Court File No. CV-25-00738613-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF HUDSON'S BAY COMPANY ULC COMPAGNIE DE LA BAIE D'HUDSON SRI, HBC CANADA PARENT HOLDINGS INC., HBC CANADA PARENT HOLDINGS 2 INC., HBC BAY HOLDINGS 1 INC., HBC BAY HOLDINGS II ULC, THE BAY HOLDINGS ULC, HBC CENTREPOINT GP INC., HBC YSS 1 LP INC., HBC YSS 2 LP INC., HBC HOLDINGS GP INC., SNOSPMIS LIMITED, 2472596 ONTARIO INC. and 2472598 ONTARIO INC.

Applicants

BOOK OF AUTHORITIES OF THE FILO AGENT
(FILO AGENT'S MOTION RETURNABLE AUGUST 28, 2025)

August 21, 2025

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2003 CarswellOnt 9109
Ontario Superior Court of Justice [Commercial List]

Air Canada, Re

2003 CarswellOnt 9109, 28 C.B.R. (5th) 52

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

In the Matter of Section 191 of the Canada Business Corporations Act, R.S.C. 1985, C. C-44, as Amended

In the Matter of a Plan of Compromise or Arrangement of Air Canada and those Subsidiaries Listed on Schedule "A"

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

Farley J.

Heard: July 15, 18, 2003
Oral reasons: July 18, 2003
Written reasons: July 21, 2003
Docket: 03-CL-4932

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James C. Tory for Air Canada Directors
Stephen Wahl, Murray Gold for CUPE
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Joseph Bellissimo for Orix Corporation, Montrose & Company, Mitsubishi Corporation, Banca Intesca, Lambard Capital, Finova Capital Corp., Pegasus Aviation, et al.

Subject: Insolvency; Corporate and Commercial
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.7 Miscellaneous

Headnote

Bankruptcy and insolvency --- Proposal — Companies' Creditors Arrangement Act — Arrangements — Effect of arrangement — Stay of proceedings

Insolvent airline AC was preparing restructuring plan pursuant to Companies' Creditors Arrangement Act ("CCAA") which would involve proposal to its creditors and AC obtained stay of proceedings against it — Federal departments or commissions which regulated AC ("regulators") brought motions questioning court's jurisdiction to impose stay pursuant to CCAA and its inherent jurisdiction — Motions dismissed — Section 11(3) of CCAA provided court with specific jurisdiction to grant stay since jurisprudence indicated that "proceedings" ought not to be restricted to judicial proceedings for economic, financial, business or commercial matters — No statute or jurisprudence constrained or eliminated ability of court to grant stay pursuant to its inherent jurisdiction — No conflict existed between CCAA and federal legislation such as Canada Labour Code since stay was anticipated to be of nine-month temporary duration — AC was required to deal with every unresolved regulatory matter after it emerged from CCAA proceedings and if AC was not successful in CCAA proceedings then most regulatory matters would become moot — Receiving AC's internal counsel's affidavit as fresh evidence justifying stay was permitted since AC had onus of demonstrating that stay was justified — Stay was justified since legal resources of AC for dealing with regulatory matters were under strain and AC was in range of having regulatory maters impair its ability to deal with its business and restructuring activities on ongoing basis — Regulators were permitted to enforce regulatory order for particular situation if based on objective justifiable grounds and AC could bring application to determine reasonableness of regulator's action.

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Cases considered by *Farley J.*:

Algoma Steel Inc., Re (2001), 25 C.B.R. (4th) 194, 147 O.A.C. 291, 2001 CarswellOnt 1742 (Ont. C.A.) — considered

Always Travel Inc. v. Air Canada (2003), 2003 FCT 707, 2003 CarswellNat 1763, 43 C.B.R. (4th) 163, 2003 CFPI 707, 235 F.T.R. 142, 2003 CarswellNat 4358 (Fed. T.D.) — considered

Anvil Range Mining Corp., Re (1998), 1998 CarswellOnt 1146, 3 C.B.R. (4th) 93 (Ont. Gen. Div. [Commercial List]) — referred to

Baxter Student Housing Ltd. v. College Housing Co-operative Ltd. (1975), [1976] 1 W.W.R. 1, 20 C.B.R. (N.S.) 240, 57 D.L.R. (3d) 1, 5 N.R. 515, 1975 CarswellMan 85, 1975 CarswellMan 3, [1976] 2 S.C.R. 475 (S.C.C.) — considered

Campeau v. Olympia & York Developments Ltd. (1992), 14 C.B.R. (3d) 303, 14 C.P.C. (3d) 339, 1992 CarswellOnt 185 (Ont. Gen. Div.) — considered

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Minister of National Revenue v. Points North Freight Forwarding Inc. (2000), 2000 SKQB 504, 200 Sask. R. 283, [2001] 3 W.W.R. 304, [2001] G.S.T.C. 87, 24 C.B.R. (4th) 184, 2000 CarswellSask 641 (Sask. Q.B.) — referred to

Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd. (1988), 92 A.R. 81, 72 C.B.R. (N.S.) 1, 63 Alta. L.R. (2d) 361, 1988 CarswellAlta 318 (Alta. Q.B.) — considered

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Toronto Stock Exchange Inc. v. United Keno Hill Mines Ltd. (2000), 7 B.L.R. (3d) 86, 2000 CarswellOnt 1770, 19 C.B.R. (4th) 299, 48 O.R. (3d) 746 (Ont. S.C.J. [Commercial List]) — considered

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Statutes considered:

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s. 91(21) — referred to

MOTIONS by federal regulators of insolvent airline questioning court's jurisdiction to grant stay of proceedings pursuant to *Companies' Creditors Arrangement Act*.

***Farley J.*:**

1 These reasons deal with what has been termed the "Regulators' Motions". As argued, these motions by the Attorney General of Canada ("AG") and the Privacy Commissioner ("PC") were to the effect that this Court, the Superior Court of Justice, in dealing with the Air Canada applicants (collectively, "AC") in relation to the *Companies' Creditors Arrangement Act* ("CCAA") proceedings had no jurisdiction pursuant to the CCAA to impose a stay as to any of the federal departments or commissions ("Regulators") which regulate or otherwise deal with AC. They also argued that this court did not have any inherent jurisdiction to impose such a stay if this court lacked specific jurisdiction under the CCAA. Furthermore they asserted that the CCAA was in conflict with other federal legislation such as the *Canada Labour Code* (e.g. s. 123(1) and s. 168(1)), which contains language to the effect that the legislation is to be applied and acted upon notwithstanding the provisions of any other legislation. Please see my endorsement of July 18, 2003 (following my oral determination in court at the end of the hearing that day) that I had reached

the conclusion that this court did have jurisdiction to issue a stay *vis-à-vis* the Regulators and that there was no conflict with the legislation. I indicated that I would give reasons later. These are the promised reasons. In addition I will deal with the other elements of the motions as to onus and whether or not a stay is justified in the circumstances initially and on an ongoing basis (the Regulators asserting that stays concerning regulatory functions ought to be granted sparingly and only where it is demonstrated that to allow the regulatory functions to continue would be of catastrophic or devastating consequences to a CCAA applicant in its restructuring activities or at least that it would materially interfere with such applicant focusing on such activities).

2 As previously indicated the Commissioner of Official Languages ("COL") withdrew her motion on July 18, 2003; it appears that she has worked out a *modus vivendi* with AC as to her ongoing activities.

3 The various AC unions and AC have also reached a *modus vivendi* as indicated in the attached draft order which I have found appropriate in the circumstances. This contemplates that matters from June 1, 2003 forward will be dealt with on an ongoing basis.

4 I also note that these motions are without prejudice to the discussions which the Superintendent of Financial Institutions ("OSFI") is having with AC and with the AC unions and others. I understand that these discussions are being engaged in to see if there can be a *modus vivendi* with respect to pension related matters.

5 Throughout these proceedings to date, including the end of the July 18 th hearing, I have urged those concerned to engage in meaningful dialogue to see if matters of concern can be dealt with in an officient and effective manner, all with a view to seeing if there is a reasonable opportunity for AC to be restructured on an ongoing viable basis in a very competitive industry, an industry which faces many challenges (some of longstanding and others of recent impact such as SARS, the Iraqi War, the threat of terrorism and economic doldrums). Specifically on July 18 th I requested AC and the Regulators to engage in *bona fide* objective discussions as to how to deal with regulatory activities on a streamlined effective and efficient basis that would minimize the use of AC resources but at the same time ensure that each case was reasonably dealt with to ensure justice. Unfortunately as was candidly acknowledged at the hearing, in essence over the past three months, there has been a "dialogue of the deaf" by both sides as AC has insisted that it need not respond to any Regulator at all (although in fact, it appears that elements of AC have continued dealing with some of the Regulators on a "business as (almost) usual" basis), while at the same time the Regulators have insisted that there was no jurisdiction for paragraph 3 of the (Amended and Restated) Initial Order which provides:

> **STAY OF PROCEEDINGS**
>
> **THIS COURT ORDERS** that, until and including June 30, 2003, or such later date as the Court may order (the "Stay Period"), (a) no suit, action, enforcement process, extra-judicial proceeding or other proceeding (including a proceeding in any court, statutory or otherwise) (a "Proceeding") against or in respect of an Applicant or any present of future property, right, assets or undertaking of an Applicant wheresoever located, and whether held by an Applicant in whole or in part, directly or indirectly, as principal or nominee, beneficially or otherwise, and without limiting the generality of the foregoing, including the leasehold interests of the Applicants in any aircraft and engines leased by an Applicant, whether in the possession of an Applicant, or subleased to another entity (and for greater certainty excluding any other title or other interest in such aircraft and engines held by other parties), any and all real property, personal property and intellectual property of an Applicant, and any and all securities, instruments, debentures, notes or bonds issued to, or held by or on behalf of an Applicant (the "Applicants' Property"), shall be commenced and any and all Proceedings against or in respect of an Applicant or the Applicants' Property already commenced be and are hereby stayed and suspended, and (b) all persons are enjoined and restrained from realizing upon or enforcing by court proceedings, private seizure or otherwise, any security of any nature or description held by that person on the Applicants' Property or from otherwise seizing or retaining possession of the Applicants' Property, or from seizing, detaining or retaining aircraft operated by the Applicants.

6 While the stay is now operative to September 30, 2003, it has been indicated that under the foreseeable circumstances, the objective of AC is to emerge from CCAA protection by the end of the 2003 year with a restructured operation pursuant to a Reorganization Plan. Given the nature of the industry, it is of course desirable for AC to see if it can do that emergence at the

earliest reasonable date. Given the myriad of issues to be dealt with, it appears to me that year end is not unreasonable — but if it is possible to do it earlier, so much the better. Given the circumstances here, that is a reasonably brief period.

7 I am of the view that every one truly appreciates that the time spent preparing for litigation and in court is not as desirably or productively spent as using that same time to work out matters on a reasonable functional basis, if that is possible with goodwill flowing both ways. The efforts of those who have engaged in such activities are recognized and applauded.

8 As was made quite clear by the Regulators' counsel during the hearing, these Motions are not in any respect to be considered as requests by the Regulators to lift the stay.

9 AC has proposed that as a compromise the Regulators be allowed to engage in their activities as such engage what AC termed the four pillars of safety, security, health and airworthiness but that there be no enforcement of any decision by the Regulators as to these areas.

CCAA Stay

10 Section 11(3) and (b) and (c) of the CCAA provides:

> s. 11 (3) A court may, on an initial application in respect of a company, make an order on such terms as it may impose, effective for such period as the court deems necessary not exceeding thirty days,
>
> . . .
>
> (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
>
> (c) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.

11 The Regulators submitted that the term "proceedings" ought to be restricted to judicial proceedings involving creditors in the sense of economic, financial, business or commercial concerns being affected; however, they did acknowledge that quasi-judicial matters might also be dealt with and affected by a CCAA stay in the sense that a matter might be the subject of an (non-court) arbitration. The Regulators rely on the views expressed at p. 173 of Sullivan and Dreidger, *Construction of Statutes 4th Ed.* (Markham: Butterworths Canada Limited, 2002) at pp. 173-4 as to the associated words rule. With respect, the term proceedings is to my view a term which imparts with it a great deal more than "action" or "suit" in their judicial or quasi-judicial element.

12 The CCAA is remedial legislation in its purest sense. See *Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 1 O.R. (3d) 289 (Ont. C.A.) at p. 306 (Doherty, J.A. dissenting but not on this point). The term "proceeding" has been determined before as not referring solely to legal proceedings — or proceedings involving economic, financial, business or commercial rights. See *Toronto Stock Exchange Inc. v. United Keno Hill Mines Ltd.* (2000), 48 O.R. (3d) 746 (Ont. S.C.J. [Commercial List]) where Lane, J. was dealing with a regulatory hearing proposed by the Toronto Stock Exchange. See also *Versatech Group Inc., Re*, [2000] O.J. No. 3785 (Ont. S.C.J. [Commercial List]); *Anvil Range Mining Corp., Re* (1998), 3 C.B.R. (4th) 93 (Ont. Gen. Div. [Commercial List]). Although technically in *obiter*, Wachowich, J. had no hesitation in going beyond the narrow view of "proceedings" urged on me by the Regulators when he said at pp. 583-4 of *Meridian Development Inc. v. Toronto Dominion Bank* (1984), 11 D.L.R. (4th) 576 (Alta. Q.B.):

> Meridian argues further on the basis of the *ejusdem generis* rule that the interpretation of "other proceeding" in s. 11 of the *Companies' Creditors Arrangement Act* is limited to proceedings which would fall within the genus indicated by the words "suit" and "action". This, too, indicates that the term as used in the Act ought to be restricted to proceedings which necessarily involve a court or court official.

> These arguments are persuasive. None the less, I am mindful of the wide scope of action which Parliament intended for this section of the Act. To narrow the interpretation of "proceeding" could lessen the ability of a court to restrain a creditor from acting to prejudice an eventual arrangement in the interim when other creditors are being consulted. As I indicated earlier, it is necessary to give this section a wide interpretation in order to ensure its effectiveness. I hesitate therefore to restrict the term "proceedings" to those necessarily involving a court or court official because there are situations in which to do so would allow non-judicial proceedings to go against the creditor which would effectively prejudice other creditors and make effective arrangement impossible. The restriction could thus defeat the purpose of the Act. I must consider, for instance, the fact that it may still be possible to make distress without requiring a sheriff or his bailiff, as for example, on a chattel mortgage. It might well be necessary in terms of s. 11 in some future situations. As a result, in the absence of a clear indication from Parliament of an intention to restrict "proceedings" to "proceedings which involve either a court or court official", I cannot find that the term should be so restricted. Had Parliament intended to so restrict the term, it would have been easy to qualify it by saying for instance "proceedings before a court or tribunal".
>
> (emphasis added)

I agree with these views. Indeed there are no such restrictive words on proceedings nor are there any words which denote that the jurisdiction to grant a stay is only to deal with economic, financial, business or commercial matters. I would note that Parliament has had ample opportunity over the past two decades to amend section 11(3)(b) and (c) in the way urged on me by the Regulators if it felt that desirable; that could have been done in the 1992 or 1997 amendments pursuant to the five year review procedure. Amendments were made at those times in various areas; however, it appears that Parliament recognized that, with respect to the types of applicants which could apply for restructuring protection under the CCAA, it was undesirable to restrict the discretion of the court to deal with matters which involve delicate balancing of various interests with a view to ensuring that productive resources were utilized to the maximum degree for the overall benefit to Canada's social and economic values. Of course that discretion is not without restraint — rather that discretion is to be judicially exercised according to the circumstances applicable in any particular case.

13 That is not to say that s. 11(3) has not been affected by amendment. In 1997, s. 11.1(2) was added to underscore that any stay granted under the CCAA did not affect certain activities related to the *Canadian Payments Act*. In 2001, s. 11.1(2) was modified to read:

> 11.1(2) No order may be made under this Act staying or restraining the exercise of any right to terminate, amend or claim any accelerated payment under an eligible financial contract or preventing a member of the Canadian Payments Association established by the *Canadian Payments Act* from ceasing to act as a clearing agent or group clearer for a company in accordance with that Act and the by-laws and rules of that Association.

That same year, the CCAA was further amended by adding s. 11.11:

> 11.11 No order may be made under this Act staying or restraining
>
> (a) the exercise by the Minister of Finance or the Superintendent of Financial Institutions any power, duty or function assigned to them by the *Bank Act*, the *Cooperative Credit Associations Act*, the *Insurance Companies Act* or the *Trust and Loan Companies Act*;
>
> (b) the exercise by the Governor in Council, the Minister of Finance or the Canada Deposit Insurance Corporation of any power, duty or function assigned to them by the *Canada Deposit Insurance Corporation Act*; or
>
> (c) the exercise by the Attorney General of Canada of any power, assigned to him or her by the *Winding-up and Restructuring Act*.

It is clear that the activities envisaged by these restricting changes are not in any way related to judicial or quasi-judicial proceedings. Nor can they be said to be of the nature of the economic, financial, business or commercial concerns pressed on

me by the Regulators. Indeed most of these activities could reasonably be said to be at a polar edge of the spectrum of activities well beyond the regulatory activities which the Regulators are engaged in. The Regulators suggested that these amendments were merely clarifications of what was already understood; however in my view, if it were already understood, then there would have been no need for clarification of that nature.

14 I am of the view that Section 11(3) provides this court with specific jurisdiction to grant the stay complained about by the Regulators.

15 I did observe during the hearing that the natural human tendency of legal counsel to add into "routine orders" additional language or provisions so as to "improve" the workability of the order (but within the four corners of the authority governing) sometimes backfires. It may well be that in expanding on the language of s. 11(3), inadvertently the draftspersons of these draft orders open up what might be perceived as loopholes and thus create false expectations amongst some of those affected. The Commercial List Users Committee is presently engaged in seeing if there can be a consensus on a "perfect order" for matters such as Initial CCAA orders; however, I recognize that legal counsel will undoubtedly be tempted to improve on that "perfection". It is perhaps the "overworking" of language in such orders that leads to misinterpretation which I respectfully am concerned may have been the case in *Always Travel Inc. v. Air Canada*, 2003 FCT 707 (Fed. T.D.) regarding the question of "court".

Inherent Jurisdiction Stay

16 Even if I were to have reached the conclusion that this court had no jurisdiction under the CCAA to stay the activities of the Regulators, then I would be of the view that this court has the inherent jurisdiction to do so. See *Loxtave Buildings of Canada Ltd., Re* (1943), 25 C.B.R. 22 (Sask. K.B.):

> It is well established law that nothing shall be intended to be out of the jurisdiction of a Superior Court but what expressly appears to be so. The jurisdiction of the King's Superior Courts over matters cognizable by them can not be taken away but by express words or perhaps by necessary implication arising from the use of words absolutely inconsistent with the exercise of the jurisdiction, or to which effect can not be given except by exclusion of such jurisdiction. If a Court has jurisdiction of the principal matter it has also jurisdiction over all matters incident thereto and may try them according to the course of their law so that it be not contrary to the common law. I realize that the Bankruptcy law is statutory mainly and a Court should not go beyond the provisions of the statute applicable. But, if the subject matter is within the statute, the Court may draw on its inherent powers to give effect to the provisions of the statute applicable.
>
> (emphasis added)

See also *Lehndorff General Partner Ltd., Re* (1993), 9 B.L.R. (2d) 275 (Ont. Gen. Div. [Commercial List]) and *Scaffold Connection Corp., Re* (2000), 15 C.B.R. (4th) 289 (Alta. Q.B.) at p. 295. I am thoroughly familiar with the concept that inherent jurisdiction has no place to fill the gap if there is indeed no gap: see *Royal Oak Mines Inc., Re* (1999), 7 C.B.R. (4th) 293 (Ont. Gen. Div. [Commercial List]), wherein I followed the view of the Supreme Court of Canada in *Baxter Student Housing Ltd. v. College Housing Co-operative Ltd.* (1975), 57 D.L.R. (3d) 1 (S.C.C.) while noting:

> However, it is fair to say that the S.C.C. in *Baxter*, when faced with the choice between an unpractical but "legal" solution and a procedural one, opted for the unpractical one. Thus, one is constrained from distinguishing on the basis of the recognition of the CCAA over the past 15 years having a familial relationship with Necessity.

17 However, it does not appear to me that there is any statute (or binding decision) which constrains or eliminates the ability of this court to grant a stay pursuant to its inherent jurisdiction provided that that discretion is judicially exercised in the circumstances prevailing. As I ruled at pp. 296-7 of *Royal Oak Mines Inc.*, in order to accomplish the goal of facilitating the restructuring of a debtor company, the court has a fund of discretionary powers arising from its inherent jurisdiction to make orders not only to do justice between the parties or other affected person but also to do what practicality demands. See *Algoma Steel Inc., Re* (2001), 25 C.B.R. (4th) 194 (Ont. C.A.) at p. 196 citing *Pacific National Lease Holding Corp., Re* (1992), 15 C.B.R. (3d) 265 (B.C. C.A. [In Chambers]) as to the recognition that appellate courts are reluctant to interfere with ongoing

supervision of a CCAA matter, appreciating that the supervising judge is required of course to exercise his or her discretion judicially.

Question of Conflict with Other Legislation

18 The Regulators appeared to have approached these motions on the basis that the stay which has been granted is a permanent stay. Nothing could be further from the truth though since this stay is a temporal one only. Once AC emerges from these CCAA proceedings (successfully one would hope), then it will have to deal with each and every then unresolved Regulator matter. As discussed above, it is contemplated that the time horizon for that will be the end of 2003. By that time, if so, then AC will have been in CCAA proceedings for some nine months. It would not seem to me that the adage of "justice delayed is justice denied" is truly applicable in these circumstances on a general basis (I do however recognize that there may be particular instances where that nine month period may cause some "justice delivery" difficulties; I would think that any such instances could be handled by reasonable discussion). See below for my view concerning the resource difficulty. Since the temporal stay is of an anticipated nine month temporary duration, then I do not see that there is any conflict with federal legislation such as the *Canada Labour Code* which has "notwithstanding any other legislation" language. See also *United Used Auto & Truck Parts Ltd., Re* (2000), 77 B.C.L.R. (3d) 143 (B.C. S.C. [In Chambers]) at p. 158, para. 38; *Minister of National Revenue v. Points North Freight Forwarding Inc.* (2000), 24 C.B.R. (4th) 184 (Sask. Q.B.) at p. 189 (Para. 14). Given my conclusion on there being no conflict, it is unnecessary to conclude whether or not federal jurisdiction to make laws respecting labour statutes is limited to its use as an ancillary power as to the regulation of federal undertakings as alluded to at p. 775 of *Québec (Commission du salaire minimum) c. Bell Telephone Co.*, [1966] S.C.R. 767 (S.C.C.). AC was asserting that the federal jurisdiction with respect to insolvency matters, in contrast, was a core area of jurisdiction enumerated in section 91(21) of the *Constitution Act*, 1967. I pause to note that if AC were not to successfully emerge from these CCAA proceedings, then most, if not all, of the accumulated regulatory matters would become moot. Since these proceedings were initiated, no one has come forward to indicate that they would be advantaged by a demise of AC; indeed when participants in these proceedings (including the Regulators) were asked that question, they all responded negatively. I take it as an unspoken given that the Regulators will do everything that is reasonably possible to avoid that possibility with its recognized very negative effects upon the stakeholders of AC, the great disruption that would entail for the public and the necessary loss of domestic economic activity and jobs. I am therefore confident that with the issue of principle as to whether or not this court has jurisdiction decided, AC and the Regulators will be able to work together to achieve a *modus vivendi* and not get bogged down.

19 Indeed it appears to me that if there is a bogging down, then there is the significant risk that momentum, the positive momentum which the AC proceedings have generated since their initiation will be halted. CCAA proceedings are somewhat like bicycles; if the rider loses momentum, the bicycle and the rider fall over. Neither should the parties get the Court bogged down as in a CCAA situation by bringing to it indefinitely and infinitely small item by small item as opposed to working out matters, if reasonably possible.

20 But I must not lose sight of the other issues which were argued and which of course affect the ultimate determination of these motions.

Onus

21 Firstly, allow me to deal with the question of onus. The onus is on an applicant in CCAA proceedings to demonstrate that it is appropriate to have a stay of proceedings. However, it must be recognized that insolvency situations are inherently chaotic. Perhaps the AC one is a prime example of that as events radically overtook which had been anticipated to be a consensual restructuring, forcing AC to run gasping to the Court for this CCAA proceeding. That was recognized at the initial order stage of April 1, 2003, with the indication that it was recognized that the order would have to undergo the critical eye of stakeholders as it had been drafted in great haste. As discussed part of AC's problems have been of longstanding and ought in fairness to have been functionally addressed well before now (an example of this would be the imperfect operational and functional merger of the old Air Canada and the old Canadian Airlines); I have indicated above the more recent impacts but did not there mention the pension deficit as to which OSFI took action in late March. It was appreciated by counsel during the hearing that on a practical and now routine basis, initial CCAA orders have broadly drafted stay provisions which may thereafter be tailored or whittled

down as circumstances require. The broad stay is required to give initial stability to a crisis situation. Certainly the condition of AC at the time of the application was perilous; it required the stabilization that a broad stay provision would give.

22 I would note that the initial application material did not provide any information specifically with respect to the stay necessity. It is only with the affidavit affirmed July 8, 2003 by Louise-Hélène Sénécal, internal counsel at AC that AC has specifically dealt with the need for such a stay (as modified as suggested above). Ms. Sénécal was not cross-examined on this affidavit but that may have been the result or a function of the Regulators growing (and reasonably so in my view) impatient with getting their motions finally on. I have no doubt that in a CCAA proceeding which has fewer fires to put out than this AC one, justification for the stay would be forthcoming on a more timely basis. However in my view it is not inappropriate for the court now to receive this type of "fresh evidence" and I note that the Regulators did not take much issue with its introduction.

Justification of the Stay Being Granted

23 The Sénécal Affidavit may be criticized as being too general. However it must be viewed in the context of the prevailing circumstances. AC is a large enterprise with at peak some forty thousand employees; it operates domestically and internationally; its facilities are widespread; it is involved in an industry which interacts with a very large number of regulatory authorities; its activities bring it into contact with an immense number of the travelling public, some of whom are veteran fliers and others who may be novices. From the material of the Regulators it appears that there are innumerable interfaces between these Regulators and AC as to various concerns. It would be relatively fruitless to specify each and every interface incident and advise in detail as to them.

24 As indicated above, AC has made progress in dealing with various of its problems. Perhaps the most important of these, at least to date, is the negotiation of revised collective agreements with its nine unions. That was accomplished in three weeks of intensive facilitation supervised by Winkler, J. (as to whom all concerned have expressed an immense debt of gratitude well deserved); that perhaps ought to be contrasted with the glacial pace of labour negotiations prior to the CCAA proceedings. These negotiations with the subsequent sanctioning of the amendments by the various memberships and the ongoing ancillary involvement with ongoing labour matters as a result have no doubt left AC's labour and legal departments breathless. The legal department (together with outside legal assistance) has also continued to be involved in negotiations relating to other areas and existing contracts. Based on a fair reading of the Sénécal Affidavit in these circumstances, I would conclude that the legal side resources of AC to deal with regulatory matters is under strain. If AC were not so heavily involved with regulatory matters as it appears that it is, then I would have expected better detail. However I am not of the view that the Sénécal Affidavit was a formalistic statement as referred to at paragraph 5 of *Versatech Group Inc.* It seems to me that with the arrangements that AC now has with the unions as to matters June 1, 2003 on and with its proposal as to the four pillars of safety, security, health and airworthiness (subject to my views below), AC is in the range of having regulatory matters impair its ability to deal with its business and its restructuring activities on an ongoing basis. I note that in *Quintette Coal Ltd. v. Nippon Steel Corp.* (1990), 2 C.B.R. (3d) 303 (B.C. C.A.), Gibbs J.A. for the British Columbia Court of Appeal stated at pp. 311-12:

> ...it would appear to be that under s.11 there is a discretionary power to restrain judicial or extra judicial conduct against the debtor company the effect of which is or would be, seriously to impair the ability of the debtor company to continue in business during the compromise or arrangement negotiating period. The power is discretionary and therefore to be exercised judicially.

25 Blair, J. in *Campeau v. Olympia & York Developments Ltd.* (1992), 14 C.P.C. (3d) 339 (Ont. Gen. Div.) observed at p. 346 that the Court's power to grant a stay under section 11(3) of the CCAA extended "to conduct which could seriously impair the debtor's ability to focus and concentrate its efforts on the business purpose of negotiating the compromise or arrangement". See also *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.* (1988), 72 C.B.R. (N.S.) 1 (Alta. Q.B.) where Forsyth, J. at page 16 stated:

> Surely a necessary part of promoting the continuance of a company is to give that company some time to stop and gather its faculties without interference from affected parties for a brief period of time. In my opinion, the distinction between

> creditors' contractual rights and the contractual rights of non-creditor third parties that Norcen asks me to draw is not a helpful one in these circumstances. Continuance of a company involves more than a consideration of creditor claims.

26 See also *Sairex GmbH v. Prudential Steel Ltd.* (1991), 8 C.B.R. (3d) 62 (Ont. Gen. Div.) at p. 77 where I observed:

> However, I must be cognizant of the fact that activity on Sairex's part would likely require activity on Algoma's part — thereby requiring the deployment of executive time in this manner which can be pursued after Algoma comes out from its C.C.A.A. shell, rather than such executives spending their time on the restructuring process or general operations of making and selling steel at a critical time. It would also result in legal expense and possible diversion of legal talent.

I would note that I mentioned "executive" time. To my view if regulatory matters can be reasonably dealt with on a managerial or lower level then that would not interfere with executive time. However that should not presuppose that such managerial or lower level resource might not be actively engaged in putting out more "immediate fires" than what might be considered "routine" regulatory matters. I would also observe that individually no one regulatory matter would likely be a "killer", but it is possible to die the "death of a thousand cuts" if one were to take on all of the matters in the aggregate.

27 The Regulators rely heavily on *Toronto Stock Exchange Inc. v. United Keno Hill Mines Ltd.*, *supra*. What Lane, J. said at page 752 was that he must weight the interests of affected parties. In that case he did so, but as he indicated at page 747: "I do not regard them [*in terrorem* examples] as useful because I do not regard my task as setting out a rule of general application. Rather, my task is to determine, on these particular facts and dealing with the specific legislation involved, whether to exercise my discretion to lift the CCAA stay". In the present case, I am similarly not setting out a rule of general application. Further, as opposed to the situation which Lane J. faced, I specifically am not dealing with a list stay request as the Regulators have indicated they have made no such request.

28 It seems to me that it is a reasonable conclusion that AC has made out a case for the continuance of the stay with the modifications noted above on a balancing of interests basis recognizing the focus feature. However with respect to the four pillars *vis-à-vis* the Regulators, I would adjust that proposal so that the Regulators, if they saw fit in any particular situation based on objective justifiable grounds, would be permitted to immediately enforce any regulatory order or equivalent. However, if AC were to be of the view that the enforcement were unnecessary in the circumstances, then AC could apply to this court to have the reasonability of the Regulator's action determined. If this court were of the opinion that the action taken was unreasonable in the circumstances, then an appropriate penalty would be levied against the Regulator. I cannot foresee that such an application would ever come to pass, given the goodwill which exists between a regulator and one regulated, especially when the one regulated is in such a delicate financial condition. I may be spoken to about the appropriate language to be embodied in the order if perchance the sides were unable to agree.

Modus Vivendi

29 Again I come back to the need for AC and the Regulators to sit down and come to a *modus vivendi*, hopefully with a streamlined system. It will not do AC any good to delay dealing with matters which it could otherwise usefully deal with prior to emergence from the CCAA proceedings without undue strain on available resources. To do otherwise bears the risk of being knocked over by a tidal wave of pent up issues; similarly if matters are delayed, then there is the further problem that any third party complainants become more frustrated than they were when they made the complaints. The three Cs of the Commercial List: communication, cooperation and common sense might be usefully employed by AC and its personnel. I would observe that if there is a failure to communicate on a meaningful timely basis with respect to even matters which are outside the control of AC — e.g., the weather, then travellers start to complain that AC is not doing enough to "control the weather". In other words, bad customer relationships spill over; but if they are attended to on a preventative basis (as opposed to a reactive basis), they can be more easily managed to the satisfaction of all concerned.

30 The PC advises that it has five active files, one of which is fully ready for the release of a prepared report. As I understand the legislation under which the PC operates, after an investigation the PC releases a non-binding report to the complainant and the company (here AC). The complainant can then choose to proceed further before the Federal Court. Based on that I can see

no objection to the PC releasing that report, with the *proviso* that the complainant would have to obtain a lift of the stay from this court in order to proceed with a further Federal Court proceeding. Given that apparently there is a designated manager of privacy compliance, I would think it advisable for AC and the PC in their dialogue to review whether or not that compliance manager could be allowed to deal with the other four and possibly future privacy matters if not otherwise reengaged in more pressing current matters.

Conclusion

31 In conclusion, I would dismiss the Motions of the regulators. That of course is without prejudice to any Regulator moving to lift the stay. However, I assume that before that will happen, that AC and the Regulators would have exhausted their *bona fide* discussions on necessity, timeliness, prioritization and related matters. Each should approach the matter in a businesslike and flexible way, recognizing that it is important for AC to have the basis for maintaining the confidence of the public and to be seen to have that confidence with it on a team basis putting consumer requirements first as an ongoing principle to maintain good will and loyalty. This will take, as I have previously expressed, respect and trust flowing both ways (originally I expressed this mostly as to relations between management and labour — but in addition I now express it between the labour-management team and the Regulators.

Motions dismissed.

Appendix — Appendix

NOTE: This order is without prejudice to all parties' positions on the union motions, or to the Regulators' Motions.

THIS COURT ORDERS that effective upon the ratification of new and/or modified collective agreements (the "*Modified Collective Agreements*") with respect to any of the Applicants' bargaining units consequent upon the agreements reached during the mediation before Justice Winkler pursuant to the order of this Court dated May 9, 2003,

> (a) Proceedings in respect of events, actions or circumstances which occur on or after June 1, 2003 which arise from such Modified Collective Agreements (including, without limitation, grievances or arbitration procedures); and
>
> (b) Proceedings pursuant to Part I or Part II of the *Canada Labour Code* which arise from events, actions or circumstances which occur on or after June 1, 2003,

shall not be deemed to be stayed notwithstanding the Amended and Restated Initial Order or any subsequent amendments thereof; provided however that (i) nothing prevents the Applicants from applying to this Court to stay any specific proceeding referred to in subparagraph (a) or (b) above, and/or the enforcement of any direction, decision or order of the Canada Industrial Relations Board made pursuant to Section 134 or 156 of the *Canada Labour Code*; and (ii) no proceeding may be taken in respect of any statutory offence provision under Part I or Part II of the *Canada Labour Code* without further order of this Court.

THIS COURT ORDERS that subparagraph 24(c) of the Amended and Restated Initial Order shall be deleted and replaced by the following:

> (c) terminate the employment of such of their unionized employees or temporarily lay off such of their unionized employees in accordance with the applicable Modified Collective Agreement; and terminate the employment of such of their non-unionized employees on such terms as may be agreed upon between the Applicant and each such employee, or failing such agreement, terminate such employment and deal with the consequences thereof in the Plan;

THIS COURT ORDERS that subparagraph 24(d) of the Amended and Restated Initial Order shall be deleted.

THIS COURT ORDERS that the unions and the Applicants meet forthwith to discuss a process for the resolution of pre-June 1, 2003 grievances, with the assistance of Mr. Justice Winkler if necessary.

THIS COURT ORDERS that the union motions be set down for hearing on August 7 and 8, 2003.

End of Document

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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

be initiated at the request of a secured creditor. Similarly, in the event that management is conflicted, notably with its intention to sponsor or be associated with a bid within a sale and investment solicitation process ("SISP") conducted in the context of a *CCAA* process, courts have allowed the monitor to extend its role, to overstep the supervisory nature of its duties and play an active role in the management of the business while having direct powers over the assets, property and undertakings of an insolvent corporation.

That said, the driving factor in allowing a secured creditor to take control over a typically debtor-driven *CCAA* process and for the monitor to have extended powers is that management of the insolvent corporation is either neglecting/failing to abide by its fiduciary duties or that management was simply not in a position to exercise same in an objective manner. It must be demonstrated that management is acting, be it actively or passively, in a manner that is detrimental not only to the secured creditors' interest but also to all other stakeholders of the corporation, and that the extended powers granted to the monitor at the request of the secured creditor is for the purpose of restructuring the business of the insolvent corporation.

This raises a number of questions. What if the secured creditor has simply lost confidence in the management and wants to appoint a professional to overview an orderly liquidation of the corporation's business, assets, property and undertakings? Can it rely on the *CCAA* to initiate a restructuring process? Is it still management's game? What would be the difference with a *BIA* receivership? Should the monitor be considered an agent of the secured creditor?

All of these questions merit attention. First, the Supreme Court of Canada in *Lemare Lake* [3] appropriately warned insolvency practitioners that the insolvency legislation's purpose may not be set aside lightly. Second, even if from a practical standpoint, a *CCAA* monitor and a *BIA* receiver are actually the same professional, a licensed trustee, the reality is that the role and nature of the duties associated with each of these appointments have historically been very different, and to some extent plainly incompatible. The old saying of "same professional, different hat" might be too simplistic and inappropriate when it comes to separating the *BIA* receiver from the *CCAA* monitor.

This article proposes a review of case law and authorities on the competing roles of a *CCAA* monitor and a *BIA* receiver, with a special focus on the circumstances giving rise to the creditor-driven *CCAA* processes providing for extended powers being granted to a *CCAA* monitor. We argue that the *CCAA*'s historical objective is in line with limiting the monitor's powers, and only extending the same when absolutely necessary. *CCAA* monitor should remain neutral and exercise supervisory powers over the restructuring process, driven by the debtor, unless evidence demonstrating that its management is failing or neglecting to exercise its fiduciary duties appropriately.

The *CCAA* is a debtor-driven process, the secured creditor-driven process being the *BIA* receivership. The line between these two processes should not be blurred by the overarching practicalities that has come to define our Canadian Insolvency practice.

May the force be with you, dear readers.

II. — HISTORICAL PURPOSE AND OBJECTIVES OF THE *CCAA*: PRESERVATION OF GOING CONCERN

The *CCAA* was drafted with little consultation by the Conservative government of RB Bennett at the height of the Great Depression in 1933. [4] It was introduced via Bill 77 by Charles H Cahan, MP, who then stated that the economic circumstances of the time required the government to adopt a law that would allow for compromises between a debtor and its creditors without wholly destroying the company and forcing the wasteful sale of its assets:

> Mr. Speaker, at the present time any company in Canada, whether it be organized under the laws of the Dominion of Canada or under the laws of any of the provinces of Canada, which becomes bankrupt or insolvent is thereby brought under either the Bankruptcy Act or the Winding-up Act. **These acts provide for the liquidation of the company under a trustee in bankruptcy in the one case and under a liquidator in the other, and the almost inevitable result is that the organization of the company is entirely disrupted, its good-will depreciated and ultimately lost, and the balance of the assets sold by the trustees or the liquidator for whatever they will bring.** There is no mode or method under our laws whereby the creditors of a company may be brought

> into court and permitted by amicable agreement between themselves to arrange for a settlement or compromise of the debts of the company in such a way as to permit the company effectively to continue its business by its reorganization. [...]
>
> At the present time some legal method of making arrangements and compromises between creditors and companies is perhaps more necessary because of the prevailing commercial and industrial depression, and it was thought by the government that we should adopt some method whereby **compromises might be carried into effect under the supervision of the courts without utterly destroying the company or its organization, without loss of good-will and without forcing the improvident sale of its assets**. [5]
>
> [Emphasis added.]

In the Senate, the Right Honourable Arthur Meighen (Conservative) similarly stated that the *CCAA* allows for cooperation and compromises for the greater good, notably by preserving the interests of employees and security holders:

> Honourable senators, the purpose of this Bill is to enable companies which otherwise would be confronted with bankruptcy to arrange compromises by means of conferences among their various classes of security holders. [...] The depression has brought almost innumerable companies to the pass where some such arrangement is necessary in the interest of the company itself, in the interest of its employees -- because the bankruptcy of the company would throw the employees on the street -- and in the interest of the security holders, who may decide that it is much better to make some sacrifice than run the risk of losing all in the general debacle of bankruptcy. [...] As it is, the best result can be attained only by the passage by our legislatures of such co-operative measures as will enable civil rights, and companies within their purview, to be interfered with for the general advantage. [6]

The Act, at merely 20 provisions long and without a preamble or a clear policy statement, was barely debated in the Parliament and was quickly passed into law without objection. [7] Yet, it was soon beset by constitutional controversy, as for the very first time a federal law could bind secured creditors' rights, an area which was then believed to be within the exclusive power of the provincial legislatures. [8]

The reluctance of practitioners at the time to use the *CCAA* or the *Farmers' Creditors Arrangement Act* [9] prompted the Bennett government to refer them to the Supreme Court of Canada in 1934 and 1936, respectively. [10] The Supreme Court held that both laws were *intra vires* of the Parliament of Canada. In essence, the Supreme Court ruled that pursuant to s 91(21) of the *Constitution* [11] the *CCAA* is valid so long as it concerns arrangements between an insolvent debtor and its creditors.

From 1950 onwards the *CCAA* fell out of favour, likely because amendments to the Act in 1953 restricted its use to companies issuing bonds, and by 1970 it was considered a dead letter law. It took another wave of economic recessions to revive the use of the Act in the 1980s and 1990s.

As a consequence of its ability to grant a broad and flexible authority to the supervising court to make the orders necessary to facilitate the reorganization, the *CCAA* rose to become the functional equivalent of the American Chapter 11 restructuring. That characterization has since influenced its judicial interpretation. [12] Ever since, the courts have significantly widened the scope of the Act. As noted by one author in this Review, "the legal setting for Canadian insolvency restructuring has evolved from a rather blunt instrument to one of the most sophisticated systems in the developed world." [13]

To this day, and after multiple amendments, the *CCAA* lacks an express purpose clause. Nonetheless, the courts, culminating in the Supreme Court's decision of *Century Services*, have time and again held that the Act has first and foremost a remedial purpose, geared at preserving the value of a company as a going concern:

> [15] As I will discuss at greater length below, the purpose of the *CCAA* -- Canada's first reorganization statute -- is to **permit the debtor to continue to carry on business and, where possible, avoid the social and economic**

> **costs of liquidating its assets**. Proposals to creditors under the *BIA* serve the same remedial purpose, though this is achieved through a rules-based mechanism that offers less flexibility. Where reorganization is impossible, the *BIA* may be employed to provide an orderly mechanism for the distribution of a debtor's assets to satisfy creditor claims according to predetermined priority rules.
>
> [16] Prior to the enactment of the *CCAA* in 1933, practice under existing commercial insolvency legislation tended heavily towards the liquidation of a debtor company. [...]
>
> [17] Parliament understood when adopting the *CCAA* that liquidation of an insolvent company was harmful for most of those it affected -- notably creditors and employees -- and that a workout which allowed the company to survive was optimal.
>
> [18] Early commentary and jurisprudence also endorsed the *CCAA*'s remedial objectives. It recognized that companies retain more value as going concerns while underscoring that intangible losses, such as the evaporation of the companies' goodwill, result from liquidation. Reorganization serves the public interest by facilitating the survival of companies supplying goods or services crucial to the health of the economy or saving large numbers of jobs. Insolvency could be so widely felt as to impact stakeholders other than creditors and employees. **Variants of these views resonate today, with reorganization justified in terms of rehabilitating companies that are key elements in a complex web of interdependent economic relationships in order to avoid the negative consequences of liquidation.** [14]
>
> [References omitted -- Emphasis added.]

In furthering this remedial objective, the *CCAA* provides the supervising judge with wide discretion, which must be exercised with care. As mentioned by the Supreme Court, the court must be cognizant of the interests of *all* stakeholders, which often extend beyond those of the debtor and creditors:

> [59] Judicial discretion must of course be exercised in furtherance of the *CCAA*'s purposes. The remedial purpose I referred to in the historical overview of the Act is recognized over and over again in the jurisprudence. To cite one early example:
>
> > The legislation is remedial in the purest sense in that it provides a means whereby the devastating social and economic effects of bankruptcy or creditor initiated termination of ongoing business operations can be avoided while a court-supervised attempt to reorganize the financial affairs of the debtor company is made.
>
> [60] Judicial decision-making under the *CCAA* takes many forms. A court must first of all provide the conditions under which the debtor can attempt to reorganize. [...] **In doing so, the court must often be cognizant of the various interests at stake in the reorganization, which can extend beyond those of the debtor and creditors to include employees, directors, shareholders, and even other parties doing business with the insolvent company.** [15]
>
> [References omitted -- Emphasis added.]

Courts and practitioners alike have had a natural tendency to resort to a comparative analysis between the *BIA* and the *CCAA* in trying to justify the objective, purpose and identity of each of those two major pieces of the Canadian insolvency legislation.

In the spirit of such a comparative analysis, one cannot disregard that, as opposed to the *BIA*, the *CCAA* does *not* provide for a scheme of distribution. Despite clear recommendations made by the *Standing Senate Committee on Banking, Trade and Commerce* in this regard, leading to the 2009 amendments to the *BIA* and *CCAA*, [16] the legislator chose not to incorporate a scheme of distribution amongst different stakeholders of a company restructuring its affairs under the *CCAA*. This gives further weight to the consideration given by the legislator to the historical objective of the *CCAA*: to restructure an insolvent

corporation's business by preserving the continuation of its going concern, thus avoiding, or at least narrowing the negative consequences attached to the pure liquidation of its assets, property and undertakings.

Increasingly the lines between liquidation and restructuring are blurred. [17] This pattern is further intensified by the increasing popularity of liquidating *CCAA*s.

Historically, liquidation was effected via *BIA* receiverships, bankruptcies, or a combination of both. Although such liquidation efforts could result in the continuation of the debtor's business for a time through a receiver or trustee in bankruptcy acting *in lieu* of the management, typically the liquidation conducted under the *BIA* would result in a piecemeal sale of the insolvent corporation's assets, property and undertakings. [18]

Generally speaking, for their fullest implementation, *BIA* processes are more rule-driven and require less discretion than the *CCAA*. The purpose of the *BIA* consists in bringing consistency to the administration and liquidation of bankrupt estates and, if possible, in facilitating restructuring under a proposal. [19] The *BIA* offers two alternatives to the remedial path of the proposal, a debtor-driven restructuring process similar in its objective to what the *CCAA* is:

- The Bankruptcy Regime: A pure liquidation process conducted under the helm of a trustee in bankruptcy having full control over the assets, property and undertakings of the insolvent debtor. Bankruptcy is triggered either voluntary, by a general assignment executed by the debtor's management in favour of the creditors, or forced upon by a creditor through an application for a bankruptcy order. Bankruptcy is used in order to shut down an insolvent debtor's business, liquidate its assets and distribute any proceeds to creditors in accordance with a statutory scheme of distribution. Once effective, management has no longer any powers over the assets, property and undertakings of the insolvent corporation; and

- Receivership: The other alternative made available under the *BIA* is the appointment of a receiver pursuant to section 243 of the *BIA*. The appointment of a receiver is reserved to secured creditors only, who must convince the court that it is "just and convenient" to appoint a licensed trustee to exercise control over the assets, property and undertakings of an insolvent corporation. What circumstances qualify as being "just and convenient" under section 243 of the *BIA* has been the subject of a significant body of case law and is beyond the purview of this article. For the purpose hereto, we will limit ourselves to saying that the appointment of a receiver under section 243 of the *BIA* usually requires a demonstration to the court that the main secured creditor has lost confidence in the management of the insolvent corporation and that there is a tangible risk that management is unjustifiably putting at risk the secured creditor's position.

To the extent that we accept that transferring the assets of an insolvent corporation required to continue the going concern of its business qualifies as restructuring, a *BIA* receivership may serve to effectively restructure a business, similar to what would be achieved under a liquidating *CCAA*. However, as previously mentioned, the major difference is that a *BIA* receivership is a secured creditor-driven process whereas the *CCAA* remains a debtor-driven process.

Receivership was crafted to allow for a secured creditor in specific circumstances to take over the management of an insolvent corporation through the appointment of a licensed trustee that it selects. The role and more specifically the beneficiary of the receiver's duties have yet to be defined by case law and authorities. Since the receiver is chosen/retained by the secured creditor, wherein the *BIA* does not provide for continuing reporting obligations to the court, let alone the debtor's management (as is the case under the *CCAA* regime), one could argue that the receiver appointed under section 243 of the *BIA* is acting as an agent of the secured creditor that has petitioned for its appointment. Undoubtedly, receivership is a secured creditor-driven process which cannot be initiated by the insolvent corporation.

In contrast, in a liquidating *CCAA* the insolvent corporation typically remains in possession and control of its assets, property and business. The monitor, who has continuous reporting obligations to the court and the stakeholders, exerts no specific power over the assets, property and business of the insolvent corporation. Management remains at the forefront of all restructuring efforts. A *CCAA* process is therefore a typically debtor-driven one. We will see from recent case law that courts have allowed

secured creditors to resort to the *CCAA* to effectuate liquidating *CCAA*s, but always with a view to preserve the going concern operations of the business operated by the insolvent corporation.

Yet this remains the exception to the rule. Even in its liquidating form, a *CCAA* process is to be driven by the insolvent corporation's management. From recent cases, we have identified four scenarios in which courts have allowed a secured creditor to rely on the *CCAA* while extending the powers of the monitor, rather than proceeding with a receivership under section 243 of the *BIA*:

- **Resignation of the management body**: when all directors and officers resign after a *CCAA* process has been initiated, courts have allowed for the continuation of the *CCAA* process by extending powers to the monitor akin to those of a receiver. Commonly referred to as a "super monitor," these powers allow the monitor to have direct powers over the assets, property and undertakings of the insolvent corporation and, for all intents and purposes, to act *in lieu* of management;

- **Unfitness of management to conduct *CCAA* proceedings**: this is trickier because it requires a demonstration that management is not fit to conduct a formal *CCAA* proceedings without causing harm to the stakeholders, akin to a fiduciary duties violation;

- **Management has no plan or their plan is doomed to fail**: this requires an analysis from the Court that management has no germ of a plan or that any potential restructuring plan is doomed to fail; and

- **Management being conflicted**: in the event that management is contemplating sponsoring or being associated with a bid in respect to the company's assets, property and undertaking in the context of a SISP.

The remainder of this article will analyze a recent rise in case law of *CCAA* liquidation processes, largely influenced or driven by creditors. The article will then aim to synthesize when and under what conditions such processes are appropriate.

III. — INCREASING USE OF LIQUIDATING *CCAA*s: A PATH FOR SECURED CREDITORS

Since the 2009 amendments to the *CCAA*, courts across Canada have held that the purpose of the *CCAA* may be met where a restructuring is effected by way of a liquidation. This has facilitated the transfer of assets, property, undertakings of an insolvent corporation related to a business to allow for its going concern operations to be preserved, even if it means that such operations ought to be continued under a new entity and/or structure. Such restructurings have become commonly referred to as liquidating *CCAA*s.

The concept of liquidating *CCAA*s was broadly approached in the recommendations made in the Senate Report, leading to the adoption of section 36 as part of the 2009 *CCAA* amendments:

> During a reorganization, an insolvent company may benefit from an opportunity to sell part of its business in order to generate capital, avoid further diminution in value and/or focus better on the financially solvent aspects of its operations. In some situations, a win-win situation would be created: insolvent companies would be able to increase their chance of survival as they gain capital and focus on their solvent operations, and creditors would avoid further reductions in the value of their claims. These sales would occur outside the normal course of the organization's business. **In some cases, the best situation for stakeholders might involve the sale of the business in its entirety**. [...]
>
> The Committee also believes that there are circumstances where **all stakeholders would benefit from an opportunity for an insolvent company involved in reorganization to divest itself of all or part of its assets**, whether to raise capital, eliminate further loss for creditors or focus on the solvent operations of the business. [20]
>
> [Emphasis added.]

However, even in the most extreme cases where the debtor is "doomed to fail," the process must have a prospect for the continuation of, among other things, employment for employees, supply relationships between suppliers and trade creditors, and the credit relationships between the debtor business and creditors. [21] It cannot be a liquidation driven process without the prospect of a going concern being preserved and continued. The proper forum for such pure liquidation process being the *BIA*.

Virginia Torrie has argued that the *CCAA* is historically a lender remedy, refuting conventional views of the Act being a debtor remedy inspired by concern for stakeholder groups, such as labour. [22] Accordingly, "if the Act was intended as a lender remedy (rather than to facilitate going-concern reorganizations) there may be less reason to object to liquidating *CCAA*s on normative or policy grounds." [23]

However, and as also noted by Dr Torrie, we respectfully submit that this perspective, taken to its extreme, risks undermining the rule of law. It is generally true that insolvency laws were enacted and amended in response to the needs of major creditors. Dr Torrie notes, regarding the *CCAA*, that the "impetus for this federal statute was to help prevent large bondholders [financial institutions] from failing, by allowing them to restructure debtors (read: restructure losses) and so return these companies (read: investments) to profitability." [24] Having said this, courts should not ignore the very purpose of the *CCAA*, as repeatedly and explicitly mentioned in Parliament and confirmed by the Supreme Court (as well as implicitly acknowledged in the aforementioned quote), which is to preserve the value of the debtor companies as a going concern for the benefit of all of its stakeholders, including employees, and when possible avoid the economic consequences of a liquidation for the society at large by "returning these companies to profitability".

It is a long-standing concern that judicial discretion in insolvency matters is bound by little in terms of procedure, *stare decisis*, or appellate oversight. As noted by David Bish, while this flexibility is of great value and is a cornerstone of Canadian restructuring law, the integrity of our system (as well as the equally important appearance of integrity), depends on the practitioners and the courts following meaningful checks and balances based on the purpose of the Act, unless we (the society at large) are comfortable embracing unfettered judicial discretion:

> If the beauty of our system lies in the unrestrained freedom of judges to drive a desirable commercial outcome, we should embrace it. If, however, we are not comfortable embracing unrestrained judicial discretion, at the very least we ought to find a way to credibly define and impose meaningful limits on that discretion. Either way -- whether transparent unfettered discretion or meaningful checks and balances -- the integrity of our system depends on it. [25]

As previously noted, the *CCAA* does not benefit from a scheme of distribution for debtors' assets and was not subject to parliamentary scrutiny and debate in this regard. Arguably, a *CCAA* court is granted wide discretion because our society expects this discretion to be used in a manner that will benefit the society at large. Given the impossibility to codify and rank the innumerable considerations that could come into play when a court is tasked with maintaining the operations of an insolvent debtor as a going concern, the great flexibility provided by the *CCAA* is entirely warranted in such circumstances.

Large creditors, who often enjoy secured status, are often best placed to evaluate the benefits and consequences of debtors' risk-taking. To allow them to call the shots by freely choosing between *CCAA* liquidation, receivership or bankruptcy will lead to inappropriate risk-taking and could, in theory, aggravate the often discussed inequity between stakeholders by syphoning value from stakeholders at large to their sole advantage.

We will see from the case law that the courts' position has evolved significantly after the 2009 *CCAA* amendments, which led, *inter alia*, to the enactment of section 36.

1. — The Case Law Prior to the 2009 *CCAA* Amendments

Prior to the enactment of the 2009 amendments to the *CCAA*, appellate decisions remained wary of using *CCAA* to effect liquidations.

In 1990, the British Columbia Court of Appeal explicitly stated that the purpose of the *CCAA* is to facilitate the making of a compromise or arrangement in order to allow the debtor to continue business:

> The purpose of the C.C.A.A. is to facilitate the making of a compromise or arrangement between an insolvent debtor company and its creditors to the end that the company is able to continue business. [...] When a company has recourse to the C.C.A.A., the Court is called upon to play a kind of supervisory role to preserve the status quo and to move the process along to the point where a compromise or arrangement is approved or it is evident that the attempt is doomed to failure. [26]

Similarly, in 1991, Justice LeBel, then of the Quebec Court of Appeal, wrote that what distinguishes the *CCAA* from the *BIA* is that *CCAA* is aimed at helping the debtor company avoid bankruptcy or emerge from its insolvency:

> More so than its liquidation, this *Act* is aimed at the reorganization of the company and its protection during the intermediate period, during which the approval and the realization of the reorganization plan is sought. Conversely, the *Bankruptcy Act* (RSC 1985, chapter B-3) seeks the orderly liquidation of the property of the bankrupt and the distribution of the proceeds of such liquidation among the creditors, in the order of priority defined by the Act. **The *Arrangements Act* responds to a distinct need and purpose, at least according to the interpretation generally given to it since its adoption. We want to either to prevent bankruptcy, or to help the company emerge from this situation.** [27]
>
> [Our translation -- Emphasis added.]

In 1998, Justice Blair of the Ontario Court of Justice held that liquidation orders can be granted under the *CCAA* "if the circumstances are appropriate and the orders can be made within the framework and in the spirit of the CCAA legislation." [28]

In 1999, the Alberta Court of Appeal unanimously sided with Justice Paperny of the Alberta Court of Queen's Bench, who ruled in the first instance that the *CCAA* should not be used when the sale of the assets generates liquidity that is insufficient to be distributed to unsecured creditors and where no plan of arrangement was put to the creditors. [29] The Court of Appeal went a step further, by calling into question the use of the *CCAA* to liquidate the assets of insolvent companies:

> [w]hile we do not intend to limit the flexibility of the CCAA, we are concerned about its use to liquidate assets of insolvent companies which are not part of a plan or compromise among creditors and shareholders, resulting in some continuation of a company as a going concern. **Generally, such liquidations are inconsistent with the intent of the CCAA and should not be carried out under its protective umbrella.** [30]
>
> [Emphasis added.]

The notion that *CCAA* process could end in liquidation in exceptional situations was also recognized by the Quebec Superior Court in 2004. In *Papiers Gaspésia*, [31] Papiers Gaspésia Inc. ("Gaspésia") was a limited partnership created by the Fonds de Solidarité FTQ, SGF Rexfor and Tembec. The Chandler paper mill was subject, since 2001, to redevelopment and modernization, and Gaspésia was seeking potential partners to refinance this project.

On 30 January 2004, Gaspésia obtained an order declaring that the company was subject to the provisions of the *CCAA*, that Ernst & Young Inc was appointed as monitor, and also offered certain relief to offer Gaspésia time to prepare a plan of compromise or arrangement. During the process the three directors of Gaspésia resigned, which event changed the role of the monitor. The monitor requested that it be allowed to act in the place of the board of directors for this matter and to represent Gaspésia in litigation before court.

The Superior Court of Quebec held that it is not excluded that proceedings under the *CCAA* can result in the liquidation of the debtor's assets, but this is only possible in exceptional and appropriate circumstances. [32]

In 2008, the British Columbia Court of Appeal appeared, in *obiter*, to cast further doubt about the possibility of liquidation conducted under the *CCAA* in *Cliffs Over Maple Bay*:

> I need not decide the point on this appeal, but I query whether the court should grant a stay under the *CCAA* to permit a sale, winding up or liquidation without requiring the matter to be voted upon by the creditors if the plan of arrangement intended to be made by the debtor company will simply propose that the net proceeds from the sale, winding up or liquidation be distributed to its creditors. [33]

This line of reasoning was picked up by the Supreme Court in the above discussed 2010 decision of *Century Services*, [34] marking the last time the purpose of the Act was directly addressed on appeal. [35] Noteworthy, the *Century Services* decision was rendered on facts that occurred prior to the 2009 *CCAA* amendments and the enactment of section 36.

2. — The Case Law Since the 2009 *CCAA* Amendments

Comprehensive changes made to the *CCAA* in 2009 brought with them the addition of section 36, which now permits the sale of assets outside the ordinary course of business subject to court authorization. As nothing in this section requires the filing of a plan or a continuing entity as a condition for court's approval, courts across the nation ruled that the court has the power to allow the sale of substantially all of the debtors' assets in the absence of a plan. Following the 2009 amendments, the trend towards liquidating *CCAA*s picked up.

In 2010, Alberta's Court of Queen's Bench granted an initial order under the *CCAA* with respect to Fairmont Resort Properties Ltd, Lake Okanagan Resort Vacation (2001) Ltd, Lake Okanagan Resort (2001) Ltd and LL Developments Ltd (the "Fairmont Group"). [36] The Fairmont Group's operations were able to continue under *CCAA* protection from the date of the initial by taking certain key measures.

FRPL Finance Ltd ("FRPL") and a related corporation were major secured creditors of the Fairmont Group, and supported the *CCAA* proceedings. FRPL had issued bonds to many individual investors in order to provide capital to the group. The capital raised by FRPL, which amounted to approximately $41.5 million, was loaned to the Fairmont Group between 2005 and 2007.

On 15 April 2010, in proceedings linked to the *CCAA* process, FRPL applied for a final order in respect of a plan of arrangement pursuant to section 193 of the *Business Corporations Act*, RSA 2000, c B-9. At a bondholder meeting, FRPL proposed a reorganization plan which included the options available for recovery of FRPL's loans to the Fairmont Group.

Under the proposed plan, bondholders would exchange their bonds for trust units in the newly established Northwynd REIT. Northwynd REIT would acquire the Fairmont Group loans and security interest through a wholly-owned limited partnership, Northwynd Limited Partnership ("Northwynd"). The limited partnership would then take steps under the security to acquire ownership and control of the Fairmont Group assets.

Roughly 60 to 63% of total bondholders were represented at the meeting and a vast majority of voting bondholders voted in favour of the proposed arrangement. Justice Romaine found that the statutory procedures had been met, the application had been put forward in good faith, the arrangement had a valid business purpose and, on the basis of the strong bondholder support and the lack of opposition, the plan was fair and reasonable.

After being assigned the secured debt amounting to approximately $52 million, Northwynd applied for an order under the *CCAA* proceedings approving the acceptance by Fairmont Group of its offer to purchase all of the assets of the Fairmont Group in consideration for the discharge of the DIP financing and the crediting of $43.8 million against the secured debt owed to FRPL.

The sale of the assets under the *CCAA* proceedings was allowed. Citing *Anvil*, [37] Justice Romaine stated that "Farley, J. noted that the *CCAA* may be used to effect a sale or liquidation of a company in appropriate circumstances, most particularly where to do so would 'maximize the value of the stakeholders' pie'". [38] Justice Romaine also noted that, while the alternative of

selling the assets through a receivership would be commercially equivalent, approval pursuant to the *CCAA* proceedings would be more efficient. [39]

Northwynd's plan proposed two options to bondholders: either continue under the existing *CCAA* proceedings or through the termination of the proceedings and the appointment of a receiver. Northwynd submitted that the most time-efficient and cost-effective method of proceeding was the sale pursuant to the *CCAA* proceedings. On the contrary, monitor Ernst & Young submitted that "the potential of achieving a sale price for the secured assets greater than the offer was very low and that the costs of a sales process would be significant," thus concluding that neither alternative would improve the return of creditors.

Based on precedents, Justice Romaine affirmed that a sale of substantially all of the assets of a debtor company is permitted in a *CCAA* proceeding pursuant to s 36 of the *CCAA* if certain statutory criteria are met and, in accordance with previous authority, if such a sale is consistent with the purpose and policy of the *CCAA* and in the best interests of creditors generally. [40]

Justice Romaine went on to cite Brenner CJ in *Pope & Talbot*:

> The decision by courts to extend the use of the CCAA to a liquidation is based on a recognition of the wider interests at stake in such a proceeding. **The purpose of a liquidating CCAA where the assets are to be sold on an operating basis, is to fairly have regard for the interests of not only the creditors and the stakeholders of the petitioner, but also the interests of employees, suppliers and others who will be affected by a complete shutdown. So provided that the objective is to dispose of assets on an operating basis, then even though it is a liquidation**, the exercise is not designed to effect a recovery for solely the secured lenders as submitted by Canfor. Clearly a continuation of operation will benefit a wider constituency. [41]
>
> [Emphasis added.]

Justice Romaine, pitting *BIA* receivership against *CCAA* as proper forum to effectuate a liquidation, relied heavily on the fact that the liquidating *CCAA* was aimed at preserving the going concern business of the insolvent corporation, thus finding comfort in the historical objective of the *CCAA*: to preserve going concern business while avoiding the dire impact on a variety of stakeholders resulting from the shutdown and pure liquidation of same.

Noting that s 36 of the *CCAA* does not require that a plan be filed as a condition of court approval or there be a continuing entity after liquidation, Justice Romaine concluded that it made both practical and commercial sense to allow the sale process to take place under the existing *CCAA* proceedings. In the alternative, a bankruptcy would have been less efficient and would have jeopardized the going concern business, to the detriment of all stakeholders. [42]

More recently in *Bloom Lake* (2017), [43] Justice Hamilton, then at the Superior Court of Quebec, recognized once more that liquidating *CCAA* can serve a legitimate purpose but justly ruled that creditors should have analogous entitlements in liquidations under the *CCAA* and the *BIA*. Otherwise, the debtor or creditors can choose liquidation under the *CCAA* in order to avoid their responsibilities under the *BIA*. [44]

In *Bloom Lake*, the debtors, Wabush Iron Co Limited and Wabush Resources lnc and the *mises-en-cause* Wabush Mines, Arnaud Railway Company and Wabush Lake Railway Company Limited (collectively the "Wabush CCAA Parties") filed a motion for the issuance of an initial order under the *CCAA*. The Wabush CCAA Parties had two pension plans for their employees governed by the *Newfoundland and Labrador Pension Benefit Act* ("NLPBA"). Therein, the monitor filed a motion seeking direction with respect to the priority's order of the debts. The purpose of this decision was to determine the preliminary question of whether the Court must defer to the Supreme Court of Newfoundland and Labrador for the application of certain rules concerning trusts and security interests under the NLPBA. Furthermore, the Court responded to the key issue of whether "the *CCAA* proceedings themselves, or some event within the *CCAA* proceedings, constitute a liquidation, assignment or bankruptcy" of the employer.

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

undertaken, and if, or to the extent, the equity proceeds were insufficient to pay out the noteholders, the notes would be converted to equity.

Crystallex concurrently sought authority to file a plan of compromise and arrangement, the authority to continue to pursue an arbitration in Venezuela, and the authority to pursue all avenues of interim financing or a refinancing of its business and to conduct an auction to raise financing. Crystallex had already received an unsolicited offer of financing from Tenor Capital Management. In coming to the aforementioned conclusions, Justice Newbould wrote:

> [20] The CCAA is intended to provide a structured environment for negotiation of compromises between a debtor company and its creditors for the benefit of both. Where a debtor company **realistically plans to continue operating or to otherwise deal with its assets but it requires the protection of the court in order to do so and it is otherwise too early for the court to determine whether the debtor company will succeed, relief should be granted under the CCAA**. The benefit to a debtor company could, depending upon the circumstances, mean a benefit to its shareholders.
>
> [21] It is clear that the CCAA serves the interests of a broad constituency of investors, creditors and employees. Thus it is appropriate at this stage to consider the interests of the shareholders of Crystallex. [...]
>
> [26] In my view, what the Noteholders propose at this stage, including the cancellation of the common shares held by the shareholders of Crystallex, is not a fair balancing of the interests of all stakeholders. **To say that they will never vote in favour of any plan unless they are paid out immediately or the current management and board of Crystallex is removed is not reflective of the purposes of the CCAA at this stage.**
>
> [27] The application of Crystallex and the terms of its Initial Order are not prejudicial to the legitimate interests of the Noteholders. The Noteholders are entitled to submit any proposal they wish to the board of Crystallex who will be obliged to consider it along with any other proposals obtained. **The board of directors of Crystallex has a continuing duty to balance stakeholder interests. If the Crystallex board does not choose their proposal, the Noteholders would have their remedies, if appropriate, in the CCAA process. What the Noteholders have sought in their CCAA application is to effectively prevent Crystallex from taking steps under the CCAA to attempt to obtain a resolution for all stakeholders without the benefit of seeing what Crystallex may be able to achieve. It cannot be said at this stage that the efforts of Crystallex are doomed to fail.** [57]
>
> [References omitted -- Emphasis added.]

In *Semi-Tech* (1999), [58] the debtor ("Semi-Tech") was a holding company and its common shares traded on the Toronto Stock Exchange. Enterprise Capital Management Inc ("Enterprise"), on its own behalf and on behalf of funds managed by it, and with the support of other holders of senior secured notes, applied for an initial order under the *CCAA* and sought orders in order to restrain the management and control of Semi-Tech in its operations by, for example, prohibiting Semi-Tech to make any payments to senior officers and directors and altering any material contracts. Agreeing that the Enterprise would be able to establish that Semi-Tech had breached certain covenants under the trust indenture, Justice Ground noted that due to lack of appropriate notices, there had been no event of default as defined in the agreement. [59]

After mentioning the remedial purpose of the *CCAA*, and noting that an application by creditors is a rarity, Justice Ground held that in the absence of any indication that Enterprise proposes a plan which would consist of some compromise or arrangement between Semi-Tech and its creditors and permit the continued operation of Semi-Tech and its subsidiaries, it would be inappropriate to make any order pursuant to the *CCAA*:

> [23] It is usual on initial applications under the *CCAA* for the applicant to submit to the Court at least a general outline of the type of plan of compromise and arrangement between the company and its creditors proposed by the applicant. **The application now before this Court is somewhat of a rarity in that the application is brought by an applicant representing a group of creditors and not by the company itself as is the usual case**. Enterprise

> has submitted that it is not in a position to submit an outline of a plan to the Court in that it lacks sufficient information and has been unable to obtain such information from Semi-Tech. Enterprise points out that, in the usual case, the application is brought by the company, the company has all the necessary information at hand and has usually had the assistance of a firm which is the proposed monitor and which has worked with the company in preparing an outline of a plan. [...]
>
> [25] **In the absence of any indication that Enterprise proposes a plan which would consist of some compromise or arrangement between Semi-Tech and its creditors and permit the continued operation of Semi-Tech and its subsidiaries in some restructured form, it appears to me that it would be inappropriate to make any order pursuant to the *CCAA*. If the Noteholders intend simply to liquidate the assets of Semi-Tech** and distribute the proceeds, it would appear that **they could do so** by proceeding under the Trust Indenture on the basis of the alleged covenant defaults, accelerating the maturity date of the Notes, realizing on their security in the shares of Singer and recovering any balance due on the Notes **by the appointment of a receiver or otherwise**. [60]
>
> [Emphasis added.]

In *SM Group* (2018), [61] the Court was presented with competing *CCAA* applications from management and secured creditors. The Quebec Superior Court chose to side with the secured creditors given the evidence submitted in respect to the loss of confidence in the management of the insolvent corporation. Serious allegations about the influence of the former president, and current main shareholder, caught in fraudulent criminal accusations and recent payments made to his benefit by management prior to the filing led the Court to side with the secured creditors' arguments that the appointment of a chief restructuring officer with powers akin to a *BIA* receiver was the best alternative to preserve going concern value of the SM Group, for the benefit of all stakeholders, including employees.

In *Taxelco* (2019), [62] the Court was presented with a motion seeking the issuance of an initial order by the main secured creditor, the National Bank of Canada, with a view to implement a SISP and preserve the going concern value of the business, while granting extended powers to the monitor, acting in lieu of management. The Court accepted the Bank's arguments, which focused on the fact that management had refused to file a motion to issue an initial order and that the directors and officers had announced their intention to resign.

In *Sural* (2019), [63] the Court was presented with a motion seeking the issuance of an initial order while granting enhanced powers to the monitor, akin to those of a *BIA* receiver, to allow for the company to implement a SISP on 28 June 2019. The motion was presented by the company and supported by its management.

In *Miniso*, the most recent decision rendered on the subject, the secured creditors of the debtor companies initiated the proceedings under the *CCAA*, and an initial order was granted on 12 July 2019. The British Columbia Supreme Court confirmed the standing for a creditor to commence *CCAA* proceedings while granting enhanced powers to the monitor: [64]

> The **commencement of *CCAA* proceedings is a proper exercise of creditors' rights** where, ideally, the *CCAA* will preserve the going-concern value of the business and allow it to continue for the benefit of the "whole economic community", including the many stakeholders here. This is intended to allow stakeholders to avoid losses that would be suffered in an enforcement and liquidation scenario. [...]
>
> A&M will have **enhanced powers as Monitor** to manage the Canadian operations and negotiate and implement a transaction, in consultation with the Migu Group ... [65]
>
> [Emphasis added.]

That being said, contrary to *Semi-Tech* and *Crystallex* cases, the *Miniso* case proceeded on an uncontested basis and management of the insolvent debtor company did not oppose the initiation of the *CCAA* process by the secured creditor, who was also providing interim financing to allow the corporation to continue its operations and preserve value for all stakeholders:

> 52 There is no doubt that the Miniso Group has dictated the course forward, for the most part. The Miniso Group holds first ranking security over all of the Migu Group's assets. **The Miniso Group has determined that a *CCAA* process is the best means to ensure the preservation and sale of the Migu Group's business as a going concern and maintain enterprise value for the benefit of all stakeholders**, including the Miniso Group. In addition, as discussed below, the Miniso Group has agreed to provide interim financing during the course of the restructuring in order to allow that process to unfold.
>
> 53 I have no doubt that the Migu Group has asserted its wishes and wants within the context of the past and ongoing negotiations between the two Groups. **However, the Migu Group now grudgingly accepted its fate and did not oppose the relief sought here**. [66]
>
> [Emphasis added.]

Following the guidance from *Crystallex*, removing *ab initio* the management of an insolvent corporation from the driver seat in a restructuring process under *CCAA* in favour of the secured creditors ought to be considered as an extraordinary measure, and to address serious concerns with respect to the incapacity and/or inability of management to conduct such a process. It requires a demonstration that management has no plan or that such a plan is "doomed to fail," or that management has resigned, is unfit or conflicted to conduct such a process for the benefit of all stakeholders.

To the extent that management can demonstrate that it is focusing its efforts on exploring restructuring paths and that such efforts may reasonably lead to the restructuring of the insolvent corporation's business, preserving the going concern value of the business, for the benefit of all stakeholders, including but not limited to the secured creditors, management should not be stripped of its powers and duties lightly. Besides, we must be mindful that the *CCAA* provides at section 11.5 for the proper mechanism to remove a director that "is unreasonably impairing the possibility of a viable compromise or arrangement being made in respect of the company or is acting or is likely to act inappropriately as a director in the circumstances."

We also find comfort in the reasoning in *Semi-Tech*, which reminds us that the *CCAA* is not to be considered as a mechanism which allows a secured creditor to liquidate the assets, unless it can be demonstrated that the proposed restructuring efforts will lead to the going concern value preservation, referring to the *BIA* receivership for such an operation to be conducted. [67] The objective sought pursuant to the *CCAA* proceedings thus remaining to favour restructuring while preserving going concern value for all stakeholders involved.

2. — Continuing the *CCAA* Process and Enhancing the Role of the Monitor

Courts have also allowed *CCAA* process initiated by the company, under certain circumstances, to be continued by the secured creditors by granting extended powers to the monitor, akin to a *BIA* receiver.

In the matter of *BioAmber*, [68] a Quebec-based company operating a succinic acid production facility in Sarnia (Ontario), the Court issued an initial order for the purpose of, *inter alia*, allowing the company to implement a SISP. When it became obvious that the SISP would not lead to the desired transaction and that management was involved/associated with a potential bidder, the Court at the request of secured creditors, issued an order granting additional powers to the monitor, akin to those of a *BIA* receiver.

In *ILTA Grain*, [69] a British Columbia-based grain producer, filed for protection under the *CCAA* on 7 July 2019. It was the company, and its management, that filed for the issuance of the Initial Order.

In its first report, filed merely eight days after the *CCAA* proceedings commenced, the monitor reported that it had become clear that certain members of the company's management did not support the company's current strategy of undertaking a SISP and pursuing transactions that may lead to the sale of the company's business and assets. [70] The Court, at the request of the company,

and likely pursuant to a strong suggestion from the secured creditors, issued an order to enhance powers of the monitor, but not to the extent of what would be typical of a *BIA* receiver.

Essentially, to ensure that the secured creditors and the monitor have confidence in the company's management, the order granted the monitor with specific recommendation, providing incremental powers while giving control powers over the receipt and disbursements to the monitor. [71]

While the role of the monitor has been expanded in various files, the Quebec Court of Appeal in *Aquadis* [72] recently brought into question the limits of such expanded role in file driven *de facto* by the creditors. Notably, the Court highlighted that enhancing the powers of the monitor must not interfere with its role and neutrality. In that file, the debtor 9323-7055 Québec inc (formerly Aquadis International Inc, "Aquadis") was a wholesale seller of plumbing fixtures. Aquadis, however, suffered serious financial difficulties when hundreds of defective faucets supplied by it failed, causing significant damage to property owners whose insurers ultimately filed subrogated claims against Aquadis. The value of those claims amounted to nearly $22 million and the monitor estimated the value of potential future claims at an additional $25 million.

According to the monitor's first and second reports, Aquadis significantly reduced its operations in 2014, completely liquidated and ceased operations in 2015. As of the date of the initial order, Aquadis had no realizable assets and the near totality of its liabilities were the litigious claims of the insurers.

To maximize the value of Aquadis' assets, in December 2016, the monitor instituted legal proceedings against the Taiwanese manufacturers and distributor and their insurers. At the same time, the monitor was negotiating with the Canadian distributors and retailers. On 20 June 2018, the supervising judge authorized settlements between the monitor and the Taiwanese distributor and its insurers in the total amount of $7.2 million.

The monitor filed a plan of arrangement on 8 January 2019, and amended the plan at the meeting of the creditors on 25 April 2019. According to the amended plan, the monitor was empowered to institute legal proceedings on behalf of Aquadis' creditors against the other persons involved in the manufacture, distribution or sale of the defective faucets. It was approved by the Superior Court on 4 July 2019, over the objections of the retailers that a plan of arrangement cannot provide for the institution of legal proceedings by the monitor, on behalf of the creditors, against third parties in connection with rights that belong to the creditors and not to the debtor company. [73]

On 20 August 2019, Justice Hamilton of the Quebec Court of Appeal granted the retailer's motions for leave to appeal, noting that the matter at hand goes to the serious issue regarding the role and neutrality of the monitor and the scope of the powers that it can obtain:

> [11] The issue is not frivolous. There are a number of *CCAA* cases where the debtor is a party to significant litigation in which there are a number of third parties who may be solidarily liable with the debtor to its creditors. In those cases, in order to reach a global settlement of all of the litigation relating to the debtor, the plan may allow third parties to contribute to a litigation pool with the debtor for the benefit of the creditors and to obtain a release. However, this case goes one step further and authorizes the Monitor to sue, on behalf of the creditors, third parties who decline to contribute to the litigation pool. There does not appear to be any precedent on this issue.
>
> [12] The issue is crucial to the file because the proceedings by the Monitor against the Canadian distributors and retailers, including the Petitioners, are a key feature of the Amended Plan and the validity of those proceedings goes to the acceptance of the plan by the creditors and the approval of the plan by the judge.
>
> [13] **It is also important to the practice because it goes to the serious issue as to the role and neutrality of the monitor in *CCAA* proceedings and the scope of the powers that can be granted to a monitor**. More specifically, the issue of whether the court can approve a plan that provides for the monitor instituting legal proceedings, on behalf of the creditors, against third parties who do not owe anything to the debtor is a novel

> issue and is of particular relevance in *CCAA* proceedings used to reach a global settlement of significant litigation involving third party co-defendants. [74]
>
> [References omitted -- Emphasis added.]

3. — Filing of a *CCAA* Plan of Arrangement

More rarely, courts have also allowed secured creditors to directly file a plan of arrangement and have same submitted to other creditors.

In 2001, the Superior Court of Ontario in *Anvil* ruled that a plan submitted by the secured creditors through an interim receiver [75] appointed by them as a result of all directors and officers resigning was fair and reasonable even though it offered nothing to unsecured creditors. In coming to that decision the Court insisted on the fact that the value of the company's assets was insufficient to yield any recovery to unsecured creditors and that it is not unreasonable for a court in such circumstances to sanction a plan which is directed solely at secured creditors. [76]

Anvil Range Mining Corporation ("Anvil") was the owner of a lead and zinc mine in the Yukon Territory. In 1990, Anvil applied for and received protection from its creditors under the *CCAA*. In 1998, Deloitte & Touche Inc had been appointed as the Interim Receiver ("IR") as a result of management resigning.

The hearing dealt with the application by the IR for the sanctioning of a plan of arrangement. The plan dealt with a series of complex priority disputes both within creditor classes and among creditor classes, as well as the allocation of funds in the IR's possession. The plan had been unanimously approved by the three groups of creditors in 2001. The unsecured creditors and the major shareholders objected to the plan because they asserted that the secured debt was lower than claimed and that the value of Anvil's assets was higher than suggested.

Justice Farley approved the plan, noting that it complied with all the statutory requirements and it was also fair and reasonable. It was determined that the IR exercised its judgment in a reasoned, practical and functional way.

The mere fact that the opponents of the plan were advocating an alternative did not imply that the IR had lost its neutrality. In fact, the alternatives proposed were unrealistic. Additionally, the plan was deemed fair because the secured claims were far in excess of the value of the assets.

> [11] While it is recognized that the main thrust of the CCAA is geared at a reorganization of the insolvent company -- or enterprise, even if the company does not survive, the CCAA may be utilized to effect a sale, winding up or a liquidation of a company and its assets in appropriate circumstances. See *Re Lehndorff General Partner Ltd.* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]) at p. 32; *Re Olympia & York Developments Ltd.* (1995), 34 C.B.R. (3d) 93 (Ont. Gen. Div. [Commercial List]) at p. 104. **Integral to those circumstances would be where a Plan under the CCAA would maximize the value of the stakeholders' pie.**
>
> [12] The CCAA permits a debtor to propose a compromise or arrangement with its secured creditors. A **Plan proposed solely to secured creditors is not unfair where the insolvent's assets are of insufficient value to yield any recovery to unsecured creditors. It is not unreasonable for a court in such circumstances to sanction a plan which is directly solely at secured creditors.** See *Olympia & York Developments Ltd. v. Royal Trust Co.* (1993), supra at pp. 513-8; *Re Philip Services Corp.*, [1999] O.J. No. 4232 (Ont. S.C.J. [Commercial List]) at paras. 20-1. That the plan does not include any agreement with a class a creditors does not, by virtue solely of that omission, make it unfair where that class is not being legally affected. Nothing is being imposed upon the unsecureds; none of their rights are being confiscated. See *Re Olympia & York* (1993), *supra* at pp. 508, 517-8. [...]

> [18] In my view, the approval of this Plan will allow the creditors (both secured and unsecured) and the shareholders of Anvil to move on with their lives and activities while the mining properties including the mine will be under proper stewardship. [...]
>
> [20] Mr. Aalto referred to *Royal Bank v. Fracmaster Ltd*., [1999] A.J. No. 675 (Alta. C.A.) at para. 16 with respect to the CCAA not being used to provide for a liquidation in a guise of a CCAA reorganization. But see my views above. **In any event, the IR has sought alternative relief allowing it to sell the assets, which sale would be on a commercially equivalent basis as the Plan under the CCAA contemplates. Given that the Plan would operate more efficiently in that respect, I see no reason to provide that this proceed as a sale by the IR**. [77]
>
> [Emphasis added.]

The reasoning of Justice Farley was soon reaffirmed by the Ontario Court of Appeal in *Bob-Lo Island*. [78] On 25 June 2004, an initial order was authorized against the debtor companies and on 22 November 2004, the plan of arrangement under the *CCAA* was sanctioned by the Court. Mr Randy Oram, a shareholder of one of the debtor companies and also an unsecured creditor, requested a leave to appeal of the sanctioned order. His main objection was that "the plan of arrangement is a secured-creditor-led plan that excludes the unsecured creditors from any realistic prospect of recovery, without requiring the secured creditors to go through the formal process of enforcing their security and without exposing the secured assets to the market." [79] Accordingly, the assets of the debtor company were to be disposed and the debtor company would not continue as a going concern.

The Ontario Court of Appeal dismissed the motion for leave to appeal. Concluding that Mr Oram had failed to establish an economic interest in the assets, the Court also noted that while there may be merit to the issue that the plan was contrary to the purposes of *CCAA*, Mr Oram had also failed to demonstrate that there is sufficient merit in that issue to justify granting leave to appeal in the circumstances of this case:

> [27] In this case, Randy Oram submits that there are serious and arguable grounds for suggesting that, by sanctioning Amico's Plan and granting a vesting order to a non-arm's length purchaser, the motion judge erred in the application of the legal principles for determining if a *CCAA* plan is fair and reasonable. In particular, the Randy Oram contends that the plan:
>
> **i)** is contrary to the broad, remedial purpose of the *CCAA*, namely to give debtor companies an opportunity to find a way out of financial difficulties short of other drastic remedies;
>
> **ii)** is a proposal by the secured creditors for the exclusive benefit of the secured creditors, designed to liquidate the property of the debtor companies **without regard to the interests** of the debtor companies, their lien claimants, **unsecured creditors** or shareholders;
>
> **iii)** does not provide for the continued operation of the debtor companies as going concerns;
>
> **iv)** does not provide for the marketing and sale of the property to maximize its value for all of the debtor companies' stakeholders;
>
> **v) rather than leaving unsecured creditors as an unaffected class, releases their claims against the property, the debtor companies, Amico, and the purchaser...**
>
> [30] [T]his is not the first time a secured-creditor-led plan, which operates exclusively for the benefit of secured creditors and under which the assets of the debtor company will be disposed of and the debtor company will not continue as a going concern, has received court approval: see *Re Anvil Range Mining Corp.* (2001), 25 C.B.R. (4th) 1 (Ont. S.C.J.), aff'd on other grounds [2002] O.J. No. 2606 (C.A.). (See also the discussion of the purposes of the *CCAA* in the cases referred to in *Re Anvil Range Mining Corp.*, *supra* at para. 11 (S.C.J.)).

> [31] **Moreover, the fact that unsecured creditors may receive no recovery under a proposed plan of arrangement does not, of itself, negate the fairness and reasonableness of a plan of arrangement**: *Re Anvil Range Mining Corp.*, *supra* at para. 31 (C.A.). [80]
>
> [Emphasis added.]

Bob-Lo Island and *Anvil*, while cautious in their approach, represented an arguably controversial shift in the evolution of the role of secured creditors under the *CCAA* and the use of the statute as a flexible and advantageous restructuring tool for secured creditors. [81]

V. — CONCLUSION

We can appreciate from the case law that the *CCAA* remains largely a debtor-driven process and that the monitor is to be considered, in the vast majority of cases, as the supervisory agent safeguarding the interest of a variety of stakeholders. This is in line with the historical, and dare we say, societal objective pursued by the legislator in enacting the *CCAA*.

The *CCAA* was enacted to offer an alternative to the liquidation path offered by the *BIA*; to counter the devastating consequences on a variety of stakeholders when a corporation fails and ceases its operations; and to preserve the going concern value of a business for the good of the greater pool of stakeholders. Although we have come to accept "liquidating *CCAA*s," the end result is usually a transfer of the assets required for a business to be continued, albeit under a new structure. Arguably, this is also in line with the *CCAA*'s objective, which is focused on preserving going concern operations of a struggling corporation.

To remove management from the helm of this restructuring process and extend the powers of the monitor accordingly is a measure that courts have cautiously limited to exceptional circumstances. In addition to adducing evidence that the *CCAA* process is likely to preserve going concern value of the business, it must be demonstrated to the court that either (i) management has resigned, leaving no directors and officers in place, (ii) management is unfit to conduct a restructuring process in a manner that would be in the best interest of all stakeholders, (iii) any potential restructuring path available would be doomed to fail, and/or that (iv) management is conflicted, notably because it is participating in the SISP under a *CCAA*.

Under those circumstances, courts have allowed the secured creditors to play a more active role in the restructuring process under a *CCAA*, be it through the appointment of a Chief Restructuring Officer, an interim receiver, or by the enhancement of the monitor's power to equate those of a *BIA* receiver.

As we have stated, the monitor's traditional role was not intended to exceed supervisory powers. This is also consistent with the fact that the monitor does not possess the required skill set to run a business on a long term basis -- management does. This is why we believe that courts have and continue to exercise caution in all such cases in order to ensure that the powers afforded to the monitor are absolutely necessary and justified by specific and special circumstances.

Footnotes

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1 *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 [*CCAA*].

2 *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 [*BIA*].

3 *Saskatchewan (Attorney General) v Lemare Lake Logging Ltd*, 2015 SCC 53, [2015] 3 SCR 419, 2015 CSC 53, 2015 CarswellSask 680, 2015 CarswellSask 681, 31 CBR (6th) 1, 391 DLR (4th) 383, [2016] 1 WWR 423, 477 NR 26, 467 Sask R 1, 651 WAC 1 (SCC) [*Lemare Lake*]. In *Lemare Lake*, the Supreme Court stated that delays to exercise secured rights provided by a provincial statute cannot be disregarded when appointing a receiver. The evidence showed a narrow purpose for s 243 of the *BIA*. It was determined

that a secured creditor, wishing to enforce its security against farm land, needed to wait 150 days under the provincial law, rather than the ten days imposed by the federal law: "General considerations of promptness and timeliness, no doubt a valid concern in any bankruptcy or receivership process, cannot be used to trump the specific purpose of s 243 and to artificially extend the provision's purpose to create a conflict with provincial legislation": *Lemare Lake* at para 68.

4 *Companies' Creditors Arrangement Act*, SC 1933, c 36.

5 *House of Commons Debates*, 17-4 (20 April 1933) at 4090-4091 (Hon CH Cahan).

6 *Senate Debates*, 17-4 (9 May 1933) at 474 (Rt Hon A Meighen).

7 Virginia Erica Torrie, *Protagonists of company reorganization: A history of Companies' Creditors Arrangement Act (Canada) and the role of large secured creditors* (PhD Thesis, University of Kent Law School, 2015) at 1.

8 *Ibid*.

9 *Farmers' Creditors Arrangement Act*, SC 1934, c 53.

10 *Reference re Companies' Creditors Arrangement Act (Canada)*, [1934] SCR 659, [1934] 4 DLR 75, 1934 CarswellNat 1, 16 CBR 1 (SCC); *British Columbia (Attorney General) v Canada (Attorney General)*, [1936] SCR 384, 17 CBR 359, 1936 CarswellNat 1, [1936] 3 DLR 610 (SCC), affirmed [1937] AC 391, [1937] 1 DLR 695, 1937 CarswellNat 1, 18 CBR 217, [1937] 1 WWR 320 (Jud Com of Privy Coun).

11 *The Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5 [*Constitution*].

12 Torrie, *supra* note 7 at 2-3.

13 Richard B Jones, "The Evolution of Canadian Restructuring: Challenges for the Rule of Law", in Janis P Sarra, ed, *Annual Review of Insolvency Law 2005* (Toronto: Carswell 2006) at 481.

14 *Century Services Inc v Canada (Attorney General)*, 2010 SCC 60, 2010 CarswellBC 3419, 2010 CarswellBC 3420, [2010] 3 SCR 379, 12 BCLR (5th) 1, 72 CBR (5th) 170, 326 DLR (4th) 577, [2011] 2 WWR 383, 296 BCAC 1, 2011 DTC 5006 (Eng), [2010] GSTC 186, 2011 GTC 2006 (Eng), 409 NR 201, 503 WAC 1, [2010] SCJ No 60 (SCC) at paras 15-18 [*Century Services*]; see also *Chef Ready Foods Ltd v HongKong Bank of Canada* (1990), 51 BCLR (2d) 84, 1990 CarswellBC 394, 4 CBR (3d) 311, [1991] 2 WWR 136, [1990] BCJ No 2384 (BCCA) at paras 10, 22 [*Hongkong Bank*]: "The purpose of the C.C.A.A. is to facilitate the making of a compromise or arrangement between an insolvent debtor company and its creditors to the end that the company is able to continue in business": *Hongkong Bank* at para 10.

15 *Century Services*, *ibid* at paras 59-60.

16 Senate, Standing Senate Committee on Banking, Trade and Commerce, *Debtors And Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act* (November 2003) (Chair: Hon Richard H Kroft) [Senate Report]: "From the perspective of fairness, the Committee too believes that the same priority rules should govern the distribution of the proceeds of realization of the debtor's assets, regardless of the insolvency legislation under which proceedings are occurring. For this reason, the Committee recommends that: The *Companies' Creditors Arrangement Act* be amended to incorporate the priority rules in the *Bankruptcy and Insolvency Act*" at 153.

17 Janis Sarra, "Reflections on a Decade of Financing Insolvency Restructurings", in Janis P Sarra, ed, *Annual Review of Insolvency Law 2012* (Toronto: Carswell, 2013) at 63.

18 For an in-depth comparison of liquidations under the *CCAA* and *BIA*, see Michelle Grant & Tevia R M Jeffries, "Having Jumped Off the Cliffs, When Liquidating Why Choose CCAA over Receivership (or vice versa)?", in Janis P Sarra, ed, *Annual Review of Insolvency Law 2013* (Toronto: Carswell, 2014).

19 Janis Sarra, *Rescue! The Companies' Creditors Arrangement Act*, 2nd ed (Toronto: Carswell, 2013) at 9; *Lemare Lake*, *supra* note 3.

20 Senate Report, *supra* note 16, at 176-177.

21 Bill Kaplan, "Liquidating *CCAA*s: Discretion Gone Awry?", in Janis P Sarra, ed, *Annual Review of Insolvency Law 2008* (Toronto: Carswell, 2009) at 88.

22 Torrie, *supra* note 7 at 313, 315.

23 *Ibid* at 288.

24 *Ibid* at 5.

25 David Bish, "Judicial Discretion in Insolvency Law" (2018) 7 *J Insolvency Inst Canada* 9.

26 *Hongkong Bank*, *supra* note 14 at para 10.

27 *Banque Laurentienne du Canada c Groupe Bovac Ltée*, EYB 1991-63766, 1991 CarswellQue 39, 9 CBR (3d) 248, 44 QAC 19, [1991] RL 593, [1991] JQ No 2509 (CA Que) at para 26.

28 *Re Canadian Red Cross Society* (1998), 5 CBR (4th) 299, 1998 CarswellOnt 3346, 72 OTC 99, [1998] OJ No 3306 (Ont Gen Div [Commercial List]) at para 45, leave to appeal to ONCA refused (1998), 32 CBR (4th) 21, 1998 CarswellOnt 5967, [1998] OJ No 6562 (Ont CA).

29 *Re Fracmaster Ltd*, 1999 ABQB 379, 11 CBR (4th) 204, 1999 CarswellAlta 461, 245 AR 102, [1999] AJ No 566 (Alta QB), affirmed 1999 ABCA 178, 1999 CarswellAlta 539, 244 AR 93, 11 CBR (4th) 230, 209 WAC 93, [1999] AJ No 675 (Alta CA) at paras 40-43.

30 *Royal Bank v Fracmaster Ltd*, 1999 ABCA 178, 1999 CarswellAlta 539, 244 AR 93, 11 CBR (4th) 230, 209 WAC 93, [1999] AJ No 675 (Alta CA) at para 16.

31 *Re Papiers Gaspésia Inc (Faillite)*, 2004 CanLII 41522, 2004 CarswellQue 4113, REJB 2004-80394 (CS Que), leave to appeal refused 2004 CarswellQue 10014, REJB 2004-81503, 9 CBR (5th) 103, 42 CLR (3d) 137, [2004] JQ No 13392 (CA Que) [*Papiers Gaspésia*].

32 *Ibid* at paras 50-54.

33 *Cliffs Over Maple Bay Investments Ltd v Fisgard Capital Corp*, 2008 BCCA 327, 2008 CarswellBC 1758, 83 BCLR (4th) 214, 46 CBR (5th) 7, 296 DLR (4th) 577, [2008] 10 WWR 575, 258 BCAC 187, 434 WAC 187, [2008] BCJ No 1587 (BCCA) at para 32.

34 *Century Services*, *supra* note 14.

35 As noted in *Montreal, Maine & Atlantic City Canada Co. (Arrangement relatif à)*, 2014 QCCS 737, 2014 CarswellQue 1559, EYB 2014-233970 (Que Bktcy) [*Lac Mégantic*].

36 *Re Fairmont Resort Properties Ltd*, 2012 ABQB 39, 532 AR 209 (Alta QB) at para 26 [*Fairmont*].

37 *Re Anvil Range Mining Corp*, 2001 CarswellOnt 1325, [2001] OJ No 1453, 25 CBR (4th) 1 (Ont SCJ [Commercial List]), affirmed on other grounds 2002 CarswellOnt 2254, [2002] OJ No 2606, 34 CBR (4th) 157 (Ont CA), additional reasons 2002 CarswellOnt 3687, 38 CBR (4th) 5, [2002] OJ No 4176 (Ont CA), leave to appeal refused 2003 CarswellOnt 730, 2003 CarswellOnt 731, 310 NR 200 (note), 180 OAC 399 (note) (SCC) [*Anvil*].

38 *Fairmont*, *supra* note 36 at para 17, citing *ibid* at para 11.

39 *Ibid* at para 20.

40 *Ibid* at para 26.

41 *Ibid* at para 22.

42 *Ibid* at para 30.

43 *Arrangement relatif à Bloom Lake*, 2017 QCCS 4057, 2017 CarswellQue 7483, EYB 2017-284304, 52 CBR (6th) 45, 35 CCPB (2nd) 220 (CS Que), varied 2017 QCCA 1828, 2017 CarswellQue 10159, EYB 2017-287116, 54 CBR (6th) 255, 38 CCPB (2nd) 1 (CA Que), application/notice of appeal 2018 CarswellQue 1574 (SCC) [*Bloom Lake*].

44 *Ibid* at para 164.

45 *Ibid* at para 162.

46 *Ibid* at para 163.

47 *Ibid* at para 164.

48 *Ibid* at para 160.

49 *Ibid* at para 174.

50 *Lac Mégantic*, *supra* note 35 at paras 71, 104: "Bien que le soussigné aurait été porté à privilégier la thèse que la LACC et la LFI sont deux régimes distincts qui s'appliquent à deux types de situations distinctes et qui servent des objectifs distincts, les amendements apportés à la LACC et le cas particulier du présent dossier militent pour la possibilité de permettre la liquidation des actifs sous la LACC" at para 104.

51 *Arrangement de MPECO Construction Inc*, 2019 QCCS 297, 2019 CarswellQue 730, EYB 2019-306949, 67 CBR (6th) 87 (Que Bktcy) [*MPECO Construction*].

52 *Ibid* at paras 34-35, 44-45.

53 *Third Eye Capital Corporation v Ressources Dianor Inc*, 2019 ONCA 508, 2019 CarswellOnt 9683, 70 CBR (6th) 181, 435 DLR (4th) 416, 3 RPR (6th) 175 (Ont CA), additional reasons 2019 ONCA 667, 2019 CarswellOnt 13563 (Ont CA) at para 71.

54 *Re Sears Canada Inc*, Toronto, Ont SCJ [Commercial List] CV-17-11846-00CL.

55 Bill C-97, *An Act to implement certain provisions of the budget tabled in Parliament on 19 March 2019 and other measures,* 1st Sess, 42nd Parl (assented to 21 June 2019), SC 2019, c 29.

56 *Re Crystallex International Corp*, 2011 ONSC 7701, 2011 CarswellOnt 15034, 89 CBR (5th) 313 (Ont SCJ [Commercial List]) at para 26, affirmed 2012 ONCA 404, 2012 CarswellOnt 7329, 4 BLR (5th) 1, 91 CBR (5th) 207, 293 OAC 102 (Ont CA), additional reasons 2012 ONCA 527, 2012 CarswellOnt 9479 (Ont CA), leave to appeal refused 2012 CarswellOnt 11931, 2012 CarswellOnt 11932, 440 NR 395 (note), 303 OAC 398 (note), [2012] SCCA No. 254 (SCC) [*Crystallex*].

57 *Ibid* at paras 20-21, 26-27.

58 *Enterprise Capital Management Inc v Semi-Tech Corp*, [1999] OJ No 5865, 1999 CarswellOnt 2213, 10 CBR (4th) 133 (Ont SCJ [Commercial List]) [*Semi-Tech*].

59 *Ibid* at para 6.

60 *Ibid* at paras 23, 25.

61 *Re Le Groupe SMI Inc, et al* (24 August 2018), Montreal, Que SC 500-11-055122-184 [*SM Group*].

62 *Re Taxelco Inc, et al* (1 February 2019), Montreal, Que SC 500-11-055956-193 [*Taxelco*].

63 *Re Sural Inc, et al* (11 February 2019), Montreal, Que SC 500-11-056018-191 [*Sural*].

64 *Miniso International Hong Kong Limited v Migu Investments Inc*, 2019 BCSC 1234, 2019 CarswellBC 2208, 71 CBR (6th) 250 (BCSC) at para 45 [*Miniso*].

65 *Ibid* at paras 47, 102.

66 *Ibid* at paras 52-53.

67 *Semi-Tech*, *supra* note 58 at para 25.

68 *Re BioAmber Canada Inc, et al* (31 July 2018), Montreal, Que SC 500-11-054564-188 [*BioAmber*].

69 *Re ILTA Grain Inc* (8 July 2019), Vancouver, BC SC S-197582 [*ILTA Grain*].

70 *Ibid* (16 July 2019) (Monitor's First Report).

71 *Ibid* (18 July 2019) (Order Made After Application).

72 *Arrangement relatif à 9323-7055 Québec inc (Aquadis International Inc)* (4 July 2019), Montreal, Que SC 500-11-049838-150, leave to appeal to QCCA granted (20 August 2019), Montreal, Que CA 500-09-028436-194, 500-09-028474-195, 500-09-028476-190 [*Aquadis*].

73 *Ibid* at paras 11-13.

74 *Ibid* at paras 11-13.

75 *Anvil*, *supra* note 37: "I would further point out that while secured creditors had the opportunity of filing a Plan, they did not so but rather they agreed amongst themselves that the authorized alternate, the IR, do so" at para 9.

76 *Ibid*.

77 *Ibid* at paras 11,12, 18, 20.

78 *Re 1078385 Ontario Ltd*, [2004] OJ No 6050, 2004 CarswellOnt 8034, 16 CBR (5th) 152, 206 OAC 17 (Ont CA) [*Bob-Lo Island*].

79 *Ibid* at para 3.

80 *Ibid* at paras 27, 30-31, 42.

81 *Caterpillar Financial Services v 360networks corporation et al*, 2007 BCCA 14, 2007 CarswellBC 29, 61 BCLR (4th) 334, 27 CBR (5th) 115, 279 DLR (4th) 701, 28 ETR (3d) 186, 235 BCAC 95, 10 PPSAC (3d) 311, 388 WAC 95, [2007] BCJ No 22 (BCCA) at para 46.

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

AND IN THE MATTER OF THE COMPROMISE OR ARRANGEMENT OF HUDSON'S BAY COMPANY ULC COMPAGNIE DE LA BAIE D'HUDSON SRI et al.

Court File No. CV-25-00738613-00CL

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BOOK OF AUTHORITIES OF THE FILO AGENT
(FILO AGENT'S MOTION RETURNABLE AUGUST 28, 2025)

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