKRUPTCY AND INSOLVENCY

BETWEEN:

AFFINITY CREDIT UNION 2013

PLAINTIFF

- and –

VORTEX DRILLING LTD.

DEFENDANT

---

Docket: QBG 1030 of 2017
Judicial Centre: Saskatoon

---

BETWEEN:

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

- and -

IN THE MATTER OF *THE* SASKATCHEWAN *BUSINESS CORPORATIONS ACT*, RSS 1978, c B-10

IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT OF VORTEX DRILLING LTD.

b. The remedial purpose of the *CCAA* is to facilitate the making of a compromise or arrangement between an insolvent debtor company and its creditors to the end that the company is able to continue in business: See *Chef Ready Foods Ltd. v Hongkong Bank of Canada* [1991] 2 WWR 136.

c. The requirements of appropriateness, good faith and due diligence are baseline considerations that a court should always bear in mind when exercising *CCAA* jurisdiction: *Century* at para 70.

d. Appropriateness is assessed by inquiring whether the order sought advances the remedial purpose of the *CCAA*: *Century* at para 70

e. Section 11.02(3)(a) of the *CCAA* states that the court shall not grant a stay of proceedings unless:

> (a) the applicant satisfies the court that circumstances exist that make the order appropriate…

[18] I proceed on the basis that a *CCAA* applicant bears the burden of establishing each of the requirements of appropriateness, good faith and due diligence.

**The Law Respecting Receivership Applications**

[19] In a previous unreported decision in *Golden Opportunities Fund Inc. v Phenomenome Discoveries Inc.* (25 February 2016) Saskatoon, QB 1639 of 2015 (Sask QB), I summarized jurisprudence with respect to applications to appoint a receiver under s. 243 of the *BIA*. I repeat here that summary, which I view as remaining accurate:

5. Under s. 243(1) of the *BIA* this court can, on application of a secured creditor, appoint a receiver where it considers it just and convenient to do so. Instructive decisions on the factors relevant to the court's determination of whether it is "just and convenient" include *Bank of Montreal v. Carnival National Leasing Ltd*. 2011 ONSC 1007 *and Kasten Energy Inc. v. Shamrock Oil & Gas Ltd*. 2013 ABQB 63.

6. In Carnival the court said the following regarding the just and convenient criteria at para 24 of its reason:

> In *Bank of Nova Scotia v. Freure Village on Clair Creek* (1996), 40 C.B.R. (3d) 274 (Ont. Gen. Div. [Commercial List]), Blair J. (as he then was) dealt with a similar situation in which the bank held security that permitted the appointment of a private receiver or an application to court to have a court appointed receiver. He summarized the legal principles involved as follows:
>
> > 10 The Court has the power to appoint a receiver or receiver and manager where it is "just or convenient" to do so: the Courts of Justice Act, R.S.O. 1990, c. 43, s. 101. In deciding whether or not to do so, it must have regard to all of the circumstances but in particular the nature of the property and the rights and interests of all parties in relation thereto. The fact that the moving party has a right under its security to appoint a receiver is an important factor to be considered but so, in such circumstances, is the question of whether or not an appointment by the Court is necessary to enable the receiver-manager to carry out its work and duties more efficiently; see generally *Third Generation Realty Ltd. v. Twigg* (1991) 6 C.P.C. (3d) 366 at pages 372-374;*Confederation Trust Co. v. Dentbram Developments Ltd*. (1992), 9 C.P.C. (3d) 399*; Royal Trust Corp. of Canada v. D.Q. Plaza Holdings Ltd*. (1984), 54 C.B.R. (N.S.) 18 at page 21. It is not essential that the moving party, a secured creditor, establish that it will suffer irreparable harm if a receiver-manager is not appointed: *Swiss Bank Corp. (Canada) v. Odyssey Industries Inc*.(1995), 30 C.B.R. (3d) 49.

7. In *Kasten* the court said the following:

> > 13 Both parties agree that the factors that may be considered in making a determination whether it is just and convenient to appoint a Receiver are listed in a non-

exhaustive manner in *Paragon Capital Corp. v. Merchants & Traders Assurance Co.*, 2002 ABQB 430 (Alta. Q.B.) at para 27, (2002), 316 A.R. 128 (Alta. Q.B.) [Paragon Capital], citing from Frank Bennett, Bennett on Receiverships, 2nd ed (Toronto: Thompson Canada Ltd, 1995) at 130] to include:

a) whether irreparable harm might be caused if no order were made, although it is not essential for a creditor to establish irreparable harm if a receiver is not appointed, particularly where the appointment of a receiver is authorized by the security documentation;

b) the risk to the security holder taking into consideration the size of the debtor's equity in the assets and the need for protection or safeguarding of the assets while litigation takes place;

c) the nature of the property;

d) the apprehended or actual waste of the debtor's assets;

e) the preservation and protection of the property pending judicial resolution;

f) the balance of convenience to the parties;

g) the fact that the creditor has the right to appoint a receiver under the documentation provided for the loan;

h) the enforcement of rights under a security instrument where the security-holder encounters or expects to encounter difficulty with the debtor and others;

i) the principle that the appointment of a receiver is extraordinary relief which should be granted cautiously and sparingly;

j) the consideration of whether a court appointment is necessary to enable the receiver to carry out its' duties more efficiently;

k) the effect of the order upon the parties;

l) the conduct of the parties;

> m) the length of time that a receiver may be in place;
>
> n) the cost to the parties;
>
> o) the likelihood of maximizing return to the parties;
>
> p) the goal of facilitating the duties of the receiver.
>
> See also, *Lindsey Estate v. Strategic Metals Co*rp., 2010 ABQB 242 (Alta. Q.B.) at para 32, aff'd 2010 ABCA 191 (Alta. C.A.); and *Romspen Investment Corp. v. Hargate Properties Inc.*, 2011 ABQB 759 (Alta. Q.B.) at para 20.



[20] Consistent with my view that a *CCAA* applicant bears the burden of establishing each of the requirements of appropriateness, good faith and due diligence, I am of the view that an applicant under s. 243 of the *BIA* bears the burden of satisfying the Court that it would be just and convenient to appoint a receiver in the circumstances.

**The Parties' Positions in Brief**

[21] Vortex's position is that on a proper application of the legislative and remedial purposes of the *CCAA* it is appropriate to issue an initial order and grant a stay. It argues that putting Vortex into receivership is going to result in liquidation of its assets and the end of its business with the resulting loss of employment for many individuals as well as the loss of the other economic activity that Vortex generates in its home community.

[22] Vortex says that the economic climate in the Western Canadian oil industry is improving and it is expecting a substantial improvement in its cash flow. It says it expects to soon secure additional business and that it is actively pursuing promising refinancing opportunities. Thus it says it is appropriate that it be given an opportunity to pursue such refinancing or a compromise with its creditors so as to

and convenient that a Receiver be appointed. I am assisted in these findings by the information provided in the Interim Receiver's reports. In particular I note the Interim Receiver's statements in his July 18, 2017 report, that:

a. Vortex is not contemplating any debt payment to be made to Affinity during the period July 17, 2017 to September 24, 2017 (para. 39); and

b. "Vortex would not have been able to manage its cash flow needs from ongoing operations without the injection of the July 7, 2017 payroll funded by the Interim Receiver." (para. 41).

[37] Vortex bears the burden of satisfying me that the relief they seek is appropriate in the circumstances. I am fully alive to the consequences that appointing a receiver may have upon Vortex's employees, unsecured creditors, shareholders and business associates. However, the evidence satisfies me that:

a. The prospect of Vortex finding a lender to refinance it, at the level required to satisfy all of the indebtedness to Affinity and other creditors without significant equity injections by the shareholders, is remote or non-existent.

b. The shareholders of Vortex have demonstrated over the last 2 ½ years that they are not prepared to invest further monies in Vortex. While Vortex says it has interest from other lenders in refinancing it, Vortex has chosen not to share with Affinity and the Court the details of such refinancing proposals. In the circumstances I am unable to give weight to suggestions that there are real prospects of refinancing that do not involve either substantial write-off of

current indebtedness or the injection of significant additional equity.

c. Vortex has long known that Affinity wanted additional capital injection to the company. Vortex has, given the accommodations Affinity provided over the last two years, had ample opportunity to pursue alternate financing. At a minimum they have since May 1, 2017 had the knowledge that the need for alternate financing was immediate.

d. Two years of financial statements of Vortex establishes that, given the day rates for drilling rigs and the work available, it is unviable at its current debt levels. To the extent Vortex has been able to generate revenue, that revenue has barely covered, and during some periods not covered, the variable costs of operating those rigs, much less making a contribution to fixed costs. Vortex is currently in breach of its statutory obligation to pay employee withholdings to Canada Revenue Agency.

e. While Vortex argues that the economic prospects are improving, there is no credible evidence provided to support that argument. Rather the evidence is that since 2014 the day rate paid for drilling rigs has been reduced to less than one half of their previous levels and even at these rates Vortex is unable to find work that does more than partially utilize its rigs.

f. Oil prices remain below $50.00 per barrel, and Vortex has provided no evidence to support a conclusion that drill utilization rates or daily charges can or will improve beyond the rates experienced over the last 2 ½ years. No statistical evidence has

been provided that establishes the number of rigs available in Western Canada and their current utilization rates nor economic forecasts or analysis that demonstrates that those utilization rates or the presently available day rates for such rigs will increase.

g. If alternate or takeout financing is not available, then the only other justification for an initial order and stay would be to provide time to Vortex to negotiate a compromise agreement between Vortex and its creditors, secured and unsecured. Affinity is the only secured creditor, and it has made it clear that it is not prepared to compromise its debts. Affinity cannot be criticized for such a position. Indeed the members of Affinity would have good reason to criticize Affinity management were they to compromise a debt which it has reasonable prospects to fully recover.

h. Affinity's position is that they have lost confidence in and no longer trust Vortex. This position is reasonable given that Vortex has repeatedly over the last two years failed to meet its commitments to make balloon payments or to resume regular payments coupled with the concerns with respect to Vortex's good faith discussed above.

i. While Vortex argues Affinity is not only fully secured, but has a significant cushion of security such that Affinity would suffer no prejudice by permitting Vortex to pursue *CCAA* relief, that argument is but one of many considerations to weigh. It does not weigh heavily given the absence of admissible and credible evidence as to the value of Affinity's security and my common sense conclusion, given the utilization rates and day rates available

to Vortex, that the present value of these rigs is a matter of significant uncertainty.

j. Continued operation of the rigs carries with it the consequence that to some greater or lesser extent the value of the rigs will continue to physically depreciate independent from market forces related to the depressed state of the Western Canadian oil industry or that may result from the introduction of new technologies in drilling rigs and practices.

k. If Vortex were granted *CCAA* protection, Affinity would effectively bears the risks and costs associated with that action since, with the exception of the relatively insignificant dollar amount owed to unsecured creditors (some $193,000), Affinity is the only creditor. If Vortex were given *CCAA* protection then, under the usual DIP financing protocols of *CCAA* protection, costs arising from the continuing operation of Vortex that are in excess of its revenue, including the costs of the Monitor and its legal counsel, will effectively be borne by the security Affinity holds. The Pre-Filing Report of the Proposed Monitor contemplates approval of up to $1,000,000 in DIP financing for the proposed 13-week cash flow period which includes $500,000 in professional fees. Such DIP financing would, of course, assume a super priority position over the secured financing of Affinity. Thus the risks associated with *CCAA* protection are effectively borne by Affinity and the unsecured lenders if the security cushion suggested by Vortex turns out not to exist.

# TAB 10

**CITATION:** BCIMC Construction Fund Corporation et al. v. The Clover on Yonge Inc. 2020 ONSC 1953
**COURT FILE NO.:** CV-20-00637301-00CL & CV-20-00637297-00CL
**DATE:** 2020-03-30



**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

**[Commercial List]**

| | | |
|---|---|---|
| **BETWEEN:** | ) | |
| | ) | |
| BCIMC CONSTRUCTION FUND CORPORATION AND BCIMC SPECIALTY FUND CORPORATION | ) | *David Bish, Adam M. Slavens, Jeremy Opolsky* Counsel for the Applicants |
| Applicants | ) | |
| **– and –** | ) | |
| THE CLOVER ON YONGE INC., THE CLOVER ON YONGE LIMITED PARTNERSHIP, 480 YONGE STREET INC. AND 480 YONGE STREET LIMITED PARTNERSHIP | ) | *Steven Graff, Ian Aversa, Jeremy Nemers* for the Respondents |
| Respondents | ) | |
| **AND BEWTWEEN** | ) | |
| BCIMC CONSTRUCTION FUND CORPORATION AND OTERA CAPITAL INC. | ) | *David Bish, Adam M. Slavens, Jeremy Opolsky* Counsel for BCIMC Construction Fund Corporation |
| Applicants | ) | *Virginie Gauthier, Allan Merskey and Peter Tae-Min Choi* counsel for Otera Capital Inc. |
| **- and -** | ) | |

Concord is not the buyer of the two projects. The existing sole purpose entities remain the owner of the projects. Concord is simply the new shareholder. It assumes no other liabilities.

[68] Finally, the HSBC letter goes on to state:

> In light of current market and economic conditions surrounding the COVID-19 health crisis, we are unable to comment specifically on financing aspects regarding the subject development projects at this time.

[69] From the perspective of the Receivership Applicants, this is the very problem. Far from pulling a rabbit out of the hat, the Debtors proposal would keep the Receivership Applicants in projects that, at least on the face of the HSBC letter, are currently not capable of obtaining new financing. In those circumstances one can readily expect that any new financing may well be conditional on the Receivership Applicants taking a discount on their debt or being forced to continue financing to avoid such a discount. Concord has not undertaken that the Receivership Applicants will be paid out without discount in any new financing.

[70] I intend no criticism of Concord by these comments. I would not expect them to make their own capital or liquidity available to the project. The whole point of financing through project specific entities is to insulate the assets of a larger group from the risks of a particular project. It is readily understandable and commercially reasonable that Concord would pursue that objective.

[71] At the same time, however, the Receivership Applicants should not necessarily be compelled to remain in the project either permanently or temporarily while they wait for a project specific company to obtain new financing without the Receivership Applicants having any control of the process. Forcing the Receivership Applicants to remain without control of the process is even more unfair when the contracts to which the Debtors agreed give the Receivership Applicants a right to control the process through a receivership.

**(b) Reputational Damage**

[72] The Debtors submit that a CCAA process is preferable to a receivership because it would cause less reputational damage to Cresford. In the circumstances of this case, that is irrelevant. Any reputational damage to Cresford is of its own making.

[73] One may well have sympathy for a debtor who is caught up in a cycle of increasing construction costs in Toronto's heated construction market. One has less sympathy for a debtor who hides those costs from lenders instead of being transparent and searching for a solution. One has even less sympathy for a debtor who from the outset of the relationship has misled a lender about the nature of the debtor's equity injection and one who uses $10.6 million of the lender's money to fund the interest on the debtor's equity injection. The Receivership Applicants lent money for construction costs. They did not lend money to finance the Debtor's equity injection.

# TAB 11

**2019 ANNREVINSOLV 14**

**Annual Review of Insolvency Law**
Editor: Janis P. Sarra

14 — In Search of a Purpose: The Rise of Super Monitors & Creditor-Driven CCAAs

# In Search of a Purpose: The Rise of Super Monitors & Creditor-Driven *CCAA*s

*Luc Morin and Arad Mojtahedi* [*]

## I. — INTRODUCTION

> *"A Jedi uses the Force for knowledge and defence, never for attack."*
>
> *- Master Yoda - The Empire Strikes Back*

The title of this article was not intended to echo the upcoming final chapter of the most recent Star Wars trilogy. In fact, we came up with the title before *The Rise of Skywalker* was announced. But for some reason, we could not help but to think that this was a sign from the force. After all, the very nature of the ethereal powers of a monitor appointed under the *Companies' Creditors Arrangement Act* [1] (*CCAA* or the "Act"), were akin to those bestowed upon any Jedi knight: guardian of the peace guided by selfless morality.

Monitor's powers have been described as being supervisory in nature and its role as being those of a fiduciary towards all stakeholders of an insolvent corporation. A *CCAA* monitor is not the agent of any particular category of stakeholders, let alone a secured creditor. It serves to be the eyes and ears of the court, to monitor the restructuring process of the insolvent corporation and account for all major operations and sometimes missteps, as the case may be, and report same to the court and the overall body of stakeholders. It must maintain an over the crowd attitude aimed at ensuring that the restructuring process is being conducted in accordance with the canonical code of conduct set forth in the *CCAA*, at the behest of a variety of stakeholders.

The roots of the monastic role of the monitor stem from the importance of the ultimate objective of the *CCAA*, which is to favour the restructuring of a struggling business and limit the terrible consequences of a corporate insolvency on its stakeholders. The *CCAA* does not provide for a scheme of distribution, which is the case under the *Bankruptcy and Insolvency Act* [2] (*BIA*). It seems that failure to restructure was never an option contemplated under the *CCAA*'s purview, the legislator leaving this to be dealt with by the *BIA*.

The *CCAA* was historically aimed at *facilitating* a compromise between creditors and an insolvent corporation. *CCAA*'s historical objective is in the very title of the Act. That said, not all insolvent corporations can or should be saved, and to the extent that efforts are made to restructure their business, courts have justifiably concluded that the *CCAA*'s objective would not be thwarted by facilitating the liquidation of the insolvent corporation's assets, property and undertakings. After all, in most cases, such a liquidation would take the form of a transfer of assets allowing for the business of the insolvent corporation to continue, albeit under a new entity or structure. Comfort could be taken in the end result that enables the restructuring of a business, even if it means that this business would have to thrive under a new master and/or a different structure.

It is in this context that one must analyze the recent trend allowing for the *CCAA* process to be initiated by secured creditors while granting extended powers to the *CCAA* monitor akin to those of a *BIA* receiver. To the extent that management of an insolvent corporation fails or neglects to address the restructuring needs of the business, courts have allowed a *CCAA* process to

 

Recognizing its jurisdiction to interpret the provisions of NLPBA in the context of this *CCAA* proceeding, the Court concluded that this was a liquidating *CCAA* at the outset, which triggered the application of the deemed trusts under the federal *Pension Benefits Standards Act* and the NLPBA. To this end, the Court noted:

- Liquidation regime under Part XVIII of the *Canada Business Corporations Act* is only available to corporations that are solvent. [45]

- The debtor in a *CCAA* proceeding remains in possession of its assets and this is sufficient to meet the requirement of the estate in liquidation, assignment or bankruptcy. [46]

- The employer should not be allowed to avoid the priority of the deemed trust by choosing to liquidate under *CCAA* rather than the *BIA*. [47]

> [160] It is clear in the present matter that the Wabush CCAA parties have liquidated their assets. With the sale of the Wabush mine in June, the Wabush CCAA parties have now sold all or substantially all of their assets. However, they did not institute formal liquidation proceedings. **They proceeded instead under the CCAA with what has come to be known as a "liquidating CCAA" [...]** [48]
>
> [174] **The Court notes that there is nothing in any way pejorative about qualifying the CCAA as a liquidating CCAA. That is a legitimate and increasingly frequent use of CCAA proceedings. However, a liquidating CCAA should be more analogous to a BIA proceeding. One of the consequences is that the deemed trusts should be triggered.** [49]
>
> [References omitted -- Emphasis added.]

In 2014, Justice Dumas in *Lac Mégantic* insisted that the question as to whether liquidations are allowed under the *CCAA* remains an open one, as there has been no recent decision from a court of appeal on this matter in Canada, but concluded that liquidating *CCAA*s were possible, on a case-by-case basis. [50]

More recently in 2019, the same Justice Dumas rendered a decision in the matter of *MPECO Construction* [51] denying a motion seeking extension of the stay of proceedings on the basis that there were no prospect for a plan of arrangement. Justice Dumas did not cast a doubt on the possibility for an insolvent corporation to liquidate its assets under a *CCAA* process. Rather, Justice Dumas questioned whether the *CCAA* was the proper forum to allow for such a liquidation exercise to be conducted to the extent that there were no reasonable grounds suggesting that such a liquidation would lead to the preservation of the going concern and that the proceeds of such an exercise could lead to the filing of a plan of arrangement being submitted to the creditors:

> [34] The objective of the CCAA is embedded in its title.
>
> [35] The objective of the Act is to allow for a struggling company to present a plan of arrangement to its creditors with the ultimate objective to restructure its business. (...)
>
> [44] That a liquidation of a debtor's assets is possible prior to the filing of a plan of arrangement is not in litigation. Courts will exercise their discretion in this regard on a case-by-case basis. **That said, one must keep in mind that the debtor's request and acts under the CCAA should lead to the filing of a plan of arrangement submitted to the creditors**.
>
> [45] Proceedings under the CCAA ought not to be used to short circuit realization process under the Bankruptcy and Insolvency Act. [52]

  

[Our translation -- Emphasis added.]

Liquidating *CCAA* is no longer a trend. It is justly considered an efficient tool to facilitate the transfer of businesses on a going concern basis. So long as the liquidation conducted under a *CCAA* process will enhance the prospect of maintaining the going concern of the business(es) operated by an insolvent corporation, even if this going concern may ultimately be continued under a new entity/structure, courts are now relying on section 36 of the *CCAA* to allow such liquidation to proceed. [53] This is in line with the historical purpose and objective of the *CCAA*.

Prime evidence of the fact that liquidating *CCAA*s are now well accepted are Sears Canada Inc's *CCAA* proceedings, which began in 2017. In a span of less than two years, the monitor was capable of monetizing substantially all of the tangible assets of these entities while temporarily maintaining certain operations and allowing for the transfer of certain businesses formally operated under the banner of Sears, hence maximizing chances that going concern preservation is maintained. [54]

On a final note, it is interesting to note that Parliament's recent amendments to the *CCAA* via Bill C-97, which will add section 11.001 to the *CCAA* requiring initial orders to "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*" [emphasis added]. [55] Buried deep within the government's budget, it remains to be seen how this new provision will be interpreted by the courts and if it will serve to reaffirm the primary and historical purpose of the *CCAA*, which is to enable a restructuring of an insolvent corporation's business for the benefit of a variety of stakeholders.

Following the guidance from the above decisions, in recent years liquidations under the *CCAA* have been effected when the maintenance of the debtors' business as a going concern was shown to increase the value for stakeholders and when the complexity of the matter justified the flexibility provided under the *CCAA*, always with a view to preserve the going concern of a business operated by an insolvent corporation. With the objective of avoiding or limiting the negative impact on a variety of stakeholders that the alternative of a liquidation on a piecemeal basis would bring. This is in line with the historical objective and very purpose of the *CCAA*.

That said, who should be at the helm of a liquidating *CCAA*? In coming to accept liquidating *CCAA*s, Courts have insisted on the fact that it was for the benefit of all stakeholders of the insolvent corporation, in some cases plainly shrugging at the idea of a liquidating *CCAA*s that would serve no more than to reimburse the secured creditor. Can the debtor-driven *CCAA* process be continued or even initiated by a secured creditor? This is the question that next section seeks to address.

## IV. — CREDITOR-DRIVEN *CCAA*s AND ENHANCED POWERS FOR THE MONITOR

### 1. — Initiating the *CCAA* Process

The *CCAA* does not prohibit creditors from bringing forth an application for an initial order. Nonetheless, given that the process is typically driven by the debtor, the courts have historically been reluctant to grant an application made by creditors. While multiple cases in recent years have allowed the creditors to initiate the *CCAA* process and enhanced the role of the monitor, *CCAA* remains first and foremost debtor-driven.

In *Crystallex* (2012), a decision which was unanimously confirmed by the Ontario Court of Appeal, Justice Newbould held that when the court is presented with competing *CCAA* applications from the debtor and from a creditor, the key consideration is which application offers the best chance for a fair balancing of the interests of all stakeholders. [56] A creditor should not be able to prevent a debtor company from undertaking restructuring efforts under the *CCAA* to maximize recovery for the benefit of all stakeholders unless it can be shown that the company's efforts are "doomed to fail."

Crystallex is a mining company whose principal focus was the exploration and development of gold projects in Venezuela. In 2004, the company issued nearly $100 million worth of senior unsecured notes due on 23 December 2011. On 22 December 2011, one day prior to the maturity of the notes, Crystallex and the noteholders filed competing *CCAA* applications. The noteholders' application contemplated that all existing common shares would be cancelled, an equity offering would be

  

# TAB 12

# SUPERIOR COURT

(Commercial Division)



CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No.: 500-11-048114-157

DATE: July 14, 2021

---

**BY THE HONOURABLE MICHEL A. PINSONNAULT, J.S.C.**

---

IN THE MATTER OF THE PLAN OF COMPROMISE OR ARRANGEMENT OF:

**BLOOM LAKE GENERAL PARTNER LIMITED**
**QUINTO MINING CORPORATION**
**CLIFFS QUÉBEC IRON MINING ULC**
**WABUSH IRON CO. LIMITED**
**WABUSH RESOURCES INC.**
Petitioners

and

**THE BLOOM LAKE IRON ORE MINE LIMITED PARTNERSHIP**
**BLOOM LAKE RAILWAY COMPANY LIMITED**
**WABUSH MINES**
**ARNAUD RAILWAY COMPANY**
**WABUSH LAKE RAILWAY COMPANY LIMITED**
Mises-en-cause

And

**FTI CONSULTING CANADA INC.**
Monitor

And

**TWIN FALLS POWER CORPORATION**
**CHURCHILL FALLS (LABRADOR) CORPORATION LIMITED**
Twinco Mises-en-cause

---

**JUDGMENT ON MOTION FOR THE EXPANSION OF THE MONITOR'S POWERS**
(Sections 11 and 23 of the *Companies' Creditors Arrangement Act*)

---

## OVERVIEW

[1] With their Motion, the Petitioners and the Mises en cause are seeking an order from this Court granting additional powers to the Monitor (the "**Motion**") so that the latter may, directly or through its counsel, do the following:

> a) compel the production, from time to time, from any Person having possession, custody or control of any books, records, accountings, documents, correspondences or papers, electronically stored or otherwise, relating to the Twinco Interest, CFLCo Indemnity and CFLCo Maintenance Obligations (each as defined hereafter), including the Twinco Requested Information (as defined below) (the "**Requested Information**") in respect of the period from and after January 1, 2010, and such earlier periods as may be approved by further order of the Court (the "**Disclosure Period**");
>
> b) require any Requested Information to be delivered within thirty (30) days of the Monitor's request or such a longer period as the Monitor may agree to in its discretion; and
>
> c) conduct investigations from time to time, including examinations under oath of any Person reasonably thought to have knowledge relating to the Requested Information, in respect of the Disclosure Period.
>
> [the "**Expanded Monitor Powers**"]

[2] Previously, on June 29, 2018, Mr. Justice Stephen W. Hamilton issued an order to sanction the Joint Plan of Compromise and Arrangement dated as of May 16, 2018 (the "**Plan**") submitted jointly by the Petitioners and the Mises en cause (collectively the "**CCAA Parties**" for the purposes hereof).

[3] During the present CCAA proceedings initiated in January 2015 pursuant to the provisions of the *Companies' Creditors Arrangement Act* (the "**CCAA**"), the CCAA Parties have sold all of their assets other than the combined 17.062% equity interest (the "**Twinco Interest**") held in Twin Falls Power Corporation ("**Twinco**") by Wabush Iron Co. Limited and Wabush Resources Inc. (collectively "**Wabush**").

[4] Pursuant to the Plan, the net proceeds of sales and other recoveries are to be distributed to the creditors of the Participating CCAA Parties[1] in accordance with the terms and conditions of the Plan.

[5] Since the implementation of the Plan, the CCAA Parties, with the assistance of the Monitor, have been working to wind down the estates of the CCAA Parties so that the net

[1] As defined in the Plan.

[15] Until now, Twinco and its shareholder CFLCo have been steadfastly blocking all attempts of the CCAA Parties and the Monitor to monetize the Twinco Interest in the furtherance of the Plan, which involves obtaining the relevant and necessary documentation required to determine with reasonable certainty the value of the Twinco Interest in the context of the present CCAA Proceedings.

[16] Twinco's and CFLCo's refusal to deal with the Twinco Interest has left little alternative but to seek the wind down and the dissolution of Twinco in the context of the present CCAA Proceedings to finally permit the CCAA Parties, with the assistance of the Monitor, to realize this asset of Wabush, complete the final distribution to the Plan creditors and terminate at last the CCAA Proceedings that have been ongoing since 2015.



## 1. THE PROCEDURAL CONTEXT INVOLVING TWINCO

### 1.1 The Twin Falls Power Corporation (Twinco)

[17] Based on the Motion, the Court retains the following relevant facts:

- Twinco is an incorporated joint venture formed under the *Canada Business Corporations Act* (the "**CBCA**") on February 18, 1960, among Churchill Falls (Labrador) Corporation Limited ("**CFLCo**"), Wabush Iron Co. Limited and Wabush Resources Inc. (collectively "**Wabush**") and the Iron Ore Company of Canada ("**IOC**"), among others;

- As at December 31, 2019, Twinco was owned 33.3% by CFLCo, 49.6% by IOC, and 17.062% interest held jointly by Wabush[5];

- Pursuant to Twinco's fiscal year 2019 Audited Financial Statements, Twinco has approximately $6.1M in cash and cash equivalent assets (the "**Twinco Cash**") and approximately $46,000 of liabilities[6];

- The history of the Twinco Plant[7] is long and complicated and is set out in significant detail in the CBCA Motion. However the highlights are set out hereafter;

- In 1961, CFLCo licensed to Twinco the rights to develop a 225-megawatt hydroelectric generating plant on the Unknown River in Labrador (the "**Twinco Plant**");

- In addition to the Twinco Plant, Twinco owned a number of other assets including (i) the physical building which houses the Twinco Plant (the "**Twinco Building**"); (ii) the transmission lines from the Twinco Plant to its consumers (the "**Twinco Transmission Lines**"); and (iii) the equipment which comprises the Twinco Plant

[5] 4.6% held by Wabush Iron Co. Limited and 12.5% by Wabush Resources Inc.
[6] **R-3**.
[7] As defined below.

# TAB 13

# Ernst & Young Inc. in its Capacity as Monitor of all of the Following: Essar Steel Algoma Inc. et al. v. Essar Global Fund Limited et al.

## [Indexed as: Ernst & Young Inc. v. Essar Global Fund Ltd.]

Ontario Reports



Court of Appeal for Ontario,

Blair, Pepall and van Rensburg JJ.A.

December 21, 2017

**139 O.R. (3d) 1** | 2017 ONCA 1014

## Case Summary

**Corporations — Oppression — Algoma's monitor in Companies' Creditors Arrangement Act ("CCAA") restructuring proceedings bringing oppression action under s. 241 of Canada Business Corporations Act ("CBCA") against Algoma's parent Essar — Monitor alleging that Essar had exercised de facto control over Algoma and had consistently preferred its own interests over those of Algoma and its stakeholders — Monitor having standing as complainant under oppression provisions of CBCA — Claim properly pleaded as oppression action rather than derivative action under s. 239 of CBCA — Algoma entirely dependent on access to port in order to function economically — Trial judge entitled to find that transaction directed by Essar which conveyed port to Essar-controlled Portco and resulted in Algoma losing control over port was oppressive to Algoma's stakeholders — Business judgment rule not providing defence to Essar — Trial judge not erring in granting remedy which removed Portco's control rights — Canada Business Corporations Act, R.S.C. 1985, c. C-44, ss. 239, 241 — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.**

Algoma was a steel manufacturer in Sault Ste. Marie, and its port facilities were integral to its operations. At a time when Algoma was facing a liquidity crisis, its board of directors placed responsibility for Algoma's recapitalization efforts in the hands of its parent Essar. Essar directed a transaction which conveyed the port facilities to Portco, which Essar indirectly owned. The port transaction resulted in Algoma losing control over the port facilities. Algoma was involved in restructuring proceedings under the *Companies' Creditors Arrangement Act*. As a result of the port transaction, Portco -- and therefore Essar -- effectively had a veto over any party acquiring Algoma in the *CCAA* proceedings. With the authorization of the supervising *CCAA* judge, Algoma's *CCAA* monitor brought an oppression action under s. 241 of the *Canada Business Corporations Act* against Essar and certain Essar-controlled companies. The trial judge found that the monitor had standing to bring the action. He found that the reasonable expectations of Algoma's trade creditors, employees, pensioners and retirees were that Algoma would not deal with a critical asset like the port in such a way as to lose long-term control over such a strategic asset to a related party on terms that [page2 p]ermitted the related party to veto and control Algoma's ability to do significant transactions or restructure and which gave unwarranted value to the related party. He concluded that Essar's actions were oppressive. He granted a remedy

[44] On November 9, 2015, Newbould J. granted an order placing Algoma, Essar Tech Algoma Inc., Algoma Holdings B.V., Essar Steel Algoma (Alberta) ULC, Cannelton Iron Ore Company, and Essar Steel Algoma Inc. USA (the "*CCAA* applicants") under *CCAA* protection. As mentioned, he appointed Ernst & Young Inc. as the monitor. The order contained various paragraphs addressing the rights and obligations of the monitor, including a direction to perform such duties as were required by the court. On November 20, 2015, Morawetz J. granted an amended and restated initial order that, among other [page15 ]things, directed the monitor to review and report to the court on any related party transactions (expressly including the port transaction).

[45] During the *CCAA* proceedings, on February 10, 2016, a sales and investment solicitation process ("SISP") for Algoma's business and property was approved by the court. Essar North America, a subsidiary of Essar Global, submitted a bid but was disqualified in April 2016 under the terms of the SISP because it failed to provide sufficient evidence of financial ability to purchase. In May and July of 2016, Essar Global persisted in its efforts to be the purchaser of the *CCAA* applicants. On May 10, 2016, counsel to Portco, who was also counsel to Essar Global, wrote to counsel for Algoma to highlight matters of particular concern in connection with the *CCAA* process. The letter stated that any prospective bidder was to be told of the consent or veto right:

> Portco and [Algoma] are party to a Cargo Handling Agreement pursuant to which [Algoma] has committed to long-term use of the port. Portco, has, of course, a keen interest in any successor to [Algoma] as counterparty to that agreement and would like it to be clear to prospective bidders that, pursuant to the terms of the Cargo Handling Agreement, Portco has a consent right in the event of any assignment by [Algoma] of the agreement or a change of control of [Algoma].
>
> Again please confirm that this has been made clear to prospective bidders.

[46] On June 20, 2016, the monitor filed its thirteenth report, which described the Portco transaction and indicated that there may be grounds for further review of that transaction. The monitor noted that the renegotiated equity commitment resulted in Essar Global contributing the sum of US$150 million in equity rather than US$250 to US$300 million, and that the Portco transaction transferred control of one of Algoma's most critical assets, the Port, to Essar Global. The Monitor stated that it remained "particularly concerned about the effect on the completion of a restructuring transaction of the restrictions on assignment in the Portco Transaction documents".

[47] On September 26, 2016, Deutsche Bank AG, who led the debtor-in-possession ("DIP") lenders of Algoma and also represented the interests of potential bidders in the *CCAA* process, applied for an order empowering the monitor to commence certain proceedings and make certain investigations.[3] On September 26, 2016, Newbould J. granted an order authorizing the [page16 ]monitor to commence and continue proceedings under s. 241 of the *CBCA* in relation to related party transactions, including but not limited to the port transaction.

[48] The action proceeded on an accelerated timetable due to the progress of the *CCAA* restructuring.[4] On October 20, 2016, the monitor commenced proceedings claiming oppression pursuant to s. 241 of the *CBCA* against Essar Global and others in the Essar Group including

[119] Generally speaking, the monitor plays a neutral role in a *CCAA* proceeding. To the extent it takes positions, typically those positions should be in support of a restructuring purpose. As stated by this court in *Ivaco Inc. (Re)* (2006), 83 O.R. (3d) 108, [2006] O.J. No. 4152 (C.A.), at paras. 49-53, a monitor is not necessarily a fiduciary; it only becomes one if the court specifically assigns it a responsibility to which fiduciary duties attach.

[120] However, in exceptional circumstances, it may be appropriate for a monitor to serve as a complainant. In my view, this is one such case.

[121] Here, in para. 37(c) of the amended and restated initial *CCAA* order dated November 20, 2015, the monitor was directed to investigate whether there were potential related party transactions that should be reviewed. It then reported back to the supervising *CCAA* judge that there were, and on that basis the *CCAA* judge authorized the monitor to commence proceedings under s. 241 of the *CBCA*. The monitor proceeded with the oppression action in the interests of the restructuring consistent [page32 ]with the objectives of the *CCAA*. The trial judge ultimately found that aspects of the port transaction, such as the change of control clause in the cargo handling agreement that gave Essar Global control over who can be a buyer of the Algoma business, were oppressive and also harmful to the restructuring process. The monitor took the action as an "adjunct to its role in facilitating a restructuring".

[122] Moreover, it cannot be said that the monitor was a fiduciary. Indeed, the appellants did not say this in their pleadings, opening submissions, or closing submissions before the trial judge. The remedy granted by the trial judge was directed at the oppression and removed an insurmountable barrier to a successful restructuring. In addition, it was brought in the face of Essar Global demonstrating a continuous desire to acquire Algoma and, as evident from the letter sent by its counsel, a desire to discourage others from doing so.

[123] It will be a rare occasion that a monitor will be authorized to be a complainant. Factors a *CCAA* supervising judge should consider when exercising discretion as to whether a monitor should be authorized to be a complainant include whether

(i) there is a *prima facie* case that merits an oppression action or application;

(ii) the proposed action or application itself has a restructuring purpose, that is to say, materially advances or removes an impediment to a restructuring; and

(iii) any other stakeholder is better placed to be a complainant.

These factors are not exhaustive, and none of them is necessarily dispositive; they are simply factors to consider.

[124] In the circumstances that presented themselves here, the *CCAA* supervising judge was justified in providing authorization. A *prima facie* case had been established; the monitor had reviewed and reported to the court on related party transactions; the oppression action served to remove an insurmountable obstacle to the restructuring; and the monitor could efficiently advance an oppression claim, representing a conglomeration of stakeholders, namely, the pensioners, retirees, employees and trade creditors, who were not organized as a group and who were all similarly affected by the alleged oppressive conduct.

# TAB 14

# COURT OF APPEAL



CANADA
PROVINCE OF QUEBEC
REGISTRY OF MONTREAL

No.: 500-09-028436-194, 500-09-028474-195, 500-09-028476-190
(500-11-049838-150)

DATE: May 21, 2020

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**CORAM: THE HONOURABLE MARK SCHRAGER, J.A.**
**PATRICK HEALY, J.A.**
**LUCIE FOURNIER, J.A.**

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***IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT***

No.: 500-09-028436-194

**HOME DEPOT OF CANADA INC.**
APPELLANT – Impleaded Party
v.
**9323-7055 QUÉBEC INC. (Formerly known as Aquadis International Inc.)**
**RAYMOND CHABOT INC.**
RESPONDENTS/ INCIDENTAL RESPONDENTS
and
**HOME HARDWARE STORES LIMITED**
IMPLEADED PARTY/INCIDENTAL APPELLANT– Impleaded party
and
**RONA INC.**
**ROYAL & SUN ALLIANCE INSURANCE COMPANY OF CANADA**
**CATHAY CENTURY INSURANCE CO., LTD**
**JING YUDH INDUSTRIAL CO., LTD**
**GROUPE BMR INC. (Formerly known as Gestion BMR Inc.)**
**GROUPE PATRICK MORIN INC. (Formerly known as Patrick Morin Inc.)**
**MATÉRIAUX LAURENTIENS INC.**
**DESJARDINS GENERAL INSURANCE INC.**
**THE PERSONAL GENERAL INSURANCE INC.**
**INTACT INSURANCE COMPANY**

REASONS OF SCHRAGER, J.A.

[9] These are appeals from a judgment rendered on July 4, 2019 by the Superior Court, District of Montreal, Commercial Division (the Honourable David R. Collier),[1] that approved a plan of arrangement (the "**Plan of Arrangement**" or the "**Plan**") under the *Companies' Creditors Arrangement Act*[2] ("***CCAA***") relating to Aquadis International Inc. (now the Respondent 9323-7055 Québec Inc.).

[10] The Appellants (sometimes hereinafter the "**Retailers**") oppose the Plan because it authorizes the Respondent Raymond Chabot Inc. (the "**Monitor**") to take legal proceedings against them on behalf of creditors of Aquadis International Inc. ("**Aquadis**" or the "**Debtor**"). Most of the creditors are insurers by way of subrogation in the rights of policy holders whose homes were damaged due to the allegedly defective faucets sold by Aquadis.

[11] The appeals are concerned with the scope of the powers that may be conferred on the Monitor.

[12] The Monitor was authorized to exercise the rights of creditors rather than those of the Debtor. While some reported judgments may present certain analogies, the present case appears to be unique in Canadian jurisprudence.

[13] There are also procedural issues raised against the Appellants' challenge of the specific clause in the Plan of Arrangement. As will be explained below, the Respondents argue primarily that these appeals are an indirect challenge of the *CCAA* judge's November 2016 order to vary the Monitor's powers (the "**November 2016 Order**").

## I. FACTS AND PROCEDURAL HISTORY

[14] The case arises from the sale of faucets that were allegedly affected by manufacturing defects and the subsequent claims arising from the resulting water damage suffered by purchasers of the product.

[15] Aquadis imported and distributed bathroom products, including faucets.

[16] Jing Yudh Industrial Co. ("**JYIC**") is a China-based manufacturer of various valve products. The faucets in question were manufactured by JYIC and sold to a Chinese

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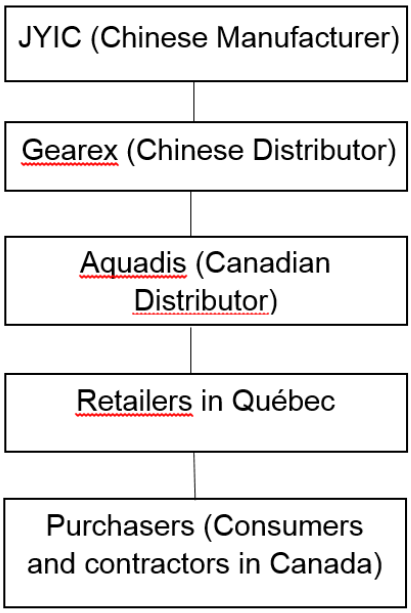
1 Judgment in appeal.

2 *Companies' Creditors Arrangement Act,* R.S.C. 1985, c. C-36.

distributor, Gearex, which, in turn, sold them to Aquadis. The latter resold the faucets to various retailers in Quebec. These include the Appellants Rona Inc. ("**Rona**"), BMR Group Inc. ("**BMR**"), The Home Depot of Canada ("**Home Depot**"), Matériaux Laurentiens and Home Hardware Stores Limited ("**Home Hardware**"). The Appellants ultimately resold the faucets to Quebec-based consumers or contractors. The flowchart in the Appellants' factum, appropriately translated, represents the chain of distribution as follows:




[17] It should be noted that the Retailers are not creditors in the insolvency proceedings in that they did not file proofs of claim. Rona sought leave to file two years after the deadline set forth in the court-approved claims protocol. Such leave was denied by the *CCAA* judge on March 13, 2019.[3]

[18] Claiming water damage caused by faulty faucets, many consumers sought compensation from their insurers, who upon payment were subrogated in the rights of their insureds.

[19] The insurers then instituted legal proceedings against Aquadis, the aggregate of which claims exceeded Aquadis' insurance coverage. Faced with this multitude of recourses, Aquadis obtained stays of proceedings through the filing of a notice of intention to file a proposal under the *Bankruptcy and Insolvency Act*[4] ("*BIA*") in June 2015, which was continued under the *CCAA* pursuant to an initial order made on

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3 *Arrangement relatif à 9323-7055 Québec inc. (Aquadis International Inc.)*, 2019 QCCS 1396.

4 *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 [*BIA*].

December 9, 2015. Raymond Chabot Inc. was appointed Monitor and granted the powers of the board of directors given the resignation of all members of the board. Legal proceedings instituted against Aquadis or anyone in the distribution chain (i.e., the Retailers) were suspended in accordance with the provisions of the *CCAA*. At the time, approximately 20 actions regrouping several hundred consumers' claims were pending before the courts of Quebec and two other provinces.[5]

[20] On January 6, 2016, the Superior Court issued an order regarding the filing and processing of creditors' claims.

[21] On November 9, 2016, the Monitor sought an order to amend its powers "to conclude transactions or, failing that, to take proceedings against persons having resold or installed defective products purchased from Aquadis, such as distributors, retailers and general contractors". Rona was the only Appellant that was notified of the motion giving rise to such order as it was the only one that had requested to be entered on the service list.

[22] On November 14, 2016, the Court granted the application to vary the Monitor's powers and thus granted the Monitor the right to commence or continue any action for and in the name of Aquadis' creditors having any connection with defective faucets. This is the November 2016 Order referred to above.[6]

[23] That judgment was not appealed nor was there an attempt to seek its revision in the lower court or in the present appeal.

[24] Following the issuance of the November 2016 Order, the Monitor began negotiations with the Retailers that stretched over a period of two years with a view to arriving at a "global settlement" in virtue of which the Retailers would contribute to a litigation pool in exchange for full releases from any liability arising as a result of the sale of any defective faucets.

[25] On December 19, 2016, the Monitor initiated legal proceedings against JYIC and Gearex to enforce the rights of Aquadis regarding the defective faucets. Settlements were reached with some of JYIC's and Gearex's insurers generating the receipt of over $7 million ($4.7 million net of fees and costs) in consideration of full releases. However,

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5 In virtue of arts. 1728, 1729 and 1730 *C.C.Q.*, each group in the supply chain would have a recourse against relevant parties above them at each step in the chain.

6 The November 2016 Order is in these terms:

> initier ou continuer toute réclamation, poursuite, action en garantie ou autre recours des créanciers de 9323-7055 Québec inc. (anciennement connue sous le nom d'Aquadis International inc., « Aquadls ») au nom et pour le compte de ces créanciers contre des personnes opérant au Canada découlant, directement ou indirectement, ou ayant un lien ou pouvant avoir raisonnablement un lien, direct ou indirect, avec un défaut de fabrication affectant des biens vendus par Aquadis, avec l'accord préalable du comité des créanciers constitue par le paragraphe n° 24 de l'Ordonnance initiale (le « Comite des créanciers »). (Emphasis added)

# TAB 15

SUPERIOR COURT OF JUSTICE

# COUNSEL/ENDORSEMENT SLIP

**COURT FILE NO.:** CV-23-00696017-00CL **DATE: May 12, 2023**

**NO. ON LIST: 3**

**TITLE OF PROCEEDING:** In the Matter of a Plan of Compromise or Arrangement of LoyaltyOne, Co.

**BEFORE: JUSTICE CONWAY**

## PARTICIPANT INFORMATION

**For Plaintiff, Applicant, Moving Party:**

| Name of Person Appearing | Name of Party | Contact Info |
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| | | |
| | | |

**For Defendant, Respondent, Responding Party:**

| Name of Person Appearing | Name of Party | Contact Info |
|---|---|---|
| | | |
| | | |
| | | |
| | | |

**For Other, Self-Represented:**

| Name of Person Appearing | Name of Party | Contact Info |
|---|---|---|
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| David Wedlake | Counsel to Sobeys Capital Incorporated | dwedlake@stewartmckelvey.com |

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**ENDORSEMENT OF JUSTICE CONWAY:**

**[1]** **All defined terms used in this Endorsement shall, unless otherwise defined, have the meanings ascribed to them in the Factum of the Applicant dated May 10, 2023.**

[2] The Applicant seeks three orders today: (i) the Approval and Vesting Order; (ii) the Assignment Order; and (iii) the Ancillary Relief Order. All of those orders will implement the Transaction with BMO (through its subsidiaries) to acquire the assets and assume the liabilities of the AIR MILES® Reward Program business, as set out in the Asset Purchase Agreement.

[3] At the conclusion of the hearing, I said that I was granting the orders (with the minor amendments discussed at the hearing). These are my reasons for doing so.

[4] BMO was the stalking horse bid in connection with the SISP, both of which were approved by this court. The SISP process ran its course. Although 48 parties were contacted, BMO was the only bidder and was confirmed to be the Successful Bid.

[5] The Transaction will see the AIR MILES® Reward Program continue as a going concern, with offers of employment for approximately 700 employees, as well as continuity for the approximately 10 million active Collectors, the Partners, Reward Suppliers and vendors. The Buyers will purchase all or substantially all of the operating assets of the Applicant, including the Travel Services Shares, and assume the Assumed Contracts. The Buyers will pay US$160,259,861.40 in cash, less certain purchase price adjustments, and will assume the Assumed Liabilities and pay certain transfer taxes.

[6] There is widespread support for the Transaction. It is supported by the Monitor. Mr. Staley and Mr. MacFarlane voiced their support for their respective secured creditors. There is no opposition from any stakeholder. Mr. Taylor addressed the court for the Bread parties and confirmed that they are not opposing the relief today. The Monitor, in its Third Report, states that the Transaction "provides for the greatest

recovery available in the circumstances and will be more beneficial to creditors than a sale or disposition in a bankruptcy".

[7] With respect to the **Approval and Vesting Order**, I am satisfied that the Transaction should be approved. I have considered the factors in s. 36 of the CCAA and in *Soundair*. Specifically, the process leading to the Transaction – the SISP – was developed in consultation with the Monitor, the Financial Advisor, BMO and certain Credit Agreement Lenders. It was approved by this court and followed by the Applicant. The market has been canvassed in accordance with that process and the Transaction is the only one that emerged. As noted, it is the only viable option and continues the business as a going concern. The purchase price will be sufficient to satisfy the Charges and the Employee Payables, and provide for a distribution to the Credit Agreement Lenders in partial recovery of their secured claims at a later date.

[8] The repayment of the DIP and the payment of the Transaction Fee are satisfactory and approved.

[9] I reviewed the Releases in detail with counsel at the hearing. I approve them pursuant to s. 11 of the CCAA. I am satisfied, among other things, that the Released Parties were necessary to the Transaction; the released claims are rationally connected to the purchase of the Transaction and are necessary for it; and the Released Parties contributed to the Transaction. The Releases do not extend to the Applicant or Travel Services. They exclude any obligations that may not be released under s. 5.1(2) of the CCAA, any obligations under the Asset Purchase Agreement and related documents, and any obligations of BMO to its own customers (the latter as directed by me at the hearing). There is no release of any Bread-related parties as set out in paragraph 24.

[10] All other provisions of the Approval and Vesting Order are satisfactory and I approve it.

[11] With respect to the **Assignment Order**, Newco (a subsidiary of BMO) will be assuming the Assumed Contracts. These are required for the ongoing business operations of the Applicant. There are approximately 231 contracts. The Applicant has served all counterparties, except for four who were served under the contract provisions but cannot be found. While the Applicant has obtained approvals for the transfer from a large number of counterparties, there are some for whom consent has not been obtained as yet (most of which are non-disclosure agreements (NDAs) and have no cure costs at issue). Ms. Dietrich advised the court that there have been no oppositions to the transfer.

[12] The Assignment Order provide that any assignment is subject to payment of any cure costs, satisfying the requirement under s. 11.3(4) of the CCAA. The assignments are to Newco, which is a subsidiary of BMO, a sophisticated financial entity. Mr. Bish submitted that although the purchase has been structured this way, for all practical purposes BMO will be seeing that the obligations under these contracts are satisfied going forward. With respect to the NDAs, the assignment will enable Newco to protect any confidential data of the business through enforcement of those agreements. Considering all of these factors, I consider it appropriate to grant the Assignment Order.

[13] With respect to the **Ancillary Relief Order**, the stay extension to July 14, 2023 is approved. This will give the parties time to close the Transaction and start the transition of the business. The Applicant is acting in good faith and with due diligence and no creditor will be prejudiced by the extension. I am expanding the powers of the Monitor under s. 11 and 23(1)(k) of the CCAA. This will enable it to seek additional avenues of recovery for the remaining assets of the Applicant, to assist in the transition of the business, and to bring this CCAA proceeding to an efficient conclusion for the benefit of stakeholders.

[14] I have signed the three orders and attached them to this Endorsement. These orders are effective from today's date and are enforceable without the need for entry and filing.

# TAB 16

**CITATION:** *Harte Gold Corp. (Re)*, 2022 ONSC 653
**COURT FILE NO.:** CV-21-00673304-00CL
**DATE:** 2022-02-04

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

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

**AND:**

A PLAN OF COMPROMISE OR ARRANGEMENT OF HARTE GOLD CORP., Applicant

**BEFORE:** Penny J.

**COUNSEL:** *Guy P. Martel, Danny Duy Vu, Lee Nicholson, William Rodler Dumais* for the Applicant

*Joseph Pasquariello, Chris Armstrong, Andrew Harmes* for the Court appointed Monitor

*Leanne M. Williams* for the Board of Directors of the Applicant

*Marc Wasserman, Kathryn Esaw, Dave Rosenblat, Justin Kanji* for 1000025833 Ontario Inc.

*Stuart Brotman and Daniel Richer* for BNP Paribas

*Sean Collins, Walker W. MacLeod and Natasha Rambaran* for Appian Capital Advisory LLP, 2729992 Ontario Corp., ANR Investments B.V. and AHG (Jersey) Limited

*David Bish* for OMF Fund II SO Ltd., Orion Resource Partners (USA) LP and their affiliates

*Orlando M. Rosa and Gordon P. Acton* for Netmizaaggamig Nishnaabeg First Nation (Pic Mobert First Nation)

*Timothy Jones* for the Attorney General of Ontario

**HEARD:** January 28, 2022

## ENDORSEMENT

[1] This is a motion by Harte Gold for an approval and reverse vesting order involving the sale of Harte Gold's mining enterprise to a strategic purchaser (that is, an entity in the gold

mining business) and for an order extending the stay and expanding the Monitor's powers to include new entities to be created for the purposes of implementing Harte Gold's proposed restructuring. There was no opposition to the relief sought. All those who appeared at the hearing supported approval of the transaction.

[2] Following the conclusion of oral submissions on Friday, January 28, 2022, I issued the orders sought with written reasons to follow. These are the reasons.

## Background

[3] Harte Gold is a public company incorporated under the *Business Corporations Act* (Ontario). Prior to January 17, 2022, its shares publicly traded on the Toronto Stock Exchange, Frankfurt Stock Exchange and over-the-counter. Harte Gold operates a gold mine located in northern Ontario within the Sault Ste. Marie Mining Division and approximately 30 km north of the town of White River. This mine, referred to as the Sugar Loaf Mine, produces gold bullion. Harte Gold has a total of 260 employees on payroll, as well as 19 employees retained through various agencies. Harte Gold's payroll obligations are current.

[4] Of some importance to the form of transaction proposed in this case, involving an approval and reverse vesting order (RVO), is the fact that Harte Gold has 12 material permits and licenses that are required to maintain its mining operations, 24 active work permits and licenses that allow the performance of exploration work on various parts of the Sugar Loaf property and many other forest resource licenses, fire permits and the like, all necessary in one way or another to Harte Gold's continued operations. Harte Gold also has 513 mineral tenures, consisting of three freehold properties, seven leasehold properties, 468 mineral claims and 35 additional tenures. The transfer of these permits and licenses etc. would involve a complex transfer or new application process of indeterminate risk, delay and cost.

[5] It is also important to note that Harte Gold is party to an Impact Benefits Agreement dated April 2018 between Harte Gold and Netmizaaggamig Nishnaabeg First Nation.

[6] Harte Gold has two primary secured creditors. They are: a numbered company (833) owned by Silver Lake Resources Limited (an Australian gold mine company). 833 is a very recent assignee of significant secured debt from BNPP; and, AHG Jersey Limited (AHG is part of the Appian group). Appian entities are also counterparties to a number of offtake agreements under which Harte Gold sells gold in exchange for prices determined by a pricing formula tied to the London bullion market. Orion is, similarly, a counterparty to additional offtake agreements. BNPP, following the assignment of its secured debt, has retained additional obligations in respect of certain hedging arrangements provided to Harte Gold. Harte Gold also has a number of trade and other unsecured creditors who are owed an estimated $7.5 million for pre-filing obligations and further amounts for services rendered post-filing.

[89] No creditors are expected to suffer material prejudice as a result of the extension of the stay of proceedings. Harte Gold is acting in good faith and will continue to pay its post-filing obligations in the ordinary course. As detailed in Harte Gold's cash flow forecast, it is expected to have sufficient liquidity to continue its operations during the contemplated extension of the stay.

[90] For these reasons the stay is extended to March 29, 2022.

**Expansion of Monitor's Powers**

[91] The CCAA provides the Court with broad discretion in respect of the Monitor's functions. Section 23(1)(k) of the CCAA provides that the Monitor can "carry out any other functions in relation to the [debtor] company that the court may direct". In addition, of course, s. 11 of the CCAA authorizes this Court to make any order that is necessary and appropriate in the circumstances.

[92] The order for the Monitor's expanded powers is intended to provide the Monitor with the power, effective upon the issuance of the approval and reverse vesting order, to administer the affairs of the newcos (which is necessary to complete the transaction), along with powers necessary to wind down these CCAA proceedings and to put the newcos into bankruptcy following the close of the transaction. No creditor is prejudiced by the expansion of the Monitor's powers to facilitate the transaction and the wind-down of the CCAA proceedings. On the contrary, the granting of such powers is necessary to achieve the benefits of the transaction to stakeholders which have been described above.

[93] I approve the grant of the requested powers to the Monitor.

**Conclusion**

[94] For all these reasons, the motion for an order approving the Silver Lake transaction, including the RVO structure, is granted. The additional requests for orders extending the stay and expanding the Monitor's powers are also granted.

**Penny J.**

**Date:** 2022-02-04

# TAB 17

**Paragon Capital Corporation Ltd. v. Merchants & Traders Assurance Company, 2002 ABQB 430**

Date: 20020429
Action No. 0101 05444



IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL DISTRICT OF CALGARY

BETWEEN:

PARAGON CAPITAL CORPORATION LTD.

Plaintiff

- and -

MERCHANTS &TRADERS ASSURANCE COMPANY, INSURCOM FINANCIAL CORPORATION, 782640 ALBERTA LTD., 586335 BRITISH COLUMBIA LTD. AND GARRY TIGHE

Defendants

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REASONS FOR JUDGMENT
of the
HONOURABLE MADAM JUSTICE B. E. ROMAINE

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APPEARANCES:

Judy D. Burke
for the Plaintiff

Robert W. Hladun, Q.C.
for the Defendants

**INTRODUCTION**

for inclusion in the affirmed receivership order. While there may have been a potential for conflict in Hudson & Company's appointment, there is no evidence that Hudson & Company showed any undue preference to Paragon while serving as a receiver, or failed in its duties as receiver in any way.

[24] The Defendants also submit that the Bench Brief used by Paragon's counsel in making the application for the *ex parte* order showed that such counsel was not impartial, but acted as an advocate on this application. Paragon's counsel did indeed advocate that a receiver should be appointed by the court, as he was retained to do, and there was nothing improper in him doing so. I have already said that full disclosure was made of the material facts in that application, including the previous involvement of both the proposed receiver and Paragon's counsel in this matter.

[25] I therefore find that there was nothing wrong or improper in the appointment of Hudson & Company as receiver or in Paragon's previous counsel acting as receiver's counsel, or in their administration of the receivership. It may be preferable to avoid an appearance of conflict in these situations, but a finding of conflict or improper preference requires more than just the appearance of it. In situations where it is highly possible that the creditors will not be paid out in full, the use of a party already familiar with the facts to act as receiver may be attractive to all creditors. I note that it is not the creditors who raise the issue of conflict in this case, but the debtors.

**Should the *ex parte* order now be set aside?**

[26] The general rule is that when an application to set aside an *ex parte* order is made, the reviewing court should hear the motion *de novo* as to both the law and the facts involved. Even if the order should not have been granted *ex parte*, which is not the case here, I may refuse to set it aside if from the material I am of the view that the application would have succeeded on notice: ***Edmonton Northlands v. Edmonton Oilers Hockey Corp***., 1993, 15 Alta. L.R. (3rd) 179 (paragraphs 30 and 31).

[27] The factors a court may consider in determining whether it is appropriate to appoint a receiver include the following:

a) whether irreparable harm might be caused if no order were made, although it is not essential for a creditor to establish irreparable harm if a receiver is not appointed, particularly where the appointment of a receiver is authorized by the security documentation;

b) the risk to the security holder taking into consideration the size of the debtor's equity in the assets and the need for protection or safeguarding of the assets while litigation takes place;

c) the nature of the property;

d) the apprehended or actual waste of the debtor's assets;

e) the preservation and protection of the property pending judicial resolution;

f) the balance of convenience to the parties;

g) the fact that the creditor has the right to appoint a receiver under the documentation provided for the loan;

h) the enforcement of rights under a security instrument where the security-holder encounters or expects to encounter difficulty with the debtor and others;

i) the principle that the appointment of a receiver is extraordinary relief which should be granted cautiously and sparingly;

j) the consideration of whether a court appointment is necessary to enable the receiver to carry out its' duties more efficiently;

k) the effect of the order upon the parties;

l) the conduct of the parties;

m) the length of time that a receiver may be in place;

n) the cost to the parties;

o) the likelihood of maximizing return to the parties;

p) the goal of facilitating the duties of the receiver.

Bennett, Frank, ***Bennett on Receiverships***, 2nd edition, (1995), Thompson Canada Ltd., page 130 (cited from various cases)

[28] In cases where the security documentation provides for the appointment of a receiver, which is the case here with respect to the General Security Agreement and the Extension Agreement, the extraordinary nature of the remedy sought is less essential to the inquiry : ***Bank of Nova Scotia v. Freure Village on Clair Creek***, [1996] O.J. No. 5088, paragraph 12.

[29] It appears from the evidence before me that the Georgia Pacific shares may be the only asset of real value pledged on this loan. Shares are by their nature vulnerable assets. These shares are in a business that is itself highly sensitive to variations in value. At the time of the application, the business appeared to have been suffering certain financial constraints. The business is situated in British Columbia, and regulated by the Investment Dealers Association of Canada and other entities, giving additional force to the argument of the necessity of a

# TAB 18

**CITATION:** Elleway Acquisitions Limited v. The Cruise Professionals Limited, 2013 ONSC 6866
**COURT FILE NO.:** CV-13-10320-00CL
**DATE:** 20131127



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

**APPLICATION UNDER SECTION 243 OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c.B-3, AS AMENDED**

**RE:** **ELLEWAY ACQUISITIONS LIMITED, Applicant**

**AND:**

**THE CRUISE PROFESSIONALS LIMITED, 4358376 CANADA INC. (OPERATING AS ITRAVEL2000.COM) AND 7500106 CANADA INC., Respondents**

**BEFORE:** **MORAWETZ J.**

**COUNSEL:** **Jay Swartz and Natalie Renner, for the Applicant**

**John N. Birch, for the Respondents**

**David Bish and Lee Cassey, for Grant Thornton, Proposed Receiver**

**HEARD & ENDORSED:** **NOVEMBER 4, 2013**

**REASONS:** **NOVEMBER 27, 2013**

## ENDORSEMENT

[1] At the conclusion of argument, the requested relief was granted with reasons to follow. These are the reasons.

[2] Elleway Acquisitions Limited ("Elleway" or the "Applicant") seeks an order (the "Receivership Order") appointing Grant Thornton Limited ("GTL") as receiver (the "Receiver"),

[26] In determining whether it is just and convenient to appoint a receiver under both statutes, a court must have regard to all of the circumstances of the case, particularly the nature of the property and the rights and interests of all parties in relation to the property. See *Bank of Nova Scotia v. Freure Village on Clair Creek*, [1996] O.J. 5088 at para. 10 (Gen. Div.)

[27] Counsel to the Applicant submits that where the security instrument governing the relationship between the debtor and the secured creditor provides for a right to appoint a receiver upon default, this has the effect of relaxing the burden on the applicant seeking to have the receiver appointed. Further, while the appointment of a receiver is generally regarded as an extraordinary equitable remedy, courts do not regard the nature of the remedy as extraordinary or equitable where the relevant security document permits the appointment of a receiver. This is because the applicant is merely seeking to enforce a term of an agreement that was assented to by both parties. See *Textron Financial Canada Ltd. v. Chetwynd Motels Ltd*., 2010 BCSC 477, [2010] B.C.J. No. 635 at paras. 50 and 75 (B.C. S.C. [In Chambers]); *Freure Village, supra*, at para. 12; *Canadian Tire Corp. v. Healy*, 2011 ONSC 4616, [2011] O.J. No. 3498 at para. 18 (S.C.J. [Commercial List]); *Bank of Montreal v. Carnival National Leasing Limited and Carnival Automobiles Limited*, 2011 ONSC 1007, [2011] O.J. No. 671 at para. 27 (S.C.J. [Commercial List]. I accept this submission.

[28] Counsel further submits that in such circumstances, the "just or convenient" inquiry requires the court to determine whether it is in the interests of all concerned to have the receiver appointed by the court. The court should consider the following factors, among others, in making such a determination:

(a) the potential costs of the receiver;

(a) the relationship between the debtor and the creditors;

(b) the likelihood of preserving and maximizing the return on the subject property; and

(c) the best way of facilitating the work and duties of the receiver.

See *Freure Village, supra*, at paras. 10-12; *Canada Tire, supra*, at para. 18; *Carnival National Leasing, supra*, at paras 26-29; *Anderson v. Hunking*, 2010 ONSC 4008, [2010] O.J. No. 3042 at para. 15 (S.C.J.).

[29] Counsel to the Applicant submits that it is just and convenient to appoint GTL as the Receiver in the circumstances of this case. As described above, the itravel Group has defaulted on its obligations under the Credit Agreement and the Fee Letter. Such defaults are continuing and have not been remedied as of the date of this Application. This has given rise to Elleway's rights under the Security Documents to appoint a receiver by instrument in writing and to institute court proceedings for the appointment of a receiver.

[30] It is submitted that it is just and convenient, or in the interests of all concerned, for the Court to appoint GTL as the Receiver for five main reasons:

# TAB 19

# Court of Queen's Bench of Alberta

**Citation: Alberta Treasury Branches v COGI Limited Partnership, 2016 ABQB 43**



**Date:** 20160121
**Docket:** 1501 12220
**Registry:** Calgary

Between:

**Alberta Treasury Branches**

Applicant

- and -

**COGI Limited Partnership, Canadian Oil & Gas International Inc., and Conserve Oil Group Inc.**

Respondents

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**Oral Reasons for Judgment**
**of the**
**Honourable Madam Justice K.M. Eidsvik**

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## Background

[1] On January 14 and 15, 2016 I heard the applications of the receiver dated November 6, 2015 and January 4, 2016.

[2] The November 6 application was to clarify and expand the receiver's powers under the Receivership Order that was granted on October 26, 2015 with respect to several subsidiaries of Conserve Oil Group Inc. (Conserve) including Conserve Oil 1st Corporation (Conserve 1st) and Proven Oil Asia Ltd (POA).

corporation or any of its affiliates

(a) Any act or omission of the corporation or any of its affiliates effects a result,

(b) The business or affairs of the corporation or any of its affiliates are or have been carried on or conducted in a manner, or

(c) The powers of the directors of the corporation or any of its affiliates are or have been exercised in a manner

that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer, the Court may make an order to rectify the matters complained of.

[13] This Order may, according to 242 (3) (b), include an order for a receiver manager.

[14] The ***Judicature Act*** s 13 (2) allows the Court wide discretion to appoint a receiver when it is "just and convenient".

[15] Oppressive conduct has been interpreted by the Supreme Court in ***BCE Inc v 1976 Debentureholders*** 2008 SCC 69. This case emphasises that the oppression remedy is an equitable discretionary remedy that must look to the fairness of the situation to all parties involved in the business in question. A two part test is outlined where the Court must determine the reasonable expectation of the parties and whether the conduct complained of amounts to a violation of those expectations.

[16] A myriad of factors are set out in ***Bennett on Receiverships*** to aid in the decision about whether a receiver should be appointed. They are often repeated in decisions so I won't do so now. I have applied the relevant factors which I will detail shortly.

[17] In addition, it is said that applications brought by a person other than a security holder, is an extraordinary remedy which should only be used sparingly. It is compared to injunctive relief and the tripartite test that is used in those cases is recommended to be used here (see ***Murphy v Cahill*** 2013 ABQB 335 at para 7).

**Analysis**.

***Serious issue to be tried***

[18] Is there a serious issue to be tried? Or more specifically, is there evidence that the actions taken by POA in the last 10 months violate the reasonable expectations of Conserve and COGI that amount to oppressive conduct?

[19] As noted above, the Receiver has two main concerns **1**. That shares in POA were issued without due notice, at the hands of directors who were in a conflict of interest and without evidence of fair value, and **2**. An asset purchase of wells from COGI by POA has left some potential liability to the AER in COGI's hands.