

COURT FILE NUMBER

2403 10147

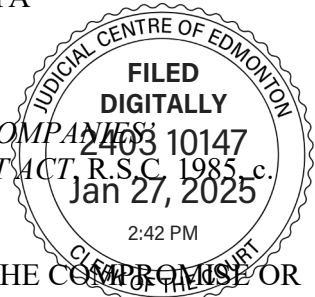
COURT

KING'S BENCH OF ALBERTA

JUDICIAL CENTRE

EDMONTON

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 ALTEK INDUSTRIAL
SUPPLY LTD., ALTEK USA HOLDINGS CORP.,
ALTEK SUPPLY USA INC., HDIM PROTECTIVE
COATINGS INC., and 610461 ALBERTA LTD.

APPLICANT(S)

MICHAEL ATEMA and ALTEK ACQUISITION
PARTNERSHIP

RESPONDENT(S)

PRICEHOUSECOOPERS INC., IN ITS CAPACITY
AS COURT-APPOINTED MONITOR OF ALTEK
INDUSTRIAL SUPPLY LTD., ALTEK USA
HOLDINGS CORP., ALTEK SUPPLY USA INC.,
HDIM PROTECTIVE COATINGS INC., AND 610461
ALBERTA LTD.

DOCUMENT

BENCH BRIEF OF THE APPLICANT

ADDRESS FOR SERVICE AND
CONTACT INFORMATION OF
PARTY FILING THIS
DOCUMENT

HGA LAW

200, 16011 – 116 Street NW
Edmonton, AB T5M 3Y1

Attention: Mandi A. Deren-Dube

Telephone: (780) 489-9750

Fax No.: (587) 701-5002

Email: mdereendube@hgalaw.ca

File No.: 2241-00012

TABLE OF CONTENTS

I.	INTRODUCTION	3
II.	BACKGROUND FACTS	3
A.	The Parties	4
B.	Background to CCAA Proceedings	4
C.	CCAA Procedural History	6
D.	The Investigation and PWC's conduct toward Mike Atema	9
III.	ISSUES	12
IV.	ARGUMENT	12
A.	The Applicants have standing to seek relief under s. 11 of the CCAA	12
B.	It is appropriate for the Court to exercise its discretion to terminate the investigatory powers of PWC	13
C.	In the alternative, the Court should set aside the Amended Notice of Appointment for Questioning or otherwise limit the scope of the Investigation	15
V.	REQUESTED RELIEF	17
VI.	INDEX OF AUTHORITIES	18

I. INTRODUCTION

1. This Brief of Law is submitted on behalf of the Applicants, Michael Atema (“**Mike Atema**”) and Altek Acquisition Partnership (“**AAP**”) (collectively, the “**Applicants**”), in support of their application for an Order under the *Companies’ Creditors Arrangement Act*, RSC 1985, c C-36, as amended¹ (the “**CCAA**”) which if granted would:
 - a. Terminate the investigatory powers granted to PricewaterhouseCoopers Inc. (“**PWC**” or the “**Monitor**”), in its capacity as court-appointed Monitor of Altek Group in these proceedings (the “**CCAA Proceedings**”);
 - b. In the alternative, limit the scope of the Monitor’s investigation to specific issues which are likely to enhance the value of the Altek Group’s estate, or maximize recovery to the Altek Group’s creditors;
 - c. Further, or in the alternative, set aside the Amended Notice of Appointment for Questioning issued by the Monitor, requiring Mike Atema to attend for Questioning on February 5 and 6, 2025 (the “**Atema Questioning**”); and
 - d. Further, or in the alternative, require the Monitor to particularize what records it requires or otherwise limiting the records to be brought to the Atema Questioning.
2. Mike Atema has filed an Affidavit, sworn on January 27, 2025, (the “**Atema Affidavit**”) in support of this Application. Words and phrases contained in this Brief of Law which begin with capital letters, but which are not expressly defined herein shall have the corresponding meanings ascribed to them in the Atema Affidavit.

II. BACKGROUND FACTS

3. The facts relevant to this Application are set out in detail in the Atema Affidavit. A summary of the key facts as they relate to the relief requested in this Application is set out below.

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

A. The Parties

4. Altek was until recently a distributor of valves and coatings used in a variety of liquid-control applications, including oil, gas, water and chemical wastewater. The majority of its products are utilized for maintenance in the oil and gas sector. As set out below, as a result of the CCAA Proceedings, the Altek Group is no longer operational.
5. Until the commencement of the CCAA Proceedings, Mike Atema was the sole director of the Altek Group.
6. All of the entities in the Altek Group are directly or indirectly owned by AAP. AAP is a partnership between two corporations, which are owned and controlled by the Atema Family Trust and the Mike Atema Family Trust (the “**Atema Trusts**”). Mike is also the sole director of AAP.
7. The Atema Trusts are discretionary trusts, which exist for the benefit of all of Fred Atema’s children, their spouses, and their grandchildren, and are controlled by trustees, which include Mike Atema and his father, Fred Atema.
8. Fred Atema owns and controls 1986154 Alberta Ltd. and Altek Industrial Holdings Ltd. (the “**Fred Atema Cos**”), which own the building that Altek formerly operated out of.
9. Canadian Imperial Bank of Commerce (“**CIBC**”) is the senior secured creditor and was the principal source of secured financing for the Altek Group. As at the date of commencement of these CCAA Proceedings, the Altek Group owed CIBC in excess of \$25,000,000.
10. The Fred Atema Cos and AAP provided financial assistance to the Altek Group prior to the CCAA, and collectively represent the largest secured and unsecured creditor of Altek next to CIBC. The amounts owed by the Altek Group to AAP, Mike Atema, and the Fred Atema Cos total in excess of \$15.9 million.

B. Background to CCAA Proceedings

11. On or around May 1, 2024, Mike Atema advised FTI that the borrowing base certificate delivered to CIBC on April 25, 2024 setting out the borrowing base calculation as of April

- 19, 2024 significantly overstated that borrowing base collateral.
12. On or around May 3, 2024, FTI communicated this to PWC, who communicated it to CIBC. As a result, CIBC demanded payment in full of the indebtedness owed, and issued section 244 notices.
 13. Mike Atema retained insolvency counsel on behalf of Altek, and fully cooperated with CIBC in the weeks following, including by providing full access to Altek's premises and operations and informally handing over control of Altek to CIBC's advisor, PWC.
 14. Prior to commencement of the CCAA Proceedings, Mike Atema took a number of steps to show his commitment to working collaboratively with CIBC and PWC and maximizing the recovery to Altek's creditors, including, *inter alia*:
 - a. Upon receipt of the demands and section 244 notices, Mike Atema waived the 10-day notice period and consented to the appointment of a Receiver;
 - b. In consultation with PWC, Mike Atema took steps to immediately reduce operating costs to critical costs only;
 - c. He worked diligently with PWC and CIBC to explain the Altek Group's business model and the relationship between Altek and its critical supplier, DHV Industries Inc ("**DHV**");
 - d. He took steps to relocate assets from the USA to Canada entirely for the benefit of CIBC, at some personal risk to himself in his capacity as a Director, to avoid the necessity and expense of foreign proceedings;
 - e. He worked to secure alternative DIP financing from Robert Bertram ("**Bertram**"), so that CIBC would not need to risk any more money;
 - f. He secured an offer from the prior owners of HDIM to purchase HDIM as a going concern, and generated significant interest among prospective purchasers in Altek's assets and operations;

- g. He leveraged his own reputation and goodwill to secure the buy in of employees and customers of Altek, to allow PWC time to run a sales process; and
 - h. He agreed to resign as director of the Altek Group, to consent to enhanced powers of the Monitor, and to stay on as an employee of the Altek Group to assist the Monitor in maximizing recovery to the Altek Group's creditors.
- 15. CIBC elected to fund the CCAA Proceedings itself and declined the offer of alternative DIP Financing. Mike Atema then obtained an offer from Bertram to put up a stalking horse bid for Altek as a going concern.

C. CCAA Procedural History

- 16. On May 24, 2024 (the “**Filing Date**”), with the consent and support of Mike Atema, CIBC sought and obtained an initial order (the “**Initial Order**”) under the CCAA from the Court of King's Bench of Alberta (the “**Court**”), appointing PWC as Super Monitor of the Altek Group.
- 17. On May 31, 2024, again with Mike Atema's consent and cooperation, an Amended and Restated Initial Order (the “**ARIO**”) was granted, pursuant to which the Monitor was also granted the enhanced power to:

Conduct investigations from time to time, including, without limitation, to compel the production from any person having possession, custody, or control of any books, records, accountings, documents, correspondences or papers, electronically stored or otherwise, relating to the Debtors and the Debtor's businesses and to compel examinations under oath of any person reasonably thought to have knowledge relating to the Debtors and the Debtor's businesses. (the “**Investigatory Powers**”).
- 18. As a direct result of Mike Atema's cooperation and effort to assist PWC with understanding Altek's operations, Altek was able to continue operating for several months following the Filing Date, while PWC ran a sales process (the “**Sales Process**”).
- 19. However, PWC failed, refused, or neglected to consider the good faith offer to purchase the company as a going concern by Bertram. PWC made no attempts to market the company as

a going concern, and failed to even reach out to Bertram about his offer, despite repeated follow-ups from his counsel.

20. PWC ultimately received 10 non-binding offers, 5 of which were limited to the purchase of equipment. PWC reviewed the offers and selected the offer that it believed maximized recovery to estate creditors, and in particular CIBC.
21. Notwithstanding the fact that Mike Atema did not agree with the approach taken by PWC during the sales process, and did not agree that they obtained the highest and best value in the circumstances, he did not object or in any way interfere with the offer accepted by PWC for the sale of the inventory, which was supported by CIBC. As a result, an Approval and Vesting Order was granted on August 8, 2024, which authorized the sale of all of Altek's inventory and equipment (the "**Purchased Assets**") to PJ Valve (the "**Sale**"), pursuant to an asset purchase agreement dated July 29, 2024 (the "**APA**").
22. Based upon the express terms of the APA, the Applicants understand that Altek continued to retain ownership of any other assets in Altek's possession as at the date of the APA other than the Purchased Assets, which include but are not limited to:
 - a. Any and all civil claims in existence as at the Closing Date, including a claim against Denso, one of Altek's former suppliers (the "**Claims**");
 - b. Any accounts receivable or other receivables existing as at the Closing Date (the "**Accounts Receivable**");
 - c. All other tangible and intangible property, assets, interests, rights, claims and contracts related to the business;
 - d. All rights in and to (a) patents, patent applications and patent disclosures, including without limitation, the patents, (b) trademarks, trade names and corporate names and including all goodwill associated therewith, (c) works of authorship, copyrightable works, copyrights, (d) Internet addresses, domain names, websites and web pages, and (e) any and all other intellectual property and proprietary rights (the "**Altek IP**").

- e. The real property located in Millet, Alberta, having a municipal address of 5515 – 53 Ave and the following legal land description:

PLAN 7520053
BLOCK 3
LOT 28
EXCEPTING THEREOUT ALL MINES AND MINERALS

(the “**Millet Property**”)

- f. All rights in and to the computer hardware, software in source code and object code form (including documentation, interfaces and development tools), websites for the Business, databases, telecommunications equipment and facilities and other information technology systems owned, used or held by the Corporation for use in or relating to the Business (the “**Altek Software**”).

(collectively, the “**Residual Assets**”).

- 23. The Monitor’s 3rd Report dated November 20, 2024 indicates that since the Sale, the Monitor has, among other things, undertaken the following activities:
 - 24. Closed the Transaction with PJ Valve and, post-closing, ceased physical operations and vacated all physical premises;
 - 25. Engaged with PJ Valve and its counsel and the landlord at Altek Supply USA Inc.’s former Houston locations, with respect to certain assets that PJ Valve considered to be part of the Transaction, which were discovered post-closing to be located at Altek Supply USA Inc.’s former Houston location and not in Edmonton;
 - 26. Continued to pursue the collection of outstanding receivables; and
 - 27. Continued its investigation (the “**Investigation**”) into the matters surrounding the fictitious sales entries and Altek’s in Transit Inventory, as described in the Sarin Affidavit.
- 28. On November 26, 2024, upon the Application of the Monitor, the Honourable Justice D.R. Mah granted an Order extending the stay period from November 30, 2024 to March 31, 2025.

29. The reasons for the stay extension requested by the Monitor were to provides the Altek Group with additional time required to: (a) complete the administration of the CCAA proceedings, which will be to the benefit of the stakeholders of the Altek Group; and (b) further the Investigation.

D. The Investigation and PWC's conduct toward Mike Atema

30. Notwithstanding Mike Atema's full cooperation and efforts to assist with operations and the sales process, PWC's conduct toward Mike Atema became increasingly adversarial following the Filing Date.
31. As a result of this conduct, on July 24, 2024, Mike Atema resigned as CEO of Altek.

32. Specific examples of this conduct include:

- a. PWC took steps to alienate Mike Atema from Altek's staff and customers, and misrepresented the reasons for excluding him from communications with customers;²
- b. PWC accused him of theft of a number of valves, and cut off his access to the premises on this basis, notwithstanding the fact that he explained to PWC that he had delivered the valves to a potential customer, in accordance with the purpose for which they were intended, and immediately arranged to have them returned;³
- c. PWC accused Mike Atema of improperly retaining a Ford truck and demanded that it be returned 7 months after the Filing Date. They subsequently refused to compensate the company that had taken over the lease payments and arranged for the truck to be repossessed, notwithstanding the fact that PWC was at all times aware that the truck was going to be transferred;⁴
- d. PWC accepted delivery of product from a supplier of Altek, sold the products, and subsequently refused to pay the supplier. PWC then directed the supplier to pursue Mike Atema personally, notwithstanding the fact that Altek received the proceeds of the sale of the product;⁵
- e. PWC made no attempts to contact Mike Atema or his counsel or ask any questions of him in furtherance of the Investigation, notwithstanding the fact that he had provided his full cooperation to date. They also made no attempt to contact his counsel to arrange Questioning dates, but instead personally served a family member at his residence with a Notice to Attend Questioning;⁶
- f. PWC refused to provide the documents they intended to put to Mike Atema during Questioning, despite his counsel's advice that these documents were necessary to allow him to meaningfully prepare for Questioning. They subsequently provided 559 separate documents to counsel one week prior to the date Questioning was scheduled to occur, and refused to consent to an adjournment of Questioning unless it was on specific terms.⁷

33. PWC has failed to share specifics about any steps taken in furtherance of the Investigation, but to the best of the knowledge of the Applicants, the Monitor has taken the following steps:
- a. PWC has obtained back-ups of the outlook mailboxes for Mike Atema, several of Altek's employees, and his family members;
 - b. PWC has contacted Mike Atema's golf club and made inquiries about his personal golf membership, without prior notice to Mike Atema; and
 - c. PWC has already conducted Questioning on a number of former employees of Altek.
34. PWC is now seeking to examine Mike Atema in furtherance of the Investigation. However, the Applicants have concerns about the examinations of Altek employees that have been conducted to date, and the utility of continued examinations.
35. The examinations that have been conducted to date appear to be more focused on Mike Atema's involvement in the creation of the fictitious Accounts Receivable and on his personal financial situation than they are on issues which would assist PWC in understanding the business operations or on facilitating recovery of assets.
36. It is clear from PWC's conduct to date and from the examinations that have already occurred that the focus of the Investigation being conducted by PWC is aimed at building a civil case against Mike Atema personally, and not on maximizing value to the estate.
37. This is particularly problematic when viewed in light of the fact that PWC had also been retained by CIBC for a year leading up to the CCAA Proceedings, to monitor Altek's financial situation, and it is possible that they may also have civil exposure for Altek's losses.
38. Notably, the expense being incurred by PWC on the Investigation only serves to increase CIBC's losses, which will ultimately be borne by the party responsible for the creation of the fictitious accounts receivable. This objective is not consistent with the purpose or intention of the CCAA.

III. ISSUES

39. This Application raises the following issues for determination by the Court:
- a. Do the Applicants have standing to seek relief under *CCAA* s. 11?
 - b. Is it appropriate for the Court to exercise its discretion to terminate the investigatory powers granted to PWC?
 - c. In the alternative, should this Court set aside the Amended Notice of Appointment for Questioning, or otherwise limit the scope of Questioning and the records required to be produced?

IV. ARGUMENT

A. The Applicants have standing to seek relief under s. 11 of the CCAA

40. The Monitor was appointed under the CCAA, which is very flexible legislation. The Court has broad authority pursuant to section 11 to make any order that it considers appropriate and in furtherance of the objectives of the CCAA.⁸

General power of court

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

41. Any party with an interest in the CCAA proceedings may bring forward an application.
42. Mike Atema is clearly an interested party, as the former director of the Altek Group and the recipient of a Notice to Attend.
43. AAP is also an interested party as the next largest creditor next to CIBC. The Monitor's conduct, specifically where that conduct serves to increase the shortfall between the amounts recovered and the amounts owing to CIBC and the other creditors, has a clear impact on all

⁸ CCAA, supra note 1 at s 11, **TAB 1**.

other creditors. To the extent that the costs of an investigation serve to increase the amounts owing to CIBC, this also impacts any party that CIBC may pursue civil proceedings against.

44. The Applicants submit that appropriate circumstances exist in this Application for the Court to grant an Order under the *CCAA*.

B. It is appropriate for the Court to exercise its discretion to terminate the investigatory powers of PWC

45. The Order granting PWC the Investigatory Powers was granted pursuant to section 11 of the *CCAA*. The Court also has the authority to grant an order terminate the investigatory powers granted to PWC, as Monitor, as a result of its broad jurisdiction under s. 11 of the *CCAA*.

46. The Supreme Court of Canada has confirmed that Canadian courts have wide discretion under the broad language of section 11 to make an order that may be appropriate under the circumstances and context, with a few restrictions. However, the discretionary authority conferred by the *CCAA*, while broad in nature, is not boundless. The authority must be exercised in furtherance of the remedial objectives of the *CCAA*.⁹

47. The Investigatory Powers granted to the Monitor in these circumstances are akin to the powers granted to Investigatory Receivers. In *Akagi v Synergy Group (2000) Inc.*¹⁰, the Ontario Court of Appeal confirmed the potential utility of investigative receivers, but simultaneously set aside the specific investigative receivership under appeal.

[65] The idea of appointing a receiver or monitor with investigative powers -- and sometimes, with only those powers -- has emerged in recent years... Suffice it to say that the idea of appointing a receiver to investigate into the affairs of a debtor is not itself unsound. Rather, it is the runaway nature of the use to which the concept has been put in this case that gives rise to the problem.

[67] ... the appointment of a receiver is an extraordinary and intrusive remedy and one that should be granted only after a careful balancing of the effect of such an order on all of the parties and others who may be affected by the order. In the case of a receivership in aid of

⁹ 19354-9186 *Québec Inc. v Callidus Capital Corp.*, 2020 SCC 10, at paras 48-49, **TAB 2**.

¹⁰ *Akagi v. Synergy Group (2000) Inc.*, 2015 ONCA 368 [**Akagi**], **TAB 3**.

execution, at least, the appointment requires evidence that the creditor's right to recovery is in serious jeopardy. It is the tension between these two considerations that defines the parameters of receivership orders in aid of execution.

48. In *Akagi*, the Court went on to note that a number of consistent themes emerge from the case law relating to investigatory receiverships:

- a. The appointment of the investigative receiver is necessary to alleviate a risk posed to the plaintiff's right to recovery: *Loblaw Brands*, at paras. 10, 14 and 16.
- b. The primary objective of investigative receivers is to gather information and "ascertain the true state of affairs" concerning the financial dealings and assets of a debtor, or of a debtor and a related network of individuals or corporations: *General Electric (Div. Ct.)*, at para. 15. One authority characterized the investigative receiver as a tool to equalize the "informational imbalance" between debtors and creditors with respect to the debtor's financial dealings: *East Guardian SPC v. Mazur*, *supra*, at para. 75.
- c. Generally, the investigative receiver does not control the debtor's assets or operate its business, leaving the debtor to continue to carry on its business in a manner consistent with the preservation of its business and property: see, e.g., *Loblaw Brands*, at para. 17; *Century Services*.
- d. Finally, in all cases the investigative receivership must be carefully tailored to what is required to assist in the recovery of the claimant's judgment while at the same time protecting the defendant's interests, and to go no further than necessary to achieve these ends.

49. As with all Orders made under section 11 of the CCAA, the Applicant submits that the investigatory powers must also be consistent with the purpose and intention of the CCAA Proceedings.

50. The Applicants submit that an Order is appropriate in the circumstances, for a number of reasons:

- a. The ARIO and the Investigatory Powers were granted on May 31, 2024. The purpose of the CCAA Proceedings was to allow the Altek Group the flexibility to coordinate a restructuring in a manner that maximizes value for all stakeholders.¹¹
- b. The enhanced powers of the Monitor, including the Investigatory Powers, were necessary in the circumstances, to ensure that the Altek Group could continue to operate and to assist with the restructuring or sale of the business. At the time, the enhanced powers were warranted due to the circumstances that gave rise to the filing, and the informational imbalance between the Creditors and the Applicants.
- c. This informational imbalance is no longer applicable, as the Monitor has been in control of Altek since that time, and has been granted full access to all of Altek's records.
- d. The purpose of the CCAA Proceedings has also been accomplished, as the Altek Group has now ceased operations and has been substantially liquidated.
- e. Allowing the Monitor unfettered access to examine witnesses on all topics, including Mike Atema's personal life and his financial situation, is unjustifiable overreach of the Investigatory Powers granted to the Monitor.

51. For all of the foregoing reasons, the Applicants submit that it is appropriate for the Court to exercise its discretion to terminate the investigatory powers of PWC.

C. In the alternative, the Court should set aside the Amended Notice of Appointment for Questioning or otherwise limit the scope of the Investigation

52. When considering the appropriateness of the Monitor's issuance of the Notice of Appointment for Questioning, it is necessary to understand what authority the Monitor derives the power to compel a party to attend Questioning.

¹¹ Pre-filing report of the Monitor dated May 23, 2024 (the "Pre-filing Report") at para 49.

53. Of note, Section 163(1) of the *BIA* vests a bankruptcy trustee with the authority to examine a bankrupt under oath, without a court order, providing the bankruptcy creditors have passed an ordinary resolution, or have tendered a written request, or, providing there is a resolution of the majority of inspectors. Section 163(2) gives the court the discretion to allow a creditor to examine a bankrupt if a set of criteria are met.¹² The difference between the scope of a trustee's authority to examine a bankrupt and the scope of authority vested in a bankruptcy creditor reflects differences between the bankruptcy process and the civil process.
54. While PWC is a licensed insolvency trustee, it is worth noting that PWC's authority to question parties with knowledge of the debtor's affairs is not derived from the *BIA* in this case. PWC was appointed as CIBC's agent for the purposes of monitoring the financial affairs of Altek for a year prior to the CCAA Proceedings. They were then appointed as Monitor by CIBC, for the purposes of realizing on CIBC's security.
55. PWC derives their authority to question parties from the express wording of the ARIO, which was granted pursuant to the provisions of the CCAA. As set out above, this authority must be exercised in furtherance of the remedial objectives of the CCAA.
56. A Monitor or trustee must also act honestly and in good faith and comply with the code of ethics prescribed by the *BIA*.¹³ Where a monitor fails to act fairly and impartially, they are in breach of this duty.¹⁴ This will occur where the monitor favours the interest of one creditor over the interests of the debtor or the other creditors.
57. Throughout these proceedings, they have taken direction from CIBC and acted for CIBC's benefit. This is evidenced by both their conduct toward suppliers and customers, the scope of questioning that has occurred to date, and the fact that they involved CIBC in the examinations of Altek employees, but did not involve any other parties.

¹² *Gherasim (Re)*, 2021 SKQB 194 at paras 6-7, **TAB 4**.

¹³ *Bankruptcy and Insolvency General Rules* (C.R.C., c. 368), at sections 34 to 52, **TAB 5**.

¹⁴ Roderick J. Wood, *Bankruptcy and Insolvency Law*, Second Edition at pages 430 and 431, **TAB 6**.

58. This is also evident by the fact that PWC intentionally excluded Mike Atema and AAP from Altek's operations and even from the sales process, notwithstanding his demonstrated commitment to cooperating and maximizing recovery.
59. The Applicants submit that PWC's conduct to date has not been in accordance with the purpose and objective of this CCAA Proceeding, and has instead been aimed at building a civil case against Mike Atema.
60. Where this is done at Altek's expense and results in an increase in the amounts owing to CIBC, which will ultimately be borne by whatever party is liable for the loss, this is not in the interests of the Debtor or the other Creditors.

V. REQUESTED RELIEF

61. For the foregoing reasons, the Applicants respectfully request that this Honourable Court grant an Order terminating the Investigatory Powers of the Monitor, substantially in the form attached to the Application.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 27th day of January, 2024.

HGA LAW

Mandi Deren-Dubé

Mandi Deren-Dubé
Counsel for the Applicants

VI. INDEX OF AUTHORITIES

TAB	DESCRIPTION
	<i>Companies' Creditors Arrangement Act</i> , RSC 1985, c C-36
	19354-9186 Québec Inc. v Callidus Capital Corp., 2020 SCC 10
	<i>Akagi v. Synergy Group (2000) Inc.</i> , 2015 ONCA 368
	<i>Gherasim (Re)</i> , 2021 SKQB 194
	<i>Bankruptcy and Insolvency General Rules</i> (C.R.C., c. 368)
	Roderick J. Wood, <i>Bankruptcy and Insolvency Law</i> , Second Edition



CANADA

CONSOLIDATION

CODIFICATION

Companies' Creditors Arrangement Act

Loi sur les arrangements avec les créanciers des compagnies

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

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

Current to December 15, 2024

À jour au 15 décembre 2024

Last amended on December 12, 2024

Dernière modification le 12 décembre 2024

OFFICIAL STATUS OF CONSOLIDATIONS

Subsections 31(1) and (2) of the *Legislation Revision and Consolidation Act*, in force on June 1, 2009, provide as follows:

Published consolidation is evidence

31 (1) Every copy of a consolidated statute or consolidated regulation published by the Minister under this Act in either print or electronic form is evidence of that statute or regulation and of its contents and every copy purporting to be published by the Minister is deemed to be so published, unless the contrary is shown.

Inconsistencies in Acts

(2) In the event of an inconsistency between a consolidated statute published by the Minister under this Act and the original statute or a subsequent amendment as certified by the Clerk of the Parliaments under the *Publication of Statutes Act*, the original statute or amendment prevails to the extent of the inconsistency.

LAYOUT

The notes that appeared in the left or right margins are now in boldface text directly above the provisions to which they relate. They form no part of the enactment, but are inserted for convenience of reference only.

NOTE

This consolidation is current to December 15, 2024. The last amendments came into force on December 12, 2024. Any amendments that were not in force as of December 15, 2024 are set out at the end of this document under the heading “Amendments Not in Force”.

CARACTÈRE OFFICIEL DES CODIFICATIONS

Les paragraphes 31(1) et (2) de la *Loi sur la révision et la codification des textes législatifs*, en vigueur le 1^{er} juin 2009, prévoient ce qui suit :

Codifications comme élément de preuve

31 (1) Tout exemplaire d'une loi codifiée ou d'un règlement codifié, publié par le ministre en vertu de la présente loi sur support papier ou sur support électronique, fait foi de cette loi ou de ce règlement et de son contenu. Tout exemplaire donné comme publié par le ministre est réputé avoir été ainsi publié, sauf preuve contraire.

Incompatibilité — lois

(2) Les dispositions de la loi d'origine avec ses modifications subséquentes par le greffier des Parlements en vertu de la *Loi sur la publication des lois* l'emportent sur les dispositions incompatibles de la loi codifiée publiée par le ministre en vertu de la présente loi.

MISE EN PAGE

Les notes apparaissant auparavant dans les marges de droite ou de gauche se retrouvent maintenant en caractères gras juste au-dessus de la disposition à laquelle elles se rattachent. Elles ne font pas partie du texte, n'y figurant qu'à titre de repère ou d'information.

NOTE

Cette codification est à jour au 15 décembre 2024. Les dernières modifications sont entrées en vigueur le 12 décembre 2024. Toutes modifications qui n'étaient pas en vigueur au 15 décembre 2024 sont énoncées à la fin de ce document sous le titre « Modifications non en vigueur ».

TABLE OF PROVISIONS

An Act to facilitate compromises and arrangements between companies and their creditors

	Short Title
1	Short title
	Interpretation
2	Definitions
3	Application
	PART I
	Compromises and Arrangements
4	Compromise with unsecured creditors
5	Compromise with secured creditors
5.1	Claims against directors — compromise
6	Compromises to be sanctioned by court
7	Court may give directions
8	Scope of Act
8.1	Right of unpaid supplier of perishable fruits or vegetables
	PART II
	Jurisdiction of Courts
9	Jurisdiction of court to receive applications
10	Form of applications
11	General power of court
11.001	Relief reasonably necessary
11.01	Rights of suppliers
11.02	Stays, etc. — initial application
11.03	Stays — directors
11.04	Persons obligated under letter of credit or guarantee
11.06	Member of the Canadian Payments Association
11.08	Restriction — certain powers, duties and functions
11.09	Stay — Her Majesty
11.1	Meaning of regulatory body
11.2	Interim financing

TABLE ANALYTIQUE

Loi facilitant les transactions et arrangements entre les compagnies et leurs créanciers

	Titre abrégé
1	Titre abrégé
	Définitions et application
2	Définitions
3	Application
	PARTIE I
	Transactions et arrangements
4	Transaction avec les créanciers chirographaires
5	Transaction avec les créanciers garantis
5.1	Transaction — réclamations contre les administrateurs
6	Homologation par le tribunal
7	Le tribunal peut donner des instructions
8	Champ d'application de la loi
8.1	Droit du fournisseur impayé — fruits ou légumes périssables
	PARTIE II
	Juridiction des tribunaux
9	Le tribunal a juridiction pour recevoir des demandes
10	Forme des demandes
11	Pouvoir général du tribunal
11.001	Redressements normalement nécessaires
11.01	Droits des fournisseurs
11.02	Suspension : demande initiale
11.03	Suspension — administrateurs
11.04	Suspension — lettres de crédit ou garanties
11.06	Membre de l'Association canadienne des paiements
11.08	Restrictions : exercice de certaines attributions
11.09	Suspension des procédures : Sa Majesté
11.1	Définition de organisme administratif
11.2	Financement temporaire

11.3	Assignment of agreements
11.4	Critical supplier
11.5	Removal of directors
11.51	Security or charge relating to director's indemnification
11.52	Court may order security or charge to cover certain costs
11.6	Bankruptcy and Insolvency Act matters
11.7	Court to appoint monitor
11.8	No personal liability in respect of matters before appointment
11.9	Disclosure of financial information
12	Fixing deadlines
13	Leave to appeal
14	Court of appeal
15	Appeals
16	Order of court of one province
17	Courts shall aid each other on request

PART III

General

Duty of Good Faith

18.6	Good faith
	Claims
19	Claims that may be dealt with by a compromise or arrangement

20	Determination of amount of claims
21	Law of set-off or compensation to apply

Classes of Creditors

22	Company may establish classes
22.1	Class — creditors having equity claims

Monitors

23	Duties and functions
24	Right of access
25	Obligation to act honestly and in good faith

Powers, Duties and Functions of Superintendent of Bankruptcy

26	Public records
27	Applications to court and right to intervene

11.3	Cessions
11.4	Fournisseurs essentiels
11.5	Révocation des administrateurs
11.51	Biens grevés d'une charge ou sûreté en faveur d'administrateurs ou de dirigeants
11.52	Biens grevés d'une charge ou sûreté pour couvrir certains frais
11.6	Lien avec la Loi sur la faillite et l'insolvabilité
11.7	Nomination du contrôleur
11.8	Immunité
11.9	Divulgence de renseignements financiers
12	Échéances
13	Permission d'en appeler
14	Cour d'appel
15	Appels
16	Ordonnance d'un tribunal d'une province
17	Les tribunaux doivent s'entraider sur demande

PARTIE III

Dispositions générales

Obligation d'agir de bonne foi

18.6	Bonne foi
	Réclamations
19	Réclamations considérées dans le cadre des transactions ou arrangements

20	Détermination du montant de la réclamation
21	Compensation

Catégories de créanciers

22	Établissement des catégories de créanciers
22.1	Catégorie de créanciers ayant des réclamations relatives à des capitaux propres

Contrôleurs

23	Attributions
24	Droit d'accès aux biens
25	Diligence

Attributions du surintendant des faillites

26	Registres publics
27	Demande au tribunal et intervention

28	Complaints
29	Investigations
30	Powers in relation to licence
31	Delegation
	Agreements
32	Disclaimer or resiliation of agreements
33	Collective agreements
34	Certain rights limited
	Obligations and Prohibitions
35	Obligation to provide assistance
36	Restriction on disposition of business assets
	Preferences and Transfers at Undervalue
36.1	Application of sections 38 and 95 to 101 of the Bankruptcy and Insolvency Act
	Her Majesty
37	Deemed trusts
38	Status of Crown claims
39	Statutory Crown securities
40	Act binding on Her Majesty
	Miscellaneous
41	Certain sections of Winding-up and Restructuring Act do not apply
42	Act to be applied conjointly with other Acts
43	Claims in foreign currency

PART IV

Cross-border Insolvencies

Purpose

44	Purpose
	Interpretation
45	Definitions
	Recognition of Foreign Proceeding
46	Application for recognition of a foreign proceeding
47	Order recognizing foreign proceeding
48	Order relating to recognition of a foreign main proceeding
49	Other orders
50	Terms and conditions of orders

28	Plaintes
29	Investigations et enquêtes
30	Décision relative à la licence
31	Pouvoir de délégation
	Contrats et conventions collectives
32	Résiliation de contrats
33	Conventions collectives
34	Limitation de certains droits
	Obligations et interdiction
35	Assistance
36	Restriction à la disposition d'actifs
	Traitements préférentiels et opérations sous-évaluées
36.1	Application des articles 38 et 95 à 101 de la Loi sur la faillite et l'insolvabilité
	Sa Majesté
37	Fiducies présumées
38	Réclamations de la Couronne
39	Garanties créées par législation
40	Obligation de Sa Majesté
	Dispositions diverses
41	Inapplicabilité de certains articles de la Loi sur les liquidations et les restructurations
42	Application concurrente d'autres lois
43	Créances en monnaies étrangères

PARTIE IV

Insolvabilité en contexte international

Objet

44	Objet
	Définitions
45	Définitions
	Reconnaissance des instances étrangères
46	Demande de reconnaissance de l'instance étrangère
47	Ordonnance de reconnaissance
48	Effets de la reconnaissance d'une instance étrangère principale
49	Autre ordonnance
50	Conditions

51	Commencement or continuation of proceedings Obligations
52	Cooperation — court
53	Obligations of foreign representative Multiple Proceedings
54	Concurrent proceedings
55	Multiple foreign proceedings Miscellaneous Provisions
56	Authorization to act as representative of proceeding under this Act
57	Foreign representative status
58	Foreign proceeding appeal
59	Presumption of insolvency
60	Credit for recovery in other jurisdictions
61	Court not prevented from applying certain rules

PART V

Administration

62	Regulations
63	Review of Act

51	Début et continuation de la procédure Obligations
52	Collaboration — tribunal
53	Obligations du représentant étranger Instances multiples
54	Instances concomitantes
55	Plusieurs instances étrangères Dispositions diverses
56	Autorisation d'agir à titre de représentant dans toute procédure intentée sous le régime de la présente loi
57	Statut du représentant étranger
58	Instance étrangère : appel
59	Présomption d'insolvabilité
60	Sommes reçues à l'étranger
61	Application de règles étrangères

PARTIE V

Administration

62	Règlements
63	Rapport



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

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

An Act to facilitate compromises and arrangements between companies and their creditors

Short Title

Short title

1 This Act may be cited as the *Companies' Creditors Arrangement Act*.

R.S., c. C-25, s. 1.

Interpretation

Definitions

2 (1) In this Act,

aircraft objects [Repealed, 2012, c. 31, s. 419]

bargaining agent means any trade union that has entered into a collective agreement on behalf of the employees of a company; (*agent négociateur*)

bond includes a debenture, debenture stock or other evidences of indebtedness; (*obligation*)

cash-flow statement, in respect of a company, means the statement referred to in paragraph 10(2)(a) indicating the company's projected cash flow; (*état de l'évolution de l'encaisse*)

claim means any indebtedness, liability or obligation of any kind that would be a claim provable within the meaning of section 2 of the *Bankruptcy and Insolvency Act*; (*réclamation*)

collective agreement, in relation to a debtor company, means a collective agreement within the meaning of the jurisdiction governing collective bargaining between the debtor company and a bargaining agent; (*convention collective*)

Loi facilitant les transactions et arrangements entre les compagnies et leurs créanciers

Titre abrégé

Titre abrégé

1 *Loi sur les arrangements avec les créanciers des compagnies.*

S.R., ch. C-25, art. 1.

Définitions et application

Définitions

2 (1) Les définitions qui suivent s'appliquent à la présente loi.

accord de transfert de titres pour obtention de crédit

Accord aux termes duquel une compagnie débitrice transfère la propriété d'un bien en vue de garantir le paiement d'une somme ou l'exécution d'une obligation relativement à un contrat financier admissible. (*title transfer credit support agreement*)

actionnaire S'agissant d'une compagnie ou d'une fiducie de revenu assujetties à la présente loi, est assimilée à l'actionnaire la personne ayant un intérêt dans cette compagnie ou détenant des parts de cette fiducie. (*shareholder*)

administrateur S'agissant d'une compagnie autre qu'une fiducie de revenu, toute personne exerçant les fonctions d'administrateur, indépendamment de son titre, et, s'agissant d'une fiducie de revenu, toute personne exerçant les fonctions de fiduciaire, indépendamment de son titre. (*director*)

agent négociateur Syndicat ayant conclu une convention collective pour le compte des employés d'une compagnie. (*bargaining agent*)

biens aéronautiques [Abrogée, 2012, ch. 31, art. 419]

company means any company, corporation or legal person incorporated by or under an Act of Parliament or of the legislature of a province, any incorporated company having assets or doing business in Canada, wherever incorporated, and any income trust, but does not include banks, authorized foreign banks within the meaning of section 2 of the *Bank Act*, telegraph companies, insurance companies and companies to which the *Trust and Loan Companies Act* applies; (*compagnie*)

court means

(a) in Nova Scotia, British Columbia and Prince Edward Island, the Supreme Court,

(a.1) in Ontario, the Superior Court of Justice,

(b) in Quebec, the Superior Court,

(c) in New Brunswick, Manitoba, Saskatchewan and Alberta, the Court of Queen's Bench,

(c.1) in Newfoundland and Labrador, the Trial Division of the Supreme Court, and

(d) in Yukon and the Northwest Territories, the Supreme Court, and in Nunavut, the Nunavut Court of Justice; (*tribunal*)

debtor company means any company that

(a) is bankrupt or insolvent,

(b) has committed an act of bankruptcy within the meaning of the *Bankruptcy and Insolvency Act* or is deemed insolvent within the meaning of the *Winding-up and Restructuring Act*, whether or not proceedings in respect of the company have been taken under either of those Acts,

(c) has made an authorized assignment or against which a bankruptcy order has been made under the *Bankruptcy and Insolvency Act*, or

(d) is in the course of being wound up under the *Winding-up and Restructuring Act* because the company is insolvent; (*compagnie débitrice*)

director means, in the case of a company other than an income trust, a person occupying the position of director by whatever name called and, in the case of an income trust, a person occupying the position of trustee by whatever name called; (*administrateur*)

eligible financial contract means an agreement of a prescribed kind; (*contrat financier admissible*)

compagnie Toute personne morale constituée par une loi fédérale ou provinciale ou sous son régime et toute personne morale qui possède un actif ou exerce des activités au Canada, quel que soit l'endroit où elle a été constituée, ainsi que toute fiducie de revenu. La présente définition exclut les banques, les banques étrangères autorisées, au sens de l'article 2 de la *Loi sur les banques*, les compagnies de télégraphe, les compagnies d'assurances et les sociétés auxquelles s'applique la *Loi sur les sociétés de fiducie et de prêt*. (*company*)

compagnie débitrice Toute compagnie qui, selon le cas :

a) est en faillite ou est insolvable;

b) a commis un acte de faillite au sens de la *Loi sur la faillite et l'insolvabilité* ou est réputée insolvable au sens de la *Loi sur les liquidations et les restructurations*, que des procédures relatives à cette compagnie aient été intentées ou non sous le régime de l'une ou l'autre de ces lois;

c) a fait une cession autorisée ou à l'encontre de laquelle une ordonnance de faillite a été rendue en vertu de la *Loi sur la faillite et l'insolvabilité*;

d) est en voie de liquidation aux termes de la *Loi sur les liquidations et les restructurations* parce que la compagnie est insolvable. (*debtor company*)

contrat financier admissible Contrat d'une catégorie réglementaire. (*eligible financial contract*)

contrôleur S'agissant d'une compagnie, la personne nommée en application de l'article 11.7 pour agir à titre de contrôleur des affaires financières et autres de celle-ci. (*monitor*)

convention collective S'entend au sens donné à ce terme par les règles de droit applicables aux négociations collectives entre la compagnie débitrice et l'agent négociateur. (*collective agreement*)

créancier chirographaire Tout créancier d'une compagnie qui n'est pas un créancier garanti, qu'il réside ou soit domicilié au Canada ou à l'étranger. Un fiduciaire pour les détenteurs d'obligations non garanties, lesquelles sont émises en vertu d'un acte de fiducie ou autre acte fonctionnant en faveur du fiduciaire, est réputé un créancier chirographaire pour toutes les fins de la présente loi sauf la votation à une assemblée des créanciers relativement à ces obligations. (*unsecured creditor*)

equity claim means a claim that is in respect of an equity interest, including a claim for, among others,

- (a) a dividend or similar payment,
- (b) a return of capital,
- (c) a redemption or retraction obligation,
- (d) a monetary loss resulting from the ownership, purchase or sale of an equity interest or from the rescission, or, in Quebec, the annulment, of a purchase or sale of an equity interest, or
- (e) contribution or indemnity in respect of a claim referred to in any of paragraphs (a) to (d); (*réclamation relative à des capitaux propres*)

equity interest means

- (a) in the case of a company other than an income trust, a share in the company — or a warrant or option or another right to acquire a share in the company — other than one that is derived from a convertible debt, and
- (b) in the case of an income trust, a unit in the income trust — or a warrant or option or another right to acquire a unit in the income trust — other than one that is derived from a convertible debt; (*intérêt relatif à des capitaux propres*)

financial collateral means any of the following that is subject to an interest, or in the Province of Quebec a right, that secures payment or performance of an obligation in respect of an eligible financial contract or that is subject to a title transfer credit support agreement:

- (a) cash or cash equivalents, including negotiable instruments and demand deposits,
- (b) securities, a securities account, a securities entitlement or a right to acquire securities, or
- (c) a futures agreement or a futures account; (*garantie financière*)

income trust means a trust that has assets in Canada if

- (a) its units are listed on a prescribed stock exchange on the day on which proceedings commence under this Act, or
- (b) the majority of its units are held by a trust whose units are listed on a prescribed stock exchange on the day on which proceedings commence under this Act; (*fiducie de revenu*)

créancier garanti Détenteur d'hypothèque, de gage, charge, nantissement ou privilège sur ou contre l'ensemble ou une partie des biens d'une compagnie débitrice, ou tout transport, cession ou transfert de la totalité ou d'une partie de ces biens, à titre de garantie d'une dette de la compagnie débitrice, ou un détenteur de quelque obligation d'une compagnie débitrice garantie par hypothèque, gage, charge, nantissement ou privilège sur ou contre l'ensemble ou une partie des biens de la compagnie débitrice, ou un transport, une cession ou un transfert de tout ou partie de ces biens, ou une fiducie à leur égard, que ce détenteur ou bénéficiaire réside ou soit domicilié au Canada ou à l'étranger. Un fiduciaire en vertu de tout acte de fiducie ou autre instrument garantissant ces obligations est réputé un créancier garanti pour toutes les fins de la présente loi sauf la votation à une assemblée de créanciers relativement à ces obligations. (*secured creditor*)

demande initiale La demande faite pour la première fois en application de la présente loi relativement à une compagnie. (*initial application*)

état de l'évolution de l'encaisse Relativement à une compagnie, l'état visé à l'alinéa 10(2)a) portant, projections à l'appui, sur l'évolution de l'encaisse de celle-ci. (*cash-flow statement*)

fiducie de revenu Fiducie qui possède un actif au Canada et dont les parts sont inscrites à une bourse de valeurs mobilières visée par règlement à la date à laquelle des procédures sont intentées sous le régime de la présente loi, ou sont détenues en majorité par une fiducie dont les parts sont inscrites à une telle bourse à cette date. (*income trust*)

garantie financière S'il est assujéti soit à un intérêt ou, dans la province de Québec, à un droit garantissant le paiement d'une somme ou l'exécution d'une obligation relativement à un contrat financier admissible, soit à un accord de transfert de titres pour obtention de crédit, l'un ou l'autre des éléments suivants :

- a) les sommes en espèces et les équivalents de trésorerie — notamment les effets négociables et dépôts à vue;
- b) les titres, comptes de titres, droits intermédiés et droits d'acquérir des titres;
- c) les contrats à terme ou comptes de contrats à terme. (*financial collateral*)

intérêt relatif à des capitaux propres

initial application means the first application made under this Act in respect of a company; (*demande initiale*)

monitor, in respect of a company, means the person appointed under section 11.7 to monitor the business and financial affairs of the company; (*contrôleur*)

net termination value means the net amount obtained after netting or setting off or compensating the mutual obligations between the parties to an eligible financial contract in accordance with its provisions; (*valeurs nettes dues à la date de résiliation*)

prescribed means prescribed by regulation; (*Version anglaise seulement*)

secured creditor means a holder of a mortgage, hypothec, pledge, charge, lien or privilege on or against, or any assignment, cession or transfer of, all or any property of a debtor company as security for indebtedness of the debtor company, or a holder of any bond of a debtor company secured by a mortgage, hypothec, pledge, charge, lien or privilege on or against, or any assignment, cession or transfer of, or a trust in respect of, all or any property of the debtor company, whether the holder or beneficiary is resident or domiciled within or outside Canada, and a trustee under any trust deed or other instrument securing any of those bonds shall be deemed to be a secured creditor for all purposes of this Act except for the purpose of voting at a creditors' meeting in respect of any of those bonds; (*créancier garanti*)

shareholder includes a member of a company — and, in the case of an income trust, a holder of a unit in an income trust — to which this Act applies; (*actionnaire*)

Superintendent of Bankruptcy means the Superintendent of Bankruptcy appointed under subsection 5(1) of the *Bankruptcy and Insolvency Act*; (*surintendant des faillites*)

Superintendent of Financial Institutions means the Superintendent of Financial Institutions appointed under subsection 5(1) of the *Office of the Superintendent of Financial Institutions Act*; (*surintendant des institutions financières*)

title transfer credit support agreement means an agreement under which a debtor company has provided title to property for the purpose of securing the payment or performance of an obligation of the debtor company in respect of an eligible financial contract; (*accord de transfert de titres pour obtention de crédit*)

unsecured creditor means any creditor of a company who is not a secured creditor, whether resident or

a) S'agissant d'une compagnie autre qu'une fiducie de revenu, action de celle-ci ou bon de souscription, option ou autre droit permettant d'acquérir une telle action et ne provenant pas de la conversion d'une dette convertible;

b) s'agissant d'une fiducie de revenu, part de celle-ci ou bon de souscription, option ou autre droit permettant d'acquérir une telle part et ne provenant pas de la conversion d'une dette convertible. (*equity interest*)

obligation Sont assimilés aux obligations les dében-
tures, stock-obligations et autres titres de créance.
(*bond*)

réclamation S'entend de toute dette, de tout engage-
ment ou de toute obligation de quelque nature que ce
soit, qui constituerait une réclamation prouvable au sens
de l'article 2 de la *Loi sur la faillite et l'insolvabilité*.
(*claim*)

réclamation relative à des capitaux propres Réclama-
tion portant sur un intérêt relatif à des capitaux propres
et visant notamment :

a) un dividende ou un paiement similaire;

b) un remboursement de capital;

c) tout droit de rachat d'actions au gré de l'action-
naire ou de remboursement anticipé d'actions au gré
de l'émetteur;

d) des pertes pécuniaires associées à la propriété, à
l'achat ou à la vente d'un intérêt relatif à des capitaux
propres ou à l'annulation de cet achat ou de cette
vente;

e) une contribution ou une indemnité relative à toute
réclamation visée à l'un des alinéas a) à d). (*equity
claim*)

surintendant des faillites Le surintendant des faillites
nommé au titre du paragraphe 5(1) de la *Loi sur la
faillite et l'insolvabilité*. (*Superintendent of Bankrupt-
cy*)

surintendant des institutions financières Le surinten-
dant des institutions financières nommé en application
du paragraphe 5(1) de la *Loi sur le Bureau du surinten-
dant des institutions financières*. (*Superintendent of
Financial Institutions*)

tribunal

domiciled within or outside Canada, and a trustee for the holders of any unsecured bonds issued under a trust deed or other instrument running in favour of the trustee shall be deemed to be an unsecured creditor for all purposes of this Act except for the purpose of voting at a creditors' meeting in respect of any of those bonds. (*créancier chirographaire*)

Meaning of *related* and *dealing at arm's length*

(2) For the purpose of this Act, section 4 of the *Bankruptcy and Insolvency Act* applies for the purpose of determining whether a person is related to or dealing at arm's length with a debtor company.

R.S., 1985, c. C-36, s. 2; R.S., 1985, c. 27 (2nd Supp.), s. 10; 1990, c. 17, s. 4; 1992, c. 27, s. 90; 1993, c. 34, s. 52; 1996, c. 6, s. 167; 1997, c. 12, s. 120(E); 1998, c. 30, s. 14; 1999, c. 3, s. 22, c. 28, s. 154; 2001, c. 9, s. 575; 2002, c. 7, s. 133; 2004, c. 25, s. 193; 2005, c. 3, s. 15, c. 47, s. 124; 2007, c. 29, s. 104, c. 36, ss. 61, 105; 2012, c. 31, s. 419; 2015, c. 3, s. 37; 2018, c. 10, s. 89.

Application

3 (1) This Act applies in respect of a debtor company or affiliated debtor companies if the total of claims against the debtor company or affiliated debtor companies, determined in accordance with section 20, is more than \$5,000,000 or any other amount that is prescribed.

Affiliated companies

(2) For the purposes of this Act,

(a) companies are affiliated companies if one of them is the subsidiary of the other or both are subsidiaries of the same company or each of them is controlled by the same person; and

(b) two companies affiliated with the same company at the same time are deemed to be affiliated with each other.

a) Dans les provinces de la Nouvelle-Écosse, de la Colombie-Britannique et de l'Île-du-Prince-Édouard, la Cour suprême;

a.1) dans la province d'Ontario, la Cour supérieure de justice;

b) dans la province de Québec, la Cour supérieure;

c) dans les provinces du Nouveau-Brunswick, du Manitoba, de la Saskatchewan et d'Alberta, la Cour du Banc de la Reine;

c.1) dans la province de Terre-Neuve-et-Labrador, la Section de première instance de la Cour suprême;

d) au Yukon et dans les Territoires du Nord-Ouest, la Cour suprême et, au Nunavut, la Cour de justice du Nunavut. (*court*)

valeurs nettes dues à la date de résiliation La somme nette obtenue après compensation des obligations mutuelles des parties à un contrat financier admissible effectuée conformément à ce contrat. (*net termination value*)

Définition de *personnes liées*

(2) Pour l'application de la présente loi, l'article 4 de la *Loi sur la faillite et l'insolvabilité* s'applique pour établir si une personne est liée à une compagnie débitrice ou agit sans lien de dépendance avec une telle compagnie.

L.R. (1985), ch. C-36, art. 2; L.R. (1985), ch. 27 (2^e suppl.), art. 10; 1990, ch. 17, art. 4; 1992, ch. 27, art. 90; 1993, ch. 34, art. 52; 1996, ch. 6, art. 167; 1997, ch. 12, art. 120(A); 1998, ch. 30, art. 14; 1999, ch. 3, art. 22, ch. 28, art. 154; 2001, ch. 9, art. 575; 2002, ch. 7, art. 133; 2004, ch. 25, art. 193; 2005, ch. 3, art. 15, ch. 47, art. 124; 2007, ch. 29, art. 104, ch. 36, art. 61 et 105; 2012, ch. 31, art. 419; 2015, ch. 3, art. 37; 2018, ch. 10, art. 89.

Application

3 (1) La présente loi ne s'applique à une compagnie débitrice ou aux compagnies débitrices qui appartiennent au même groupe qu'elle que si le montant des réclamations contre elle ou les compagnies appartenant au même groupe, établi conformément à l'article 20, est supérieur à cinq millions de dollars ou à toute autre somme prévue par les règlements.

Application

(2) Pour l'application de la présente loi :

a) appartiennent au même groupe deux compagnies dont l'une est la filiale de l'autre ou qui sont sous le contrôle de la même personne;

b) sont réputées appartenir au même groupe deux compagnies dont chacune appartient au groupe d'une même compagnie.

Company controlled

(3) For the purposes of this Act, a company is controlled by a person or by two or more companies if

(a) securities of the company to which are attached more than fifty per cent of the votes that may be cast to elect directors of the company are held, other than by way of security only, by or for the benefit of that person or by or for the benefit of those companies; and

(b) the votes attached to those securities are sufficient, if exercised, to elect a majority of the directors of the company.

Subsidiary

(4) For the purposes of this Act, a company is a subsidiary of another company if

(a) it is controlled by

(i) that other company,

(ii) that other company and one or more companies each of which is controlled by that other company, or

(iii) two or more companies each of which is controlled by that other company; or

(b) it is a subsidiary of a company that is a subsidiary of that other company.

R.S., 1985, c. C-36, s. 3; 1997, c. 12, s. 121; 2005, c. 47, s. 125.

PART I

Compromises and Arrangements

Compromise with unsecured creditors

4 Where a compromise or an arrangement is proposed between a debtor company and its unsecured creditors or any class of them, the court may, on the application in a summary way of the company, of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors, and, if the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.

R.S., c. C-25, s. 4.

Application

(3) Pour l'application de la présente loi, ont le contrôle d'une compagnie la personne ou les compagnies :

a) qui détiennent — ou en sont bénéficiaires —, autrement qu'à titre de garantie seulement, des valeurs mobilières conférant plus de cinquante pour cent du maximum possible des voix à l'élection des administrateurs de la compagnie;

b) dont lesdites valeurs mobilières confèrent un droit de vote dont l'exercice permet d'élire la majorité des administrateurs de la compagnie.

Application

(4) Pour l'application de la présente loi, une compagnie est la filiale d'une autre compagnie dans chacun des cas suivants :

a) elle est contrôlée :

(i) soit par l'autre compagnie,

(ii) soit par l'autre compagnie et une ou plusieurs compagnies elles-mêmes contrôlées par cette autre compagnie,

(iii) soit par des compagnies elles-mêmes contrôlées par l'autre compagnie;

b) elle est la filiale d'une filiale de l'autre compagnie.

L.R. (1985), ch. C-36, art. 3; 1997, ch. 12, art. 121; 2005, ch. 47, art. 125.

PARTIE I

Transactions et arrangements

Transaction avec les créanciers chirographaires

4 Lorsqu'une transaction ou un arrangement est proposé entre une compagnie débitrice et ses créanciers chirographaires ou toute catégorie de ces derniers, le tribunal peut, à la requête sommaire de la compagnie, d'un de ces créanciers ou du syndic en matière de faillite ou liquidateur de la compagnie, ordonner que soit convoquée, de la manière qu'il prescrit, une assemblée de ces créanciers ou catégorie de créanciers, et, si le tribunal en décide ainsi, des actionnaires de la compagnie.

S.R., ch. C-25, art. 4.

Compromise with secured creditors

5 Where a compromise or an arrangement is proposed between a debtor company and its secured creditors or any class of them, the court may, on the application in a summary way of the company or of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors, and, if the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.

R.S., c. C-25, s. 5.

Claims against directors — compromise

5.1 (1) A compromise or arrangement made in respect of a debtor company may include in its terms provision for the compromise of claims against directors of the company that arose before the commencement of proceedings under this Act and that relate to the obligations of the company where the directors are by law liable in their capacity as directors for the payment of such obligations.

Exception

(2) A provision for the compromise of claims against directors may not include claims that

- (a)** relate to contractual rights of one or more creditors; or
- (b)** are based on allegations of misrepresentations made by directors to creditors or of wrongful or oppressive conduct by directors.

Powers of court

(3) The court may declare that a claim against directors shall not be compromised if it is satisfied that the compromise would not be fair and reasonable in the circumstances.

Resignation or removal of directors

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

1997, c. 12, s. 122.

Compromises to be sanctioned by court

6 (1) If a majority in number representing two thirds in value of the creditors, or the class of creditors, as the case may be — other than, unless the court orders otherwise, a class of creditors having equity claims, — present and voting either in person or by proxy at the meeting or

Transaction avec les créanciers garantis

5 Lorsqu'une transaction ou un arrangement est proposé entre une compagnie débitrice et ses créanciers garantis ou toute catégorie de ces derniers, le tribunal peut, à la requête sommaire de la compagnie, d'un de ces créanciers ou du syndic en matière de faillite ou liquidateur de la compagnie, ordonner que soit convoquée, de la manière qu'il prescrit, une assemblée de ces créanciers ou catégorie de créanciers, et, si le tribunal en décide ainsi, des actionnaires de la compagnie.

S.R., ch. C-25, art. 5.

Transaction — réclamations contre les administrateurs

5.1 (1) La transaction ou l'arrangement visant une compagnie débitrice peut comporter, au profit de ses créanciers, des dispositions relativement à une transaction sur les réclamations contre ses administrateurs qui sont antérieures aux procédures intentées sous le régime de la présente loi et visent des obligations de celle-ci dont ils peuvent être, ès qualités, responsables en droit.

Restriction

(2) La transaction ne peut toutefois viser des réclamations portant sur des droits contractuels d'un ou de plusieurs créanciers ou fondées sur la fausse représentation ou la conduite injustifiée ou abusive des administrateurs.

Pouvoir du tribunal

(3) Le tribunal peut déclarer qu'une réclamation contre les administrateurs ne peut faire l'objet d'une transaction s'il est convaincu qu'elle ne serait ni juste ni équitable dans les circonstances.

Démission ou destitution des administrateurs

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

1997, ch. 12, art. 122.

Homologation par le tribunal

6 (1) Si une majorité en nombre représentant les deux tiers en valeur des créanciers ou d'une catégorie de créanciers, selon le cas, — mise à part, sauf ordonnance contraire du tribunal, toute catégorie de créanciers ayant des réclamations relatives à des capitaux propres —

meetings of creditors respectively held under sections 4 and 5, or either of those sections, agree to any compromise or arrangement either as proposed or as altered or modified at the meeting or meetings, the compromise or arrangement may be sanctioned by the court and, if so sanctioned, is binding

(a) on all the creditors or the class of creditors, as the case may be, and on any trustee for that class of creditors, whether secured or unsecured, as the case may be, and on the company; and

(b) in the case of a company that has made an authorized assignment or against which a bankruptcy order has been made under the *Bankruptcy and Insolvency Act* or is in the course of being wound up under the *Winding-up and Restructuring Act*, on the trustee in bankruptcy or liquidator and contributories of the company.

Court may order amendment

(2) If a court sanctions a compromise or arrangement, it may order that the debtor's constating instrument be amended in accordance with the compromise or arrangement to reflect any change that may lawfully be made under federal or provincial law.

Restriction — certain Crown claims

(3) Unless Her Majesty agrees otherwise, the court may sanction a compromise or arrangement only if the compromise or arrangement provides for the payment in full to Her Majesty in right of Canada or a province, within six months after court sanction of the compromise or arrangement, of all amounts that were outstanding at the time of the application for an order under section 11 or 11.02 and that are of a kind that could be subject to a demand under

(a) subsection 224(1.2) of the *Income Tax Act*;

(b) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, or a premium under Part VII.1 of that Act, and of any related interest, penalties or other amounts; or

(c) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any

présents et votant soit en personne, soit par fondé de pouvoir à l'assemblée ou aux assemblées de créanciers respectivement tenues au titre des articles 4 et 5, acceptent une transaction ou un arrangement, proposé ou modifié à cette ou ces assemblées, la transaction ou l'arrangement peut être homologué par le tribunal et, le cas échéant, lie :

a) tous les créanciers ou la catégorie de créanciers, selon le cas, et tout fiduciaire pour cette catégorie de créanciers, qu'ils soient garantis ou chirographaires, selon le cas, ainsi que la compagnie;

b) dans le cas d'une compagnie qui a fait une cession autorisée ou à l'encontre de laquelle une ordonnance de faillite a été rendue en vertu de la *Loi sur la faillite et l'insolvabilité* ou qui est en voie de liquidation sous le régime de la *Loi sur les liquidations et les restructurations*, le syndic en matière de faillite ou liquidateur et les contributeurs de la compagnie.

Modification des statuts constitutifs

(2) Le tribunal qui homologue une transaction ou un arrangement peut ordonner la modification des statuts constitutifs de la compagnie conformément à ce qui est prévu dans la transaction ou l'arrangement, selon le cas, pourvu que la modification soit légale au regard du droit fédéral ou provincial.

Certaines réclamations de la Couronne

(3) Le tribunal ne peut, sans le consentement de Sa Majesté, homologuer la transaction ou l'arrangement qui ne prévoit pas le paiement intégral à Sa Majesté du chef du Canada ou d'une province, dans les six mois suivant l'homologation, de toutes les sommes qui étaient dues lors de la demande d'ordonnance visée aux articles 11 ou 11.02 et qui pourraient, de par leur nature, faire l'objet d'une demande aux termes d'une des dispositions suivantes :

a) le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*;

b) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, d'une cotisation ouvrière ou d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, ou d'une cotisation prévue par la partie VII.1 de cette loi ainsi que des intérêts, pénalités ou autres charges afférents;

c) toute disposition législative provinciale dont l'objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*, ou qui renvoie à ce paragraphe, et qui prévoit la perception d'une somme,

related interest, penalties or other amounts, and the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a *province providing a comprehensive pension plan* as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a *provincial pension plan* as defined in that subsection.

Restriction — default of remittance to Crown

(4) If an order contains a provision authorized by section 11.09, no compromise or arrangement is to be sanctioned by the court if, at the time the court hears the application for sanction, Her Majesty in right of Canada or a province satisfies the court that the company is in default on any remittance of an amount referred to in subsection (3) that became due after the time of the application for an order under section 11.02.

Restriction — employees, etc.

(5) The court may sanction a compromise or an arrangement only if

(a) the compromise or arrangement provides for payment to the employees and former employees of the company, immediately after the court's sanction, of

(i) amounts at least equal to the amounts that they would have been qualified to receive under paragraph 136(1)(d) of the *Bankruptcy and Insolvency Act* if the company had become bankrupt on the day on which proceedings commenced under this Act, and

(ii) wages, salaries, commissions or compensation for services rendered after proceedings commence under this Act and before the court sanctions the compromise or arrangement, together with, in the case of travelling salespersons, disbursements properly incurred by them in and about the company's business during the same period; and

(b) the court is satisfied that the company can and will make the payments as required under paragraph (a).

ainsi que des intérêts, pénalités ou autres charges afférents, laquelle somme :

(i) soit a été retenue par une personne sur un paiement effectué à une autre personne, ou déduite d'un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l'impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l'impôt sur le revenu*,

(ii) soit est de même nature qu'une cotisation prévue par le *Régime de pensions du Canada*, si la province est une province instituant un régime général de pensions au sens du paragraphe 3(1) de cette loi et si la loi provinciale a institué un régime provincial de pensions au sens de ce paragraphe.

Défaut d'effectuer un versement

(4) Lorsqu'une ordonnance comporte une disposition autorisée par l'article 11.09, le tribunal ne peut homologuer la transaction ou l'arrangement si, lors de l'audition de la demande d'homologation, Sa Majesté du chef du Canada ou d'une province le convainc du défaut de la compagnie d'effectuer un versement portant sur une somme visée au paragraphe (3) et qui est devenue exigible après le dépôt de la demande d'ordonnance visée à l'article 11.02.

Restriction — employés, etc.

(5) Le tribunal ne peut homologuer la transaction ou l'arrangement que si, à la fois :

a) la transaction ou l'arrangement prévoit le paiement aux employés actuels et anciens de la compagnie, dès son homologation, de sommes égales ou supérieures, d'une part, à celles qu'ils seraient en droit de recevoir en application de l'alinéa 136(1)d) de la *Loi sur la faillite et l'insolvabilité* si la compagnie avait fait faillite à la date à laquelle des procédures ont été introduites sous le régime de la présente loi à son égard et, d'autre part, au montant des gages, salaires, commissions ou autre rémunération pour services fournis entre la date de l'introduction des procédures et celle de l'homologation, y compris les sommes que le voyageur de commerce a régulièrement déboursées dans le cadre de l'exploitation de la compagnie entre ces dates;

b) il est convaincu que la compagnie est en mesure d'effectuer et effectuera les paiements prévus à l'alinéa a).

Restriction — pension plan

(6) If the company participates in a prescribed pension plan for the benefit of its employees, the court may sanction a compromise or an arrangement in respect of the company only if

(a) the compromise or arrangement provides for payment of the following amounts that are unpaid to the fund established for the purpose of the pension plan:

(i) an amount equal to the sum of all amounts that were deducted from the employees' remuneration for payment to the fund,

(ii) if the prescribed pension plan is regulated by an Act of Parliament,

(A) an amount equal to the normal cost, within the meaning of subsection 2(1) of the *Pension Benefits Standards Regulations, 1985*, that was required to be paid by the employer to the fund, and

(A.1) an amount equal to the sum of all special payments, determined in accordance with section 9 of the *Pension Benefits Standards Regulations, 1985*, that were required to be paid by the employer to the fund referred to in sections 81.5 and 81.6 of the *Bankruptcy and Insolvency Act* to liquidate an unfunded liability or a solvency deficiency,

(A.2) any amount required to liquidate any other unfunded liability or solvency deficiency of the fund as determined on the day on which proceedings commence under this Act,

(B) an amount equal to the sum of all amounts that were required to be paid by the employer to the fund under a defined contribution provision, within the meaning of subsection 2(1) of the *Pension Benefits Standards Act, 1985*,

(C) an amount equal to the sum of all amounts that were required to be paid by the employer to the administrator of a pooled registered pension plan, as defined in subsection 2(1) of the *Pooled Registered Pension Plans Act*, and

(iii) in the case of any other prescribed pension plan,

(A) an amount equal to the amount that would be the normal cost, within the meaning of subsection 2(1) of the *Pension Benefits Standards Regulations, 1985*, that the employer would be

Restriction — régime de pension

(6) Si la compagnie participe à un régime de pension réglementaire institué pour ses employés, le tribunal ne peut homologuer la transaction ou l'arrangement que si, à la fois :

a) la transaction ou l'arrangement prévoit que seront effectués des paiements correspondant au total des sommes ci-après qui n'ont pas été versées au fonds établi dans le cadre du régime de pension :

(i) les sommes qui ont été déduites de la rémunération des employés pour versement au fonds,

(ii) dans le cas d'un régime de pension réglementaire régi par une loi fédérale :

(A) les coûts normaux, au sens du paragraphe 2(1) du *Règlement de 1985 sur les normes de prestation de pension*, que l'employeur est tenu de verser au fonds,

(A.1) la somme égale au total des paiements spéciaux, établis conformément à l'article 9 du *Règlement de 1985 sur les normes de prestation de pension*, que l'employeur est tenu de verser au fonds visé aux articles 81.5 et 81.6 de la *Loi sur la faillite et l'insolvabilité* pour la liquidation d'un passif non capitalisé ou d'un déficit de solvabilité,

(A.2) toute somme requise pour la liquidation de tout autre passif non capitalisé ou déficit de solvabilité du fonds établi à la date à laquelle des procédures sont intentées sous le régime de la présente loi,

(B) les sommes que l'employeur est tenu de verser au fonds au titre de toute disposition à cotisations déterminées au sens du paragraphe 2(1) de la *Loi de 1985 sur les normes de prestation de pension*,

(C) les sommes que l'employeur est tenu de verser à l'administrateur d'un régime de pension agréé collectif au sens du paragraphe 2(1) de la *Loi sur les régimes de pension agréés collectifs*,

(iii) dans le cas de tout autre régime de pension réglementaire :

(A) la somme égale aux coûts normaux, au sens du paragraphe 2(1) du *Règlement de 1985 sur les normes de prestation de pension*, que l'employeur serait tenu de verser au fonds si le régime était régi par une loi fédérale,

required to pay to the fund if the prescribed plan were regulated by an Act of Parliament, and

(A.1) an amount equal to the sum of all special payments, determined in accordance with section 9 of the *Pension Benefits Standards Regulations, 1985*, that would have been required to be paid by the employer to the fund referred to in sections 81.5 and 81.6 of the *Bankruptcy and Insolvency Act* to liquidate an unfunded liability or a solvency deficiency if the prescribed plan were regulated by an Act of Parliament,

(A.2) any amount required to liquidate any other unfunded liability or solvency deficiency of the fund as determined on the day on which proceedings commence under this Act,

(B) an amount equal to the sum of all amounts that would have been required to be paid by the employer to the fund under a defined contribution provision, within the meaning of subsection 2(1) of the *Pension Benefits Standards Act, 1985*, if the prescribed plan were regulated by an Act of Parliament,

(C) an amount equal to the sum of all amounts that would have been required to be paid by the employer in respect of a prescribed plan, if it were regulated by the *Pooled Registered Pension Plans Act*; and

(b) the court is satisfied that the company can and will make the payments as required under paragraph (a).

Non-application of subsection (6)

(7) Despite subsection (6), the court may sanction a compromise or arrangement that does not allow for the payment of the amounts referred to in that subsection if it is satisfied that the relevant parties have entered into an agreement, approved by the relevant pension regulator, respecting the payment of those amounts.

Payment — equity claims

(8) No compromise or arrangement that provides for the payment of an equity claim is to be sanctioned by the court unless it provides that all claims that are not equity claims are to be paid in full before the equity claim is to be paid.

R.S., 1985, c. C-36, s. 6; 1992, c. 27, s. 90; 1996, c. 6, s. 167; 1997, c. 12, s. 123; 2004, c. 25, s. 194; 2005, c. 47, s. 126, 2007, c. 36, s. 106; 2009, c. 33, s. 27; 2012, c. 16, s. 82; 2023, c. 6, s. 5.

(A.1) la somme égale au total des paiements spéciaux, établis conformément à l'article 9 du *Règlement de 1985 sur les normes de prestation de pension*, que l'employeur serait tenu de verser au fonds visé aux articles 81.5 et 81.6 de la *Loi sur la faillite et l'insolvabilité* pour la liquidation d'un passif non capitalisé ou d'un déficit de solvabilité si le régime était régi par une loi fédérale,

(A.2) toute somme requise pour la liquidation de tout autre passif non capitalisé ou déficit de solvabilité du fonds établi à la date à laquelle des procédures sont intentées sous le régime de la présente loi,

(B) les sommes que l'employeur serait tenu de verser au fonds au titre de toute disposition à cotisations déterminées au sens du paragraphe 2(1) de la *Loi de 1985 sur les normes de prestation de pension* si le régime était régi par une loi fédérale,

(C) les sommes que l'employeur serait tenu de verser à l'égard du régime s'il était régi par la *Loi sur les régimes de pension agréés collectifs*;

b) il est convaincu que la compagnie est en mesure d'effectuer et effectuera les paiements prévus à l'alinéa a).

Non-application du paragraphe (6)

(7) Par dérogation au paragraphe (6), le tribunal peut homologuer la transaction ou l'arrangement qui ne prévoit pas le versement des sommes mentionnées à ce paragraphe s'il est convaincu que les parties en cause ont conclu un accord sur les sommes à verser et que l'autorité administrative responsable du régime de pension a consenti à l'accord.

Paiement d'une réclamation relative à des capitaux propres

(8) Le tribunal ne peut homologuer la transaction ou l'arrangement qui prévoit le paiement d'une réclamation relative à des capitaux propres que si, selon les termes de celle-ci, le paiement intégral de toutes les autres réclamations sera effectué avant le paiement de la réclamation relative à des capitaux propres.

L.R. (1985), ch. C-36, art. 6; 1992, ch. 27, art. 90; 1996, ch. 6, art. 167; 1997, ch. 12, art. 123; 2004, ch. 25, art. 194; 2005, ch. 47, art. 126, 2007, ch. 36, art. 106; 2009, ch. 33, art. 27; 2012, ch. 16, art. 82; 2023, ch. 6, art. 5.

Court may give directions

7 Where an alteration or a modification of any compromise or arrangement is proposed at any time after the court has directed a meeting or meetings to be summoned, the meeting or meetings may be adjourned on such term as to notice and otherwise as the court may direct, and those directions may be given after as well as before adjournment of any meeting or meetings, and the court may in its discretion direct that it is not necessary to adjourn any meeting or to convene any further meeting of any class of creditors or shareholders that in the opinion of the court is not adversely affected by the alteration or modification proposed, and any compromise or arrangement so altered or modified may be sanctioned by the court and have effect under section 6.

R.S., c. C-25, s. 7.

Scope of Act

8 This Act extends and does not limit the provisions of any instrument now or hereafter existing that governs the rights of creditors or any class of them and has full force and effect notwithstanding anything to the contrary contained in that instrument.

R.S., c. C-25, s. 8.

Right of unpaid supplier of perishable fruits or vegetables

8.1 (1) Subject to this section, if a person (in this section referred to as the “supplier”) has sold to a debtor company (in this section referred to as the “purchaser”) perishable fruits or vegetables for use in relation to the purchaser’s business and the purchaser has not fully paid the supplier, the perishable fruits or vegetables, as well as any of the proceeds of sale, are deemed to be held in trust by the purchaser for the supplier, if

- (a) the supplier has included in their invoice a notice, or has otherwise given notice within 30 days of the receipt by the purchaser of the perishable fruits or vegetables, in the prescribed form and manner, informing the purchaser of their intention to avail themselves of their right as beneficial owner of the perishable fruits or vegetables and the proceeds of sale in case the purchaser applies to the court to sanction a compromise or an arrangement;
- (b) the purchaser has 30 days or less to pay the entire balance owing to the supplier; and
- (c) the purchaser does not pay to the supplier the entire balance owing when it becomes due as provided in the invoice.

Le tribunal peut donner des instructions

7 Si une modification d’une transaction ou d’un arrangement est proposée après que le tribunal a ordonné qu’une ou plusieurs assemblées soient convoquées, cette ou ces assemblées peuvent être ajournées aux conditions que peut prescrire le tribunal quant à l’avis et autrement, et ces instructions peuvent être données tant après qu’avant l’ajournement de toute ou toutes assemblées, et le tribunal peut, à sa discrétion, prescrire qu’il ne sera pas nécessaire d’ajourner quelque assemblée ou de convoquer une nouvelle assemblée de toute catégorie de créanciers ou actionnaires qui, selon l’opinion du tribunal, n’est pas défavorablement atteinte par la modification proposée, et une transaction ou un arrangement ainsi modifié peut être homologué par le tribunal et être exécutoire en vertu de l’article 6.

S.R., ch. C-25, art. 7.

Champ d’application de la loi

8 La présente loi n’a pas pour effet de limiter mais d’étendre les stipulations de tout instrument actuellement ou désormais existant relativement aux droits de créanciers ou de toute catégorie de ces derniers, et elle est pleinement exécutoire et effective nonobstant toute stipulation contraire de cet instrument.

S.R., ch. C-25, art. 8.

Droit du fournisseur impayé — fruits ou légumes périssables

8.1 (1) Sous réserve des autres dispositions du présent article, dans le cas où une compagnie débitrice — appelée « acheteur » au présent article — n’a pas payé au complet des fruits ou légumes périssables destinés à être utilisés dans le cadre de ses affaires à la personne — appelée « fournisseur » au présent article — qui les lui a vendus, les fruits ou légumes périssables, ainsi que tout produit de vente, sont réputés être détenus en fiducie par l’acheteur pour le fournisseur lorsque les conditions suivantes sont réunies :

- a) le fournisseur a donné avis à l’acheteur, en la forme et de la manière réglementaires — soit dans sa facture, soit autrement dans un délai de trente jours suivant la réception des fruits ou légumes périssables par l’acheteur — de son intention de se prévaloir de son droit à titre de véritable propriétaire des fruits ou légumes périssables et de tout produit de vente dans le cas où l’acheteur demande au tribunal d’homologuer une transaction ou un arrangement;
- b) l’acheteur disposait d’au plus trente jours pour acquitter le solde impayé;

Clarification

(2) For greater certainty, once the perishable fruits or vegetables, as well as any of the proceeds of sale, are deemed to be held in trust by the purchaser for the supplier in accordance with subsection (1), they are not included in the property of the purchaser.

Provincial law

(3) The laws of general application in relation to trusts and trustees in force in the province in which the purchaser resided or carried on business when the purchaser applied to the court to sanction a compromise or an arrangement apply to the trust, and in the event of any inconsistency or conflict between this section and the provisions of any of those laws, the provisions of those laws prevail to the extent of the inconsistency or conflict.

Definitions

(4) The following definitions apply in this section.

perishable fruits or vegetables includes perishable fruits and vegetables that have been repackaged or transformed by the purchaser to the extent that the nature of the fruits or vegetables remains unchanged. (*fruits ou légumes périssables*)

proceeds of sale means the proceeds from the sale by the purchaser of the perishable fruits or vegetables that are subject to the trust, whether or not those proceeds have been kept by the purchaser in a separate account or have been combined with other funds. (*produit de vente*)

2024, c. 31, s. 3.

PART II

Jurisdiction of Courts

Jurisdiction of court to receive applications

9 (1) Any application under this Act may be made to the court that has jurisdiction in the province within which the head office or chief place of business of the company in Canada is situated, or, if the company has no place of business in Canada, in any province within which any assets of the company are situated.

c) l'acheteur n'a pas acquitté le solde impayé lorsqu'il est devenu exigible conformément à ce qui était prévu dans la facture.

Précision

(2) Il est entendu que les fruits ou légumes périssables, ainsi que tout produit de vente, ne sont pas compris dans les biens de l'acheteur dès lors qu'ils sont réputés être détenus en fiducie par l'acheteur pour le fournisseur au titre du paragraphe (1).

Droit provincial

(3) La fiducie est assujettie aux lois d'application générale concernant les fiducies et les fiduciaires de la province où l'acheteur résidait ou exerçait des activités lorsqu'il a demandé au tribunal d'homologuer une transaction ou un arrangement, les dispositions de ces lois l'emportant sur les dispositions incompatibles du présent article.

Définitions

(4) Les définitions qui suivent s'appliquent au présent article.

fruits ou légumes périssables Sont compris parmi les fruits ou légumes périssables ceux qui sont réemballés ou transformés par l'acheteur sans qu'en soit changée leur nature. (*perishable fruits or vegetables*)

produit de vente Produit de la vente par l'acheteur des fruits ou légumes périssables assujettis à la fiducie, qu'il ait été gardé par l'acheteur dans un compte distinct ou combiné à d'autres fonds. (*proceeds of sale*)

2024, ch. 31, art. 3.

PARTIE II

Juridiction des tribunaux

Le tribunal a juridiction pour recevoir des demandes

9 (1) Toute demande prévue par la présente loi peut être faite au tribunal ayant juridiction dans la province où est situé le siège social ou le principal bureau d'affaires de la compagnie au Canada, ou, si la compagnie n'a pas de bureau d'affaires au Canada, dans la province où est situé quelque actif de la compagnie.

Single judge may exercise powers, subject to appeal

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

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

Form of applications

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

Documents that must accompany initial application

(2) An initial application must be accompanied by

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

Publication ban

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

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

General power of court

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

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

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

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

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

Forme des demandes

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

Documents accompagnant la demande initiale

(2) La demande initiale doit être accompagnée :

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

Interdiction de mettre l'état à la disposition du public

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

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

Pouvoir général du tribunal

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

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

Relief reasonably necessary

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

2019, c. 29, s. 136.

Rights of suppliers

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

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

(b) requiring the further advance of money or credit.

2005, c. 47, s. 128.

Stays, etc. — initial application

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

(a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;

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

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

Stays, etc. — other than initial application

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

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

Redressements normalement nécessaires

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

2019, ch. 29, art. 136.

Droits des fournisseurs

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

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

b) d'exiger le versement de nouvelles avances de fonds ou de nouveaux crédits.

2005, ch. 47, art. 128.

Suspension : demande initiale

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

a) suspendre, jusqu'à nouvel ordre, toute procédure qui est ou pourrait être intentée contre la compagnie sous le régime de la *Loi sur la faillite et l'insolvabilité* ou de la *Loi sur les liquidations et les restructurations*;

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

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

Suspension : demandes autres qu'initiales

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

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

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

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

Burden of proof on application

(3) The court shall not make the order unless

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

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

Restriction

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

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

Stays — directors

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

Exception

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

Persons deemed to be directors

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

2005, c. 47, s. 128.

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

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

Preuve

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

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

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

Restriction

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

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

Suspension — administrateurs

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

Exclusion

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

Présomption : administrateurs

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

2005, ch. 47, art. 128.

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

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

2020 SCC 10

File No.: 38594.

Hearing and judgment: January 23, 2020.

Reasons delivered: May 8, 2020.

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

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

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

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

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

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

2020 CSC 10

N° du greffe : 38594.

Audition et jugement : 23 janvier 2020.

Motifs déposés : 8 mai 2020.

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

EN APPEL DE LA COUR D'APPEL DU QUÉBEC

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Cases Cited

By Wagner C.J. and Moldaver J.

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

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

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

Jurisprudence

Citée par le juge en chef Wagner et le juge Moldaver

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

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

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

Statutes and Regulations Cited

- An Act respecting Champerty*, R.S.O. 1897, c. 327.
Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, ss. 4.2, 43(7), 50(1), 54(3), 108(3), 187(9).
Budget Implementation Act, 2019, No. 1, S.C. 2019, c. 29, ss. 133, 138, 140.
Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, ss. 2(1), 3(1), 4, 5, 6(1), 7, 11, 11.2(1), (2), (4), (a), (b), (c), (d), (e), (f), (g), (5), 11.7, 11.8, 18.6, 22(1), (2), (3), 23(1)(d), (i), 23 to 25, 36.
Winding-up and Restructuring Act, R.S.C. 1985, c. W-11, s. 6(1).

Authors Cited

- Agarwal, Ranjan K., and Doug Fenton. "Beyond Access to Justice: Litigation Funding Agreements Outside the Class Actions Context" (2017), 59 *Can. Bus. L.J.* 65.
 Canada. Innovation, Science and Economic Development Canada. *Archived — Bill C-55: clause by clause analysis*, last updated December 29, 2016 (online: <https://www.ic.gc.ca/eic/site/cilp-pdci.nsf/eng/cl00908.html#bill128e>; archived version: https://www.scc-csc.ca/cso-dce/2020SCC-CSC10_1_eng.pdf).
 Canada. Office of the Superintendent of Bankruptcy Canada. *Bill C-12: Clause by Clause Analysis*, developed by Industry Canada, last updated March 24, 2015 (online: <https://www.ic.gc.ca/eic/site/bsf-osb.nsf/eng/br01986.html#a79>; archived version: https://www.scc-csc.ca/cso-dce/2020SCC-CSC10_2_eng.pdf).
 Canada. 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*. Ottawa, 2003.
 Houlden, Lloyd W., Geoffrey B. Morawetz and Janis P. Sarra. *Bankruptcy and Insolvency Law of Canada*, vol. 4, 4th ed. Toronto: Thomson Reuters, 2009 (loose-leaf updated 2020, release 3).
 Kaplan, Bill. "Liquidating CCAAs: Discretion Gone Awry?", in Janis P. Sarra, ed., *Annual Review of Insolvency Law*. Toronto: Carswell, 2008, 79.
 Klar, Lewis N., et al. *Remedies in Tort*, vol. 1, by Leanne Berry, ed. Toronto: Thomson Reuters, 1987 (loose-leaf updated 2019, release 12).
 McElcheran, Kevin P. *Commercial Insolvency in Canada*, 4th ed. Toronto: LexisNexis, 2019.
 Michaud, Guillaume. "New Frontier: The Emergence of Litigation Funding in the Canadian Insolvency Landscape", in Janis P. Sarra et al., eds., *Annual Review of Insolvency Law 2018*. Toronto: Thomson Reuters, 2019, 221.

Lois et règlements cités

- An Act respecting Champerty*, R.S.O. 1897, c. 327.
Loi n° 1 d'exécution du budget de 2019, L.C. 2019, c. 29, art. 133, 138, 140.
Loi sur la faillite et l'insolvabilité, L.R.C. 1985, c. B-3, art. 4.2, 43(7), 50(1), 54(3), 108(3), 187(9).
Loi sur les arrangements avec les créanciers des compagnies, L.R.C. 1985, c. C-36, art. 2(1), 3(1), 4, 5, 6(1), 7, 11, 11.2(1), (2), (4), a), b), c), d), e), f), g), (5), 11.7, 11.8, 18.6, 22(1), (2), (3), 23(1)d), i), 23 à 25, 36.
Loi sur les liquidations et les restructurations, L.R.C. 1985, c. W-11, art. 6(1).

Doctrine et autres documents cités

- Agarwal, Ranjan K., and Doug Fenton. « Beyond Access to Justice : Litigation Funding Agreements Outside the Class Actions Context » (2017), 59 *Rev. can. dr. comm.* 65.
 Canada. Bureau du surintendant des faillites Canada. *Projet de loi C-12 : analyse article par article*, élaboré par Industrie Canada, dernière mise à jour 24 mars 2015 (en ligne : <https://www.ic.gc.ca/eic/site/bsf-osb.nsf/fra/br01986.html#a77f>; version archivée : https://www.scc-csc.ca/cso-dce/2020SCC-CSC10_2_fra.pdf).
 Canada. Innovation, Sciences et Développement économique Canada. *Archivé — Projet de Loi C-55 : analyse article par article*, dernière mise à jour 29 décembre 2016 (en ligne : <https://www.ic.gc.ca/eic/site/cilp-pdci.nsf/fra/cl00908.html#lacc11-2>; version archivée : https://www.scc-csc.ca/cso-dce/2020SCC-CSC10_1_fra.pdf).
 Canada. Sénat. Comité sénatorial permanent des banques et du commerce. *Les débiteurs et les créanciers doivent se partager le fardeau : Examen de la Loi sur la faillite et l'insolvabilité et de la Loi sur les arrangements avec les créanciers des compagnies*, Ottawa, 2003.
 Houlden, Lloyd W., Geoffrey B. Morawetz and Janis P. Sarra. *Bankruptcy and Insolvency Law of Canada*, vol. 4, 4th ed., Toronto, Thomson Reuters, 2009 (loose-leaf updated 2020, release 3).
 Kaplan, Bill. « Liquidating CCAAs : Discretion Gone Awry? », in Janis P. Sarra, ed., *Annual Review of Insolvency Law*, Toronto, Carswell, 2008, 79.
 Klar, Lewis N., et al. *Remedies in Tort*, vol. 1, by Leanne Berry, ed., Toronto, Thomson Reuters, 1987 (loose-leaf updated 2019, release 12).
 McElcheran, Kevin P. *Commercial Insolvency in Canada*, 4th ed., Toronto, LexisNexis, 2019.
 Michaud, Guillaume. « New Frontier : The Emergence of Litigation Funding in the Canadian Insolvency Landscape », in Janis P. Sarra et al., eds., *Annual*

Nocilla, Alfonso. “Asset Sales Under the Companies’ Creditors Arrangement Act and the Failure of Section 36” (2012), 52 *Can. Bus. L.J.* 226.

Nocilla, Alfonso. “The History of the Companies’ Creditors Arrangement Act and the Future of Re-Structuring Law in Canada” (2014), 56 *Can. Bus. L.J.* 73.

Rotsztain, Michael B., and Alexandra Dostal. “Debtor-In-Possession Financing”, in Stephanie Ben-Ishai and Anthony Duggan, eds., *Canadian Bankruptcy and Insolvency Law: Bill C-55, Statute c. 47 and Beyond*. Markham, Ont.: LexisNexis, 2007, 227.

Sarra, Janis P. *Rescue! The Companies’ Creditors Arrangement Act*, 2nd ed. Toronto: Carswell, 2013.

Sarra, Janis P. “The Oscillating Pendulum: Canada’s Sesquicentennial and Finding the Equilibrium for Insolvency Law”, in Janis P. Sarra and Barbara Romaine, eds., *Annual Review of Insolvency Law 2016*. Toronto: Thomson Reuters, 2017, 9.

Wood, Roderick J. *Bankruptcy and Insolvency Law*, 2nd ed. Toronto: Irwin Law, 2015.

APPEALS from a judgment of the Quebec Court of Appeal (Dutil, Schrager and Dumas J.J.A.), 2019 QCCA 171, [2019] AZ-51566416, [2019] Q.J. No. 670 (QL), 2019 CarswellQue 94 (WL Can.), setting aside a decision of Michaud J., 2018 QCCS 1040, [2018] AZ-51477967, [2018] Q.J. No. 1986 (QL), 2018 CarswellQue 1923 (WL Can.). Appeals allowed.

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

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

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

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

Review of Insolvency Law 2018, Toronto, Thomson Reuters, 2019, 221.

Nocilla, Alfonso. « Asset Sales Under the Companies’ Creditors Arrangement Act and the Failure of Section 36 » (2012), 52 *Rev. can. dr. comm.* 226.

Nocilla, Alfonso. « The History of the Companies’ Creditors Arrangement Act and the Future of Re-Structuring Law in Canada » (2014), 56 *Rev. can. dr. comm.* 73.

Rotsztain, Michael B., and Alexandra Dostal. « Debtor-In-Possession Financing », in Stephanie Ben-Ishai and Anthony Duggan, eds., *Canadian Bankruptcy and Insolvency Law : Bill C-55, Statute c. 47 and Beyond*, Markham (Ont.), LexisNexis, 2007, 227.

Sarra, Janis P. *Rescue! The Companies’ Creditors Arrangement Act*, 2nd ed., Toronto, Carswell, 2013.

Sarra, Janis P. « The Oscillating Pendulum : Canada’s Sesquicentennial and Finding the Equilibrium for Insolvency Law », in Janis P. Sarra and Barbara Romaine, eds., *Annual Review of Insolvency Law 2016*, Toronto, Thomson Reuters, 2017, 9.

Wood, Roderick J. *Bankruptcy and Insolvency Law*, 2nd ed., Toronto, Irwin Law, 2015.

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

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

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

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

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

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

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

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

The reasons for judgment of the Court were delivered by

THE CHIEF JUSTICE AND MOLDAVER J.—

I. Overview

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

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

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

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

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

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

Version française des motifs de jugement de la Cour rendus par

LE JUGE EN CHEF ET LE JUGE MOLDAVER —

I. Aperçu

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

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

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

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

II. Facts

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

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

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

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

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

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

II. Les faits

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. The Initial Competing Plans of Arrangement

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

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

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

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

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

B. Les premiers plans d'arrangement concurrents

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

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

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

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

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

C. Creditors' Vote on Callidus's First Plan

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[20] Callidus et certains créanciers non garantis qui ont voté en faveur de son plan (qui sont maintenant intimés au présent pourvoi et se font appeler le « groupe de créanciers ») contestent la demande de Bluberi au motif que l’AFL est un plan d’arrangement et qu’à ce titre, il doit être soumis au vote des créanciers².

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

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

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

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

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

III. Decisions Below

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

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

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

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

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

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

III. Historique judiciaire

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

IV. Issues

[37] These appeals raise two issues:

- (1) Did the supervising judge err in barring Callidus from voting on its New Plan on the basis that it was acting for an improper purpose?
- (2) Did the supervising judge err in approving the LFA as interim financing, pursuant to s. 11.2 of the CCAA?

V. Analysis

A. *Preliminary Considerations*

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

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

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

IV. Questions en litige

[37] Les pourvois soulèvent deux questions :

- (1) Le juge surveillant a-t-il commis une erreur en empêchant Callidus de voter sur son nouveau plan au motif qu'elle agissait dans un but illégitime?
- (2) Le juge surveillant a-t-il commis une erreur en approuvant l'AFL en tant que plan de financement provisoire, selon les termes de l'art. 11.2 de la LACC?

V. Analyse

A. *Considérations préliminaires*

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

(1) The Evolving Nature of CCAA Proceedings

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

d'autoriser la vente ou la disposition des actifs d'une compagnie débitrice hors du cours ordinaire de ses affaires³. Fait important, lorsque le Comité sénatorial permanent des banques et du commerce a recommandé l'adoption de l'art. 36, il a fait observer que la liquidation n'est pas nécessairement incompatible avec les objectifs réparateurs de la LACC et qu'il pourrait s'agir d'un moyen « soit pour obtenir des capitaux [et faciliter la restructuration] ou éviter des pertes plus graves aux créanciers, soit pour se concentrer sur ses activités solvables » (p. 163). D'autres auteurs ont observé que la liquidation peut [TRADUCTION] « être un moyen de restructurer une entreprise » en lui permettant de survivre, quoique sous une forme corporative différente ou sous la gouverne de propriétaires différents (Sarra, *Rescue! The Companies' Creditors Arrangement Act*, p. 169; voir aussi K. P. McElcheran, *Commercial Insolvency in Canada* (4^e éd. 2019), p. 311). D'ailleurs, dans l'arrêt *Indalex*, la compagnie a vendu ses actifs sous le régime de la LACC afin de protéger les emplois de son personnel, même si elle ne pouvait demeurer leur employeur (voir par. 51).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Good faith

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

Good faith — powers of court

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

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

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

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

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

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

Bonne foi

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

Bonne foi — pouvoirs du tribunal

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Related creditors

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

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

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

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

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

Créancier lié

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

General power of court

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

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

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

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

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

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

Pouvoir général du tribunal

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[78] Le juge surveillant a tenu compte de l'ensemble des circonstances et a conclu que le vote de Callidus viserait un but illégitime (par. 45 et 48). Nous sommes d'accord avec cette conclusion. Il savait qu'avant le vote sur le premier plan, Callidus avait choisi de n'évaluer *aucune partie* de sa réclamation à titre de créancier non garanti et s'était par la suite abstenue de voter — bien que le contrôleur l'ait expressément invité à le faire⁴. Le juge surveillant savait aussi que le premier plan de Callidus n'avait pas reçu l'aval des autres créanciers à l'assemblée des créanciers tenue le 15 décembre 2017, et que Callidus avait choisi de ne pas profiter de l'occasion pour modifier ou augmenter la valeur de son plan à ce moment-là, ce qu'elle était en droit de faire (voir LACC, art. 6 et 7; contrôleur, m.i., par. 17). Entre l'insuccès du premier plan et la proposition du nouveau plan — qui était identique au premier plan, hormis la modeste augmentation de 250 000 \$ — les

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

C. Bluberi’s LFA Should Be Approved as Interim Financing

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

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

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

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

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

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

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

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

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

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

Interim financing

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

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

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

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

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

Financement temporaire

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

[87] L'étendue du pouvoir discrétionnaire du juge surveillant d'approuver le financement temporaire ressort du libellé du par. 11.2(1). Abstraction faite des protections concernant le préavis et les sûretés constituées avant le dépôt des procédures, le par. 11.2(1) ne prescrit aucune forme ou condition type⁵. Il prévoit simplement que le financement doit être d'un montant qui est « indiqué » et qui tient compte de « l'état de l'évolution de l'encaisse et des besoins de [la compagnie] ».

⁵ Une autre exception a été codifiée dans les modifications apportées en 2019 à la LACC qui créent le par. 11.2(5) (voir *Loi n° 1 d'exécution du budget de 2019*, art. 138). Cet article prévoit que, lorsqu'une ordonnance relative à la demande initiale a été demandée, « le tribunal ne rend l'ordonnance visée au paragraphe [11.2](1) que s'il est également convaincu que les modalités du financement temporaire demandé sont limitées à ce qui est normalement nécessaire à la continuation de l'exploitation de la compagnie débitrice dans le cours ordinaire de ses affaires durant cette période ». Cette disposition ne s'applique pas en l'espèce, et les parties ne l'ont pas invoquée. Toutefois, il se peut qu'elle ait pour effet d'empêcher les juges surveillants d'approuver des AFL à titre de financement temporaire au moment où l'ordonnance relative à la demande initiale est rendue.

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

Priority — secured creditors

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

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

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

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

Priorité — créanciers garantis

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

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

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

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

Factors to be considered

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

- (a) the period during which the company is expected to be subject to proceedings under this Act;
- (b) how the company's business and financial affairs are to be managed during the proceedings;
- (c) whether the company's management has the confidence of its major creditors;
- (d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;
- (e) the nature and value of the company's property;
- (f) whether any creditor would be materially prejudiced as a result of the security or charge; and
- (g) the monitor's report referred to in paragraph 23(1)(b), if any.

(CCAA, s. 11.2(4))

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

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

Facteurs à prendre en considération

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

- a) la durée prévue des procédures intentées à l'égard de la compagnie sous le régime de la présente loi;
- b) la façon dont les affaires financières et autres de la compagnie seront gérées au cours de ces procédures;
- c) la question de savoir si ses dirigeants ont la confiance de ses créanciers les plus importants;
- d) la question de savoir si le prêt favorisera la conclusion d'une transaction ou d'un arrangement viable à l'égard de la compagnie;
- e) la nature et la valeur des biens de la compagnie;
- f) la question de savoir si la charge ou sûreté causera un préjudice sérieux à l'un ou l'autre des créanciers de la compagnie;
- g) le rapport du contrôleur visé à l'alinéa 23(1)b).

(LACC, par. 11.2(4))

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(Houlden, Morawetz and Sarra, at §33)

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

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

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

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

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

(Houlden, Morawetz et Sarra, §33)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The facts of this case are unusual: there is a single “pot of gold” asset which, if realized, will provide significantly more than required to repay the creditors. The supervising judge was in the best position to balance the interests of all stakeholders. I am of the view that the supervising judge’s exercise of discretion in approving the Tenor DIP Loan was reasonable and appropriate, despite having the effect of constraining the negotiating position of the creditors.

...

... While the approval of the Tenor DIP Loan affected the Noteholders’ leverage in negotiating a plan, and has made the negotiation of a plan more complex, it did not compromise the terms of their indebtedness or take away any of their legal rights. It is accordingly not an arrangement, and a creditor vote was not required. [paras. 82 and 93]

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

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

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

[TRADUCTION] Les faits de l’espèce sont inhabituels : la « marmite d’or » ne contient qu’un seul élément d’actif qui, s’il est réalisé, rapportera beaucoup plus que ce qui est nécessaire pour rembourser les créanciers. Le juge surveillant était le mieux placé pour établir un équilibre entre les intérêts de toutes les parties intéressées. J’estime que l’exercice par le juge surveillant de son pouvoir discrétionnaire d’approuver le prêt de DE Tenor était raisonnable et approprié, bien qu’il ait eu pour effet de limiter la position de négociation des créanciers.

...

... L’approbation du prêt de DE Tenor a certes amoindri l’influence que pouvaient exercer les détenteurs de billets lors de la négociation d’un plan, et rendu plus complexe la négociation d’un plan, mais ce prêt ne constituait pas une transaction visant les conditions de leurs dettes ni ne les privait de l’un de leurs droits reconnus par la loi. Il ne s’agit donc pas d’un arrangement, et un vote des créanciers n’était pas nécessaire. [par. 82 et 93]

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

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

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

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

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

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

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

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

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

VI. Conclusion

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

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

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

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

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

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

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

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

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

VI. Conclusion

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

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

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

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

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

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

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

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

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

Akagi v. Synergy Group (2000) Inc. et al.
[Indexed as: Akagi v. Synergy Group (2000) Inc.]

Ontario Reports

Court of Appeal for Ontario,
Simmons, Blair and Juriansz JJ.A.
May 22, 2015

125 O.R. (3d) 401 | 2015 ONCA 368

Case Summary

Debtor and creditor — Receivers — Applicant investor obtaining default judgment for fraud and obtaining order appointing receiver under s. 101 of Courts of Justice Act — Receivership order greatly expanded on subsequent ex parte applications by receiver in order to permit receiver to carry out broad investigative inquiry to determine whether respondents had defrauded other investors — Other investors' interests not requiring protection in order to preserve applicant's interests — Section 101 of Courts of Justice Act permitting appointment of investigative receiver in appropriate circumstances but receivership put into place by application judge going beyond what is authorized by s. 101 — Orders set aside — Courts of Justice Act, R.S.O. 1990, c. C.43, s. 101.

The applicant contributed funds to a tax program, marketed and sold by Synergy, which was supposed to generate tax loss allocations for him but did not. He sued Synergy and certain individuals associated with it for fraud and obtained default judgment. He then applied successfully for an *ex parte* order under s. 101 of the *Courts of Justice Act* appointing a receiver over the assets of Synergy and an additional company, IBC. On subsequent *ex parte* applications by the receiver, the receivership order morphed into a wide-ranging investigative receivership, freezing and otherwise reaching the assets of 43 additional individuals and entities and authorizing the registration of certificates of pending litigation against their properties. None of the additional targets was a party to the receivership proceeding, and only two were actually judgment debtors. The application judge empowered the receiver to root out the details of the broader tax allocation scheme as it affected a large number of other investors, although there was no pending or intended proceeding on behalf of those investors. The respondents' application to set aside the orders was dismissed. The respondents appealed.

Held, the appeal should be allowed.

The court had jurisdiction to hear the appeal. The initial receivership order was obtained on application. There was nothing more to be disposed of once that relief was granted. The initial order was a final order. The subsequent orders expanding the initial order were subsumed in the order dismissing the respondents' application, which was a final order.

Section 101 of the *Courts of Justice Act* provides an equitable remedy for the appointment of an

investigative receiver in appropriate circumstances. However, the type of receivership envisaged and put into place by the application judge went beyond what is authorized by s. 101. The purpose of appointing a receiver in aid of execution under s. 101 is to protect the interests of the claimant seeking the order where there is a real risk that its recovery would otherwise be in serious jeopardy. The reach of the subsequent orders granting the receiver enhanced powers was beyond the scope of what could be justified in a single-creditor receivership involving an outstanding claim of, at most, perhaps \$122,000. Those orders should be vacated. To the extent that the initial order was granted for the same roving purposes as the subsequent orders, that order should also be vacated. Even if the initial order was granted only to aid the execution of the [page402] applicant's judgment, it still had to be set aside. The applicant failed to show that a receivership order freezing and otherwise interfering with the debtors' assets -- and the assets of others as well -- was needed to protect his ability to recover on the judgment debt.

The application judge erred in granting certificates of pending litigation. No action or application had been commenced by the applicant asserting a claim to an interest in land or requesting a certificate of pending litigation. Moreover, there was no indication that either the applicant's claim or the claims sought to be protected on behalf of unnamed investors gave rise to any claims to an interest in land.

Century Services Inc. v. New World Engineering Corp. (July 28, 2006), Toronto, Court File No. 06-CL-6558 (S.C.J.); *General Electric Canada Real Estate Financing Holding Co. v. Liberty Assisted Living Inc.*, [2011] O.J. No. 3632, 2011 ONSC 4704, 282 O.A.C. 345, 81 C.B.R. (5th) 265 (Div. Ct.), affg [2011] O.J. No. 4213, 2011 ONSC 4136 (S.C.J.); *Stroh v. Millers Cove Resources Inc.*, [1995] O.J. No. 1949, 85 O.A.C. 26, 56 A.C.W.S. (3d) 289 (Div. Ct.), affg [1995] O.J. No. 1376 (Gen. Div.); *Udayan Pandya v. Courtney Wallis Simpson* (November 17, 2005), Toronto, Court File No. 05-CL-6159 (S.C.J.), **consd**

Loblaws Brands Ltd. v. Thornton, [2009] O.J. No. 1228, 78 C.P.C. (6th) 189, 176 A.C.W.S. (3d) 141 (S.C.J.), **distd**

Other cases referred to

236523 *Ontario Inc. v. Nowack*, [2013] O.J. No. 5525, 2013 ONSC 7479 (S.C.J.); *Baker v. Paddock Inn Peterborough Ltd.* (1977), 16 O.R. (2d) 38, [1977] O.J. No. 2247, 2 B.L.R. 101 (H.C.J.); *CanaSea Petrogas Group Holdings Ltd. (Re)*, [2014] O.J. No. 4984, 2014 ONSC 6116, 18 C.B.R. (6th) 283, 246 A.C.W.S. (3d) 18 (S.C.J.); *Chilian v. Augdome Corp.* (1991), 2 O.R. (3d) 696, [1991] O.J. No. 414, 78 D.L.R. (4th) 129, 44 O.A.C. 263, 49 C.P.C. (2d) 1, 25 A.C.W.S. (3d) 1234 (C.A.); *Degroote v. DC Entertainment Corp.*, [2013] O.J. No. 5207, 2013 ONSC 7101, 7 C.B.R. (6th) 232 (S.C.J.); *East Guardian SPC v. Mazur*, [2014] O.J. No. 5377, 2014 ONSC 6403, 19 C.B.R. (6th) 317, 64 C.P.C. (7th) 90, 247 A.C.W.S. (3d) 181 (S.C.J.); *Erdman (Re)*, [2012] O.J. No. 2499, 2012 ONSC 3268, 91 C.B.R. (5th) 82 (S.C.J.); *Illidge (Trustee of) v. St. James Securities Inc.* (2002), 60 O.R. (3d) 155, [2002] O.J. No. 2174, 159 O.A.C. 311, 34 C.B.R. (4th) 227, 114 A.C.W.S. (3d) 657 (C.A.); *Ontario v. Shehrazad Non Profit Housing Inc.* (2007), 85 O.R. (3d) 81, [2007] O.J. No. 1388, 2007 ONCA 267, 223 O.A.C. 76, 46 C.P.C. (6th) 195, 156 A.C.W.S. (3d) 523; *Pandora Select Partners LP v. Strategy Real Estate*

Investments Ltd., [2007] O.J. No. 993, 27 B.L.R. (4th) 299, 155 A.C.W.S. (3d) 1014 (S.C.J.); *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, [1994] S.C.J. No. 17, 111 D.L.R. (4th) 385, 164 N.R. 1, J.E. 94-423, 60 Q.A.C. 241, 54 C.P.R. (3d) 114, 46 A.C.W.S. (3d) 40; *Romspen Investment Corp. v. Hargate Properties Inc.*, [2011] A.J. No. 1361, 2011 ABQB 759, 86 C.B.R. (5th) 49, 209 A.C.W.S. (3d) 843; *Ryder Truck Rental Canada Ltd. v. 568907 Ontario Ltd. (Trustee of)*, [1987] O.J. No. 2315, 16 C.P.C. (2d) 130, 3 A.C.W.S. (3d) 426 (H.C.J.)

Statutes referred to

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 [as am.]

Business Corporations Act, R.S.O. 1990, c. B.16 [as am.], ss. 161, 163

Canada Business Corporations Act, R.S.C. 1985, c. C-44, ss. 229 [as am.], 230 [as am.]

Courts of Justice Act, R.S.O. 1990, c. C.43, ss. 101 [as am.], 103

Securities Act, R.S.O. 1990, c. S.5 [as am.] [page403]

Rules and regulations referred to

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rule 42.01(2)

APPEAL from the receivership orders of C. Campbell J. of the Superior Court of Justice dated June 14, 2013; June 24, 2013; June 28, 2013; August 2, 2013; and September 16, 2013.

J. Lisus and J. Renihan, for appellants Student Housing Canada and R.V. Inc.

J. Spotswood and W. McDowell, for appellants Integrated Business Concepts Inc. and Vincent Villanti.

D. Magisano and S. Puddister, for appellant Ravendra Chaudhary.

M. Katzman, for appellants Synergy Group (2000) Inc., Shane Smith, Nadine Theresa Smith, David Prentice, and Jean Lucien Breau and 1893700 Ontario Limited.

J. Leon and R. Promislow, for respondent J.P. Graci & Associates (the court-appointed receiver).

T. Corsianos, for respondent Trent Akagi.

BLAIR J.A.: —

Overview

[1] The appointment of a receiver in a civil proceeding is not tantamount to a criminal investigation or a public inquiry. Regrettably, those responsible for obtaining the appointment in this case thought that it was. As a result, the receivership proceeded on an entirely misguided course.

[2] Mr. Akagi contributed funds to a tax program, marketed and sold by the Synergy Group. It was supposed to generate tax loss allocations for him, but did not. He sued Synergy Group (2000) Inc. ("Synergy") and certain individuals associated with it for fraud and obtained default judgment in the amount of approximately \$137,000. On June 14, 2013, Mr. Akagi applied for, and obtained, an *ex parte* order appointing a receiver over all assets, undertakings and property of Synergy and an additional company, Integrated Business Concepts Inc. ("IBC").

[3] The primary evidence in support of the application consisted of a three-page affidavit sworn by Mr. Akagi and copies of three affidavits from representatives of the Canadian Revenue Agency ("CRA"). The representatives' affidavits outlined the details of a CRA investigation into the tax loss allocation scheme and indicated that, besides Mr. Akagi, there may be as many as [page404] 3,800 other investors who were defrauded. The materials did not disclose that the CRA investigation had been terminated in February 2013 -- some four months before Mr. Akagi brought the *ex parte* application.

[4] Subsequently, through a series of further *ex parte* applications, the receivership order morphed into a wide-ranging "investigative receivership", freezing and otherwise reaching the assets of 43 additional individuals and entities (including authorizing the registration of certificates of pending litigation against their properties). None of the additional targets was a party to the receivership proceeding, only three had any connection to the underlying Akagi action and only two were actually judgment debtors.

[5] On September 16, 2013, the appellants moved before the application judge in a "come-back proceeding" to set aside the receivership orders. Their application was dismissed. They now appeal from the September 16 order and the previous *ex parte* orders.

[6] All of the receivership orders were sought and obtained pursuant to s. 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, which gives the court broad powers to make such an order "where it appears to a judge of the court to be just or convenient to do so". Accordingly, the appeal does not involve issues that may arise in connection with the appointment of a receiver under the numerous other statutes that contain such powers, or by way of a private appointment by a secured creditor under a security document. Nor does the appeal concern a class proceeding or other form of representative action.

[7] Mr. Akagi is an unsecured judgment creditor. However, it is apparent from the record that the relief sought was intended to reach far beyond his interests in that capacity. It was intended to empower the receiver to root out the details of the broader tax allocation scheme as it affected a large number of other investors beyond Mr. Akagi -- although to what end is unclear, as there is no pending or intended proceeding on behalf of those investors.

[8] For the reasons that follow, I would allow the appeal and set aside all of the contested orders.

Factual Background

The tax loss allocation scheme

[9] Mr. Akagi invested more than \$100,000 through Synergy in what he understood were small businesses managed by IBC that would generate legitimate business losses. Synergy's [page405] "tax reduction strategy" program was misrepresented to him as a means of achieving substantial tax savings through the allocation to him of his proportionate share of those losses.

[10] Mr. Akagi made an initial investment of \$20,000 in November 2006. He received documentary confirmation that he and Synergy agreed "to explore alternative income tax strategies by purchasing units in small to medium businesses"; that Synergy, as transfer agent, was to act as liaison between Mr. Akagi and IBC "to facilitate the placement of capital into . . . small and medium sized, privately owned businesses"; and that "IBC agree[ed] to execute the purchase on behalf of the Purchaser, provide complete documentation to support the purchase and any related tax benefit and provide all necessary follow-up documentation and service in the event that [the CRA] requests substantiating proof of Purchaser's Participation and any resulting Income Tax Deduction Claims."

[11] In March 2007, Mr. Akagi received a documentary package from Synergy for the purposes of preparing his 2006 tax returns. The business entity in which he had purportedly invested was said to have suffered a total loss of \$164,500, of which his proportionate share was \$104,000. Mr. Akagi deducted that amount and received a tax credit of \$27,262.10.

[12] Having received that benefit, Mr. Akagi invested a further \$90,000 with Synergy for the purposes of his 2007 taxation year. He received the same type of documentary confirmation. At the end of February 2008, he received a letter from an entity known as the International Business Consultants Association ("IBCA") enclosing a cheque in the amount of \$248.78, purportedly representing his share of IBCA's profits for the 2007 year.

[13] The honeymoon was short-lived, however. On March 19, 2008, Mr. Akagi received a letter from the CRA stating that an audit was being conducted on IBC with respect to the 2006 taxation year. A few days later, Synergy sent a letter advising Mr. Akagi that the CRA did not "approve of [Synergy's] Profit and Loss Business Development Program", and that Synergy would not be issuing tax forms for the 2007 tax year until it had cleared matters with the CRA. Mr. Akagi was given the option of filling in and returning a form to obtain a refund of his investment for 2007. Although he did so, his \$90,000 investment was not returned.

[14] In December 2008, the CRA advised Mr. Akagi that it was questioning his loss claim for 2006, and that it was the position of CRA that the IBCA loss arrangement "constitutes a sham or sham transactions". In May 2009, Mr. Agaki received a notice of reassessment for the 2006 taxation year, completely [page406] disallowing his claimed business losses of \$104,000. In the end, the CRA waived some penalties and interest, and Mr. Akagi repaid \$54,842.58.

The underlying proceedings: the Akagi action

[15] In August 2009, Mr. Akagi commenced an action against Synergy and four individuals connected with it -- Shane Smith, David Prentice, Sandra Delahaye and Jean Lucien Breau (the "Akagi action"). Smith acted and held himself out as the president of Synergy. Prentice acted and held himself out as its vice-president. Delahaye, a chartered accountant, was the salesperson who sold the investment to Mr. Akagi. Breau, according to the corporate records, was the sole shareholder and director of Synergy.

[16] In the action, Mr. Akagi claimed \$116,575.98 in damages, representing the monetary losses he had sustained as a result of what he alleged to be an unlawful conspiracy to defraud him. He also claimed punitive damages. The defendants were noted in default (except for Breau, who was never served), and Mr. Akagi moved, without further notice, for default judgment. In May 2010, Cullity J. granted default judgment, awarding Mr. Akagi the claimed compensatory damages plus \$25,000 in punitive damages. He dismissed Mr. Akagi's claim for equitable tracing because he had failed to identify any fund or property in the pleadings to which the funds could be traced.

[17] Immediately upon learning of the default judgment, the defendants moved to set it aside. Justice Whitaker did so on September 3, 2010. His order was upheld on appeal, subject to the following conditions: (i) the defendants were to pay Mr. Akagi \$15,000 in costs thrown away, plus \$7,000 for his costs on appeal; and (ii) the defendants were to pay \$60,000 to the credit of the action pending the outcome of the proceedings.

[18] The defendants complied with these conditions.

[19] Mr. Akagi subsequently moved for summary judgment against Synergy and the defendants Smith and Prentice.¹ On May 14, 2012, McEwen J. granted summary judgment in the amount of \$90,000, representing Mr. Akagi's outstanding 2007 investment. However, McEwen J. declined to grant summary judgment on the claims for fraud and conspiracy to defraud on the basis that the defendants' materials raised triable issues on [page407] those claims. By agreement of the parties, the \$60,000 earlier paid into court to the credit of the action remained in court and was not be applied to the \$90,000 judgment.

[20] The saga continued, however. Mr. Akagi moved once again to strike the statements of defence of Synergy, Smith and Prentice, and for an order directing that the \$60,000 be paid out to him in partial satisfaction of his \$90,000 partial summary judgment. On October 5, 2012, Roberts J. granted that relief. On January 18, 2013, Roberts J. made a further order: (i) directing the registrar to note Synergy, Smith and Prentice in default; and (ii) directing Mr. Akagi to proceed to trial to determine the issues left to be tried by McEwen J.

[21] Justice Chiappetta heard the undefended trial of the remaining issues and, on April 24, 2013 -- on the basis of the fraud and conspiracy to defraud claims in the Akagi action -- awarded Mr. Akagi \$116,575.98 in compensatory damages, \$30,000 in punitive damages and \$17,000 in costs. On January 23, 2015, a different panel of this court dismissed the appeal from this judgment.

[22] I note here that the \$90,000 sum awarded by McEwen J. is a component of the \$116,575.98 compensatory damages awarded by Chiappetta J. In the end, Mr. Akagi's outstanding claim against Synergy, Smith and Prentice is approximately \$182,000, consisting of (i) \$116,575.98 in compensatory damages; (ii) \$30,000 in punitive damages; and (iii) \$36,000 in

costs. From this must be subtracted the \$60,000 already paid, leaving a balance of approximately \$122,000.

[23] It is this claim that spawned the sprawling receivership outlined below.

The initial ex parte receivership application

[24] No steps appear to have been taken to effect recovery on the judgment. Nevertheless, on June 14, 2013 -- less than two months after the judgment was granted -- Mr. Akagi brought an *ex parte* application before the Commercial List in Toronto, seeking the appointment of J.P. Graci & Associates as receiver of the assets, property and undertakings of Synergy and IBC (IBC had not been made a defendant in the Akagi action).

[25] In support of the initial application, Mr. Akagi filed a three-page affidavit characterizing himself as a victim of fraud perpetrated by Synergy, Smith and Prentice (as set out in the summary judgment materials before McEwen J.), and as a judgment creditor of Synergy, Smith and Prentice (the "debtors") as a result of Chiappetta J.'s judgment awarding him compensatory and punitive damages. [page408]

[26] In addition, without swearing as to his belief in the truth of their contents, Mr. Akagi attached three documents relating to an investigation by the CRA into the affairs of Synergy and IBC: (i) a copy of an information to obtain production order, presented by a CRA officer, Andrew Suga, to a judge five years earlier (in July 2008); (ii) a copy of an affidavit sworn three years earlier (on June 25, 2010) by a CRA officer, Sophie Carswell; and (iii) a copy of a second affidavit sworn by Ms. Carswell on March 2, 2012. Also attached, again without swearing as to his belief in the truth of their contents, were copies of three newspaper articles regarding the execution of search warrants by the RCMP on June 6, 2013 (in a matter unrelated to Mr. Akagi, but purporting to relate to Synergy and Smith).

[27] The thrust of the information contained in the CRA documents was that, at the time the documents were executed, the CRA was conducting a criminal investigation relating to Synergy and IBC's tax allocation program. In particular, CRA officials were investigating the affairs of Synergy, IBC, Smith, Prentice and Breau, as well as those of the appellants Vincent Villanti (the president of IBC) and Ravendra Chaudhary (a chartered accountant working with IBC and Villanti) and various other persons. The tax scheme (defined by Ms. Carswell as the "Tax Plan") was described as follows:

In the Tax Plan, arm's length individuals who purchased "units" as part of the Tax Plan have deducted certain losses in their 2004, 2005 and 2006 T1 individual income Tax Returns ("T1 Returns"), which they were led to believe were partnership losses validly deductible against other income. These losses purportedly originated from the operations of struggling small and medium sized enterprises ("Joint Venture Partners" or "JVPs" hereinafter) who contributed them to a pool of losses by way of signing Joint Venture Partnership Agreements with the Independent Business Consulting Association (hereinafter "IBCA"). No such losses are deductible in the T1 Returns of the Unit Purchasers.

The net result of the Alleged Offenders' activities is that:

- a) Purchasers of units in the Tax Plan (hereinafter "Unit Purchasers") were defrauded of the money they had paid to the Alleged Offenders, because what they received for the money paid was not deductible in their Income Tax Returns, contrary to what they were led to believe.
- b) The Unit Purchasers claimed losses in their respective T1 Returns for the calendar years 2004, 2005 and 2006, resulting in the understatement of their income taxes payable to the Crown, and
- c) The Alleged Offenders understated their income from their participation in the promotion and sale of the Tax Plan, thus understating the taxable income and consequent income tax thereon in their own respective income tax returns (corporate and individual) for the taxation years 2004, 2005 and 2006. [page409]

As a result of its findings in the investigation to date, the essence of the CRA's theory of the offences currently is that the individuals cited above as Alleged Offenders . . . acting personally or through corporations or entities which they controlled, participated in the promotion and sale of the Tax Plan which the Affiant believes to be fraudulent because the overwhelming majority of JVPs' losses as shown on their financial statements were fraudulently inflated in arriving at the loss figures shown on the T2124 Statements of Business Activities issued by the Alleged Offenders to the Unit Purchases as part of the Tax Plan.

[28] The Suga information to obtain, referred to above, described a similar tax scheme, although in much greater detail.

[29] As noted, Mr. Akagi did not say what, if any, knowledge he had of the information contained in the Carswell and Suga material or that he believed in the truth of their contents. Nor did he or the receiver -- then or at any time during the subsequent *ex parte* applications discussed below -- disclose that the CRA had terminated its investigation in February 2013, four months before the receivership application (albeit, as it later turned out, the RCMP was, at the same time, conducting a continuing investigation into the same alleged scheme).

[30] On the basis of this record, on June 14, 2013, the application judge granted the receivership order sought, stating in a brief four-line endorsement that he was "satisfied that the grounds for relief sought have been made out and that a Receiving Order [should] issue in the form filed". The order was made pursuant to s. 101 of the *Courts of Justice Act*. I shall refer to this order as the "initial order".

[31] Mr. Akagi submits that "the application judge appointed the receiver for the purpose of investigating the Synergy Alternative Tax Investment Program *on behalf of all investors therein*, and not just on behalf of Mr. Akagi" (emphasis added). However, the initial order makes no mention of the Synergy alternative tax investment program, much less of the power to investigate any such program. That said, the receiver appears to have treated the initial order as entitling it to embark on such an inquiry, and at some point in the evolution of the receivership the application judge appears to have accepted that he had put an "investigative receivership" into place.

[32] What follows is a brief description of how the receivership evolved.

The subsequent ex parte expansions of the receiver's powers

June 24, 2013

[33] Just ten days after the initial order, the receiver applied *ex parte* for expanded powers. It sought authorization to direct [page410] financial institutions to disclose information and documentation regarding payments and transfers of funds not only by Synergy and IBC (the only entities subject to the initial order), but also by or at the direction of an expanded list of targets: Independent Business Consulting Association, Independent Business Consultants Association, Integrated Business Consultants Association, 565819 Ontario Ltd., Vincent Villanti, Jean Breau, Larry Haliday, Joe Loshiavo, Shane Smith, David Prentice, Ravendra Kumar Chaudhary and Nadine Smith.

[34] The receiver did not file a notice of motion, notice of application or a factum. The only additional material filed beyond that which informed the initial order was the receiver's first report. In another brief endorsement, the application judge granted the order sought.

[35] As I shall explain later, it is at this point that the receivership truly began to embark on its impermissible voyage. The expanded order was sought on the premise that "[t]he Receivership concerns a tax scheme . . . described by Canada Revenue Agency", as set out in the excerpt from Ms. Carswell's affidavit, set out above. Based on CRA's documents, the "scheme" was described as involving 3,815 "victims", and the list of "Alleged Offenders" in Ms. Carswell's affidavit became the expanded target list outlined above.

June 28, 2013

[36] Still, the receiver was not content.

[37] Four days later, on June 28, the matter was back before the application judge, again *ex parte* with no notice of motion or application, no further evidence and no factum. This time, there was not even an additional receiver's report. The receiver sought a further expansion of its powers, authorizing it, amongst other things, to examine the financial account statements and related records in the hands of any financial institutions of the debtors and IBC, as well as the others on the expanded target list. The enlarged authority was granted. In another brief endorsement, the application judge stated that "[h]aving heard from counsel [he was] satisfied the relief sought is in the circumstances [was] appropriate and so approved in terms of the draft order signed".

August 2, 2013

[38] On August 2, 2013, the receiver obtained what can only be described as a breathtakingly broad extension of the initial order. Recall that the only judgment debtors of Mr. Akagi were -- and are -- Synergy, Smith and Prentice. The only [page411] respondents on the initial application -- and the only entities made subject to the initial order -- were Synergy and IBC. IBC is not, and never has been, a debtor of Mr. Akagi.

[39] Here is what happened leading up to August 2.

[40] On July 30, 2013, the receiver e-mailed the application judge with a copy of its second report, dated that same date. On July 31, counsel for the receiver appeared before the

application judge, but there is nothing in the court file to indicate what submissions were made. On August 1, counsel for the receiver e-mailed the application judge again, attaching a draft order that would become the August 2 order. In the e-mail, counsel offered to make themselves available if the judge "would like a call to discuss the draft order". There is no record of any such discussion. On August 2, the application judge sent an e-mail to counsel for the receiver, stating: "I hereby authorize the attached order to issue." No reasons were provided.

[41] Again, this order was sought and obtained *ex parte*, without any formal notice of motion or application, and without any evidence other than the filing of the receiver's second report.

[42] The second report summarized the results of the receiver's investigations after serving the June 24 and June 28 "disclosure orders" on various financial institutions. The information received included bank statements of a large number of individuals and corporations named in the earlier orders or in some way associated or affiliated with them. The receiver's conclusion was "that the alleged offenders have set up a complex matrix of companies and bank accounts". It also identified certain properties said to be associated with the appellant Chaudhary and others, and certain information obtained from the appellants Smith and Prentice at their examinations in aid of execution held on July 26, 2013.

[43] What makes the reach of the August 2 order breathtakingly broad is the following:

- It extended the receiver's powers to include and apply to a list of 43 additional individuals and entities identified in Schedule "A" to the order; any affiliates of those individuals or entities (as defined in the Ontario *Business Corporations Act*, R.S.O. 1990, c. B.16 ("OBCA")); any corporations or other entities directly or indirectly controlled by the individuals listed or of which they were directors or officers; any corporation in respect of which the listed individuals were entitled to conduct financial transactions; and finally, any entity with a registered head office at the premises occupied by Synergy and IBC. [page412]
- The Schedule "A" list was inaccurately defined as comprising "additional debtors". Of those on the list, only Synergy, Smith and Prentice were debtors to Mr. Akagi.
- The order contained sweeping injunctive provisions -- operating on a worldwide scale -- enjoining all of the 45 listed individuals and entities from dealing with their assets, property or undertakings, wherever located, in any way, and freezing their accounts by enjoining any financial institution served with the order from "disbursing, transferring or dealing with any funds or assets deposited in all [their] accounts".
- The order authorized the receiver to register certificates of pending litigation against the properties of not only the Debtors and IBC, but the 41 "additional debtors" listed in Schedule "A", despite no action or application having been commenced seeking such relief.² The court's attention was not drawn to s. 103 of the *Courts of Justice Act*, which requires the commencement of an action claiming an interest in land as a condition to issuing a certificate of pending litigation.
- Not only did the order freeze the accounts of the debtors and the "additional debtors", it granted the receiver a \$500,000 borrowing charge against the frozen funds to fund the receiver's activities.

[44] All of this evolved out of a receivership that could only have been granted in aid of execution of Mr. Akagi's outstanding judgment of, at most, approximately \$122,000, against the three judgment debtors -- Synergy, Smith and Prentice. As noted above, Smith and Prentice

were not even subject to the initial order, nor were they examined in aid of execution until July 26, 2013, more than a month *after* the initial order was made. Nor was there any evidence before the application judge on the initial application -- or thereafter for that matter -- indicating that Mr. Akagi had taken any steps to enforce his judgment or that his recovery was likely to be in any jeopardy. As far as the record shows, none of the debtors or "additional debtors" is insolvent. [page413]

[45] I shall refer to the *ex parte* orders of June 24, June 28 and August 2, 2013 as the "subsequent orders".

The September 16, 2013 "come-back hearing"

[46] Sometime after the August 2 order was granted, the various appellants were notified of the initial and subsequent orders. On August 14, 2013, they applied to the application judge to have the orders set aside. On September 16, 2013, their requests were dealt with by way of a "come-back hearing", and dismissed for written reasons delivered that day. I shall refer to this order as the "come-back hearing order".

[47] At the come-back hearing, the receiver filed its third, fourth and fifth reports dated August 15, September 8 and September 16, 2013. Mr. Akagi filed a responding motion record, as did the appellants.

[48] The application judge dismissed the complaint that the receiver had breached its obligations to the court and to the parties to make full disclosure, by failing to disclose the fact that the CRA had terminated its investigation several months before the application for the initial order. He was satisfied there was no lack of full disclosure. There was evidence on the June 14 application that the RCMP was investigating the matter and, while there was no specific evidence that the CRA had referred the matter to the RCMP, this was implicit in the reference to recent search warrant executions by the RCMP. The application judge concluded that there was "no suggestion that CRA [had] discontinued to pursue what is its concern, namely fraudulent activity in the sale of tax losses to investors which lacked reality".

[49] Secondly, the application judge rejected the appellants' argument that the materials filed did not satisfy the test for injunctive relief (as applied to interim receivers) set out in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, [1994] S.C.J. No. 17, at paras. 47-48. He concluded:

The second ground for setting aside namely, that the *RJR MacDonald* test was not met, does not in my view succeed on this material. It is conceded that there is a serious issue of fraud alleged and given the large number of investors (over 3800) of relatively small sums (\$10-15,000) I conclude it was appropriate that there be an investigative Receiving Order issued. Otherwise many investors would not know of the potential fraud. The irreparable harm on the material clearly extends beyond Mr. Akagi and does extend to a great number of other investors who have not the resources to pursue to judgment as has Mr. Akagi who remains an unsatisfied judgment debtor.

[50] Thirdly, the application judge rejected the argument that the initial and subsequent orders constituted execution before [page414] judgment, analogous to a *Mareva* injunction. In his view,

the relief sought was simply a "freezing subject to further order in support of an ongoing investigation".

[51] Finally, after recognizing the "powerful and important intrusion" of a receivership order under s. 101 of the *Courts of Justice Act*, and acknowledging that the test for the appointment of a receiver was "comparable" to the test for interlocutory injunctive relief, the application judge concluded:

Comparable does not mean precisely. This is a case where some 3800 investors on their own would not be able to adequately investigate the activities of their agent (Synergy) in dealing on their behalf with CRA. A Receiver under s. 101 provides an equitable remedy and in circumstances where, as here, its purpose is investigative. For that reason as in *Loblaws Brands Limited v. Thornton* (CV-09-373422) a Receiver may be appointed to investigate when other means are not available to answer the legitimate concerns of investors.

Final or Interlocutory Order

[52] Counsel for Mr. Akagi advanced two arguments that he submits undermine this court's jurisdiction to hear the current appeal.

[53] First, he argued that the orders under attack are interlocutory and therefore this court does not have jurisdiction to deal with them. In the circumstances here, I disagree.

[54] The initial order was obtained on application. No relief was claimed other than the appointment of a receiver. There was nothing more to be disposed of once that relief was granted. In the context of the proceedings, it was not intended to be interim or interlocutory in nature pending the outcome of a proceeding involving Mr. Akagi or anyone else.

[55] Although Mr. Akagi's counsel refers to the orders as "separate receivership orders", the character of the subsequent orders is unclear because the receiver did not file a notice of motion, notice of application or any formal record on any of the subsequent *ex parte* proceedings.

[56] In any event, they are subsumed in the September 16, 2013 come-back hearing order, which is a final order. It finally disposes of the receivership issues between the parties to the initial order and between the receiver and the numerous non-parties caught by the subsequent orders. There is no action or application in which any further rights will be determined. There will be no pleadings defining the issues and giving the appellants the opportunity to defend. This conclusion is consistent with decisions of this court, faced with similar circumstances, holding that a receivership order obtained by way of application is a final order from which an appeal lies directly to [page415] this court: see, e.g., *Illidge (Trustee of) v. St. James Securities Inc.* (2002), 60 O.R. (3d) 155, [2002] O.J. No. 2174 (C.A.); *Ontario v. Shehrazad Non Profit Housing Inc.* (2007), 85 O.R. (3d) 81, [2007] O.J. No. 1388, 2007 ONCA 267.

[57] Secondly, counsel for Mr. Akagi argued that a direct appeal to this court from the initial and subsequent orders is inappropriate because the Rules of Civil Procedure, R.R.O. 1990, Reg. 194 provide for the steps to be taken to set aside an *ex parte* order. Again, I disagree. This argument overlooks the fact that the come-back hearing effectively provided that very procedure.

[58] For these reasons, an appeal lies to this court from the come-back hearing order.

Discussion and Analysis

[59] It will be apparent from the foregoing narration that, in my view, the receivership orders must be set aside. They stand on a fundamentally flawed premise and are unjustifiably overreaching in the powers they grant. Procedurally, they call for at least a word of caution as well, although it is not necessary to dispose of the appeal on this basis in view of the more substantive issues raised by the orders. The procedural concerns arise out of the *ex parte* nature of this developing set of extraordinary orders, the somewhat casual manner in which they were processed, and the failure to make full disclosure.

[60] I will return momentarily to these issues, and to the particulars of this case. First, however, it may be useful (i) to revisit the framework of this proceeding; and (ii) to comment briefly on the relatively new notion of an "investigative receiver" -- so named for the powers the receiver is granted -- as it begins to stride across the commercial law landscape.

The framework of this proceeding

[61] The initial order and subsequent orders were sought and obtained by relying on s. 101 of the *Courts of Justice Act*. Mr. Akagi is an unsecured judgment creditor with a judgment based on fraud.

[62] This is not the case of a secured creditor requesting the appointment of a receiver under its security instrument by court order rather than by private appointment. Nor is it a case involving the appointment of a receiver under insolvency legislation, such as the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("BIA"), or under the *Securities Act*, R.S.O. 1990, c. S.5 (where the court has the power to appoint a receiver to protect [page416] investors in certain circumstances). As noted earlier, it is not a class proceeding or other form of representative action.

[63] This is a case where a judgment creditor seeks to use an unsatisfied judgment as an entrée to obtain a receivership in order to freeze the assets and investigate the affairs of not only the debtors, but also of a complex mix of related and not-so-related entities and individuals. And to do so not to protect his own interests, but those of some 3,800 other investors who may have been victims of a similar fraud, but who have not sought to assert a similar claim.

[64] This is made clear in the initial notice of application, both in the outline of the factual grounds for the receivership and in the summary of why Mr. Akagi said it was in the interests of justice that the receiver be appointed. Ground 10 in the notice of application states:

It is in the interests of justice that a Receiver be appointed over Synergy and IBC:

- (a) Judicial process will ensure that an independent court officer will control the process and address competing claims.
- (b) The Court appointed Receiver can investigate and work with authorities to locate and realize upon assets for the benefit of all creditors.

- (c) The complex business structure would make litigation by individuals untenable. The Court appointed Receiver can deal with such complexities on behalf of all victims.
- (d) The Court appointed Receiver can prevent further wasting of assets and help to preserve assets for the benefit of all victims/creditors.

"Investigative" or "investigatory" receiverships

[65] The idea of appointing a receiver or monitor with investigative powers -- and sometimes, with only those powers -- has emerged in recent years. This court has not previously been asked to consider whether, or in what circumstances, a s. 101 receiver may be empowered in this fashion. For the purposes of this appeal, it is not necessary that the contours of such an appointment be traced in a detailed manner. Suffice it to say that the idea of appointing a receiver to investigate into the affairs of a debtor is not itself unsound. Rather, it is the runaway nature of the use to which the concept has been put in this case that gives rise to the problem.

[66] Indeed, whether it is labelled an "investigative" receivership or not, there is much to be said in favour of such a tool, in my view -- when it is utilized in appropriate circumstances and with appropriate restraints. Clearly, there are situations where the appointment of a receiver to investigate the affairs of [page417] a debtor or to review certain transactions -- including even, in proper circumstances, the affairs of and transactions concerning related non-parties -- will be a proper exercise of the court's "just and convenient" authority under s. 101 of the *Courts of Justice Act*. See, for example, *Stroh v. Millers Cove Resources Inc.*, [1995] O.J. No. 1376 (Gen. Div.), affd [1995] O.J. No. 1949, 85 O.A.C. 26 (Div. Ct.); *Udayan Pandya v. Courtney Wallis Simpson* (November 17, 2005), Toronto, Court File No. 05-CL-6159 (S.C.J.); *Century Services Inc. v. New World Engineering Corp.* (July 28, 2006), Toronto, Court File No. 06-CL-6558 (S.C.J.); *Loblaw Brands Ltd. v. Thornton*, [2009] O.J. No. 1228, 78 C.P.C. (6th) 189 (S.C.J.); *General Electric Canada Real Estate Financing Holding Co. v. Liberty Assisted Living Inc.*, [2011] O.J. No. 4213, 2011 ONSC 4136 (S.C.J.), affd [2011] O.J. No. 3632, 2011 ONSC 4704 (Div. Ct.); *Degroote v. DC Entertainment Corp.*, [2013] O.J. No. 5207, 2013 ONSC 7101 (S.C.J.); *East Guardian SPC v. Mazur*, [2014] O.J. No. 5377, 2014 ONSC 6403 (S.C.J.); 236523 *Ontario Inc. v. Nowack*, [2013] O.J. No. 5525, 2013 ONSC 7479 (S.C.J.) (relief denied); *Romspen Investment Corp. v. Hargate Properties Inc.*, [2011] A.J. No. 1361, 2011 ABQB 759.

[67] It goes without saying that the root principles governing the appointment of any receiver remain in play in this context, however, and in this respect, two "bookend" considerations, are particularly germane. On the one hand, the authority of the court to appoint a receiver under s. 101 of the *Courts of Justice Act* "where it appears . . . just or convenient to do so" is undoubtedly broad and must be shaped by the circumstances of individual cases. At the same time, however, the appointment of a receiver is an extraordinary and intrusive remedy and one that should be granted only after a careful balancing of the effect of such an order on all of the parties and others who may be affected by the order. In the case of a receivership in aid of execution, at least, the appointment requires evidence that the creditor's right to recovery is in serious jeopardy. It is the tension between these two considerations that defines the parameters of receivership orders in aid of execution.

[68] A review of some of the authorities referred to above will illustrate how these tensions have been resolved in the particular context of a receivership clothed with investigative powers.

Stroh v. Millers Cove Resources Inc.

[69] The first is *Stroh v. Millers Cove Resources Inc.*, *supra*. Because it involved an oppression remedy claim, the appointment [page418] of an inspector under the *OBCA* was an available option.³ Justice Farley appointed a receiver to take control of the assets of a company and to investigate and conduct an independent review of certain self-dealing transactions by the company's majority shareholder, of which the company's directors were unaware. In affirming his decision, the Divisional Court underlined that "the main thrust" of the order was to ensure that the company's assets and arrangements "[could] be fully examined and considered so that future actions [could] then be planned": para. 7.

[70] It is important to note that in *Stroh* the defendant corporation was not an operating company and that Farley J. only granted the receivership remedy after giving counsel the opportunity to reattend before him and make further submissions about whether the officer to be appointed should be a receiver/manager, a monitor, an inspector or something else. He ultimately concluded that the only way the investigation stood any chance of success (because of the secrecy of the majority shareholder and the power it exercised) was to appoint a receiver with the authority he granted.

[71] In other words, Farley J. carefully fashioned the remedy to meet the needs of the oppression remedy claimants in the proceeding. [page419]

Udayan Pandya v. Courtney Wallis Simpson and Century Services v. New World Engineering Corp.

[72] A decade later, Ground J. made a similar order in *Udayan Pandya v. Courtney Wallis Simpson*, *supra*, as did Morawetz J. in *Century Services Inc. v. New World Engineering Corp.*, *supra*. Both cases involved the appointment of a receiver for the primary purpose of monitoring and investigating the assets and affairs of defendants.

[73] As Morawetz J. reasoned in *Century Services*, the appointment of a receiver was "necessary to monitor the affairs of the defendants so that a more fulsome investigation [could] be undertaken". No power was given to seize or freeze assets and the order was very specific that the receiver "shall not operate or unduly interfere with the business of the corporate defendants".

[74] In short, the focus was on investigating the affairs of *the defendants* in order to protect the rights of *the plaintiff*. That is, the relief granted was carefully designed to meet the needs of the particular proceeding itself (unlike here, where the investigative receivership reached numerous non-party "alleged offenders" unrelated to the underlying proceedings to protect the interests of thousands of unrelated, non-party "victims").

Loblaw Brands Ltd. v. Thornton and General Electric Canada Real Estate Financing Holding Co. v. Liberty Assisted Living

[75] It appears to have been D.M. Brown J. (as he then was) who adopted the terminology of an "investigative" or, as he called it, an "investigatory" receiver. As far as I can determine from the Canadian, American, British and other common law jurisprudence, his decisions in *Loblaw*

Brands Ltd. v. Thornton, supra, and *General Electric Canada Real Estate Financing Holding Co. v. Liberty Assisted Living, supra*, are the first to have recognized such a receiver as, in effect, a specific class of receiver. Neither of these authorities assists the respondent in justifying the receivership as it evolved here, however.

[76] *Loblaw Brands* -- a decision upon which the application judge relied -- is not this case at all. It involved a fraud perpetrated against Loblaw by an employee (Thornton) who diverted about \$4.2 million in supplier rebate payments from Loblaw to his own company (IBL). [page420]

[77] Prior to the appointment of the "investigatory receiver", Brown J. had granted a *Norwich Pharmacal*⁴ order followed by a *Mareva* injunction against the assets of Thornton and IBL. Based on the investigation following those orders, Loblaw learned that IBL's bank account contained less than \$44,000 and Thornton's less than \$6,000. On the other hand, the accounts revealed outgoing transfers of over \$900,000 for payments to various car dealerships, the purchase of a cottage, mortgage payments, home improvements and cash transfers to Thornton's son.

[78] Based on these facts, Brown J. appointed a receiver "to locate, investigate, and monitor" the property of Thornton and IBL and "to secure access for the Receiver to such books, record, documents and information the Receiver considers necessary to conduct an investigation of transfers of funds by or from Paul Thornton or IBL, or their banks or trust accounts, to the other defendants or other persons": para. 17.

[79] In one sense, this was quite a broad order. However, *Loblaw Brands* is markedly different from the present case in a number of ways.

[80] First, the *Loblaw* receivership was grounded in necessity in relation to the collection of the defrauded funds by the claimant Loblaw: given the huge disparity between the amount of money diverted from Loblaw to IBL (\$4.2 million) and the value of Thornton and IBL's known assets (approximately \$50,000), Brown J. concluded that "without the appointment of a receiver the plaintiff's right to recovery could be seriously jeopardized": para. 16. These circumstances do not apply here. Mr. Akagi is owed approximately \$122,000. There is no evidence of any dramatic disparity between the assets of Synergy, Smith and Prentice (much less IBC) and the amount of the outstanding judgment. Nor is there any evidence that Mr. Akagi's right to recover on the judgment is in jeopardy.

[81] Secondly, the *Loblaw* receivership was very carefully tailored to preserve Loblaw's right to recover without providing the receiver with overreaching powers to interfere with the rights of others. The *Loblaw* receiver's mandate was "to locate, investigate and monitor" (para. 17); it was not empowered to seize and freeze, as was the receiver here. Nor were the targeted individuals and entities whose assets were encumbered and affairs interfered with anywhere nearly as widespread or tangentially associated with the parties to the proceeding as is the case here. [page421]

[82] Finally, the *Loblaw* receivership was also very carefully crafted to protect the interests of Loblaw alone. Here, however, the receivership is more concerned -- if not entirely concerned -- with protecting the interests of the 3,800 other investors who are said to have been defrauded in the tax allocation scheme. The assets being chased in this receivership are not those needed to

protect Mr. Akagi's interests at all; they relate to the interests of those 3,800 unrelated, non-party individuals who may or may not find themselves in the same situation as Mr. Akagi.

[83] Nor does Brown J.'s decision in *General Electric* -- a bankruptcy proceeding -- provide a basis for justifying the orders here.

[84] *General Electric* involved four bankrupt companies and two related non-bankrupt companies that were part of a group of companies called the Liberty Group. The Liberty Group owned and operated a number of retirement homes. Prior to their bankruptcies, the four bankrupt companies defaulted on their secured obligations to General Electric. The receiver subsequently assigned the companies into bankruptcy and became the trustee in bankruptcy under the *BIA*.

[85] In the course of the bankruptcy proceeding, it became apparent that, during the bankrupt companies' period of insolvency, there had been a series of intercompany payments from them to the two related but solvent corporations under the Liberty Group umbrella: Liberty Assisted Living Inc. ("Liberty") and 729285 Ontario Limited ("729285"). Liberty had been the manager of the retirement homes and 729285 was a shareholder of the company that held all of the shares of the bankrupt companies. In addition, three retirement residences had been sold in the face of court orders prohibiting such sales.

[86] The trustee tried to obtain financial information regarding these transactions from the bankrupt companies and from Liberty and 729285. In spite of court orders requiring disclosure of the information and requiring the companies' officers to attend for examinations under s. 163 of the *BIA*, the information was either not provided or, if provided, was inconsistent, unreliable and misleading. Faced with this stonewalling, the trustee sought the appointment of an "investigative receiver" to investigate the affairs of Liberty and 729285.

[87] Justice Brown granted the order with respect to 729285, but declined to do so with respect to Liberty. He concluded there was a strong case that the bankrupt companies had made preference payments to 729285 while insolvent. Because the companies had provided unreliable and inconsistent information on their s. 163 examinations and had compounded that problem by [page422] making misrepresentations to the court about the true state of the transferred proceeds, he was satisfied, at para. 103, that

Those factors point[ed] to the need to allow an independent third party (a) to look into the transactions which took place between the Bankrupt Companies and 729285, (b) to ascertain the true state of 729185's interest in any of the [funds] -- whether they were in trust for others or whether the company enjoyed a beneficial interest in them -- and, (c) to figure out the true state of the affairs regarding those to whom the [funds] were paid.

[88] With respect to Liberty, however, Brown declined to grant such an order. Since Liberty had managed the bankrupt companies, there were contract-based reasons for payments to and from the companies and there was no evidence that the proffered explanations were unreliable.

[89] Again, then, *General Electric* is a case where the investigative powers granted to the receiver were carefully weighed and carefully tailored to protect the rights of the applicant in relation to the affairs of companies closely related to the bankrupt companies.

[90] Some consistent themes emerge from these authorities:

- The appointment of the investigative receiver is necessary to alleviate a risk posed to the plaintiff's right to recovery: *Loblaw Brands*, at paras. 10, 14 and 16.
- The primary objective of investigative receivers is to gather information and "ascertain the true state of affairs" concerning the financial dealings and assets of a debtor, or of a debtor and a related network of individuals or corporations: *General Electric* (Div. Ct.), at para. 15. One authority characterized the investigative receiver as a tool to equalize the "informational imbalance" between debtors and creditors with respect to the debtor's financial dealings: *East Guardian SPC v. Mazur*, *supra*, at para. 75.
- Generally, the investigative receiver does not control the debtor's assets or operate its business, leaving the debtor to continue to carry on its business in a manner consistent with the preservation of its business and property: see, e.g., *Loblaw Brands*, at para. 17; *Century Services*.
- Finally, in all cases the investigative receivership must be carefully tailored to what is required to assist in the recovery of the claimant's judgment while at the same time protecting the defendant's interests, and to go no further than necessary to achieve these ends. [page423]

[91] An additional theme that is reflected in the authorities relates to the application of the three-part test set out by the Supreme Court of Canada in *RJR-MacDonald*, at paras. 47-48. The *RJR-MacDonald* test requires the applicant to demonstrate (i) that there is a serious issue to be tried;⁵ (ii) that the creditor will suffer irreparable harm if the relief is not granted; and (iii) that the balance of convenience favours the creditor. The test is often applied where the receivership order is purely interlocutory and ancillary to the pursuit of other relief claimed -- where it is, in effect, execution before judgment.

[92] Although the application judge applied the test at the time of the come-back hearing -- concluding that it had been met here -- I need not dwell on whether that was so, or on the role of *RJR-MacDonald* in the receivership context generally, for the purposes of this appeal. The initial order, subsequent orders and come-back hearing order must be set aside in any event, in my view, for the reasons that follow.

The investigative receivership in this case

[93] In spite of the positive features of investigative receivers, as set out above, there are risks as well. This appeal provides a case in point. The receiver, in particular, took a useful concept and ran too far with it. In addition, a number of procedural safeguards were at least obscured in the dust of the chase.

The procedural issues

[94] Because of the substantive frailties undermining the receivership, it is not necessary to determine this appeal based on the procedural issues raised.⁶ It bears noting, however, that if the matter had not proceeded through the numerous steps on an *ex parte* basis, as it did, it would have been less likely to have gone astray, as it did. The same may be said of the somewhat relaxed procedural approach taken to the proceedings. Had the normally salutary processes of the Commercial List -- carefully designed to permit the parties to get to the merits

of a dispute and resolve them in "real time" without trampling their procedural rights -- not been permitted to become overly casual, [page424] as they did, the galloping nature of the receivership may well have been reined in.

[95] *Ex parte* proceedings are to be taken sparingly, and only then on full disclosure and in circumstances where it is demonstrated that notice to other parties would undermine the purpose of the proceeding. As Penny J. noted recently in *CanaSea Petrogas Group Holdings Ltd. (Re)*, [2014] O.J. No. 4984, 2014 ONSC 6116 (S.C.J.), at para. 28, applicants are under "high obligations of candor and disclosure on an *ex parte* application".

[96] At best, the steps taken in pursuit of the orders here sailed very close to this line. There is a reason for requiring a proper record of steps taken, including a notice of motion or application, a motion or application record, a proper evidentiary foundation and adequate judicial reasons: it is otherwise impossible to determine subsequently what was at issue and the basis for the order made. This is particularly so where the relief sought involves the extraordinary, *Mareva*-like nature of a receivership order, much less a receivership order of the sweep that emerged from these proceedings.

[97] Beyond the receiver's failure to prepare any of the above-listed documents, the appellants place considerable emphasis on the receiver's failure to disclose, during the *ex parte* steps in the proceeding, that the CRA had discontinued its investigation -- on the particulars of which the applicant relied -- in February 2013, several months before the initial receivership application was made. It was not until almost two weeks *after* the August 2 order that the termination of the CRA investigation was first brought to the court's attention, and even then, it was raised indirectly: in its third report, dated August 15, 2013, the receiver confirmed that the CRA had referred its investigation to the RCMP.

[98] There was some indication in the materials filed when the initial order was sought, however, that the RCMP was also investigating the matter. Based on this -- despite the absence of evidence that the CRA had referred the matter to the RCMP or that the CRA had itself discontinued its investigation -- the application judge "was satisfied there was no lack of full disclosure".

[99] The application judge was well positioned to determine whether he had been misled by any material non-disclosure, and his decision in that regard is entitled to deference. That said, in my view, the failure to disclose that the very investigation upon which the *ex parte* receivership application was founded had been discontinued, at the very least, sailed close to the line of failing to make full and fair disclosure. [page425]

The substantive issues

The "roving receivership"

[100] The fundamental flaw underlying the initial and subsequent orders is the faulty premise that the receiver could be appointed in these circumstances to carry out a broad, stand-alone, investigative inquiry -- the civil equivalent of a criminal investigation or public inquiry -- for the purposes of determining whether wrongs were suffered by an unidentified hodgepodge of non-party persons who were not represented by anyone in the proceedings, who had expressed no interest in becoming parties or in having their rights protected in the proceedings, and whose interests did not need to be protected to preserve the interests of the appointing creditor. This

flawed premise is compounded by the overreaching nature of the relief granted, namely, the authority to both (i) investigate, without notice, the private financial affairs of a myriad of targets only indirectly, if at all, related to the defendants, as well as further potential targets far beyond the actual debtors and the need to protect Mr. Akagi's interests; and (ii) tie up and freeze the assets and property of those targets, again without notice, pending the termination of the receivership.

[101] Mr. Akagi sought the appointment of a receiver because he had an unsatisfied judgment against Synergy, Smith and Prentice for approximately \$122,000. The purpose of appointing a receiver in aid of execution under s. 101 of the *Courts of Justice Act* is to protect the interests of the claimant seeking the order where there is a real risk that its recovery would otherwise be in "serious jeopardy": *Ryder Truck Rental Canada Ltd. v. 568907 Ontario Ltd (Trustee of)*, [1987] O.J. No. 2315, 16 C.P.C. (2d) 130 (H.C.J.), at para. 6.

[102] Put simply, the reach of the subsequent orders granting the receiver enhanced powers is beyond the scope of what could be justified in a single-creditor receivership involving an outstanding claim of, at most, perhaps \$122,000. To the extent the initial order was granted for the same roving purpose -- as the receiver submits it was -- that order must also be vacated.

[103] That the receivership was intended from the beginning to be -- and certainly became -- an investigation of the affairs of those involved in the broad tax scheme (and of others even beyond that) on behalf of 3,800 non-party investors is apparent from both the position taken by the receiver and the application judge's following comment from his September 16 reasons:

This is a case where some 3800 investors on their own would not be able to adequately investigate the activities of their agent (Synergy) in dealing on [page426] their behalf with CRA. A Receiver under s. 101 provides an equitable remedy and in circumstances where, as here, its purpose is investigative. For that reason as in *Loblaws Brands Limited v. Thornton* (CV-09-373422) a Receiver may be appointed to investigate when other means are not available to answer legitimate concerns of investors.

[104] As explained above, *Loblaws Brands* is distinguishable from the present case. While I agree that s. 101 provides an equitable remedy for the appointment of an investigative receiver in appropriate circumstances, the type of receivership envisaged and put into place by the application judge goes beyond what is authorized by that provision.

The initial order of June 14, 2013

[105] Even if the initial order was not granted for the "roving" purpose discussed above, but only to aid the execution of Mr. Akagi's judgment (the only legal or equitable basis upon which it could have been granted pursuant to s. 101 of the *Courts of Justice Act*), it must still be set aside.

[106] It is true that the judgment against Synergy, Smith and Prentice was based on fraud. However, this is insufficient, by itself, to support such an order, in my view. In this context, Mr. Akagi is a judgment creditor. He was required to show that a receivership order freezing and otherwise interfering with the debtors' assets -- and, in this case, not only the debtors' assets but the assets of others as well -- was needed to protect his ability to recover on the debt.

[107] However, the record reflects no evidence of any attempt by Mr. Akagi to collect on the judgment in any fashion other than to apply for the appointment of the receiver. Nor was there any evidence that Synergy or the other defendants had insufficient assets to satisfy the judgment, much less that it was necessary to reach the assets of IBC (which was not a party to the Akagi action) in order to protect Mr. Akagi's interests. Finally, with respect to the *ex parte* nature of the application, there was no evidence of urgency or of any reason to believe that, if given notice, Synergy or IBC (or Smith or Prentice, for that matter) would take steps to frustrate the legal process or undermine Mr. Akagi's prospects of recovery.

[108] The initial order must be set aside on this basis as well.

The certificates of pending litigation

[109] The final subsequent order, granted *ex parte* on August 2, 2013, authorized the receiver to register certificates of pending litigation not only against the property of Synergy and IBC (the original targets of the receivership application) but also [page427] against the property of the 43 "additional debtors" sought to be added to the receivership, only two of which were debtors to the underlying Akagi action.

[110] There are at least two problems with this aspect of the order.

[111] First, no action or application has been commenced by Mr. Akagi, or anyone else, asserting a claim to an interest in land or requesting a certificate of pending litigation. Pursuant to s. 103 of the *Courts of Justice Act* and rule 42.01(2) [of the Rules of Civil Procedure], these requirements are mandatory before an order authorizing the issuance of a certificate of pending litigation can be made: *Chilian v. Augdome Corp.* (1991), 2 O.R. (3d) 696, [1991] O.J. No. 414, 78 D.L.R. (4th) 129 (C.A.), at p. 714 O.R.; *Erdman (Re)*, [2012] O.J. No. 2499, 2012 ONSC 3268 (S.C.J.), at para. 65. Nor was it asserted before this court that Mr. Akagi, or anyone else, intended to commence such an action.

[112] Second, there is no indication that either Mr. Akagi's claim or the claims sought to be protected on behalf of the 3,800 unnamed investors give rise to any claims to an interest in land. The thrust of the claim is that they were all victims of a fraudulent tax allocation scheme, not a fraudulent land investment scheme. While there may be other ways of immobilizing the lands of targeted entities -- such as the "freezing" orders otherwise attacked in these proceedings -- a certificate of pending litigation cannot be issued in the air against unknown and undescribed lands regarding which no claim is, or could be, asserted.

[113] For these reasons, the August 12 order authorizing the issuance of certificates of pending litigation must be set aside.

Disposition

[114] For the foregoing reasons, I would set aside the initial order dated June 24, 2013; the subsequent orders dated June 24, 2013, June 28, 2013 and August 2, 2013; and the come-back hearing order dated September 16, 2013.

[115] If the parties cannot agree on costs, they may make brief written submissions, not to exceed eight pages in length, within 30 days of the release of these reasons.

Appeal allowed.

Notes

- 1 The defendant Breau was never served with the proceedings, and by the time of the summary judgment motion, the defendant Delahaye had made an assignment in bankruptcy.
- 2 The receiver now concedes that an error was made in granting this authorization, but argues that the lands should remain encumbered in some other fashion.
- 3 Legislation governing the affairs of corporations provides for the appointment of an "an inspector" to carry out "an investigation" into the business and affairs of a corporation or its affiliates: see the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44 ("CBCA"), ss. 229 and 230; *OBCA*, s. 161. In general, this relief is available at the instance of a shareholder where it is apparent that the corporation's books and records are not properly kept or are inaccurate, or where there has been some deceit or oppressive conduct practiced against the shareholders: *Baker v. Paddock Inn Peterborough Ltd.* (1977), 16 O.R. (2d) 38, [1977] O.J. No. 2247 (H.C.J.), at p. 39 O.R. Its purpose is to ensure that a corporation discharges its core obligation to provide shareholders with an accurate picture of its financial position: *Pandora Select Partners, LP. v. Strategy Real Estate Investments Ltd.*, [2007] O.J. No. 993, 27 B.L.R. (4th) 299 (S.C.J.), at para. 13. The court has broad powers to make any order it thinks fit, but, in particular, is empowered to appoint an inspector to conduct an investigation and to authorize the inspector to enter any premises in which the court is satisfied there might be relevant information, to examine anything and to make copies of any document or record found on the premises, and to require any persons to produce documents or records to the inspector. While this case does not concern this corporate statutory framework, the notion of a receiver with investigative powers appears to have been born in that context. Nothing in these reasons is meant to suggest that an investigative receiver is intended to supplant the appointment of an inspector under the relevant legislation.
- 4 That is, an order providing for discovery of a non-party prior to trial.
- 5 It is not necessary to comment here on the debate in the authorities as to whether it is necessary for a creditor seeking the appointment of an investigative receiver to demonstrate fraud. It is accepted in this case that there has been fraud; Mr. Akagi's judgment is based on that finding.
- 6 I will deal with the issues surrounding the authorization of certificates of pending litigation separately.

QUEEN'S BENCH FOR SASKATCHEWAN

Citation: **2021 SKQB 194**

Date: **2021 07 07**
Docket: Bky 84 of 2016
Estate No: 22-1978136

BETWEEN:

IN THE MATTER OF THE BANKRUPTCY OF
HUGH GHERASIM
OF THE CITY OF REGINA
IN THE PROVINCE OF SASKATCHEWAN

Counsel:

M. Kim Anderson, Q.C. for the Bankrupt
James Kroczyński for objecting creditor, Richardson International
Limited

JUDGMENT
July 7, 2021

C. ELAINE THOMPSON
REGISTRAR IN BANKRUPTCY

[1] This application deals with Richardson International Limited's [Richardson] opposition to the automatic bankruptcy discharge of Hugh Gherasim.

[2] MNP Ltd. is represented by Pamela Meger, [Trustee]. The Amended Trustee's Report [Report], dated March 2021 states the Trustee's finding that Mr. Gherasim cannot be justly held responsible for any of the facts referred to in s. 173 of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 [BIA].

[3] Richardson has opposed the automatic discharge of Mr. Gherasim on the following grounds:

1. The assets of the Bankrupt are not of a value equal to fifty cents on the dollar on the amount of the Bankrupt's unsecured liabilities (s. 173(1)(a) of the *BIA*);
2. The Bankrupt has failed to account satisfactorily for loss and deficiency of assets to meet the Bankrupt's liabilities (s. 173(1)(d) of the *BIA*);
3. The Bankrupt has brought on and contributed to his bankruptcy by culpable neglect of his business affairs (s. 173(1)(e) of the *BIA*);
4. The Bankrupt has, within the period beginning on the day that is three months before the date of the initial bankruptcy event and ending on the date of the bankruptcy, both dates included, when unable to pay debts as they became due, given an undue preference to various of the Bankrupt's creditors (s. 173(1)(h) of the *BIA*);
5. The Bankrupt has been guilty of fraud, by knowingly failing to fully and fairly disclose particulars of the Bankrupt's financial circumstances in obtaining credit from Richardson (s. 173(1)(k) of the *BIA*);
6. The Bankrupt has failed to perform the duties imposed upon the Bankrupt under the *BIA* (s. 173(1)(o) of the *BIA*), the particulars of which are as follows:

a. Failure to deliver to the Trustee all books, records, documents, writings and papers including, without restricting the generality of the foregoing, title papers, insurance policies and tax records and returns and copies thereof in any way relating to his property or affairs, contrary to s. 158(b) of the *BIA*; and

b. Failure to aid to the utmost of his power in the realization of his property and the distribution of the proceeds among his creditors (s. 158(k) of the *BIA*).

7. The bankrupt has committed an offence under the *BIA*, or any other statute in connection with the Bankrupt's property, the bankruptcy or the proceedings thereunder (s. 173(1)(l) of the *BIA*), the particulars of which are as follows:

a. The Bankrupt has made a fraudulent disposition of the Bankrupt's property before the date of the initial bankruptcy event, contrary to s. 198(1)(a) of the *BIA*; and

b. The Bankrupt has, after or within one year of immediately preceding the date of the initial bankruptcy event, obtained credit by false representations made by the Bankrupt, contrary to s. 198(1)(e) of the *BIA*.

ISSUES

1. Was the examination conducted by Mr. Kroczynski properly constituted?
2. Is Mr. Gherasim and honest but unfortunate bankrupt?

ANALYSIS

1. Was the examination conducted by Mr. Kroczynski properly constituted?

A. Background

i. Examinations in the bankruptcy context

[4] At the hearing of this matter, Mr. Gherasim’s counsel, Mr. Anderson raised preliminary concerns about the propriety of some of Richardson’s arguments; in particular, he submitted that the arguments referring to unanswered undertakings given by Mr. Gherasim under the guidance of previous counsel, might have been founded on an improperly constituted examination conducted by Mr. Kroczynski.

[5] Mr. Kroczynski submits that he was acting for the Trustee, in a properly constituted hearing, when he examined Mr. Gherasim.

[6] Section 163(1) of the *BIA* vests a bankruptcy trustee with the authority to examine a bankrupt under oath, without a court order, providing the bankruptcy creditors have passed an ordinary resolution, or have tendered a written request, or, providing there is a resolution of the majority of inspectors. Section 163(2) gives the court the discretion to allow a creditor to examine a bankrupt if a set of criteria are met.

[7] The difference between the scope of a trustee's authority to examine a bankrupt and the scope of authority vested in a bankruptcy creditor reflects differences between the bankruptcy process and the civil process.

[8] It is instructive to consider the provisions side by side. Sections 163(1) and (2) state:

163 (1) The trustee, on ordinary resolution passed by the creditors or on the written request or resolution of a majority of the inspectors, may, *without an order*, examine under oath before the registrar of the court or other authorized person, the bankrupt, any person reasonably thought to have knowledge of the affairs of the bankrupt or any person who is or has been an agent or a mandatary, or a clerk, a servant, an officer, a director or an employee of the bankrupt, respecting the bankrupt or the bankrupt's dealings or property and may order any person liable to be so examined to produce any books, documents, correspondence or papers in that person's possession or power relating in all or in part to the bankrupt or the bankrupt's dealings or property.

Examination of bankrupt, trustee and others by a creditor

(2) On the application to the court by the Superintendent, any creditor or other interested person and on sufficient cause being shown, *an order may be made for the examination under oath*, before the registrar or other authorized person, of the trustee, the bankrupt, an inspector or a creditor, or any other person named in the order, for the purpose of investigating the administration of the estate of any bankrupt, and the court may further order any person liable to be so examined to produce any books, documents, correspondence or papers in the person's possession or power relating in all or in part to the bankrupt, the trustee or any creditor, the costs of the examination and investigation to be in the discretion of the court.

[9] In a bankruptcy, unlike a civil action, the individual claims of proven unsecured creditors are handled by one trustee in a single proceeding model. The provisions governing examination in the *BIA* are consistent with the single proceeding model for bankruptcy. Supreme Court Justice Gascon explains the policy rationale for the single proceeding model in *Alberta (Attorney General) v Moloney*, 2015 SCC 51 at paras 33-34, [2015] 3 SCR 327:

33 The first purpose of bankruptcy, the equitable distribution of assets, is achieved through a single proceeding model. Under this model, creditors of the bankrupt wishing to enforce a claim provable in bankruptcy must participate in one collective proceeding. This ensures that the assets of the bankrupt are distributed fairly amongst the creditors. As a general rule, all creditors rank equally and share rateably in the bankrupt's assets: s. 141 of the *BIA*; *Husky Oil [Husky Oil Operations Ltd. v. Canada (Minister of National Revenue), [1995] 3 SCR 453]*, at para. 9. In *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379, at para. 22, the majority of the Court, per Deschamps J., explained the underlying rationale for this model:

The single proceeding model avoids the inefficiency and chaos that would attend insolvency if each creditor initiated proceedings to recover its debt. Grouping all possible actions against the debtor into a single proceeding controlled in a single forum facilitates negotiation with creditors because it places them all on an equal footing, rather than exposing them to the risk that a more aggressive creditor will realize its claims against the debtor's limited assets while the other creditors attempt a compromise.

Avoiding inefficiencies and chaos, and favouring an orderly collective process, maximizes global [page352] recovery for all creditors: *Husky Oil*, at para. 7; R. J. Wood, *Bankruptcy and Insolvency Law* (2009), at p. 3.

34 For this model to be viable, creditors must not be allowed to enforce their provable claims individually, that is, outside the collective proceeding. Section 69.3 of the *BIA* thus provides for an automatic stay of proceedings, which is effective as of the first day of bankruptcy:

69.3 (1) Subject to subsections (1.1) and (2) and sections 69.4 and 69.5, on the bankruptcy of any debtor, no creditor has any remedy against the debtor or the debtor's property, or shall commence or continue any action, execution or other proceedings, for the recovery of a claim provable in bankruptcy.

(See *R. v. Fitzgibbon*, [1990] 1 S.C.R. 1005, at pp. 1015-16.)

[10] The bankruptcy stay that bars individual creditors from pursuing the debtor when he assigns in bankruptcy is also a key component of the legal apparatus that allows for a bankrupt's rehabilitation. The protection of the stay would be eroded if each bankruptcy were to involve multiple creditor proceedings to continue during the bankruptcy administration. Justice Gascon provides context for the need to adhere to the single proceeding model as he explains the purpose of financial rehabilitation, the effect of bankruptcy on creditors, the desired outcome for bankruptcy on the bankrupt and the policies behind the provisions that govern the bankruptcy process at paras 36-39 of *Moloney*:

36 The second purpose of the *BIA*, the financial rehabilitation of the debtor, is achieved through the discharge of the debtor's outstanding debts at the end of the bankruptcy: *Husky Oil*, at para. 7. Section 178(2) of the *BIA* provides:

(2) Subject to subsection (1), an order of discharge releases the bankrupt from all claims provable in bankruptcy.

From the perspective of the creditors, the discharge means they are unable to enforce their provable claims: *Schreyer v. Schreyer*, 2011 SCC 35, [2011] 2 S.C.R. 605(S.C.C.), at para. 21. This, in effect, gives the insolvent person a "fresh start", in that he or she is "freed from the burdens of pre-existing indebtedness": Wood, at p. 273; see also *Industrial Acceptance Corp. v. Lalonde*, [1952] 2 S.C.R. 109(S.C.C.), at p. 120. This fresh start is not only designed for the well-being of the bankrupt debtor and his or her family; rehabilitation helps the discharged bankrupt to reintegrate into economic life so he or she can become a productive member of society: Wood, at pp. 274-75; L. W. Houlden, G. B. Morawetz and J. Sarra, *Bankruptcy and Insolvency Law of Canada* (4th ed. (loose-leaf), at p. 6-283. In many cases of consumer bankruptcy, the debtor has very few or no assets to distribute to his or her creditors. In those cases, rehabilitation becomes the primary objective of bankruptcy: Wood, at p. 37.

37 Although it is an important purpose of the *BIA*, financial rehabilitation also has its limits. Section 178(1) of the *BIA* lists debts that are not released by discharge and that survive bankruptcy. Furthermore, s. 172 provides that an order of discharge may be denied, suspended, or granted subject to conditions. These provisions demonstrate Parliament's attempt to balance financial rehabilitation with other policy objectives, such

as confidence in the credit system, that require certain debts to survive bankruptcy: Wood, at pp. 273 and 289.

38 Discharge is the main rehabilitative tool contained in the *BIA*, but it is not the only one. As Professor Wood, at p. 273, observes:

The bankruptcy discharge is one of the primary mechanisms through which bankruptcy law attempts to provide for the economic rehabilitation of the debtor. However, it is not the only means by which bankruptcy law seeks to meet this objective. The exclusion of exempt property from distribution to creditors, the surplus income provisions, and mandatory credit counselling also are directed towards this goal.

39 Another means of rehabilitation is the automatic stay of proceedings contained in s. 69.3 of the *BIA*. The stay not only ensures that creditors are redirected into the collective proceeding described above, it also ensures that creditors are precluded from seizing property that is exempt from distribution to creditors. This is an important part of the bankrupt's financial rehabilitation:

The rehabilitation of the bankrupt is not the result only of his discharge. It begins when he is put into bankruptcy with measures designed to give him the minimum needed for subsistence.

(*Vachon v. Canada (Employment & Immigration Commission)*, [1985] 2 S.C.R. 417(S.C.C.), at p. 430.]

[11] The statutory requirement for the court to supervise creditor involvement in the bankruptcy process that is set out in s.163(2) of the *BIA* flows from these same policy objectives. Parliament has determined that a creditor can only examine a bankrupt if the court exercises its interlocutory discretion to allow an examination.

ii. Bankruptcy versus civil process

[12] The bankruptcy rules around examinations differ from the rules that govern Queen's Bench Court process in Saskatchewan. In civil proceedings parties have the authority to examine opponents by right, under Part 5 of *The Queen's Bench Rules*.

[13] The evidence indicates that Mr. Gherasim's previous counsel appears to have gone along with an examination that began under the Trustee's authority and then continued over the course of two days under Mr. Kroczyński, ending with over 50 undertakings on the part of Mr. Gherasim.

[14] I have no evidence to ascertain whether Mr. Gherasim's former counsel was aware of the distinctions governing proceedings in bankruptcy court. I do not know whether he knowingly consented to waive the requirement for a court order under the *BIA*. Even if he had been aware of the distinctions in process, however, mere consent of opposing counsel cannot be used to override the statutory requirements.

[15] In sum, I have been provided with no authority under the *BIA* that allows a creditor to conduct an examination of a bankrupt without a court order. Additionally, I have been provided with no authority that allows the trustee to delegate its properly constituted authority to a creditor's counsel for the purpose of conducting an examination.

iii. At the hearing

[16] Prior to the hearing no examination order had been obtained by Richardson.

[17] I learned at the hearing that three examination transcripts existed. One transcript detailed the examination of Mr. Gherasim by Mr. Schofield [Former Trustee]. The other two transcripts detailed questions posed by Mr. Kroczyński [Kroczyński Examination Transcripts]. Only one of the two Kroczyński examination transcripts was filed before the hearing, so I was not fully apprised of the substance, the full extent of questioning or the numerous undertakings Mr. Gherasim had granted to Mr. Kroczyński under the guidance of Mr. Gherasim's former counsel, prior to the hearing.

[18] Mr. Kroczyński submitted that he had intended to file the Former Trustee's as well as one of the Kroczyński Examination Transcripts before the hearing, and these were filed immediately after the hearing on the same day. I have no reason to doubt that Mr. Kroczyński intended to have these transcripts filed before the hearing.

[19] Beyond the submission that the examination had been properly constituted by the Trustee, Mr. Kroczyński made no other submissions on the propriety of the examination at the hearing and I was not aware of the extent of examination that had been undertaking at that time and I reserved on the matter of the propriety of how Mr. Kroczyński went about obtaining examination evidence.

[20] At the hearing Mr. Kroczyński did not cross-examine the bankrupt and he did not seek an order approving the examination *nunc pro tunc*, as he had the right to do. Examination and cross-examination of the bankrupt at a discharge hearing is common practice in the bankruptcy court. Mr. Kroczyński has examined bankrupts in many discharge hearings. Mr. Kroczyński did not ask to examine Mr. Gherasim at the hearing.

[21] I also note that Mr. Kroczyński has obtained a number of examination orders from this Court on behalf of creditors in the past and that he is aware of the process required and the legal onus that must be met to trigger the court's discretion to grant an examination order.

[22] Once I had received the two Kroczyński Examination Transcripts, after the hearing, it became apparent to me that parties should be allowed to speak to the matter of the propriety of the Kroczyński Examinations Transcripts and their admissibility and I sought further submissions on the issue of the admissibility of the portion of the examination conducted solely by Mr. Kroczyński.

[23] My request for information stated as follows:

Mr. Kroczyński has tendered a transcript of an examination of Hugh Gherasim for the court's consideration in the matter of Mr. Gherasim's discharge from bankruptcy.

Mr. Anderson, bankrupt's counsel, has objected to evidence and arguments based on material in the examination transcript on grounds that the examination occurred without the court order that is required pursuant to s. 163(2) of the *Bankruptcy and Insolvency Act*. Section 163(2) of the *BIA* gives a bankruptcy creditor the right to apply to a court for an order to examine the bankrupt, among others. It states:

163(2) On the application to the court by the Superintendent, any creditor or other interested person and on sufficient cause being shown, an order may be made for the examination under oath, before the registrar or other authorized person, of the trustee, the bankrupt, an inspector or a creditor, or any other person named in the order, for the purpose of investigating the administration of the estate of any bankrupt, and the court may further order any person liable to be so examined to produce any books, documents, correspondence or papers in the person's possession or power relating in all or in part to the bankrupt, the trustee or any creditor, the costs of the examination and investigation to be in the discretion of the court.

163(3) Examination to be filed

The evidence of any person examined under this section shall, if transcribed, be filed in the court and may be read in any proceedings before the court under this Act to which the person examined is a party.

Mr. Kroczyński submits that the examination was properly constituted by the Trustee, without need for a court order, and consented to by the bankrupt's former counsel.

The registrar is seeking written submissions on the legal authority that allows a creditor to examine the bankrupt without a court order, with the consent of a trustee and the bankrupt.

While the registrar acknowledges that the bankrupt's former counsel and the trustee went along with the creditor's examination of the bankrupt in this case, it is not clear that either had the authority to

allow creditor's counsel to take over the examination of the bankrupt without a court order.

If there was no authority for this examination to proceed, then evidence tendered by way of the examination must be excluded from the court's consideration.

Please provide your written submissions on whether there is authority for a trustee or a bankrupt to consent to an examination of a bankrupt by a creditor by April 12, 2021, so that the registrar can proceed to determine the discharge application, accordingly. The registrar will proceed to make the decision as of materials tendered by end of day on May 12, 2021.

iv. Mr. Kroczyński's submissions

[24] Mr. Kroczyński submitted that he was acting on behalf of the Former Trustee, and not for Richardson, when the Former Trustee invited him to examine Mr. Gherasim.

[25] Mr. Kroczyński explained that he had interpreted Mr. Anderson's objection as having to do with the bankrupt's requirement to comply with undertakings that had been given at the examination, as opposed to admissibility of the examination evidence *per se*:

In closing, it was my understanding that the objection raised by legal counsel for the bankrupt at the discharge hearing was not to the filing of the transcripts, but to the requirement of the bankrupt to comply with the undertakings given at the examination which took place on April 13, 2017. No ruling was made regarding the requirement for compliance with the undertakings, and no objection taken to my extensive reference to the transcripts of evidence which resulted from the examinations. Had objection raised and a determination made at the discharge hearing that the evidence tendered by way of the examination must be excluded from the court's consideration, I would have requested the opportunity to examine the bankrupt at the discharge hearing, and request to do so now should the registrar find that the transcripts cannot be relied upon.

v. Mr. Anderson's position

[26] Mr. Anderson takes the position that s. 163(2) of the *BIA* places clear restrictions on when a creditor can examine a bankrupt.

[27] According to Mr. Anderson, the purpose of requiring a court order prior to an examination of the debtor is to ensure the proper administration of the bankrupt's estate and, as importantly, to prevent creditors from going on a fishing expedition while examining the bankrupt.

[28] The decision of *Giardino (Re)* (2001), 25 CBR (4th) 35 (Ont SC), explains some aspects of the purpose behind the requirement of a court order, as well as the context of examination by a creditor within the bankruptcy process:

6 The true dispute between the parties to this motion is their interpretation of the phrase "the administration of the estate" in s. 163.(2) of the Act. Clearly the scope of any questioning is narrower than the questioning contemplated by s. 163.(1). It is not to be a "fishing expedition", nor does it allow an enquiry into the private affairs of others, even family members of the bankrupt, unless a clear connection exists between the information or documentation sought and some aspect of the *administration* of the bankrupt's estate. It is reasonable to require Mr. Speciale to state on the record, if requested, the connection between the information or documentation he seeks and the administration of the bankrupt's estate. He should also first undertake to be personally responsible for any costs subsequently ordered in favour of Ms Pucchio. Mr. VanBavel and Mr. Snider are to be given notice of the time and place of any examination, and shall have the right to participate on behalf of the parties they represent.

[29] Mr. Anderson also referred to my decision in *Ellis (Re)*, 2013 SKQB 225, 6 CBR (6th) 232, which cited Registrar Schwann (as she then was), observing that a creditor applying for an examination order bears the onus of demonstrating to the court that it has sufficient cause to support the court's decision to exercise its discretion to grant the order under s. 163(2):

It is also incumbent on any creditor to demonstrate, by way of affidavit evidence, that it has sufficient cause to examine the bankrupt prior to the examination occurring. In *Ellis* [2013 SKQB 225], the court reiterated the test for a section 163(2) order as follows:

[emphasis added]

5 The criteria that must be established for a ss. 163(2) order is set out in further detail in the unreported decision of Registrar Schwann, as she then was, in *Re Henderson* (unreported decision in the matter of the Bankruptcy of Allen Scott Henderson, December 16, 2010):

An order under s. 163(2) is interlocutory and discretionary (*NsC Diesel Power Inc. (Re)* (1997), 47 C.B.R. (3d) 129 N.S.C.A.), with consideration turning on these criteria:

(1) has sufficient cause been established by the applicant for the examination under oath directly related to the person the creditor seeks to examine: *NsC Diesel Power Inc., Re* (1997), 49 C.B.R. (3d) 213 (N.S.S.C.);

(2) does the purported scope of the examination relate to the business or property of the bankrupt, to the causes of the bankruptcy or the disposition of property: s. 167; *Re McDonough* (2001), 27 C.B.R. (4th) 279, (Ont. S.C.J.); and

(3) is the examination for the general benefit of the creditors, and does it relate to the general administration of the bankrupt's estate: *Re Assaf* (1976), 23 C.B.R. (N.S.) 14 (Ont. S.C.J.)

[30] Mr. Anderson also notes that there are circumstances where the interests of the creditor and the trustee diverge, as is apparent when an examination order is sought and the creditor seeking the order is also pursuing a civil remedy against the bankrupt outside of the bankruptcy process.

[31] In cases where a creditor may be considering an action or is involved in a civil action, against the bankrupt outside of the bankruptcy process, a court may be reluctant to grant an examination order to a creditor.

[32] In *Harris (Re)*, 2018 ABQB 1038, Registrar Farrington denied a creditor's application for an examination when the same creditor was also involved in a civil suit against the bankrupt, outside the bankruptcy process. Registrar Farrington explained that the examination powers under the *BIA* are not to be used as a collection tool, but that the *BIA* is designed to promote the rehabilitation of debtors and fair and equitable distribution of their estates. In that case, Registrar Farrington also observed that the creditor who is also involved in a civil process outside bankruptcy has access to other means of obtaining information from the bankrupt.

[33] The civil litigation process provides the objecting bankruptcy creditor with ways of accessing substantial information. Registrar Farrington emphasized Parliament's intention to draw a line between examination for use by a trustee and the more limited circumstances where creditor's might be allowed to examine a bankrupt:

18 The law as summarized emphasizes that a section 163(1) examination is to "collect information to assist the trustee in carrying out its duties in administering the bankrupt estate" (see *SHS Services* [2015 ONSC 2674]). In *SHS Services* the Court reminded that the trustee's powers of examination should not be treated as a mere "step in the action". The *Bankruptcy and Insolvency Act* is not a collection tool. It is a statute for the rehabilitation of debtors and fair and equitable distribution of their estates. The Court must balance the interests of the creditors and the bankrupt. Here, the Trustee has not indicated that it has any gaps in its ability to administer the estate and the objecting creditors have no interest in administering the estate.

....

20 Substantial information has already been available to the objecting creditors through their litigation processes. They pursued their actions in a case managed proceeding. They have further avenues for obtaining information for use in the bankruptcy proceedings. The bankrupt has filed an affidavit in support of his discharge application, and the objecting creditors are fully entitled to cross-examine on that affidavit as part of the discharge application process, and I grant leave to do so pursuant to Rule 14 of the *Bankruptcy and Insolvency Rules*.

21 Proceeding under section 163(1) would run afoul of the rule against using a section 163(1) examination as a form of discovery process for contemplated litigation. Here, the objecting creditors are much more interested in the litigation process than they are in the estate administration process.

22 Parliament has carefully prescribed the circumstances under s. 163(1) of the *Bankruptcy and Insolvency Act* as to when a trustee can examine the bankrupt and under s. 163(2) as to when a creditor can examine the bankrupt. Using section 38 as a means to avoid those prescribed circumstances and the balance that they strike would not be appropriate in this case on these facts.

[34] According to Mr. Anderson, additional vigilance may be required in cases where there is the possibility of a civil suit as well as a bankruptcy. Vigilance on the court's part is required to ensure that the examination is designed to benefit the estate and not a fishing expedition on behalf of a civil litigant who is also a creditor. In this case, the examination occurred prior to the civil suit, without knowledge of the court.

[35] With regard to the suggestion that the consent of Mr. Gherasim's former counsel legitimized the examination outside of the required court order, Mr. Anderson takes the position that prior attendance at an examination cannot be construed to waive the statutory requirements for a court order in this case. I agree with Mr. Anderson.

[36] Mr. Anderson cites the comments of Registrar Ferron in *Worldidge (Re)* (1983), 46 CBR (NS) 60 (Ont H Ct J) in support of this position:

Registrar Ferron considered whether an order for re-examination was warranted by reason that an affidavit had been sworn. This was disposed of as follows:

12 Nor is the applicant entitled to examine the deponent as a right, as he would be if the proceedings were in the ordinary provincial civil court. In bankruptcy, the rules require that leave of the court be obtained for such an examination.

13 It is of course, true that very often counsel simply agree to examinations on affidavits filed in a proceeding in bankruptcy and in that case no difficulty arises. However, in the absence of such an agreement, the leave of the court must be obtained and a proper case made out to warrant the examination sought: see *Re Legault* (1977) 24 C.B.R. (N.S.) 83 (Ont. S.C.).

14 No order for the examination of Brockbank was obtained so that there is no right to require his attendance in the first instance and, of course, no question of his reattendance to answer questions he refused to answer on his attendance pursuant to the appointment which was served upon him/

[37] Mr. Anderson's position is summarized in the remainder of his submissions as follows:

This of course, parallels the determination made in *Harris*.

Here, Richardson has failed to discharge the requirement that it demonstrated sufficient cause, either prior to the examination or at present.

Richardson has interests that extend beyond those of the estate, and the extent of questioning undertaken by Richardson, when compared to that undertaken by the Trustee, suggests that the interests of Richardson were much more extensive than those of the Trustee, who was responsible for the administration of the estate.

Richardson did not seek leave to examine at the outset. Richardson has not sought leave to examine Mr. Gherasim on a *pro nunc tunc* basis or filed any affidavit in support of its position.

To reiterate, at no time has Richardson demonstrated any reasons for conducting either of the examinations which took place by its counsel.

The onus is on the creditor to demonstrate it has sufficient reason to question the bankrupt. Richardson, in failing to lead any evidence, has failed to meet the onus both before and after the fact.

It is on the basis of the foregoing that is respectfully submitted that the transcripts from the examination of Hugh Gherasim by Richardson should not be introduced into evidence.

B. Facts

[38] No examination order was ever obtained by Mr. Kroczyński with regard to the Gherasim bankruptcy.

[39] Mr. Kroczyński submits that he conducted the Kroczyński Examinations at the behest of the Former Trustee.

[40] The Former Trustee's Report confirms that the Former Trustee was under the apprehension that "a creditor" had obtained undertakings at an examination. No other creditor appears to have been present at the examination, so I infer that the Former Trustee is referring to Mr. Kroczyński's attendance on behalf of Richardson. The Former Trustee states on p. 4 (see Exhibit K to the Affidavit of Trustee) that:

The Bankrupt was examined under oath by the Trustee and one of the creditors. Until all undertakings are completed by the Bankrupt the Trustee is unable to make a recommendation on the bankrupts [*sic*] discharge.

[41] An invoice confirming that Mr. Kroczyński was acting for the Former Trustee during the examination could easily have corroborated the assertion that he had been retained by the Former Trustee. None was tendered.

[42] Instead, Mr. Kroczyński has provided a number of documents which suggest a relationship and course of dealings between himself and the Former Trustee,

wherein the Former Trustee appeared to invite Mr. Kroczyński to ask questions, without regard to the need for a court order.

[43] At one point in the Former Trustee's examination transcript, an exchange between the Former Trustee and Mr. Kroczyński indicates that the Former Trustee and Mr. Kroczyński had divergent objectives with regard to the examination:

Mr. Schofield: **Now I was not proposing to ask any questions about the Farm Credit mortgages and stuff.**

Mr. Kroczyński: **I'm going to.**

Mr. Schofield: **I suspected you might. So --**

Mr. Kroczyński: **Yes.**

Mr. Schofield: **-- I'm not going to do that.**

Mr. Kroczyński: Thank you.

Q But I am going to ask you – just before this meeting you gave me a notice that apparently Farm Credit is foreclosing on your land. Do you know why they are foreclosing?

A No, not at this present time.

Q Okay. So you've received no communication from Farm Credit per se?

A Not that I can recall.

Mr. Schofield: Okay. I guess I'd like an undertaking to produce any correspondence from Farm Credit as it's received.

Q As far as you know, you've made all of the required payments to Farm Credit?

A Yes, the land payments we've been making, yes.

Q Okay. Well, the letter you gave me clearly implies that it's a foreclosure on land.

A Right.

Q Which logically would suggest that they think you haven't, but I don't know that.

A Right.

Q So that's why I'm asking for the undertaking. I'm going to, I think, let Mr. Kroczyński ask some questions now. I'll reserve the right to come back and ask more if I want.

[emphasis added]

[44] The Kroczyński Examinations occurred on January 29, 2016 and April 16, 2017. I have been informed that the Kroczyński Examination Transcript dated April 16, 2016 is misdated and ought to read April 16, 2017.

[45] After the first examination but prior to the second, Mr. Kroczyński obtained an order from this Court, pursuant to s. 38 of the *BIA*, allowing Richardson to take proceedings in its own name to pursue any claim which the Trustee might have in respect of payment made by Mr. Gherasim to various of his creditors. No examination evidence was filed in support of that application.

[46] The court record on the section 38 civil action indicates that nothing has occurred on this file since March 1, 2017 which was the date when it went to mediation (see QBG 2385/2016).

[47] The evidence supports the finding that Mr. Kroczyński was not examining Mr. Gherasim as a representative of the Former Trustee. I find that he was acting on behalf of the creditor, Richardson, when he conducted the examinations.

[48] The fact that the Former Trustee allowed Mr. Kroczyński to examine Mr. Gherasim cannot be used to override the statutory requirement that a creditor can only examine a bankrupt with a court order.

[49] There is no authority in the *BIA* to suggest that consent of the bankrupt's counsel to examination can be used to override the statutory requirement for a court order. The principles in the case law confirm that a creditor has no authority to examine

the bankrupt without court supervision and assent and the policy behind the *BIA* supports the need to ensure that the court is involved where a creditor wishes to question a bankrupt.

[50] I find that Richardson conducted an examination as a creditor, without legal authority of a court order.

[51] Mr. Kroczyński had a number of options and he has considerable experience with the *BIA* and the bankruptcy court. He could have sought an examination order at any time between the bankruptcy assignment in June 2015 and the discharge hearing in March 2021. He could have sought an order *nunc pro tunc* at the discharge hearing. He could have cross-examined the bankrupt on his affidavit at the discharge hearing. He did not.

[52] Mr. Gherasim assigned in bankruptcy six years ago. Six years is a long time to remain in bankruptcy and normally only serious wrong-conduct will support a bankruptcy of this length. It would be inequitable to allow this matter to continue indefinitely. I find that allowing an examination at this point in the bankruptcy would unduly delay Mr. Gherasim's discharge to his detriment. Mr. Kroczyński has had sufficient time to obtain an order and conduct an examination.

[53] I would also note, that there are very few realizable assets in the estate and that the point of an examination at this stage is not likely to result in any increased return to Richardson.

[54] Finally, I have serious concerns that allowing further examinations to take place at this stage would establish a bad precedent for the future operations of this Court. It would open the door for creditors to undertake fishing expeditions without court supervision, contrary to Parliament's requirement for court supervision over the

process. It could also give creditors the ability to take control of the timing of the bankruptcy discharge application process, potentially causing unwarranted delays and inappropriate use of process.

[55] For the foregoing reasons, I exercise my discretion to deny Mr. Kroczyński's request to examine the bankrupt now.

2. Is Mr. Gherasim an honest but unfortunate bankrupt?

[56] Pursuant to the *BIA*, Mr. Gherasim bears the onus of establishing that he is not justly responsible for the existence of one of the facts itemized in s. 173 of the *BIA* in relation to his bankruptcy.

[57] The Trustee's Report concludes that no s. 173 facts are in play. Pursuant to s. 170(5) of the *BIA*, a Trustee's Report is to be taken as evidence of the statements it contains at the bankruptcy discharge application. This makes sense because the bankruptcy trustee is the person who is most familiar with the bankruptcy proceeding and administration and is the person best placed to understand the bankrupt's conduct in regard to the bankruptcy.

[58] Courts routinely consider a favourable trustee's report as a rebuttal of the bankrupt's reverse onus to establish that his or her asset to liability ratio has arisen by his or her fault.

[59] For this reason, the onus of demonstrating that a s. 173 fact exists falls to the objecting creditor where the trustee's report to the court concludes that there has been no misconduct on the bankrupt's part. In these cases the creditor must establish a s. 173 fact exists on a balance of probabilities in order to support the need for a court order condition in the bankrupt's discharge.

[60] If a creditor does not establish that a s. 173 fact exists, the court has very broad discretion to dispose of the discharge, including ordering an absolute discharge from bankruptcy.

[61] If a creditor establishes a s. 173 fact, then the court's authority to dispose of the discharge remains broad, but it cannot discharge the bankrupt absolutely.

[62] In cases where a s. 173 fact exists, the court must assess the unique circumstances of the bankruptcy including pre-bankruptcy conduct, inter-bankruptcy conduct, the bankrupt's financial circumstances at the time of the discharge application and the relative gravity of any wrong-conduct on the bankrupt's part, to determine the appropriate measure required to sustain the integrity of the bankruptcy system.

i. The Former Trustee's Report

[63] Hugh Gherasim was deemed to have assigned into bankruptcy, by operation of s. 57 of the *BIA*, on July 22, 2015, after his creditors voted against a proposal to deal with his debts. According to the Former Trustee's Report, Mr. Gherasim's assets were valued at \$3,048,000. The Former Trustee estimated that the estate would realize around \$100,848, with an anticipated rate of dividends of 0% for the unsecured creditors. The cause of the bankruptcy was identified as weather conditions producing poor crops.

[64] Without enough information to make a recommendation to the court on the discharge application, the Former Trustee concluded that Mr. Gherasim could not be justly held responsible for any of the facts pursuant to s. 173 of the *BIA*. One inspector was appointed in the estate. In March 2016, under the administration of the Former Trustee, Mr. Gherasim's discharge was adjourned on the following grounds:

The bankrupt was examined under oath by the Trustee and one of the creditors. Until all the undertakings are completed by the bankrupt the Trustee is unable to make a recommendation on the bankrupts *[sic]* discharge. (Exhibit L to the Affidavit of the Trustee)

ii. Trustee's Report (Appended to the Affidavit of Trustee, Exhibit L)

[65] By March 2021, the Former Trustee had retired, and the Trustee had assumed carriage of the administration of the bankruptcy estate. The Former Trustee had realized \$243,888.22 mostly in relation to the sale of non-exempt real property.

[66] The anticipated rate of dividends remained at \$0. The Trustee concluded that the bankrupt could not be justly held responsible for any s. 173 facts and found no reason to oppose the bankrupt's discharge. The Report also addressed the Former Trustee's concern about undertakings, stating:

An earlier report of the Trustee dated March 16, 2016 had indicated that the Bankrupt failed to provide the Trustee with the required information requested at his examination. Mr. Gherasim required the assistance of Mr. Bob Stocks to assist in preparing the documents requested. Mr. Stocks provided an estimate of costs to counsel for Richardson Pioneer company on February 8, 2016. The Bankrupt was unable to pay the costs for Mr. Stocks to assist in the preparation of the information required for the undertakings. The undertakings remain outstanding at this time.

[67] At this point it is important to highlight that the Trustee decided not to oppose the discharge, with knowledge that undertakings had not been met. The Trustee made no distinction between the undertakings provided to the Former Trustee and those provided to Mr. Kroczyński on Richardson's behalf.

[68] Despite the unanswered undertakings, the Trustee determined that Mr. Gherasim could not be justly held responsible for a s. 173 fact and concluded that Mr. Gherasim had met his obligations with regard to the bankruptcy administration.

Accordingly, the Trustee recommended that Mr. Gherasim ought to be discharged absolutely from bankruptcy.

[69] Richardson could have obtained an order from the court to compel the examination of Mr. Stocks with regard to the unanswered undertakings of the Former Trustee. Richardson did not apply to the court for an order.

iii. Richardson's Position

[70] Richardson submits that Mr. Gherasim is not an honest but unfortunate bankrupt on the grounds stated in its Notice of Intended Opposition.

[71] Each ground will be addressed in the analysis that follows.

1. The assets of the Bankrupt are not of a value equal to fifty cents on the dollar on the amount of the Bankrupt's unsecured liabilities

[72] By operation of ss. 172 and 173 of the *BIA*, the court is precluded from ordering an absolute discharge if:

173(1)(a) the assets of the bankrupt are not of a value equal to fifty cents on the dollar on the amount of the bankrupt's unsecured liabilities, unless the bankrupt satisfies the court that the fact that the assets are not of a value equal to fifty cents on the dollar on the amount of the bankrupt's unsecured liabilities has arisen from circumstances for which the bankrupt cannot justly be held responsible;

[73] In this case, the Trustee's Report confirms that the bankrupt cannot justly be held responsible for any of the facts referred to in s. 173 of the *BIA* (p. 3 Trustee's report attached as Exhibit L to Affidavit of Trustee). The bankruptcy is attributed to weather conditions producing poor crops.

[74] To successfully contend the Trustee's evidence, Richardson must demonstrate, on a balance of probabilities that Mr. Gherasim's asset to debt ratio was not justifiable.

[75] Richardson based much of its argument on changes in Mr. Gherasim's net worth prior to the proposal and at the time of the proposal. The documents on which Richardson relied were obtained without a court order and, accordingly, have been excluded for the court's consideration.

[76] Mr. Gherasim attested that he was not in a position to explain discrepancies in the financial documents because he had relied on another professional to prepare the financial reporting documents and could not now afford to retain Mr. Stocks to explain his methodology in preparing the financial reporting.

[77] No party obtained an order compelling Mr. Stock's attendance at an earlier examination, or at the discharge hearing.

[78] Accordingly, there is no evidence before the court with regard to Richardson's concerns around Mr. Gherasim's financial reporting.

2. The Bankrupt has failed to account satisfactorily for loss and deficiency of assets to meet the Bankrupt's liabilities;

[79] By operation of ss. 172 and 173 of the *BIA*, the court is precluded from ordering an absolute discharge if it is established that:

173(1)(d) the bankrupt has failed to account satisfactorily for any loss of assets or for any deficiency of assets to meet the bankrupt's liabilities;

[80] In this case, the Trustee's Report, concludes that the bankrupt cannot justly be held responsible for any of the facts referred to in s. 173 of the *BIA* (p. 3 Trustee's report attached as Exhibit L to Affidavit of Trustee).

[81] The bankruptcy is attributed to weather conditions producing poor crops and the Trustee's Report did not identify a failure to account in this case.

[82] To successfully contend the Trustee's conclusions, Richardson must demonstrate that a failure to account existed, on a balance of probabilities.

[83] No other creditors have identified a concern about the bankrupt's accounting in this case.

[84] Mr. Gherasim has attested to the fact that he could not afford the fees Mr. Stocks quoted to assist in the explanation of how the financial documents were prepared for Mr. Gherasim, by Mr. Stocks.

[85] Mr. Gherasim is not an accountant and he was unable to provide explanations without Mr. Stocks' assistance.

[86] Richardson chose not to apply for an order to examine Mr. Stocks as it could have, pursuant to s. 163(2) of the *BIA*.

[87] Without any evidence before the court of a failure to account, the court is left to rely on the evidence in the Trustee's Report.

[88] Accordingly, Mr. Gherasim has accounted satisfactorily for loss and deficiency of assets to meet his liabilities.

3. The Bankrupt has brought on and contributed to his bankruptcy by culpable neglect of his business affairs.

[89] By operation of ss. 172 and 173 of the *BIA*, the court is precluded from ordering an absolute discharge if it is established that:

173(1)(e) the bankrupt has brought on, or contributed to, the bankruptcy by rash and hazardous speculations, by unjustifiable extravagance and living, by gambling or by culpable neglect of the bankrupt's business affairs.

[90] In this case, the Trustee's Report concluded that the bankrupt cannot justly be held responsible for any of the facts referred to in s. 173 of the *BIA* (p. 3 Trustee's report attached as Exhibit L to Affidavit of Trustee).

[91] There is no evidence before the court to rebut the Trustee's conclusion.

[92] The Trustee attributes the bankruptcy to weather conditions producing poor crops.

[93] There is no evidence that the bankrupt has brought on and contributed to his bankruptcy by culpable neglect of his business affairs.

4. The Bankrupt has, within the period beginning on the day that is three months before the date of the initial bankruptcy event and ending on the date of the bankruptcy, both dates included, when unable to pay debts as they became due, given an undue preference to various of the Bankrupt's creditors.

[94] This matter is the subject of a civil suit before the Court of Queen's Bench.

[95] In September of 2017, Richardson issued a Notice to Defendant to Mr. Gherasim, the Bank of Nova Scotia, Farm Credit Canada, PHI Financial Services Canada Limited and Blair's Fertilizer in relation to its claim for relief, pursuant to *The Fraudulent Preferences Act*, RSS 1978, c F-21 and the *BIA*. Richardson claimed that Mr. Gherasim had paid each of the other defendants, to the detriment of Richardson's entitlement, at a time when Mr. Gherasim was insolvent and unable to pay his debts in full, or when he knew that he was on the eve of insolvency. Parties filed their statements of defence and a Certificate of Compliance certified that the requirement of mediation in the action had been met on Wednesday March 1, 2017. According to the Court File, QBG385/2016, no further action appears to have been taken with regard to this claim.

1. The Bankrupt has been guilty of fraud, by knowingly failing to fully and fairly disclose particulars of the Bankrupt's financial circumstances in obtaining credit from Richardson.

[96] Evidence in front of the court in connection with this bankruptcy does not support a finding of fraud.

[97] According to a long line of jurisprudence, arguments based on fraud are only heard in a bankruptcy discharge application where evidence of fraud is clear.

[98] This approach does not foreclose on a creditor's options because debts arising from fraud survive the bankruptcy. The civil courts provide a remedy for creditors in these cases; moreover, the civil process lends itself better to determining questions of fraud.

2. The Bankrupt has failed to perform the duties imposed upon the Bankrupt under the *BIA*, the particulars of which are as follows:

a. Failure to deliver to the Trustee all books, records, documents, writings and papers including, without restricting the generality of the foregoing, title papers, insurance policies and tax records and returns and copies thereof in any way relating to his property or affairs, contrary to s. 158(b) of the *BIA*; and

b. Failure to aid to the utmost of his power in the realization of his property and the distribution of the proceeds among his creditors.

[99] By operation of ss. 172 and 173 of the *BIA*, the court is precluded from ordering an absolute discharge if:

173(1)(o) the bankrupt has failed to perform the duties imposed on the bankrupt under this Act or to comply with any order of the court.

[100] Pursuant to s. 158 of the *BIA* the bankrupt shall:

158(b) deliver to the trustee all books, records, documents, writings and papers including, without restricting the generality of the foregoing, title papers, insurance policies and tax records and returns and copies thereof in any way relating to his property or affairs;

...

158(k) aid to the utmost of his power in the realization of his property and the distribution of the proceeds among his creditors

[101] The Trustee's Report concluded that Mr. Gherasim was not off-side s. 173 of the *BIA* and that he had complied with all legal requirements in connection with the bankruptcy administration.

[102] Richardson, therefore, bears the onus of establishing on a balance of probabilities that Mr. Gherasim failed to meet his bankruptcy obligations.

[103] The Trustee is licensed to perform the bankruptcy administration, she is an expert with regard to bankruptcy administration and has considerable experience with the bankrupt in this matter. Administrative principles dictate that some deference is warranted with regard to the Trustee's conclusions. Under the *BIA* a trustee is an officer of the court for the purpose of assessing and reporting on the bankrupt's compliance with the bankruptcy administration requirements.

[104] In this case the Former Trustee may have had concerns with the bankrupt's conduct at earlier stages in the bankruptcy. Today, the Trustee has concluded that the bankrupt should not be held accountable for undertakings that he cannot answer due to financial constraints.

[105] Richardson chose not to obtain an order to examine Mr. Stocks, who prepared the financial information provided to creditors with regard to Mr. Gherasim's proposal.

[106] Neither the estate nor Mr. Gherasim had funds to pay Mr. Stocks to explain his methodology in creating financial documents.

[107] Mr. Gherasim relied on Mr. Stocks' expertise to create the financial reporting documents required for the proposal and he testified he does not have the financial expertise to explain how the numbers were arrived at without Mr. Stocks' assistance.

[108] The examination by the Former Trustee took place in 2016, over five years ago and the Trustee maintains that Mr. Gherasim has been compliant and met his obligations.

3. The bankrupt has committed an offence under the *BIA*, or any other statute in connection with the Bankrupt's property, the bankruptcy or the proceedings thereunder, the particulars of which are as follows:

a. The Bankrupt has made a fraudulent disposition of the Bankrupt's property before the date of the initial bankruptcy event, contrary to s. 198(1)(a) of the *BIA*; and

b. The Bankrupt has, after or within one year of immediately preceding the date of the initial bankruptcy event, obtained credit by false representations made by the Bankrupt, contrary to s. 198(1)(e) of the *BIA*.

[109] This matter was not contended. Moreover, the provincial court is the proper court to ascertain matters concerning bankruptcy offenses.

Disposition

[110] As no fact has been established to rebut the Trustee's finding that Mr. Gherasim cannot justly be held responsible for a fact under s. 173, Mr. Gherasim shall be discharged absolutely from bankruptcy as of today's date.

C. ELAINE THOMPSON
REGISTRAR IN BANKRUPTCY



CANADA

CONSOLIDATION

CODIFICATION

Bankruptcy and Insolvency General Rules

Règles générales sur la faillite et l'insolvabilité

C.R.C., c. 368

C.R.C., ch. 368

Current to December 15, 2024

À jour au 15 décembre 2024

Last amended on March 25, 2011

Dernière modification le 25 mars 2011

OFFICIAL STATUS OF CONSOLIDATIONS

Subsections 31(1) and (3) of the *Legislation Revision and Consolidation Act*, in force on June 1, 2009, provide as follows:

Published consolidation is evidence

31 (1) Every copy of a consolidated statute or consolidated regulation published by the Minister under this Act in either print or electronic form is evidence of that statute or regulation and of its contents and every copy purporting to be published by the Minister is deemed to be so published, unless the contrary is shown.

...

Inconsistencies in regulations

(3) In the event of an inconsistency between a consolidated regulation published by the Minister under this Act and the original regulation or a subsequent amendment as registered by the Clerk of the Privy Council under the *Statutory Instruments Act*, the original regulation or amendment prevails to the extent of the inconsistency.

LAYOUT

The notes that appeared in the left or right margins are now in boldface text directly above the provisions to which they relate. They form no part of the enactment, but are inserted for convenience of reference only.

NOTE

This consolidation is current to December 15, 2024. The last amendments came into force on March 25, 2011. Any amendments that were not in force as of December 15, 2024 are set out at the end of this document under the heading “Amendments Not in Force”.

CARACTÈRE OFFICIEL DES CODIFICATIONS

Les paragraphes 31(1) et (3) de la *Loi sur la révision et la codification des textes législatifs*, en vigueur le 1^{er} juin 2009, prévoient ce qui suit :

Codifications comme élément de preuve

31 (1) Tout exemplaire d'une loi codifiée ou d'un règlement codifié, publié par le ministre en vertu de la présente loi sur support papier ou sur support électronique, fait foi de cette loi ou de ce règlement et de son contenu. Tout exemplaire donné comme publié par le ministre est réputé avoir été ainsi publié, sauf preuve contraire.

[...]

Incompatibilité — règlements

(3) Les dispositions du règlement d'origine avec ses modifications subséquentes enregistrées par le greffier du Conseil privé en vertu de la *Loi sur les textes réglementaires* l'emportent sur les dispositions incompatibles du règlement codifié publié par le ministre en vertu de la présente loi.

MISE EN PAGE

Les notes apparaissant auparavant dans les marges de droite ou de gauche se retrouvent maintenant en caractères gras juste au-dessus de la disposition à laquelle elles se rattachent. Elles ne font pas partie du texte, n'y figurant qu'à titre de repère ou d'information.

NOTE

Cette codification est à jour au 15 décembre 2024. Les dernières modifications sont entrées en vigueur le 25 mars 2011. Toutes modifications qui n'étaient pas en vigueur au 15 décembre 2024 sont énoncées à la fin de ce document sous le titre « Modifications non en vigueur ».

Appeal to Court of Appeal

31 (1) An appeal to a court of appeal referred to in subsection 183(2) of the Act must be made by filing a notice of appeal at the office of the registrar of the court appealed from, within 10 days after the day of the order or decision appealed from, or within such further time as a judge of the court of appeal stipulates.

(2) If an appeal is brought under paragraph 193(e) of the Act, the notice of appeal must include the application for leave to appeal.

SOR/98-240, s. 1; SOR/2007-61, s. 63(E).

32 The registrar of the court appealed from shall transmit to the court of appeal the notice of appeal and the file.

SOR/98-240, s. 1.

Official Receiver

33 The official receiver may request instructions from the registrar or, if the official receiver is the registrar, from the judge, in case of doubt respecting any matter arising out of the Act, these Rules or a directive.

SOR/98-240, s. 1.

Code of Ethics for Trustees

34 Every trustee shall maintain the high standards of ethics that are central to the maintenance of public trust and confidence in the administration of the Act.

SOR/98-240, s. 1.

35 For the purposes of sections 39 to 52, **professional engagement** means any bankruptcy or insolvency matter in respect of which a trustee is appointed or designated to act in that capacity pursuant to the Act.

SOR/98-240, s. 1.

36 Trustees shall perform their duties in a timely manner and carry out their functions with competence, honesty, integrity and due care.

SOR/98-240, s. 1.

37 Trustees shall cooperate fully with representatives of the Superintendent in all matters arising out of the Act, these Rules or a directive.

SOR/78-389, s. 2; SOR/98-240, s. 1.

Appels devant la cour d'appel

31 (1) Un appel est formé devant une cour d'appel visée au paragraphe 183(2) de la Loi par le dépôt d'un avis d'appel au bureau du registraire du tribunal ayant rendu l'ordonnance ou la décision portée en appel, dans les 10 jours qui suivent le jour de l'ordonnance ou de la décision, ou dans tel autre délai fixé par un juge de la cour d'appel.

(2) En cas d'application de l'alinéa 193e) de la Loi, l'avis d'appel est accompagné de la demande d'autorisation d'appel.

DORS/98-240, art. 1; DORS/2007-61, art. 63(A).

32 Le registraire du tribunal ayant rendu l'ordonnance ou la décision portée en appel transmet à la cour d'appel l'avis d'appel et le dossier.

DORS/98-240, art. 1.

Séquestre officiel

33 Le séquestre officiel peut demander des consignes au registraire ou, s'il agit en qualité de registraire, au juge, en cas de doute au sujet de toute question relevant de la Loi, des présentes règles ou des instructions.

DORS/98-240, art. 1.

Code de déontologie des syndics

34 Le syndic se conforme à des normes élevées de déontologie, lesquelles sont d'une importance primordiale pour le maintien de la confiance du public dans la mise en application de la Loi.

DORS/98-240, art. 1.

35 Pour l'application des articles 39 à 52, **activité professionnelle** s'entend de toute affaire de faillite ou d'insolvabilité dans laquelle le syndic est nommé ou désigné pour exercer ses fonctions dans le cadre de la Loi.

DORS/98-240, art. 1.

36 Le syndic s'acquitte de ses obligations dans les meilleurs délais et exerce ses fonctions avec compétence, honnêteté, intégrité, prudence et diligence.

DORS/98-240, art. 1.

37 Le syndic coopère entièrement avec les représentants du surintendant dans toute affaire qui relève de la Loi, des présentes règles ou des instructions.

DORS/78-389, art. 2; DORS/98-240, art. 1.

38 Trustees shall not assist, advise or encourage any person to engage in any conduct that the trustees know, or ought to know, is illegal or dishonest, in respect of the bankruptcy and insolvency process.

SOR/98-240, s. 1.

39 Trustees shall be honest and impartial and shall provide to interested parties full and accurate information as required by the Act with respect to the professional engagements of the trustees.

SOR/81-646, s. 2; SOR/98-240, s. 1.

40 Trustees shall not disclose confidential information to the public concerning any professional engagement, unless the disclosure is

- (a) required by law; or
- (b) authorized by the person to whom the confidential information relates.

SOR/81-646, s. 3; SOR/98-240, s. 1.

41 Trustees shall not use any confidential information that is gathered in a professional capacity for their personal benefit or for the benefit of a third party.

SOR/98-240, s. 1.

42 Trustees shall not purchase, directly or indirectly,

- (a) property of any debtor for whom they are acting with respect to a professional engagement; or
- (b) property of any estates in respect of which the Act applies, for which they are not acting, unless the property is purchased
 - (i) at the same time as it is offered to the public,
 - (ii) at the same price as it is offered to the public, and
 - (iii) during the normal course of business of the bankrupt or debtor.

SOR/98-240, s. 1.

43 (1) Subject to subsection (2), if trustees have a responsibility to sell property in connection with a proposal or bankruptcy, they shall not sell the property, directly or indirectly,

- (a) to their employees, agents or mandataries, or persons not dealing at arms' length with the trustees;
- (b) to other trustees or, knowingly, to employees of other trustees; or

38 Le syndic n'aide, ne conseille ni n'encourage quiconque à accomplir un acte qu'il sait — ou devrait savoir — être illégal ou malhonnête dans le contexte du régime de la faillite et de l'insolvabilité.

DORS/98-240, art. 1.

39 Le syndic est honnête et impartial et fournit, conformément aux exigences de la Loi, des renseignements exacts et complets aux parties intéressées au sujet de ses activités professionnelles.

DORS/81-646, art. 2; DORS/98-240, art. 1.

40 Le syndic ne divulgue aux membres du public aucun renseignement confidentiel relatif à ses activités professionnelles, sauf dans les cas suivants :

- a) il y est tenu par la loi;
- b) il a obtenu le consentement de la personne visée par le renseignement confidentiel.

DORS/81-646, art. 3; DORS/98-240, art. 1.

41 Le syndic n'utilise ni pour son propre bénéfice ni pour celui d'un tiers les renseignements confidentiels recueillis dans le cadre de ses fonctions professionnelles.

DORS/98-240, art. 1.

42 Le syndic n'achète, ni directement ni indirectement :

- a) les biens d'un débiteur pour lequel il agit dans le cadre d'une activité professionnelle;
- b) les biens des actifs régis par la Loi et auxquels il n'est pas commis, à moins que ces biens ne soient achetés :
 - (i) en même temps qu'ils sont offerts au public,
 - (ii) à un prix égal à celui auquel ils sont offerts au public,
 - (iii) dans le cours normal des affaires du failli ou du débiteur.

DORS/98-240, art. 1.

43 (1) Sous réserve du paragraphe (2), lorsque le syndic a la responsabilité de vendre des biens dans le cadre d'une proposition ou d'une faillite, il ne les vend, ni directement ni indirectement :

- a) à ses employés, à ses mandataires ou à des personnes ne traitant pas à distance avec lui;
- b) à un autre syndic ou, sciemment, aux employés de ce dernier;
- c) aux personnes liées à lui ou, sciemment, aux personnes liées à celles mentionnées aux alinéas a) ou b).

(c) to related persons of the trustees or, knowingly, to related persons of the persons referred to in paragraph (a) or (b).

(2) If trustees have a responsibility to act in accordance with subsection (1), they may sell property in connection with a proposal or bankruptcy to the persons set out in paragraph (1)(a), (b) or (c), if the property is offered for sale

(a) at the same time as it is offered to the public;

(b) at the same price as it is offered to the public; and

(c) during the normal course of business of the bankrupt or debtor.

SOR/98-240, s. 1; SOR/2007-61, ss. 9(E), 63(E).

44 Trustees who are acting with respect to any professional engagement shall avoid any influence, interest or relationship that impairs, or appears in the opinion of an informed person to impair, their professional judgment.

SOR/98-240, s. 1.

45 Trustees shall not sign any document, including a letter, report, statement, representation or financial statement that they know, or reasonably ought to know, is false or misleading, and shall not associate themselves with such a document in any way, including by adding a disclaimer of responsibility after their signature.

SOR/98-240, s. 1; SOR/2005-284, s. 4.

46 Trustees may transmit information that they have not verified, respecting the financial affairs of a bankrupt or debtor, if

(a) the information is subject to a disclaimer of responsibility or an explanation of the origin of the information; and

(b) the transmission of the information is not contrary to the Act, these Rules or any directive.

SOR/98-240, s. 1.

46.1 [Repealed, SOR/98-240, s. 1]

47 Trustees shall not engage in any business or occupation that would compromise their ability to perform any professional engagement or that would jeopardize their integrity, independence or competence.

SOR/98-240, s. 1.

48 Trustees who hold money or other property in trust shall

(2) Lorsque le syndic a la responsabilité d'agir conformément au paragraphe (1), il peut vendre des biens dans le cadre d'une proposition ou d'une faillite aux personnes mentionnées aux alinéas (1)a), b) ou c), dans la mesure où ces biens sont offerts en vente :

a) en même temps qu'ils sont offerts au public;

b) à un prix égal à celui auquel ils sont offerts au public;

c) dans le cours normal des affaires du failli ou du débiteur.

DORS/98-240, art. 1; DORS/2007-61, art. 9(A) et 63(A).

44 Dans toute activité professionnelle, le syndic évite les influences, les intérêts et les relations qui compromettent son jugement professionnel ou qui, aux yeux d'une personne avisée, donnent à croire qu'ils ont un tel effet.

DORS/98-240, art. 1.

45 Le syndic ne signe aucun document, notamment une lettre, un rapport, une déclaration, un exposé et un état financier, qu'il sait ou devrait raisonnablement savoir être faux ou trompeur, ni ne s'associe de quelque manière à un tel document, y compris en y joignant sous sa signature un déni de responsabilité.

DORS/98-240, art. 1; DORS/2005-284, art. 4.

46 Le syndic peut communiquer des renseignements financiers concernant le failli ou le débiteur sans les avoir vérifiés si :

a) d'une part, ils font l'objet d'un déni de responsabilité ou d'une explication de leur origine;

b) d'autre part, cette communication n'est pas contraire à la Loi, aux présentes règles et aux instructions.

DORS/98-240, art. 1.

46.1 [Abrogé, DORS/98-240, art. 1]

47 Le syndic ne se livre à aucune occupation ni aucune activité commerciale qui compromettraient son intégrité, son indépendance et sa compétence ou qui le gêneraient dans l'exercice de ses activités professionnelles.

DORS/98-240, art. 1.

48 Le syndic qui détient de l'argent ou d'autres biens en fiducie ou en fidéicommiss :

(a) hold the money or property in accordance with the laws, regulations and terms applicable to the trust; and

(b) administer the money or property with due care, subject to the laws, regulations and terms applicable to the trust.

SOR/98-240, s. 1.

49 Trustees shall not, directly or indirectly, pay to a third party a commission, compensation or other benefit in order to obtain a professional engagement or accept, directly or indirectly from a third party, a commission, compensation or other benefit for referring work relating to a professional engagement.

SOR/98-240, s. 1.

50 Trustees shall not obtain, solicit or conduct any engagement that would discredit their profession or jeopardize the integrity of the bankruptcy and insolvency process.

SOR/98-240, s. 1.

51 Trustees shall not, directly or indirectly, advertise in a manner that

(a) they know, or should know, is false, misleading, materially incomplete or likely to induce error; or

(b) unfavourably reflects on the reputation or competence of another trustee or on the integrity of the bankruptcy and insolvency process.

SOR/98-240, s. 1.

52 Trustees, in the course of their professional engagements, shall apply due care to ensure that the actions carried out by their employees, agents or mandataries or any persons hired by the trustees on a contract basis are carried out in accordance with the same professional standards that those trustees themselves are required to follow in relation to that professional engagement.

SOR/98-240, s. 1; SOR/2007-61, s. 10(E).

53 Any complaint that relates to a contravention of any of sections 36 to 52 must be sent to the Division Office in writing.

SOR/98-240, s. 1.

Appointment and Substitution of Trustees

54 A certificate of the official receiver, or a certified copy of it, is admissible in any proceeding under the Act as evidence of the appointment or substitution of a trustee,

a) se conforme aux lois, règlements et conditions applicables à la fiducie ou au fidéicommiss;

b) sous réserve des lois, règlements et conditions applicables à la fiducie ou au fidéicommiss, administre l'argent et les biens avec prudence et diligence.

DORS/98-240, art. 1.

49 Le syndic ne verse, ni directement ni indirectement, de commission, de rémunération ou d'autre avantage à un tiers en vue d'exercer une activité professionnelle et il n'accepte, ni directement ni indirectement, le versement par un tiers d'une commission, d'une rémunération ou de tout autre avantage pour lui avoir confié un travail lié à une activité professionnelle.

DORS/98-240, art. 1.

50 Le syndic n'accepte, ne sollicite ni n'exerce d'activité qui tendrait à discréditer la profession de syndic ou à compromettre l'intégrité du régime de la faillite et de l'insolvabilité.

DORS/98-240, art. 1.

51 Le syndic ne fait, ni directement ni indirectement :

a) de la publicité qu'il sait — ou devrait savoir — être fausse, trompeuse, substantiellement incomplète ou susceptible d'induire en erreur;

b) de la publicité qui porte atteinte à la réputation ou à la compétence d'un autre syndic ou à l'intégrité du régime de la faillite et de l'insolvabilité.

DORS/98-240, art. 1.

52 Dans toute activité professionnelle, le syndic veille avec prudence et diligence à ce que les actes accomplis par ses mandataires, ses employés ou toute personne engagée par lui à contrat respectent les mêmes normes professionnelles qu'il aurait lui-même à appliquer relativement à cette activité.

DORS/98-240, art. 1; DORS/2007-61, art. 10(A).

53 Les plaintes relatives à la violation d'un des articles 36 à 52 sont envoyées par écrit au bureau de division.

DORS/98-240, art. 1.

Nomination et substitution du syndic

54 Dans les procédures intentées sous le régime de la Loi, le certificat du séquestre officiel ou la copie certifiée conforme de celui-ci constitue une preuve admissible de la nomination ou de la substitution d'un syndic sans qu'il

without proof of the authenticity of the signature or of the official character of the signatory.

SOR/98-240, s. 1; SOR/2007-61, s. 11(E).

54.1 to 54.49 [Repealed, SOR/98-240, s. 1]

Duties of Trustees

55 A trustee who is appointed pursuant to subsection 41(11) of the Act shall notify the Division Office of the appointment, in writing, within 10 days after the appointment.

SOR/98-240, s. 1.

56 A former trustee who is to pass the accounts before the court in accordance with subsection 36(1) of the Act shall make an application to the court and attach to it an affidavit in prescribed form, and shall send a notice in prescribed form, accompanied by a copy of the statement of receipts and disbursements, specifying the time and place set for passing the accounts, to the following persons:

- (a) every creditor whose claim has been proved;
- (b) the registrar;
- (c) the bankrupt;
- (d) the substituted trustee; and
- (e) a representative of the Division Office.

However, the court may order that the notice is not required to be given to the persons referred to in paragraph (a).

SOR/92-579, s. 7; SOR/98-240, s. 1.

57 If a bankrupt who is being examined pursuant to subsection 161(1) of the Act cannot speak fluently in the official language in which the examination is being conducted, the trustee shall arrange for the services, at the examination, of an interpreter approved by the official receiver.

SOR/98-240, s. 1; SOR/2007-61, s. 63(E).

Remuneration of Trustees

58 (1) Unless the court orders otherwise, the remuneration of a trustee is deemed to take into account all services performed by the trustee and by the trustee's partners and employees.

(2) In taxing the accounts of a trustee pursuant to section 152 of the Act, the taxing officer shall tax disbursements at the rates provided by the tariff.

soit nécessaire de prouver l'authenticité de la signature ou la qualité officielle du signataire.

DORS/98-240, art. 1; DORS/2007-61, art. 11(A).

54.1 à 54.49 [Abrogés, DORS/98-240, art. 1]

Attributions du syndic

55 Le syndic nommé conformément au paragraphe 41(11) de la Loi en avise le bureau de division par écrit dans les 10 jours suivant sa nomination.

DORS/98-240, art. 1.

56 L'ancien syndic qui doit soumettre ses comptes au tribunal conformément au paragraphe 36(1) de la Loi lui présente une demande en ce sens accompagnée d'un affidavit en la forme prescrite et envoie un avis en la forme prescrite, accompagné d'une copie de l'état des recettes et des débours, indiquant les date, heure et lieu fixés pour la production des comptes, aux personnes suivantes :

- a) les créanciers qui ont prouvé leur réclamation;
- b) le registraire;
- c) le failli;
- d) le syndic substitué à l'ancien syndic;
- e) un représentant du bureau de division.

Toutefois, le tribunal peut rendre une ordonnance dispensant de l'envoi d'un avis aux personnes visées à l'alinéa a).

DORS/92-579, art. 7; DORS/98-240, art. 1.

57 Lorsque le failli interrogé conformément au paragraphe 161(1) de la Loi ne parle pas couramment celle des langues officielles dans laquelle se déroule l'interrogatoire, le syndic retient pour l'interrogatoire les services d'un interprète agréé par le séquestre officiel.

DORS/98-240, art. 1; DORS/2007-61, art. 63(A).

Rémunération du syndic

58 (1) Sauf ordonnance contraire du tribunal, la rémunération du syndic est censée englober tous les services rendus par lui, ses associés et ses employés.

(2) Lors de la taxation des comptes du syndic conformément à l'article 152 de la Loi, le fonctionnaire taxateur taxe les débours aux taux prévus au tarif.

(3) A trustee's disbursements do not include the indirect costs of the trustee's facilities or premises.

(4) The expenses incurred by a trustee for the services of an interpreter referred to in section 57 and subsection 108(2) are calculated, at the time of taxation, at a rate that the taxing officer deems reasonable.

(5) The taxing officer shall determine the disbursements for which the trustee is entitled to be repaid in accordance with this section.

SOR/98-240, s. 1; SOR/2005-284, s. 5; SOR/2009-218, s. 5.

58.1 (1) For the purposes of section 156.1 of the Act, the amount required to be paid under the agreement must not be more than \$1,800.

(2) Subject to section 136 of the Act, money from the estate of the bankrupt shall be applied to satisfy the amount to be paid under the agreement.

(3) The trustee shall provide the Superintendent and the bankrupt with a signed copy of the agreement immediately after it is entered into.

SOR/2009-218, s. 6.

Prescribed Circumstances for Operation of Paragraph 67(1)(B.1) of Act

59 (1) A goods and services tax credit payment is not comprised in the property of the bankrupt for the purpose of paragraph 67(1)(b.1) of the Act if a dividend is available to the creditors without taking that payment into account.

(2) If, in order for a dividend to be available to the creditors, it would be necessary to take into account all or part of a goods and services tax credit payment, the portion of that payment that is not comprised in the property of the bankrupt for the purpose of paragraph 67(1)(b.1) of the Act is the portion, if any, that would have been paid as a dividend to the creditors had all of the payment been comprised in the property of the bankrupt.

(3) For greater certainty, if no dividend would be available to the creditors even if a goods and services tax credit payment were taken into account, all of that payment is comprised in the property of the bankrupt for the purpose of paragraph 67(1)(b.1) of the Act.

SOR/98-240, s. 1.

(3) Les débours du syndic ne peuvent comprendre les coûts indirects de ses installations et équipements.

(4) Les frais engagés par le syndic pour les services d'un interprète prévus à l'article 57 et au paragraphe 108(2) sont calculés, lors de la taxation, au taux que le fonctionnaire taxateur estime raisonnable.

(5) Le fonctionnaire taxateur qui établit le montant du remboursement auquel le syndic a droit pour ses débours le fait conformément au présent article.

DORS/98-240, art. 1; DORS/2005-284, art. 5; DORS/2009-218, art. 5.

58.1 (1) Pour l'application de l'article 156.1 de la Loi, la somme dont l'accord prévoit le paiement n'excède pas 1 800 \$.

(2) Sous réserve de l'article 136 de la Loi, les sommes qui se trouvent à l'actif de la faillite sont appliquées au paiement de la somme prévue à l'accord.

(3) Le syndic transmet au surintendant et au failli une copie signée de l'accord dès sa conclusion.

DORS/2009-218, art. 6.

Circonstances prescrites pour l'application de l'alinéa 67(1)b.1) De la loi

59 (1) Pour l'application de l'alinéa 67(1)b.1) de la Loi, le paiement au titre d'un crédit de la taxe sur les produits et services n'est pas compris dans les biens du failli si un dividende est payable aux créanciers sans qu'il faille prendre en compte ce paiement.

(2) Dans le cas où le versement d'un dividende aux créanciers nécessiterait la prise en compte de tout ou partie du paiement au titre d'un crédit de la taxe sur les produits et services, la partie de ce paiement qui n'est pas comprise dans les biens du failli pour l'application de l'alinéa 67(1)b.1) de la Loi est la partie qui serait versée aux créanciers à titre de dividende si la totalité du paiement était comprise dans les biens du failli.

(3) Il est entendu que dans le cas où aucun dividende ne serait payable aux créanciers même si le paiement au titre d'un crédit de la taxe sur les produits et services était pris en compte, la totalité du paiement est comprise dans les biens du failli pour l'application de l'alinéa 67(1)b.1) de la Loi.

DORS/98-240, art. 1.

- investigate the state of the company's business and financial affairs and the causes of the financial difficulties;³⁹
- file a cash-flow statement indicating the projected cash flow of the debtor and a report on the reasonableness of the cash-flow statement, both signed by the trustee, and a report containing representations signed by the debtor;⁴⁰
- file a report on the state of the company's business and financial affairs (1) with the official receiver without delay after ascertaining any material change in the company's projected cash flow or financial circumstances; (2) with the court at such times as may be ordered by the court;⁴¹
- send to every known creditor a copy of a notice of intention to make a proposal (which contains the names and addresses of creditors with claims greater than \$250) within five days after the filing;⁴²
- advise on and participate in the preparation of the proposal, including negotiations after the filing of a notice of intention;⁴³
- call a meeting of the creditors, to be held within twenty-one days after the filing of the proposal with the official receiver, and send every known creditor the relevant documents;⁴⁴
- apply to the court for an appointment for a hearing of the application for the court's approval of the proposal within five days after its acceptance;⁴⁵ and
- prepare and file a report with the court that sets out the debtor's realizable assets and liabilities, the causes of the insolvency, the conduct of the debtor, and an opinion on whether the proposal is an advantageous one for the creditors.⁴⁶

3) Breach of Duty

A monitor or trustee must act honestly and in good faith and comply with the Code of Ethics prescribed by the BIA.⁴⁷ A monitor or trustee who fails to act fairly and impartially is in breach of this duty. This will

³⁹ BIA, s 50(5).

⁴⁰ *Ibid*, ss 50(6) and 50.4(2).

⁴¹ *Ibid*, ss 50(10) and 50.4(7).

⁴² *Ibid*, s 50.4(1).

⁴³ *Ibid*, s 50.5.

⁴⁴ *Ibid*, s 51.

⁴⁵ *Ibid*, s 58.

⁴⁶ *Ibid*; Form 40.

⁴⁷ CCAA, s 25; BIA, s 13.5. The Code of Ethics is contained in *Bankruptcy and Insolvency General Rules*, above note 35, ss 34–53.

occur if a monitor or trustee favours the interest of one of the creditors over the interests of the debtor or the other creditors. If a breach of duty or excess of authority is established, the court should then determine if damage is attributable to the monitor's conduct, including damage to the integrity of the insolvency system, and ascertain the appropriate fee reduction.⁴⁸ A breach of duty may also justify a removal and replacement of a monitor.

4) Relationship with the Debtor

The selection of a person to act as monitor under the CCAA or as trustee under the BIA is usually made by the debtor in the first instance. However, once that person is appointed, he or she becomes an officer of the court and the debtor has no power to terminate the appointment. Only the court can do so.⁴⁹

The CCAA expressly gives the court the power to direct a monitor to carry out other functions.⁵⁰ The initial order will usually give the monitor the power to advise the debtor company in the development of its plan and in respect of its meeting with its creditors. Although the BIA does not contain a provision that permits a court to confer additional powers on a trustee, the trustee is expressly given the power to advise the debtor and participate in the preparation of the proposal, including negotiations with creditors.

The monitor or trustee therefore undertakes two essential functions, and there is an ever-present danger that these will come into conflict with one another. The first is to provide an independent assessment of the business and financial affairs of the debtor that can be relied upon by the court and by the creditors. The second is to assist the debtor in navigating through the complexities of restructuring proceedings. The monitor or trustee must attempt to guide the debtor through the process without becoming an advocate or mouthpiece for the debtor.

Since they are officers of the court, a monitor's and a trustee's reports do not need to be sworn, and neither a monitor nor a trustee is generally subject to cross-examination on these reports.⁵¹ However, courts are wary of debtors who attempt to hide behind a report of a monitor or trustee. If the matter is contentious, the debtor will be expected

⁴⁸ See *Winalta Inc (Re)*, above note 25.

⁴⁹ CCAA, s 11.7(3); BIA, s 14.04.

⁵⁰ CCAA, s 23(1)(k).

⁵¹ *Re Bell Canada International Inc*, 2003 CarswellOnt 4537 (SCJ).