Court File No.: SJM/125/2023

IN THE COURT OF KING'S BENCH OF NEW BRUNSWICK
TRIAL DIVISION
JUDICIAL DISTRICT OF SAINT JOHN

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF SOUTH SHORE SEAFOODS LTD., CAPTAIN COOKE'S SEAFOOD INC., BY THE WATER SHELLFISH (2012) INC., CAN-AM LOBSTER & SHELLFISH LTD., SOUTH SHORE SEAFOODS INTERNATIONAL LTD., BRIDGE LOBSTERS LIMITED, ARSENAULT'S FISH MART INC. (each a "Company' and collectively the "Companies")

BETWEEN: **THE TORONTO-DOMINION BANK**

APPLICANT

- and –

SOUTH SHORE SEAFOODS LTD., CAPTAIN COOKE'S SEAFOOD INC., BY THE WATER SHELLFISH (2012) INC., CAN-AM LOBSTER & SHELLFISH LTD., SOUTH SHORE SEAFOODS INTERNATIONAL LTD., BRIDGE LOBSTERS LIMITED, ARSENAULT'S FISH MART INC.

RESPONDENTS

BRIEF ON LAW
Submitted on Behalf of the Applicant, The Toronto-Dominion Bank
(for the Hearing scheduled for October 25, 2023 at 10:30 a.m.)

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PART I - BACKGROUND

1. The Toronto-Dominion Bank (the "**Applicant**") is bringing this motion to seek relief pursuant to the *Companies' Creditors Arrangement Act* (Canada)[1] ("**CCAA**") in respect of South Shore Seafoods Ltd., Captain Cooke's Seafood Inc., By the Water Shellfish (2012) Inc., Can-Am Lobster & Shellfish Ltd., South Shore Seafoods International Ltd., Bridge Lobsters Limited and Arsenault's Fish Mart Inc. (collectively, the "**Debtors**").

2. Specifically, the Applicant is requesting approval of a second amended and restated initial order (the "**Second ARIO**"), a second amended and restated charging order (the "**Second ARCO**") and a SISP order (the "**SISP Approval Order**" and together with the Second ARIO and Second ARCO, the "**Proposed Orders**") that collectively provide for the following relief:

(a) Granting the Proposed Additional Powers (defined below) to the Monitor (defined below);

(b) Extending the Stay Period (defined below) until and including January 31, 2024;

(c) Increasing the borrowing limit under the DIP Facility (defined below) from $4 million to $7 million;

(d) Excluding certain unearned premiums from the collateral covered by the charges in the Second ARCO;

(e) Approving the Monitor's sale and investment solicitation process (the "**SISP**"); and

(f) Approving the Monitor's activities as set out in its reports filed to date.

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

3. The primary legal questions at issue on this motion relate to the granting of the Proposed Additional Powers and the approval of the SISP. As such, this brief focuses on those two issues.

4. Capitalized terms used herein and not otherwise defined have the meaning given to them in the fourth report of the Monitor dated October 23, 2023 (the "**Fourth Report**").

PART II - FACTS

Background

5. The Debtors are a group of privately-held companies carrying on business as buyers, processors and wholesalers of live and cooked lobster in Atlantic Canada.[2]

6. All of the Debtors are owned, directly or indirectly, by two shareholders – Timothy Williston and Michel Jacob (collectively, the "**Shareholders**"). The Shareholders are also the sole directors of the Debtors.[3]

Initial Filing

7. On September 21, 2023, upon application by the Applicant, the Debtors obtained protection under the CCAA pursuant to (i) an initial order; and (ii) a charging order of this Court (collectively, the "**Original Initial Orders**").[4]

8. The Original Initial Orders granted, among other things:

(a) The appointment of Deloitte Restructuring Inc. as monitor (the "**Monitor**");

[2] Affidavit of Andrea Jamnisek sworn September 18, 2023 ["**First Jamnisek Affidavit**"] at paras 9 and 11.
[3] First Jamnisek Affidavit at para 9.
[4] Affidavit of Andrea Jamnisek sworn October 23, 2023 ["**Second Jamnisek Affidavit**"] at para 4; Fourth Report of the Monitor, Deloitte Restructuring Inc., dated October 23, 2023 ["**Fourth Report**"] at paras 1-2.

(b) The appointment of David Boyd, a representative of Resolve Advisory Services Ltd., as chief restructuring officer ("**CRO**");

(c) A stay of proceedings to and including October 1, 2023 (as subsequently extended, the "**Stay Period**");

(d) An administration charge in the amount of $250,000 (the "**Administration Charge**") in favour of the Monitor and its counsel, the Debtors' counsel (limited to $25,000), the Applicant's counsel and the CRO; and

(e) A debtor-in-possession financing facility (the "**DIP Facility**") with a maximum borrowing limit of $3 million.[5]

9. The decision to bring the CCAA application, as opposed to pursue a receivership, was made after the Debtors had been in default of their Credit Agreement for months, including a significant overstatement of inventory resulting in a major overadvance (the "**Overadvance**") in spring 2023.[6] After giving the Debtors several months to improve operations, post new collateral or find new investors, the Applicant advised that it was not prepared to continue to fund outside of a formal insolvency proceeding.[7] The CCAA process was ultimately agreed to as it was seen as the best solution for maximizing value to all creditors, but on the premise that it was to be largely run as a monitor-driven process.[8] This structure had been suggested by the Debtors' own advisor, Bonfire Capital Advisors.[9]

10. As such, leading up to the filing, the Applicant and the Debtors agreed to the terms of a forbearance agreement dated as of September 18, 2023 (the "**DIP Facility Agreement**"), which

[5] Second Jamnisek Affidavit at para 4; Fourth Report at para 2.
[6] First Jamnisek Affidavit at paras 4 and 30-32.
[7] First Jamnisek Affidavit at para 5.
[8] First Jamnisek Affidavit at para 5; Second Jamnisek Affidavit at para 6.
[9] Second Jamnisek Affidavit at para 6.

provided that, among other things, the Applicant would make certain funding available pursuant to the existing Credit Agreement (as defined in the DIP Facility Agreement), subject to availability and on a number of conditions including the following:

(a) The Overadvance would not increase beyond $2.5 million;

(b) On the comeback motion (the "**Comeback**"), the Monitor's powers would be expanded;

(c) The Debtors would not oppose any relief sought by the Applicant or the Monitor or take any position adverse or contrary to the Applicant or the Monitor in connection with any motion or request for relief; and

(d) A SISP would be commenced no later than the Comeback.[10]

11. The Debtors agreed to the terms of the DIP Facility Agreement and obtained legal advice with respect to the same.[11]

Events Since the Initial Filing

12. Almost immediately after the Original Initial Orders were granted and prior to the Comeback, the Debtors entered into two transactions in contravention of the Original Initial Orders (the "**Subject Transactions**"), whereby the Shareholders authorized the transfer of over 50,000 pounds of live product to two customers as an off-set against pre-filing debts.[12]

[10] Second Jamnisek Affidavit at para 7; First Jamnisek Affidavit, Exhibit "JJ" ["**DIP Facility Agreement**"] at ss 4.1-4.2.
[11] Second Jamnisek Affidavit at para 8.
[12] Second Jamnisek Affidavit at para 10.

13. The Subject Transactions led to a material adverse change being reported by the Monitor in its supplemental first report dated September 27, 2023, at which point in time the Monitor noted that the Debtors' liquidity was impacted by approximately $382,000.[13]

14. Accordingly, the Subject Transactions, as well as significantly lower than projected sales, resulted in a materially negative impact on the cash flow forecast that had been initially supported by the Applicant and constituted a default under the DIP Facility Agreement.[14]

Comeback Hearing

15. As a result of the material adverse change, it was not possible to request a longer extension of the stay or propose SISP terms, given the uncertainty in the forecast in the coming weeks. At the Comeback, the Applicant requested a short extension of the stay so that an updated cash flow forecast could be prepared prior to further discussions taking place.[15]

16. In response to the alarming nature of the Subject Transactions, the Applicant also requested to significantly enhance the Monitor's powers to ensure sufficient control and oversight of the Debtors' operations.[16]

17. The Debtors raised oral objections to the relief sought by the Applicant, particularly as it related to the expanded powers of the Monitor. These objections were raised despite the fact that the Debtors had agreed to the request for expanded powers under the DIP Facility Agreement and had committed to full cooperation with the Applicant's motions in the CCAA proceedings. In this respect, the Debtors' objections constituted another violation of the DIP Facility Agreement.[17]

[13] Second Jamnisek Affidavit at para 11; Fourth Report at para 6.
[14] Second Jamnisek Affidavit at paras 11-12.
[15] Second Jamnisek Affidavit at para 13; Fourth Report at para 7.
[16] Second Jamnisek Affidavit at para 14.
[17] Second Jamnisek Affidavit at paras 14 and 15.

18. To progress the CCAA proceedings, the Applicant ultimately conceded by agreeing to withdraw certain of the requested enhanced powers for an interim period.[18]

19. On September 29, 2023, this Court approved, among other things, (i) an amended and restated initial order, which extended the Stay Period to October 6, 2023 and provided more limited powers to the Monitor, including powers to further investigate the Subject Transactions; and (ii) an amended and restated charging order, which increased the quantum of the Administration Charge to $500,000.[19]

Subsequent Hearings

20. On October 5, 2023, to allow for more time for the Monitor to prepare an updated cash flow, the Court further extended the Stay Period to October 25, 2023 and scheduled the next hearing for same day (the "**October 25 Hearing**").[20]

21. However, prior to the October 25 Hearing, the Debtors advised the Monitor that their projected borrowings under the DIP Facility were going to exceed the maximum amount available the week of October 16, 2023 and that an immediate increase was required to fund certain critical payments, including payroll and payments to fishermen and fishermen helpers.[21]

22. To accommodate the Debtors, the Applicant agreed to seek an increase of the borrowing limit on an emergency basis and, on October 17, 2023, the Court granted an order increasing the borrowing limit to $4 million under the DIP Facility.[22]

[18] Second Jamnisek Affidavit at para 15.
[19] Second Jamnisek Affidavit at para 15; Fourth Report at para 7.
[20] Second Jamnisek Affidavit at para 16; Fourth Report at para 9.
[21] Second Jamnisek Affidavit at para 17.
[22] Second Jamnisek Affidavit at para 18; Fourth Report at paras 10-11.

23. In connection with the motion on October 17, 2023, the Monitor filed a third report dated October 16, 2023 outlining the requested funding increase as well as the projection that the Debtors would remain within the required $2.5 million Overadvance.[23]

24. Two days later, on October 19, 2023, the Applicant was informed that, in fact, the Debtors would not have sufficient availability to make payments to the fishermen on October 20, 2023 unless the Applicant agreed to an increase in the Overadvance of approximately $150,000. The variance was due to, among other things, significantly lower than forecast collections caused by a timing variance as well as lower than forecast sales post-filing.[24]

25. The Applicant accommodated the request for the increase in the Overadvance so that the necessary payments could be made, which funding was yet another default under the DIP Facility Agreement.[25]

Subject Transactions

26. As set out above, the Monitor was granted investigative powers at the Comeback in respect of the Subject Transactions. In its second report dated October 4, 2023, the Monitor noted that the Debtors would be reversing the credit notes and seeking payment from the preferential creditors in full.[26]

27. However, despite follow-ups by the Monitor in the following weeks, the Debtors did not send out their first written communications until October 19, 2023, which conduct has caused the Applicant to have serious concerns about leaving collection efforts in the hands of the Debtors.[27]

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[23] Second Jamnisek Affidavit at para 19; Fourth Report at para 10.
[24] Second Jamnisek Affidavit at para 20.
[25] Second Jamnisek Affidavit at para 21.
[26] Second Jamnisek Affidavit at para 22; Fourth Report at para 25.
[27] Second Jamnisek Affidavit at paras 22-23; Fourth Report at para 26.

Next Steps: The SISP

28. With the funding provided by the Applicant, the Debtors were able to complete the PEI lobster season, which ended on October 14, 2023.[28] With the conclusion of the season, purchasing and processing of live product has ceased, and the Debtors have significantly reduced headcount, with further reductions expected.[29] Going forward, while there are some collection and sales to be completed, along with winterizing the facilities, the primary remaining activity for the Debtors is to support the Monitor in the SISP.[30] This will be the focus for the next number of months.

29. The Monitor, in consultation with the CRO and the Applicant, has developed a SISP to solicit both sale and investment offers for the Business and/or the Property.[31] Provided that the Proposed Additional Powers (defined below) are granted, the Applicant has agreed to seek approval of the SISP.[32]

30. Target dates and milestones under the SISP include the following:

(a) Commencement of the SISP: October 30, 2023;

(b) Phase 1 Bid Deadline: December 11, 2023;

(c) Phase 2 Bid Deadline: January 12, 2024;

(d) Approval Hearing: on or before January 31, 2024; and

[28] Fourth Report at para 21.
[29] Fourth Report at para 21.
[30] Fourth Report at para 22.
[31] Fourth Report at para 44.
[32] Second Jamnisek Affidavit at para 35.

(e) Target Closing Date: on or before February 28, 2024.[33]

31. Pursuant to the SISP, bidders must clearly allocate value attributable to the BDC Priority Collateral and the Buchanan Road Properties (to the extent that such assets are included in the bid) and consult with the applicable lenders in respect of bids on those properties.[34] The SISP also provides for consultation with the CRO.[35]

32. In light of the expressed intention by the Shareholders to participate as bidders, the SISP is to be run exclusively by the Monitor to avoid any conflict of interest.[36]

Proposed Additional Powers

33. The Applicant has made significant concessions despite the numerous defaults of the Debtors under the DIP Facility Agreement. However, the Applicant is no longer wiling to fund the CCAA proceedings without clear reduction in overhead cost and increased control and oversight by the Monitor.[37] The Monitor has also expressed the need for full autonomous authority as it relates to the conduct of the SISP given the Shareholders' intention to participate as bidders.[38]

34. Accordingly, as a condition to supporting the next phase of these proceedings, the Applicant requests that the Monitor be authorized and empowered to:

(a) Develop and conduct a SISP;

(b) Execute agreements, instruments, notices, directions settlements, filings authorizations and other documents on behalf of the Debtors;

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[33] Second Jamnisek Affidavit at paras 36; Fourth Report at para 45; Fourth Report, Appendix B ["**Revised SISP Procedures**"] at para 2.4.
[34] Revised SISP Procedures at para 5.2(a)(ii)(B).
[35] Revised SISP Procedures at para 2.2.
[36] Second Jamnisek Affidavit at para 37.
[37] Second Jamnisek Affidavit at paras 26-27.
[38] Fourth Report at para 37(i).

(c) Retain, hire or terminate employees, including awarding non-material discretionary bonuses;

(d) Disclaim contracts;

(e) Use the Debtors to administer the Business or Property as the Monitor deems necessary or desirable for the purposes of completing any transaction involving the Business or the Property or for purposes of facilitating distributions to creditors of the Debtors; and

(f) Cause the Debtors to engage assistants or advisors as the Monitor deems necessary or desirable and provide instructions and directions to any current advisors of the Debtors.[39]

(the "**Proposed Additional Powers**").

PART III - ISSUES

35. The principal issues to be determined on this motion are as follows:

(a) Should the Court approve the SISP; and

(b) Should the Court grant the Proposed Additional Powers.

PART IV - LAW & ARGUMENT

The SISP Should be Approved

36. The Court has the jurisdiction to approve the SISP.[40] Courts have recognized that the broad remedial nature of the CCAA confers the power upon the Court to, among other things,

[39] Second Jamnisek Affidavit at para 25; Fourth Report at para 37.
[40] CCAA, s 11; *Freshlocal Solutions Inc. (Re)*, 2022 BCSC 1616 (CanLII) at para 22.

approve sale and investment solicitation processes in respect of CCAA debtors and their property.[41]

37. Courts have routinely recognized that the following factors, referred to as the *Nortel* criteria, are applicable when determining if a proposed sale process should be approved in the context of a CCAA proceeding: (a) is a sale transaction warranted at this time? (b) will the sale benefit the whole "economic community"? (c) do any of the debtors' creditors have a *bona fide* reason to object to the sale of the business? and (d) is there a better viable alternative?[42]

38. Courts have found that there is a distinction in the application of the criteria set out in Section 36 of the CCAA when seeking approval of a SISP as opposed to the subsequent approval of a sale.[43] However, the criteria set out in Section 36 of the CCAA may still be instructive when considering the terms of the proposed SISP.

39. Additional factors that have been considered by courts include:

(a) The fairness, transparency and integrity of the proposed process;

(b) The commercial efficacy of the proposed process in light of the specific circumstances; and

(c) Whether the sale process will optimize the chances, in the particular circumstances, of securing the best possible price for the assets up for sale.[44]

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[41] *Nortel Networks Corporation (Re)*, 2009 CanLII 39492 (On SC) ["***Nortel***"] at para 36.
[42] *Nortel*, *supra* at para 49.
[43] *Brainhunter Inc. (Re)*, 2009 CanLII 72333 (ON SC) at paras 16-17.
[44] *CCM Master Qualified Fund v. blutip Power Technologies*, 2012 ONSC 1750 (CanLII) at para 6; *Walter Energy Canada Holdings, Inc. (Re)*, 2016 BCSC 107 (CanLII) at para 20.

40. These factors are to be considered in light of the principles from *Royal Bank v. Soundair Corp.*[45] ("***Soundair***").[46] As the Court in *Terrace Bay Pulp Inc. (Re)* pointed out, the *Soundair* principles largely overlap with the factors set out in Section 36(3) of the CCAA:

(a) Whether the court-appointed officer has made sufficient effort to get the best price and has not acted improvidently;

(b) The interest of all parties;

(c) The efficacy and integrity of the process by which the offers are obtained; and

(d) Whether there has been unfairness in the working out of the process.[47]

41. Certain more recent caselaw, including *Boutique Euphoria Inc. (Re)*[48], has also offered additional criteria for consideration when seeking approval of a SISP. However, the majority of the additional criteria found in that line of cases relates to the appropriateness of the acceptance of a stalking horse offer, which is not proposed as part of this SISP.

42. The proposed SISP meets the applicable criteria for approval. Among other things:

(a) The primary purpose of the CCAA proceedings is to conduct a sale process to attempt to preserve a going concern and maximize value for all stakeholders;[49]

(b) The only other viable alternative at this time is liquidation – the SISP enhances the prospects of the continuation of a going concern and maximization of value;

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[45] *Royal Bank of Canada v. Soundair Corp.*, 1991 CanLII 2727 (ON CA).
[46] *DCL Corporation (Re)*, 2023 ONSC 3686 (CanLII) at para 19.
[47] *Terrace Bay Pulp Inc. (Re)*, 2012 ONSC 4247 (CanLII) at para 44.
[48] *Boutique Euphoria Inc. (Re),* 2007 QCCS 7129 (CanLII) at para 37.
[49] Second Jamnisek Affidavit at para 6.

(c) The SISP has been developed, and will be conducted, by the Monitor to ensure the integrity of the process, particularly in light of the expressed intention of the Shareholders to participate as bidders;[50]

(d) The SISP provides for allocation of value to the BDC Priority Collateral and the Buchanan Road Properties, being the only assets of the Debtors on which the Applicant does not have first priority security;[51]

(e) The SISP allows the Monitor to consult with applicable secured creditors;[52]

(f) The length of the SISP has been developed by the Monitor and provides extensive time for submission of non-binding expressions of interest and final binding bids with due consideration to, among other things, the holidays; and

(g) The Monitor recommends the SISP and believes that it is fair and reasonable in the circumstances.[53]

The Proposed Additional Powers of the Monitor Should be Granted

43. The Court has the jurisdiction to expand the powers of a monitor beyond what has been provided for in Section 23 of the CCAA and the standard model orders.[54] Indeed, in recent years, courts have routinely granted the monitor expanded powers where it has been appropriate in the circumstances.[55]

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[50] Second Jamnisek Affidavit at para 27(a); Fourth Report at para 37(i).
[51] Revised SISP Procedures at para 5.2(a)(ii)(B).
[52] Revised SISP Procedures at paras 3.1, 4.1, 5.3, 6.5 and 6.14.
[53] Fourth Report at paras 46-47.
[54] CCAA, ss 11 and 23(1)(k).
[55] See e.g. *Arrangement relatif à Bloom Lake General*, 2021 QCCS 2946 (CanLII) ["***Bloom Lake***"]; *Ernst & Young Inc. v. Essar Global Fund Limited*, 2017 ONCA 1014 (CanLII).

44. It has become accepted that the monitor's powers may be expanded to the extent of allowing it to function as a "super monitor" under the CCAA.[56] Such enhanced powers should be granted in furtherance of the remedial objectives of the CCAA, one of which is the maximization of creditor recovery.[57] This is also consistent with the Court's analysis in *Arrangement relatif à Bloom Lake General* ("***Bloom Lake***"), where it affirmed that the Court may grant such powers as is necessary and appropriate to enable the monitor to fulfill its duties to, among other things, "further the valid purpose of the CCAA".[58]

45. While it has been described as the "exception" to the rule, courts have provided super monitor powers, including to assume managerial control of the business while having direct powers over the assets, property and undertakings of the debtor company, particularly where:[59]

(a) Existing management and/or the board of directors have resigned or are unable (or unwilling) to undertake all of the responsibilities that are the subject matter of the expanded powers;[60]

(b) It is necessary for such powers to be granted for the monitor to fulfill its statutory or other duties under the CCAA and initial order;[61]

(c) It is necessary to assist with the maximization of value and return to creditors;[62]

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[56] *Arrangement relatif à 9323-7055 Québec inc. (Aquadis International Inc.)*, 2020 QCCA 659 (CanLII) ["***Aquadis***"] at para 68.
[57] *Aquadis*, *supra* at para 62. See also *In the Matter of a Plan of Compromise or Arrangement of LoyaltyOne, Co.*, Endorsement of Justice Conway (May 12, 2023) ["***LoyaltyOne***"] at para 13; *Harte Gold Corp. (Re)*, 2022 ONSC 653 (CanLII) ["***Harte Gold***"] at paras 91-93; and *PricewaterhouseCoopers Inc. v. Canada Fluorspar (NL) Inc.*, 2023 NLSC 88 (CanLII) ["***CFI***"] at para 85.
[58] *Bloom Lake*, *supra* at para 73.
[59] Luc Morin & Arad Mojtahedi, "In Search of a Purpose: The Rise of Super Monitors & Creditor-Driven *CCAAs*" (2019) 14 Annual Review of Insolvency Law.
[60] See e.g. *Aquadis*, *supra* at para 19; *Re ILTA Grain Inc.*, Expansion of Monitor's Power Order (January 9, 2020), Vancouver, BC SC S-197582, which Order was granted based on the facts in the Notice of Application (July 18, 2019) ["***ILTA Grain***"].
[61] See e.g. *Bloom Lake*, *supra* at para 73.
[62] See e.g. *LoyaltyOne*, *supra* at para 13; *Harte Gold*, *supra* at paras 91-93.

(d) Existing management has demonstrated that it is unfit to conduct the restructuring process without causing harm to stakeholders; or

(e) Existing management is conflicted in virtue of its intention to be involved with a bid in a SISP.[63]

46. It is equally clear that it is not only in the context of a pursuit of a restructuring plan when expanded powers may be granted. This was specifically addressed by the Court in *Bloom Lake*:

> The fact that we find ourselves in the context of CCAA proceedings involving the liquidation of the CCAA Parties as opposed to their restructuring does not matter. Liquidating CCAA proceedings have been accepted in practice and case law with an expanded view of the role of the monitor under such circumstances.[64]

47. Further, distinct from other circumstances where the Court has been reluctant to grant expanded powers, the Applicant's request for the Proposed Additional Powers is appropriate particularly as, in this case,

(a) The Debtors' operations are largely dormant, leaving the SISP as the main activity;[65]

(b) The Shareholders must be excluded from conducting, or having influence on, the conduct of the SISP given their intention to participate as bidders;[66] and

(c) Further oversight and control is required by the Monitor given the extensive defaults under the DIP Facility Agreement and, most critically, the entry into the Subject Transactions.[67]

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[63] See e.g. *Re BioAmber Canada Inc, et al*, Third Amended and Restated Initial Order (July 31, 2018), 2018 QCCS 3170.
[64] *Bloom Lake*, *supra* at paras 92-93; see also *Aquadis*, *supra* at para 68.
[65] Fourth Report at para. 21 and 22.
[66] Fourth Report at para. 37(i).
[67] *Re Crystallex International Corp*, 2011 ONSC 7701 (CanLII), affirmed 2012 ONCA 404 (CanLII).

48. The second issue considered by the courts is the scope of the additional powers that are to be granted. Consideration has been given both to the circumstances as well as whether the proposed expanded powers are required for the monitor to fulfill its statutory and other mandated duties under the initial order. Where appropriate, the Court has ordered expanded powers that include the following:

(a) Exercise any powers that may be properly exercised by the board of directors of the debtor company;[68]

(b) Take any and all actions to facilitate the administration of the debtor company's business, property and operations;[69]

(c) Execute agreements, instruments and other writings on behalf of and in the name of the debtor company;[70]

(d) Retain, hire or terminate personnel of the debtor company, including employees, assistants and advisors;[71]

(e) Engage, deal, negotiate or settle on behalf of the debtor company with any creditor or stakeholder;[72]

(f) Compel any person reasonably thought to have knowledge about the debtor's business or property to be examined and disclose/produce documents;[73]

(g) Cause the dissolution or winding-up of the debtor company;[74] and

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[68] See e.g. *CFI*, *supra*, Monitor's Enhanced Powers Order.
[69] See e.g. *ILTA Grain*, *supra*, Expansion of Monitor's Power Order (January 9, 2020).
[70] See e.g. *LoyaltyOne*, *supra*, Ancillary Relief Order (May 12, 2023).
[71] See e.g. *CFI*, *supra*, Monitor's Enhanced Powers Order.
[72] See e.g. *CFI*, *supra*, Monitor's Enhanced Powers Order; *LoyaltyOne*, *supra*, Ancillary Relief Order (May 12, 2023).
[73] See e.g. *Bloom Lake*, *supra* at para 96.
[74] See e.g. *CFI*, *supra*, Monitor's Enhanced Powers Order.

(h) Institute legal proceedings against third parties on behalf of the debtor company's creditors.[75]

49. As is clear from the foregoing, while not an unlimited discretion, the Court clearly may and has granted expansive powers to the monitor where it has been shown appropriate to do so.

50. The Proposed Additional Powers are in line what is required given the circumstances. They are largely designed to achieve the following goals:

(a) Preserve the integrity of the SISP by providing the Monitor with full authority to run the SISP and make decisions about the conduct of the business for the purposes of pursuing transactions or making distributions to creditors and to implement transactions arising from the SISP – all in consultation with the CRO where appropriate;

(b) Pursue collections and claims, particularly as it relates to the Subject Transactions where little has been made to date; and

(c) Ability to make timely decisions that influence cash flow including with respect to headcount including both awarding of non-material bonuses and reduction and disclaimer of contracts.

51. In consideration of the granting of super monitor powers, it should also be considered whether the applying creditor would have otherwise been able to apply for the appointment of a receiver. Pursuant to Section 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended ("**BIA**")[76], a court may appoint a receiver when it is just and/or convenient to do so. The determination of whether the appointment of a receiver is just and/or convenient is to be

[75] See e.g. *Aquadis*, *supra*.
[76] *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ["**BIA**"], s 243(1).

determined having regard to all the circumstances of the case, particularly the nature of the property and the rights and interests of all parties in relation thereto, including the rights of a secured creditor under its security.[77]

52. In such circumstances, where the decision has been made to proceed under the CCAA, the extent of the control of the monitor should be considered in the face of the powers that would have otherwise been given to a receiver.

53. The present circumstances clearly warrant the granting of the Proposed Additional Powers. Among other things:

(a) The Applicant's willingness to pursue the CCAA proceedings was premised on the Debtors entering into the DIP Facility Agreement, pursuant to which the Debtors consented to enhancing the Monitor's powers[78] – it would have otherwise been open to the Applicant to apply for a receivership order, which in the circumstances would have been just and convenient;

(b) Despite numerous defaults by the Debtors under the DIP Facility Agreement, the Applicant has continued to support the Debtors to allow them to complete the PEI lobster season, make payments to employees and fishers and, in the process, has deferred collection of its own interest;[79]

(c) In the absence of sufficient controls, the Shareholders authorized, in violation of the Original Initial Orders, the transfer of over 50,000 pounds of lobster to offset pre-filing obligations, and have done virtually nothing to attempt to collect such

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[77] *Macquarie Equipment Finance Limited v. Validus Power Corp. et al.*, 2023 ONSC 4772 (CanLII) at para 5; *Canadian Equipment Finance and Leasing Inc. v. The Hypoint Company Limited*, 2022 ONSC 6186 (CanLII) at para 23.
[78] Second Jamnisek Affidavit at para 7; DIP Facility Agreement at s 4.2(b)(iv); Fourth Report at para 37.
[79] Second Jamnisek Affidavit at para 26.

amounts since[80] – the opposite of conduct that reflects a desire to maximize value for all stakeholders;

(d) The Shareholders intend to participate as bidders in the SISP[81] – there can be no question that all decisions relating to the SISP and entry into documents in relation to the SISP must be within the control and power of the Monitor;

(e) The ongoing overhead cost of the Debtors needs to be reduced. With the PEI lobster season now over, the primary remaining activities in these proceedings relate to collections, winterizing the plants and the conduct of the SISP – the Proposed Additional Powers will allow the Monitor to make further reductions in headcount and reduce costs overall;[82]

(f) Other than the Shareholders, the only other member of management is the chief financial officer of the Debtors, who is inexperienced in restructurings or liquidations and who cannot manage all aspects of the business, even with the assistance of the CRO; and

(g) In the absence of the granting of the Proposed Additional Powers, it is unclear whether the Debtors satisfy the statutory criteria of ongoing good faith and due diligence, which satisfaction is required for an extension of the stay.

54. Fundamentally, these powers were agreed to at the outset and as the premise to proceeding under the CCAA. The Debtors received legal advice before they entered into the DIP Facility Agreement.[83]

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[80] Second Jamnisek Affidavit at paras 10 and 22.
[81] Second Jamnisek Affidavit at paras 27 and 37.
[82] Second Jamnisek Affidavit at para 27.
[83] Second Jamnisek Affidavit at paras 7-8.

55. The Applicant could have applied for the appointment of a receiver given the extensive and persisting defaults under the Credit Agreement, including the significant overstatement of inventory that occurred in early 2023. The Applicant has also met the requirements for providing notice of intention to enforce pursuant to Section 244 of the BIA, which enforcement was consented to by the Debtors in May 2023.[84] Further, while the contractual right to the appointment of a private receiver was available, in the current circumstance, the only plausible option for a receivership would have been through a court appointment given, among other things: (a) differing secured creditors with registrations on different properties; (b) the lack of a stay of proceedings, which is required to maintain the status quo during this time; (c) the significant number of stakeholders involved including employees, fishers and suppliers; (d) the inability to obtain a vesting order; and (e) the requirement for court-ordered charges for ongoing funding.

56. Given the protections that would be afforded to the Applicant if a Court-appointed receiver were in place, the Proposed Additional Powers should also be available within the context of the CCAA proceedings.

57. Absent the granting of the Proposed Additional Powers, the Applicant is unwilling to continuing funding these proceedings.[85] Conversely, the Applicant has agreed to make significant further funding available within the CCAA proceedings provided that such powers are granted. The additional funding, which will result in a significant increase in the Overadvance, provides for dedicated funding to pay (a) ongoing payroll costs; (b) travel allowances for foreign workers who worked through the PEI lobster season; (c) unpaid professional fees; and (d) other operating costs.[86] There is significant benefit to the Debtors to have this funding continue on an uninterrupted basis.

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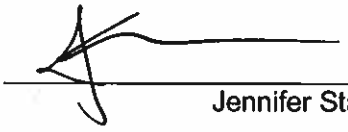
[84] BIA, s 244; First Jamnisek Affidavit at para 36.
[85] Second Jamnisek Affidavit at para 27.
[86] Fourth Report at para 28.

PART V - RELIEF SOUGHT

58. To date, the professional cost of these proceedings has been significantly higher than expected. The October 25 Hearing will be the Applicant's sixth appearance in Court in just over a month. The request for, in particular, the Proposed Additional Powers, SISP and stay extension are intended to provide for a reduction in certain professional fees while the Monitor focuses on running the SISP. The Debtors have advised that they do not oppose the relief being sought.

59. For the reasons set out above, the Applicant requests the orders substantially in the forms attached to the Applicant's notice of motion.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 24th day of October, 2023.



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SCHEDULE "A"

LIST OF AUTHORITIES

1. *Freshlocal Solutions Inc. (Re)*, 2022 BCSC 1616 (CanLII)
2. *Nortel Networks Corporation (Re)*, 2009 CanLII 39492 (On SC)
3. *Brainhunter Inc. (Re)*, 2009 CanLII 72333 (ON SC)
4. *CCM Master Qualified Fund v. blutip Power Technologies*, 2012 ONSC 1750 (CanLII)
5. *Walter Energy Canada Holdings, Inc. (Re)*, 2016 BCSC 107 (CanLII)
6. *Royal Bank of Canada v. Soundair Corp.*, 1991 CanLII 2727 (ON CA)
7. *DCL Corporation (Re)*, 2023 ONSC 3686 (CanLII)
8. *Terrace Bay Pulp Inc. (Re)*, 2012 ONSC 4247 (CanLII)
9. *Boutique Euphoria Inc. (Re),* 2007 QCCS 7129 (CanLII)
10. *Arrangement relatif à Bloom Lake General*, 2021 QCCS 2946 (CanLII)
11. *Ernst & Young Inc. v. Essar Global Fund Limited*, 2017 ONCA 1014 (CanLII)
12. *Arrangement relatif à 9323-7055 Québec inc. (Aquadis International Inc.)*, 2020 QCCA 659 (CanLII)
13. *In the Matter of a Plan of Compromise or Arrangement of LoyaltyOne, Co.*, Endorsement of Justice Conway (May 12, 2023)
14. *Harte Gold Corp. (Re)*, 2022 ONSC 653 (CanLII)
15. *PricewaterhouseCoopers Inc. v. Canada Fluorspar (NL) Inc.*, 2023 NLSC 88 (CanLII)
16. Luc Morin & Arad Mojtahedi, "In Search of a Purpose: The Rise of Super Monitors & Creditor-Driven *CCAAs*" (2019) 14 Annual Review of Insolvency Law.
17. *Re BioAmber Canada Inc, et al*, Third Amended and Restated Initial Order (July 31, 2018) 2018 QCCS 3170
18. *Re Crystallex International Corp*, 2011 ONSC 7701 (CanLII), affirmed 2012 ONCA 404 (CanLII)
19. *Macquarie Equipment Finance Limited v. Validus Power Corp. et al.*, 2023 ONSC 4772 (CanLII)
20. *Canadian Equipment Finance and Leasing Inc. v. The Hypoint Company Limited*, 2022 ONSC 6186 (CanLII)

SCHEDULE “B”

TEXT OF STATUTES, REGULATIONS & BY - LAWS

Companies' Creditors Arrangement Act, RSC 1985, c C-36

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.

Duties and functions

23 (1) The monitor shall

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

Restriction on disposition of business assets

36 (1) A debtor company in respect of which an order has been made under this Act may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.

Notice to creditors

(2) A company that applies to the court for an authorization is to give notice of the application to the secured creditors who are likely to be affected by the proposed sale or disposition.

Factors to be considered

(3) In deciding whether to grant the authorization, the court is to consider, among other things,

(a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;

(b) whether the monitor approved the process leading to the proposed sale or disposition;

(c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;

(d) the extent to which the creditors were consulted;

(e) the effects of the proposed sale or disposition on the creditors and other interested parties; and

(f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

Additional factors — related persons

(4) If the proposed sale or disposition is to a person who is related to the company, the court may, after considering the factors referred to in subsection (3), grant the authorization only if it is satisfied that

(a) good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the company; and

(b) the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition.

Related persons

(5) For the purpose of subsection (4), a person who is related to the company includes

(a) a director or officer of the company;

(b) a person who has or has had, directly or indirectly, control in fact of the company; and

(c) a person who is related to a person described in paragraph (a) or (b).

Assets may be disposed of free and clear

(6) The court may authorize a sale or disposition free and clear of any security, charge or other restriction and, if it does, it shall also order that other assets of the company or the proceeds of the sale or disposition be subject to a security, charge or other restriction in favour of the creditor whose security, charge or other restriction is to be affected by the order.

Restriction — employers

(7) The court may grant the authorization only if the court is satisfied that the company can and will make the payments that would have been required under paragraphs 6(5)(a) and (6)(a) if the court had sanctioned the compromise or arrangement.

Restriction — intellectual property

(8) If, on the day on which an order is made under this Act in respect of the company, the company is a party to an agreement that grants to another party a right to use intellectual property that is included in a sale or disposition authorized under subsection (6), that sale or disposition does not affect that other party's right to use the intellectual property — including the other party's right to enforce an exclusive use — during the term of the agreement, including any period for which the other party extends the agreement as of right, as long as the other party continues to perform its obligations under the agreement in relation to the use of the intellectual property.

Bankruptcy and Insolvency Act, RSC 1985, c B-3

Court may appoint receiver

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

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

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

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

Advance notice

244 (1) A secured creditor who intends to enforce a security on all or substantially all of

(a) the inventory,

(b) the accounts receivable, or

(c) the other property

of an insolvent person that was acquired for, or is used in relation to, a business carried on by the insolvent person shall send to that insolvent person, in the prescribed form and manner, a notice of that intention.

Period of notice

(2) Where a notice is required to be sent under subsection (1), the secured creditor shall not enforce the security in respect of which the notice is required until the expiry of ten days after sending that notice, unless the insolvent person consents to an earlier enforcement of the security.

No advance consent

(2.1) For the purposes of subsection (2), consent to earlier enforcement of a security may not be obtained by a secured creditor prior to the sending of the notice referred to in subsection (1).

Exception

(3) This section does not apply, or ceases to apply, in respect of a secured creditor

(a) whose right to realize or otherwise deal with his security is protected by subsection 69.1(5) or (6); or

(b) in respect of whom a stay under sections 69 to 69.2 has been lifted pursuant to section 69.4.

Idem

(4) This section does not apply where there is a receiver in respect of the insolvent person.

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

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

Luc Morin and Arad Mojtahedi [*]

I. — INTRODUCTION

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

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

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

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

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

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

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

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

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

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

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

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

May the force be with you, dear readers.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[Our translation -- Emphasis added.]

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

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

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

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

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

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

1. — Initiating the *CCAA* Process

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

V. — CONCLUSION

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

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

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

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

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

Footnotes

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

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

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

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

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

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

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

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

8 *Ibid*.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

23 *Ibid* at 288.

24 *Ibid* at 5.

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

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

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

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

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

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

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

32 *Ibid* at paras 50-54.

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

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

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

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

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

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

39 *Ibid* at para 20.

40 *Ibid* at para 26.

41 *Ibid* at para 22.

42 *Ibid* at para 30.

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

44 *Ibid* at para 164.

45 *Ibid* at para 162.

46 *Ibid* at para 163.

47 *Ibid* at para 164.

48 *Ibid* at para 160.

49 *Ibid* at para 174.

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

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

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

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

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

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

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

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

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

59 *Ibid* at para 6.

60 *Ibid* at paras 23, 25.

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

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

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

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

65 *Ibid* at paras 47, 102.

66 *Ibid* at paras 52-53.

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

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

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

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

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

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

73 *Ibid* at paras 11-13.

74 *Ibid* at paras 11-13.

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

76 *Ibid*.

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

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

79 *Ibid* at para 3.

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

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

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SUPERIOR COURT
(Commercial Division)

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

N°: 500-11-054564-188

DATE: July 31, 2018

PRESIDING: THE HONOURABLE MICHEL A. PINSONNAULT, J.S.C.

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

BIOAMBER CANADA INC.

BIOAMBER SARNIA INC.

BIOAMBER INC.

Petitioners

-and-

PRICEWATERHOUSECOOPERS INC.

Monitor

THIRD AMENDED AND RESTATED INITIAL ORDER

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[1] **THE COURT**, upon reading the Petitioners' *Motion for the Extension of the Stay of Proceedings* (the "**Stay Extension Petition**") pursuant to the *Companies' Creditors Arrangement Act* ("**CCAA**"), having examined the proceeding, the affidavits and the exhibits;

[2] **GIVEN** the Initial Order issued herein on May 24, 2018, and the Petitioners' *Motion for (I) the Continuance of Proceedings Commenced under Part III of the Bankruptcy Act, (II) the Issuance of an Initial Order under the Companies'*

Creditors Arrangement Act, and (III) Ancillary Relief (the "**Initial Petition**") and the affidavit and exhibits in support thereof;

[3] **GIVEN** the Amended and Restated Initial Order issued herein on June 15, 2018, and the Petitioners' *Motion for (I) the Approval of Interim Financing and the Creation of an Interim Financing Charge, (II) the Extension of the Stay of Proceedings, and (III) the Issuance of an Amended and Restated Initial Order* (the "**Second Petition**") and the affidavit and exhibits in support thereof;

[4] **GIVEN** the Second Amended and Restated Initial Order issued herein on July 18, 2018 (the "**Second Amended and Restated Initial Order**"), and the Petitioners' *Motion for (I) the Approval of a Key Employee Retention Program, (II) the Granting of a KERP Charge, and (III) the Issuance of a Second Amended and Restated Initial Order* (the "**Third Petition**") and the affidavit and exhibits in support thereof;

[5] **GIVEN** the representations by counsel for the Petitioners, the Monitor, the Interim Lender (as defined herein), the secured creditors and other parties;

[6] **GIVEN** the provisions of the CCAA;

FOR THESE REASONS, THE COURT HEREBY:

[7] **AMENDS** and **RESTATES** the Second Amended and Restated Initial Order pursuant to the terms hereof;

[8] **ISSUES** an order pursuant to the CCAA (the "**Order**"), divided under the following headings:

a) Service;

b) Application of the CCAA, Continuation of the BIA Proceedings under the CCAA and Procedural Consolidation;

c) Effective Time;

d) Plan of Arrangement;

e) Stay of Proceedings against the Petitioners and the Property;

f) Stay of Proceedings against the Directors and Officers;

g) Possession of Property and Operations;

h) No Exercise of Rights or Remedies;

i) No Interference with Rights;

j) Continuation of Services;

k) Non-Derogation of Rights;

l) Interim Financing;

m) Directors' and Officers' Indemnification and Charge;

n) Key Employee Retention Program

o) Restructuring;

p) Powers of the Monitor;

q) Priorities and General Provisions Relating to CCAA Charges;

r) General.

A. Service

[9] **ORDERS** that any prior delay for the presentation of the Stay Extension Petition is hereby abridged and validated so that the Stay Extension Petition is properly returnable today and hereby dispenses with further service thereof.

[10] **DECLARES** that sufficient prior notice of the presentation of the Stay Extension Petition has been given by the Petitioners to interested parties, including the secured creditors who are likely to be affected by the charges created herein.

B. Application of the CCAA, Continuation of BIA Proceedings under the CCAA and Procedural Consolidation

[11] **DECLARES** that the Petitioners are debtor companies to which the CCAA applies.

[12] **ORDERS** that the proceedings commenced by Petitioner BioAmber Canada Inc. and the Petitioner BioAmber Sarnia Inc. pursuant to the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "**BIA**") in court files 500-11-054564-188 and 500-11-054563-180, respectively, be continued under the CCAA in the present court file.

[13] **ORDERS** that the consolidation of these CCAA proceedings in respect of the Petitioners shall be for administrative purposes only and shall not effect a consolidation of the assets and property of each of the Petitioners including, without limitation, for the purposes of any Plan or Plans that may be hereafter proposed.

C. Effective Time

[14] **DECLARES** that this Order and all of its provisions are effective as of 12:01 a.m. Montreal time, province of Quebec, on the date of this Order (the "**Effective Time**").

D. Plan of Arrangement

[15] **DECLARES** that the Petitioners, with the consent of the Monitor, shall have the authority to file with this Court and to submit to their creditors one or more plans of compromise or arrangements (collectively, the "**Plan**") in accordance with the CCAA.

E. Stay of Proceedings against the Petitioners and the Property

[16] **ORDERS** that, until and including August 28, 2018, or such later date as the Court may order (the "**Stay Period**"), no proceeding or enforcement process in any court or tribunal (each, a "**Proceeding**") shall be commenced or continued against or in respect of the Petitioners, or affecting the Petitioners' business operations and activities (the "**Business**") or the Property (as defined herein), including as provided in paragraph [26] herein except with leave of this Court. Any and all Proceedings currently under way against or in respect of the Petitioners or affecting the Business or the Property are hereby stayed and suspended pending further order of this Court, the whole subject to subsection 11.1 CCAA.

[16].1 **ORDERS** that the rights of Her Majesty in right of Canada and Her Majesty in right of a Province are suspended in accordance with the terms and conditions of subsection 11.09 CCAA.

F. Stay of Proceedings against Directors and Officers

[17] **ORDERS** that during the Stay Period and except as permitted under subsection 11.03(2) of the CCAA, no Proceeding may be commenced, or continued against any former, present or future director or officer of the Petitioners nor against any person deemed to be a director or an officer of any of the Petitioners under subsection 11.03(3) CCAA (each, a "**Director**", and collectively the "**Directors**") in respect of any claim against such Director which arose prior to the Effective Time and which relates to any obligation of the Petitioners where it is alleged that any of the Directors is under any law liable in such capacity for the payment of such obligation.

G. Possession of Property and Operations

[18] **ORDERS** that, subject and subordinate to the Monitor's additional powers granted herein, the Petitioners shall remain in possession and control of their

present and future assets, rights, undertakings and properties of every nature and kind whatsoever, and wherever situated, including all proceeds thereof (collectively the "**Property**"), the whole in accordance with the terms and conditions of this order including, but not limited, to paragraphs [47] and [55] hereof.

[19] **ORDERS** that, for greater certainty, the Petitioners shall immediately suspend operations at the Sarnia Facility (as defined in the Initial Petition), as no Binding Offers (as defined in the SISP) have been received from any Qualified Bidder (as defined in the SISP) in accordance with the terms of the SISP (as defined below).

[20] **ORDERS** that each of the Petitioners, with the consent of the Monitor, are authorized to complete outstanding transactions and engage in new transactions with other Petitioners, and to continue, on and after the date of this Order, to buy and sell goods and services, and allocate, collect and pay costs, expenses and other amounts from and to the other Petitioners, or any of them (collectively, the "**Intercompany Transactions**") in the ordinary course of business. All ordinary course Intercompany Transactions among the Petitioners shall continue, with the consent of the Monitor, on terms consistent with existing arrangements or past practice, subject to such changes thereto, or to such governing principles, policies or procedures as the Monitor may require, or subject to further Order of this Court. Without limiting the generality of the foregoing, the Petitioner BioAmber Inc. is hereby permitted, with the consent of the Monitor, to pay amounts becoming due to the Petitioner BioAmber Canada Inc. on and after May 4, 2018 for services provided by BioAmber Canada Inc. pursuant to the Management Services Agreement filed in support of the Initial Petition as Exhibit R-8.

[21] **ORDERS** that, without limiting the generality of paragraph [20] hereof, for the purpose of meeting their respective post-filing obligations provided for pursuant to the Cash Flow Forecast filed in support of the Initial Petition as Exhibit R-12 or making any other payments they are authorized and permitted to make pursuant to the present Order, the Petitioners are permitted, with the consent of the Monitor (i) to borrow, repay and re-borrow from each other from time to time, by way of intercompany advances pursuant to promissory notes bearing interest at a rate of 5% *per annum* (the "**Post-Filing Intercompany Advances**"), and (ii) to operate set-off of such Post-Filing Intercompany Advances, as applicable, such that the net aggregate outstanding amount of such Post-Filing Intercompany Advances shall not be more than $750,000 (the "**Net Post-Filing Intercompany Advances**").

[22] **DECLARES** that all of the Property of each of the Petitioners (excluding the sum of $375,000 held in escrow by Boivin Desbiens Senecal LLP to secure the obligations of BioAmber Sarnia Inc. to Arlanxeo Canada Inc. pursuant to a steam supply agreement dated as of May 12, 2012 (as amended) (the "**Arlanxeo**

Escrowed Funds")) is hereby subject to charges and security for an aggregate amount of $750,000 in favour of the other Petitioners (the "**Post-Filing Intercompany Advance Charges**") to secure the Net Post-Filing Intercompany Advances owing after the Petitioners have operated set-off of Post-Filing Intercompany Advances amongst themselves. The Post-Filing Intercompany Advance Charges shall have the priority established at paragraphs [67] and [68] of this Order.

[23] **ORDERS** that the Petitioners, with the consent of the Monitor, shall be entitled but not required to pay the following expenses whether incurred prior to or after this Order:

a) all outstanding and future wages, salaries, non-discretionary bonuses, employee and current service pension contributions, expenses, benefits and vacation pay payable on or after the date of this Order, in each case incurred in the ordinary course of business and consistent with existing compensation policies and arrangements; and

b) the fees and disbursements of any agents retained or employed by the Petitioners in respect of these proceedings, at their standard rates and charges.

[24] **ORDERS** that, except as otherwise provided to the contrary herein, the Petitioners, with the consent of the Monitor, shall be entitled but not required to pay all reasonable expenses incurred by the Petitioners during the orderly liquidation of the Business, and in carrying out the provisions of this Order, which expenses shall include, without limitation:

a) all expenses reasonably necessary for the preservation of the Property or the Business; and

b) payment for goods or services actually supplied to the Petitioners following the date of this Order.

[25] **ORDERS** that the Petitioners shall remit, in accordance with legal requirements, or pay:

a) any statutory deemed trust amounts in favour of the Crown in right of Canada or of any Province thereof or any other taxation authority which are required to be deducted from employees' wages, including, without limitation, amounts in respect of (i) employment insurance, (ii) Canada Pension Plan, (iii) Québec Pension Plan, and (iv) income taxes, or, in the case of BioAmber Inc., any similar amounts payable pursuant to applicable United States federal and state law; and

b) all goods and services, harmonized sales or other applicable sales taxes (collectively, "**Sales Taxes**") required to be remitted by the Petitioners and in connection with the sale of goods and services by the Petitioners, or, in the case of BioAmber Inc., any similar amounts payable pursuant to applicable United States federal and state law, but only where such Sales Taxes are accrued or collected after the date of this Order, or where such Sales Taxes were accrued or collected prior to the date of this Order but not required to be remitted until on or after the date of this Order.

H. No Exercise of Rights of Remedies

[26] **ORDERS** that during the Stay Period, and subject to, *inter alia*, subsection 11.1 CCAA, all rights and remedies, including, but not limited to modifications of existing rights and events deemed to occur pursuant to any agreement to which any of the Petitioners is a party as a result of the insolvency of the Petitioners and/or these CCAA proceedings, any events of default or non-performance by the Petitioners or any admissions or evidence in these CCAA proceedings, of any individual, natural person, firm, corporation, partnership, limited liability company, trust, joint venture, association, organization, governmental body or agency, or any other entity (all of the foregoing, collectively being "**Persons**" and each being a "**Person**") against or in respect of the Petitioners, or affecting the Business, the Property or any part thereof are hereby stayed and suspended except with leave of this Court.

[27] **DECLARES** that, to the extent any rights, obligations, or prescription, time or limitation periods including, without limitation, to file grievances relating to the Petitioners or any of the Property or the Business may expire (other than pursuant to the terms of any contracts, agreements or arrangements of any nature whatsoever), the term of such rights, obligations, or prescription, time or limitation periods shall hereby be deemed to be extended by a period equal to the Stay Period. Without limitation to the foregoing, in the event that the Petitioners, or any of them, become(s) bankrupt or a receiver as defined in subsection 243(2) of the BIA is appointed in respect of the Petitioners, the period between the date of the Order and the day on which the Stay Period ends shall not be calculated in respect of the Petitioners in determining the 30 day periods referred to in Sections 81.1 and 81.2 of the BIA.

I. No Interference with Rights

[28] **ORDERS** that during the Stay Period, no Person shall discontinue, fail to honour, alter, interfere with, repudiate, resiliate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of or held by the Petitioners except with the written consent of the Monitor, or with leave of this Court.

J. Continuation of Services

[29] **ORDERS** that during the Stay Period and subject to paragraph [31] hereof and subsection 11.01 CCAA, all Persons having verbal or written agreements with the Petitioners or statutory or regulatory mandates for the supply of goods or services, including without limitation all computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation, utility or other goods or services made available to the Petitioners, are hereby restrained until further order of this Court from discontinuing, altering, interfering with or terminating the supply of such goods or services as may be required by the Petitioners, and that the Petitioners shall be entitled to the continued use of their current premises, telephone numbers, facsimile numbers, internet addresses, domain names or other services, provided in each case that the normal prices or charges for all such goods or services received after the date of the Order are paid by the Petitioners, without having to provide any security deposit or any other security, in accordance with normal payment practices of the Petitioners or such other practices as may be agreed upon by the supplier or service provider and the Petitioners, as applicable, with the consent of the Monitor, or as may be ordered by this Court.

[30] **ORDERS** that, notwithstanding anything else contained herein and subject to subsection 11.01 CCAA, no Person shall be prohibited from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided to the Petitioners on or after the date of this Order, nor shall any Person be under any obligation on or after the date of the Order to make further advance of money or otherwise extend any credit to the Petitioners.

[31] **ORDERS** that, without limiting the generality of the foregoing and subject to Section 21 of the CCAA, if applicable, cash or cash equivalents placed on deposit by any Petitioner with any Person during the Stay Period, whether in an operating account or otherwise for itself or for another entity, shall not be applied by such Person in reduction or repayment of amounts owing to such Person or in satisfaction of any interest or charges accruing in respect thereof; however, this provision shall not prevent any financial institution from: (i) reimbursing itself for the amount of any cheques drawn by a Petitioner and properly honoured by such institution, or (ii) holding the amount of any cheques or other instruments deposited into a Petitioner's account until those cheques or other instruments have been honoured by the financial institution on which they have been drawn.

K. Non-Derogation of Rights

[32] **ORDERS** that, notwithstanding the foregoing, any Person who provided any kind of letter of credit, guarantee or bond (the "**Issuing Party**") at the request of the Petitioners shall be required to continue honouring any and all such letters, guarantees and bonds, issued on or before the date of the Order, provided that

all conditions under such letters, guarantees and bonds are met save and except for defaults resulting from this Order; however, the Issuing Party shall be entitled, where applicable, to retain the bills of lading or shipping or other documents relating thereto until paid.

(and after consultation with the secured lenders

L. Interim Financing (DIP)

[33] **ORDERS** that BioAmber Canada Inc. and BioAmber Sarnia Inc. (collectively, the "**Canadian Petitioners**"), with the consent of the Monitor, be and are hereby authorized to borrow, repay and reborrow from Maynbridge Capital Inc. (the "**Interim Lender**") such amounts from time to time as the Petitioners, in consultation with the Monitor, consider desirable, up to a maximum principal amount of $3,045,000, on the terms and conditions as set forth in the DIP Credit Facility Agreement and the First Amendment to the DIP Credit Facility Agreement attached hereto en liasse as Schedule A (collectively, the "**Interim Financing Agreement**") and in the Interim Financing Documents (as defined hereinafter), to fund the ongoing expenditures of Petitioners and to pay such other amounts as are permitted by the terms of the Order and the Interim Financing Documents (the "**Interim Facility**").

[34] **ORDERS** that Canadian Petitioners are hereby authorized to execute and deliver such credit agreements, security documents and other definitive documents (collectively the "**Interim Financing Documents**") as may be required by the Interim Lender in connection with the Interim Facility and the Interim Financing Agreement, and Petitioners are hereby authorized to perform all of their obligations under the Interim Financing Documents.

[35] **ORDERS** that Canadian Petitioners, with the consent of the Monitor, shall pay to the Interim Lender, when due, all amounts owing (including principal, interest, fees and expenses, including without limitation, all reasonable fees and disbursements of counsel and all other reasonably required advisers to or agents of the Interim Lender on a full indemnity basis (the "**Interim Lender Expenses**")) under the Interim Financing Documents and shall perform all of its other obligations to the Interim Lender pursuant to the Interim Financing Agreement, the Interim Financing Documents and the Order.

[36] **DECLARES** that all of the existing and after-acquired real and personal, movable and immovable, tangible and intangible, corporeal and incorporeal, property, assets and undertaking of the Canadian Petitioners is hereby subject to a charge and security for an aggregate amount of $3,600,000 (such charge and security is referred to herein as the "**Interim Lender Charge**") in favour of the Interim Lender as security for all obligations of the Canadian Petitioners to the Interim Lender with respect to all amounts owing (including principal, interest and the Interim Lender Expenses) under or in connection with the Interim Financing

Agreement and the Interim Financing Documents. The Interim Lender Charge shall have the priority established by paragraphs [67] and [68] of this Order.

[37] **ORDERS** that the claims of the Interim Lender pursuant to the Interim Financing Documents shall not be compromised or arranged pursuant to the Plan or these proceedings and the Interim Lender, in that capacity, shall be treated as an unaffected creditor in these proceedings and in any Plan.

[38] **ORDERS** that the Interim Lender may:

a) notwithstanding any other provision of the Order, take such steps from time to time as it may deem necessary or appropriate to register, record or perfect the Interim Lender Charge and the Interim Financing Documents in all jurisdictions where it deems it is appropriate; and

b) notwithstanding the terms of the paragraph to follow, refuse to make any advance to the Canadian Petitioners if the Canadian Petitioners fail to meet the provisions of the Interim Financing Agreement and the Interim Financing Documents.

[39] **ORDERS** that the Interim Lender shall not take any enforcement steps under the Interim Financing Documents or the Interim Lender Charge without providing at least five (5) business days' written notice (the "**Notice Period**") of a default thereunder to the Petitioners, the Monitor and to creditors whose rights are registered or published at the appropriate registers or requesting a copy of such notice. Upon expiry of such Notice Period, the Interim Lender shall be entitled to take any and all steps under the Interim Financing Documents and the Interim Lender Charge and otherwise permitted at law, but without having to send any demands under Section 244 of the BIA;

[40] **ORDERS** that, subject to further order of this Court, no order shall be made varying, rescinding, or otherwise affecting paragraphs **Erreur ! Source du renvoi introuvable.** to [39] hereof unless either (a) notice of a motion for such order is served on the Interim Lender by the moving party within seven (7) days after that party was served with the Order or (b) the Interim Lender applies for or consents to such order;

M. Directors' and Officers' Indemnification and Charge

[41] **ORDERS** that the Petitioners shall indemnify their Directors from all claims relating to any obligations or liabilities they may incur and which have accrued as of May 4, 2018 by reason of or in relation to their respective capacities as directors or officers of the Petitioners after the Effective Time, except where such obligations or liabilities were incurred as a result of such directors' or officers' gross negligence, wilful misconduct or gross or intentional fault as further detailed in Section 11.51 CCAA.

[42] **ORDERS** that the Directors of the Petitioners shall be entitled to the benefit of and are hereby granted a charge and security in the Property (excluding the Arlanxeo Escrowed Funds) to the extent of the aggregate amount of $500,000 (the "**Directors' Charge**"), as security for the indemnity provided in paragraph [41] of this Order as it relates to obligations and liabilities that the Directors may incur in such capacity after May 4, 2018. The Directors' Charge shall have the priority set out in paragraphs [67] and [68] of this Order.

[43] **ORDERS** that, notwithstanding any language in any applicable insurance policy to the contrary, (a) no insurer shall be entitled to be subrogated to or claim the benefit of the Directors' Charge, and (b) the Directors shall only be entitled to the benefit of the Directors' Charge to the extent that they do not have coverage under any directors' and officers' insurance policy, or to the extent that such coverage is insufficient to pay amounts for which the Directors are entitled to be indemnified in accordance with paragraph [41] of this Order.

N. Key Employee Retention Program

[44] **ORDERS** that the Key Employee Retention Plan (the "**KERP**"), as reflected in the KERP Summary (as defined in the Third Petition) filed in support of the Third Petition as Exhibits R-11A (the "**KERP Summary**"), is hereby approved, and that the Petitioners are authorized and directed to make payments in accordance with the terms thereof, up to a maximum aggregate amount of $1,289,478.

[45] **ORDERS**, notwithstanding paragraph [44] of this Order and the provisions of the KERP Summary, that no amount earned by Key Employees (as defined in the Third Petition) pursuant to the KERP will be payable unless and until the Interim Lender, Comerica Bank acting in its capacity as agent for the Senior Secured Lenders (as defined in the Initial Petition), Mitsui & Co. Ltd., Her Majesty the Queen in Right of Ontario as represented by the Minister of Economic Development and Growth and BDC Capital Inc. have been paid in full in cash.

[46] **ORDERS** that the Key Employees (as defined in the Third Petition) shall be entitled to the benefit of and are hereby granted a charge and security in the Property (excluding the Arlanxeo Escrowed Funds) to the extent of the aggregate amount of $1,289,478 (the "**KERP Charge**"), to secure the amounts payable to the Key Employees pursuant to the KERP pursuant to paragraph [44] of this Order, having the priority established by paragraph [69] of this Order.

O. Restructuring

[47] **DECLARES** that, to facilitate the orderly liquidation of their business and financial affairs (the "**Liquidation**") but subject to such requirements as are imposed by the CCAA or any further order of the Court, the Monitor shall have the right to:

a) permanently or temporarily cease, downsize or shut down any of the Petitioners' operations or locations as it deems appropriate;

b) pursue all avenues to market, convey, transfer, assign or in any other manner dispose of the Business or Property, in whole or part, subject to further order of the Court and sections 11.3 and 36 CCAA, and under reserve of subparagraph (c);

c) subject to prior written consent from the Interim Lender, Comerica Bank acting in its capacity as agent for the Senior Secured Lenders, Her Majesty the Queen in Right of Ontario as represented by the Minister of Economic Development and Growth and BDC Capital Inc., convey, transfer, assign, lease, or in any other manner dispose of the Property, outside of the ordinary course of business, in whole or in part, and that the price and value in each case does not exceed $200,000 or $2,000,000 in the aggregate;

d) terminate the employment of the Petitioners' employees or temporarily or permanently lay off the Petitioners' employees as it deems appropriate and, to the extent that any amounts in lieu of notice, termination or severance pay or other amounts in respect thereof are not paid in the ordinary course, make provision, on such terms as may be agreed upon between the Monitor and such employee, or failing such agreement, further Order of the Court;

e) subject to the provisions of section 32 CCAA, disclaim or resiliate, any of the Petitioners' agreements, contracts or arrangements of any nature whatsoever, with such disclaimers or resiliation to be on such terms as may be agreed between the Monitor and the relevant party; and

f) subject to section 11.3 CCAA, assign any rights and obligations of Petitioners.

[48] **DECLARES** that, if a notice of disclaimer or resiliation is given to a landlord of any of a Petitioner pursuant to section 33 of the CCAA and subsection 57(e) of this Order, then (a) during the notice period prior to the effective time of the disclaimer or resiliation, the landlord may show the affected leased premises to prospective tenants during normal business hours by giving such Petitioner and the Monitor 24 hours prior written notice and (b) at the effective time of the disclaimer or resiliation, the landlord shall be entitled to take possession of any such leased premises and re-lease any such leased premises to third parties on such terms as any such landlord may determine without waiver of, or prejudice to, any claims or rights of the landlord against the Petitioners, provided nothing herein shall relieve such landlord of their obligation to mitigate any damages claimed in connection therewith.

[49] **ORDERS** that the Monitor shall provide to any relevant landlord notice of the intention of any of the Petitioners to remove any fittings, fixtures, installations or leasehold improvements at least seven (7) days in advance. If a Petitioner has already vacated the leased premises, it shall not be considered to be in occupation of such location pending the resolution of any dispute between such Petitioner and the landlord.

[50] **DECLARES** that, in order to facilitate the Liquidation, the Monitor may, by agreement or further Order of the Court, settle claims of customers and suppliers that are in dispute.

[51] **ORDERS** that all meetings of the shareholders of Petitioners be postponed and extended pending further order of this Court.

[52] **DECLARES** that, pursuant to sub-paragraph 7(3)(c) of the *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c.5, the Monitor is permitted, in the course of these proceedings, to disclose personal information of identifiable individuals in their possession or control to stakeholders or prospective investors, financiers, buyers or strategic partners and to their advisers (individually, a "**Third Party**"), but only to the extent desirable or required to negotiate and complete the Liquidation or a transaction for that purpose, provided that the Persons to whom such personal information is disclosed enter into confidentiality agreements with the Petitioners binding them to maintain and protect the privacy of such information and to limit the use of such information to the extent necessary to complete the transaction then under negotiation. Upon the completion of the use of personal information for the limited purpose set out herein, the personal information shall be returned to the Petitioners or destroyed. In the event that a Third Party acquires personal information as part of the Liquidation or the preparation or implementation of the Plan or a transaction in furtherance thereof, such Third Party may continue to use the personal information in a manner which is in all respects identical to the prior use thereof by the Petitioners.

[53] **ORDERS** that pursuant to clause 3(c)(i) of the *Electronic Commerce Protection Regulations,* made under *An Act to Promote the Efficiency and Adaptability of the Canadian Economy by Regulating Certain Activities that Discourage Reliance on Electronic Means of Carrying Out Commercial Activities, and to Amend the Canadian Radio-television and Telecommunications Commission Act, the Competition Act, the Personal Information Protection and Electronic Documents Act and the Telecommunications Act,* S.C. 2010, c. 23, the Petitioners and the Monitor are authorized and permitted to send, or cause or permit to be sent, commercial electronic messages to an electronic address of prospective purchasers or bidders and to their advisors but only to the extent desirable or required to provide information with respect to any sales process in these CCAA proceedings.

P. Powers of the Monitor

[54] **ORDERS** that PricewaterhouseCoopers Inc. is hereby appointed to monitor the business and financial affairs of the Petitioners as an officer of this Court (the "**Monitor**") and that the Monitor, in addition to the prescribed powers and obligations, referred to in Section 23 of the CCAA:

a) shall, as soon as practicable, (i) publish once a week for two (2) consecutive weeks or as otherwise directed by the Court, in La Presse+, the Sarnia Observer, the Globe & Mail National Edition and the Star Tribune (Minnesota) and (ii) within five (5) business days after the date of this Order (A) post on the Monitor's website (the "**Website**") a notice containing the information prescribed under the CCAA, (B) make this Order publicly available in the manner prescribed under the CCAA, (C) send, in the prescribed manner, a notice to all known creditors having a claim against a Petitioner of more than $1,000, advising them that the Order is publicly available, and (D) prepare a list showing the names and addresses of such creditors and the estimated amounts of their respective claims, and make it publicly available in the prescribed manner, all in accordance with Section 23(1)(a) of the CCAA and the regulations made thereunder;

b) shall monitor the Petitioners' receipts and disbursements;

c) shall deal with the Petitioners creditors and other interested Persons during the Stay Period;

d) shall prepare the Petitioners' cash flow projections and any other projections or reports;

e) shall review the Petitioners' business and assess opportunities for cost reduction, revenue enhancement and operating efficiencies;

f) shall conduct the Liquidation and any negotiations with the Petitioners' creditors and other interested Persons;

g) shall report to the Court on the state of the business and financial affairs of the Petitioners or developments in these proceedings or any related proceedings within the time limits set forth in the CCAA and at such time as considered appropriate by the Monitor or as the Court may order and may file consolidated Reports for the Petitioners;

h) shall report to this Court and interested parties with respect to the Monitor's assessment of, and recommendations with respect to the Liquidation;

i) may retain and employ such agents, advisers and other assistants as are reasonably necessary for the purpose of carrying out the terms of this Order, including, without limitation, one or more entities related to or affiliated with the Monitor;

j) may engage legal counsel to the extent the Monitor considers necessary in connection with the exercise of their powers or the discharge of their obligations in these proceedings and any related proceeding, under this Order or under the CCAA;

k) may act as a "foreign representative" of any of the Petitioners or in any other similar capacity in any insolvency, bankruptcy or reorganisation proceedings outside of Canada;

l) may give any consent or approval as may be contemplated by this Order or the CCAA;

m) may hold and administer funds in connection with arrangements made among the Petitioners, any counter-parties and the Monitor, or by Order of this Court; and

n) may perform such other duties as are required by this Order or the CCAA or by this Court from time to time.

[55] **ORDERS** that, in addition to the foregoing, and notwithstanding anything to the contrary therein, the Monitor is hereby authorized and empowered to:

a) preserve, protect and maintain the control of the Property, or any parts thereof;

b) operate and carry on the Business for the purpose of Liquidation including, without limitation:

i) completing any transaction for the sale, use or monetization of the Property; and

ii) if appropriate, developing and implementing a Plan or Plans on behalf of the Petitioners;

c) take all steps and actions the Monitor considers necessary or desirable in these proceedings including, without limitation:

i) entering into any agreements;

ii) incurring obligations in the daily ordinary course of business;

iii) retaining or terminating employees or contractors;

iv) administering and winding down all employee benefit plans of the Petitioners and making and endorsing all filings related thereto (including, without limitation, financial statements, tax returns and tax filings); and

v) ceasing to carry on all or part of the Business;

vi) accessing, at all times, the places of business and the premises of the Petitioners, the Property, and changing the locks to such places of business and premises of the Petitioners;

vii) accessing all the accounting records of the Petitioners, as well as to any document, contract, register of any nature or kind whatsoever, wherever they may be situated and regardless of the medium on which they may be recorded (the "**Records**"), including the powers necessary to make copies of all the Records necessary or useful to the execution of the Monitor's functions;

viii) controlling the Petitioners' receipts and disbursements;

ix) collecting all accounts receivable and all other claims of the Petitioners and transacting in respect of same, including signing any document for this purpose;

x) selling and disposing of all inventory of the Petitioners, whether at regular price or at a discount, and executing all documentation necessary in this regard;

xi) opening any required bank account, on the terms and conditions the Monitor may determine, with any chartered Canadian bank or any other financial institution, the whole, in order to cash any item payable to the Petitioners, and issuing any payment which, in the opinion of the Monitor, is necessary or useful to the Petitioners' operations;

xii) using the Petitioners' cash flow to pay any and all amounts due by the Petitioners and/or the Monitor in relation to post-filing expenses or services as well as all professional services incurred, including the Monitor's fees and expenses as well as those of its legal counsel;

xiii) marketing or soliciting one or several potential buyers of all or any part of the Property, including, without limitation, the right to carry

out a public call for tenders or private solicitations in order to dispose of the Property;

xiv) reporting to, meeting and discussing with the Petitioners' secured lenders and the Interim Lender, as the Monitor deems appropriate, regarding all matters relating to the Property, the liquidation process and these proceedings, and sharing information with them subject to such terms as to confidentiality as the Monitor deems advisable; and

xv) performing such other duties and taking such other steps reasonably incidental to the exercise of these powers and as required by this Order or by this Court from time to time.

d) engage consultants, appraisers, agents experts, auditors, accountants, managers, counsel and such other person from time to time and on whatever basis, including on a temporary basis, to assist with the exercise of the powers and duties conferred by this Order;

e) continue to engage the services of the Petitioners' employees on behalf of the Petitioners, until the Monitor, acting for and on behalf of the Petitioners, terminates the employment of such employees. The Monitor shall not be liable for any employee related liabilities, including any successor-employer liabilities as provided for in section 11.8(1) of the CCAA, other than such amounts as the Monitor may specifically agree in writing to pay;

f) oversee and direct the preparation of cash flow statements and assist in the dissemination of financial or other information in these proceedings;

g) receive, collect and take possession of all monies and accounts now owned or hereafter owing to any one or more of the Petitioners, including proceeds payable pursuant to the sale of Property;

h) execute, assign, issue, endorse documents of whatever nature in respect of any of the Property, whether in the Monitor's name or in the name and on behalf of any of the Petitioners (including without limitation, financial statements, tax returns and tax filings);

i) initiate, prosecute, make and respond to applications and motions in, and continue the prosecution of any and all proceedings on behalf of or involving one or more of the Petitioners (including the within proceedings) and settle or compromise any proceedings or claims by and against one or more of the Petitioners. The authority hereby conveyed shall extend to such appeals or application and motions for judicial review in respect of any order or judgement pronounced in any such proceedings;

j) exercise any rights that the Petitioners have;

k) provide instruction and direction to the advisors of the Petitioners;

l) make any distribution or payment required under any Order in these proceedings;

m) apply to the Court upon notice as required under the BIA, and, where the Court is of the opinion that it is proper and in the best interests of the estate, to assign the Petitioners into bankruptcy or obtain a bankruptcy order against the Petitioners. Nothing in this Order shall prevent the Monitor from acting as trustee in bankruptcy of any of the Petitioners; and

n) perform such other duties or take any steps reasonably incidental to the exercise of such powers and obligations conferred upon the monitor by this Order or any Order of this Court.

[56] **ORDERS** that no provisions of this Order is intended to appoint the Monitor as an officer, director or employee of any of the Petitioners or to create a fiduciary duty to any party including, without limitation, any creditor or shareholder of the Petitioners. Additionally, nothing in this Order shall constitute or be deemed to constitute the Monitor as a receiver, assignee, liquidator, or receiver and manager of any of the Petitioners and any distribution made to creditors of the Petitioners will be deemed to be have been made by the Petitioners.

[57] **ORDERS** that the Petitioners and their employees, current and former shareholders, officers, Directors, agents and representatives shall fully cooperate with the Monitor in the exercise of its powers and discharge if its duties, rights and obligations as provided and set out in this Order.

[58] **ORDERS** that, without limiting the generality of the foregoing, the Petitioners and their Directors, officers, employees and agents, accountants, auditors and all other Persons having notice of the Order shall forthwith provide the Monitor with unrestricted access to all of the Business and Property, including, without limitation, the premises, books, records, data, including data in electronic form, and all other documents of the Petitioners in connection with the Monitor's duties and responsibilities hereunder.

[59] **DECLARES** that the Monitor may provide creditors and other relevant stakeholders of the Petitioners with information in response to requests made by them in writing addressed to the Monitor and its counsel. In the case of information that is confidential, proprietary or competitive, the Monitor shall not provide such information to any Person unless otherwise directed by this Court.

[60] **DECLARES** that if the Monitor, in its capacity as Monitor, carries on the business of the Petitioners or continues the employment of the Petitioners' employees, the Monitor shall benefit from the provisions of section 11.8 of the CCAA.

[61] **DECLARES** that The Monitor is hereby empowered to apply to any court, tribunal, regulatory or administrative body, in any foreign jurisdiction for the recognition of this order and for assistance in carrying out the terms of this Order, including in the United States of America pursuant to under chapter 15 of title 11 of the United States Code, 11 U.S.C. § 101-1532 ("**Chapter 15 of the U.S. Bankruptcy Code**"), and to take such actions necessary or appropriate in furtherance of the recognition of these proceedings in any such jurisdiction, including for the replacement of Mr. Mario Settino as foreign representative in the U.S. bankruptcy proceedings in respect of BioAmber Inc.

[62] **DECLARES** that Section 215 of the BIA applies *mutatis mutandis* and that no action or other proceedings shall be commenced against the Monitor relating to its appointment, its conduct as Monitor or the carrying out of the provisions of any order of this Court, except with prior leave of this Court, on at least seven days' notice to the Monitor and its counsel. The entities related to or affiliated with the Monitor referred to in subparagraph [54]c) hereof shall also be entitled to the protection, benefits and privileges afforded to the Monitor pursuant to this paragraph.

[63] **DECLARES** that subject to the powers granted to the Monitor pursuant to the terms of this Order, nothing herein contained shall require the Monitor to occupy or to take control, or to otherwise manage all or any part of the Property. The Monitor shall not, as a result of this Order, be deemed to be in possession of any of the Property within the meaning of environmental legislation, the whole pursuant to the terms of the CCAA.

[64] **DECLARES** that the powers of the Monitor shall be exercised pursuant to its sole discretion and judgment.

[65] **ORDERS** that the Petitioners shall pay the reasonable fees and disbursements of the Monitor, the Monitor's legal counsel, the Petitioners' legal counsel and other advisers, directly related to these proceedings, the Plan and the Restructuring, whether incurred before or after this Order.

[66] **DECLARES** that the Monitor, the Monitor's legal counsel (Borden Ladner Gervais LLP), the Petitioners' legal counsel (Blake, Cassels & Graydon LLP as insolvency counsel and DSL, LLP as general counsel), the Monitor's and the Petitioners' respective advisers, as security for the professional fees and disbursements incurred both before and after the making of this Order and directly related to these proceedings, the Plan and the Restructuring, be entitled to the benefit of and are hereby granted a charge and security in the Property

(excluding the Arlanxeo Escrowed Funds), to the extent of the aggregate amount of $300,000 (the "**Administration Charge**"), having the priority established by paragraphs [67] and [68] of this Order.

Q. <u>Priorities and General Provisions Relating to CCAA Charges</u>

[67] **DECLARES** that the priorities of the Administration Charge, the Interim Lender Charge, the Post-Filing Intercompany Advance Charges and the Directors' Charge (collectively, the "**CCAA Charges**"), as between them with respect to any Property to which they apply, shall be as follows:

a) first, the Administration Charge;

b) second, the Interim Lender Charge;

c) third, the Post-Filing Intercompany Advance Charges; and

d) fourth, the Directors' Charge.

[68] **DECLARES** that each of the CCAA Charges shall rank in priority to any and all other hypothecs, mortgages, liens, security interests, priorities, charges, options, encumbrances or security of whatever nature or kind (collectively, the "**Encumbrances**") affecting the Property whether or not charged by such Encumbrances.

[69] **DECLARES** that the KERP Charge shall rank behind the CCAA Charges and any and all other Encumbrances affecting the Property charged by such Encumbrances.

[70] **ORDERS** that, except as otherwise expressly provided for herein the Petitioners or the Monitor shall not grant any Encumbrances in or against any Property that rank in priority to, or *pari passu* with, any of the CCAA Charges unless the Petitioners, as applicable, obtain the prior written consent of the Monitor and the prior approval of the Court.

[71] **DECLARES** that each of the CCAA Charges shall attach, as of the Effective Time, to all present and future Property of the Petitioners, notwithstanding any requirement for the consent of any party to any such charge or to comply with any condition precedent.

[72] **DECLARES** that the CCAA Charges and the rights and remedies of the beneficiaries of the CCAA Charges, as applicable, shall be valid and enforceable and not otherwise be limited or impaired in any way by (i) these proceedings and the declarations of insolvency made herein; (ii) any application(s) for bankruptcy order(s) issued pursuant to BIA, or any bankruptcy order made pursuant to such applications or any assignments in bankruptcy made or deemed to be made in

respect of any Petitioner; or (iii) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of Encumbrances, contained in any agreement, lease, sub-lease or other arrangement which binds the Petitioners (a "**Third Party Agreement**"), and notwithstanding any provision to the contrary in any Third Party Agreement:

a) the creation of any of the CCAA Charges shall not create nor be deemed to constitute a breach by the Petitioners of any Third Party Agreement to which any Petitioner is a party; and

b) the beneficiaries of the CCAA Charges shall not have any liability to any Person whatsoever as a result of any breach of any Third Party Agreement caused by or resulting from the creation of the CCAA Charges.

[73] **DECLARES** that notwithstanding: (i) these proceedings and the declarations of insolvency made herein; (ii) any application(s) for bankruptcy order(s) issued pursuant to BIA, or any bankruptcy order made pursuant to such applications or any assignments in bankruptcy made or deemed to be made in respect of any Petitioner, and (iii) the provisions of any federal or provincial statute, the payments or disposition of Property made by any Petitioner pursuant to this Order and the granting of the CCAA Charges, do not and will not constitute settlements, fraudulent preferences, fraudulent conveyances or other challengeable or reviewable transactions or conduct meriting an oppression remedy under any applicable law.

[74] **DECLARES** that the CCAA Charges shall be valid and enforceable as against all Property of the Petitioners and against all Persons, including, without limitation, any trustee in bankruptcy, receiver, receiver and manager or interim receiver of the Petitioners.

R. <u>General</u>

[75] **ORDERS** that no Person shall commence, proceed with or enforce any Proceedings against any of the Directors, employees, legal counsel or financial advisers of the Petitioners or of the Monitor in relation to the Business or Property of the Petitioners, without first obtaining leave of this Court, upon five (5) calendar days' written notice to the Petitioners' counsel, the Monitor's counsel, and to all those referred to in this paragraph whom it is proposed be named in such Proceedings.

[76] **ORDERS** that, subject to further Order of this Court, all motions in these CCAA proceedings are to be brought on not less than five (5) calendar days' notice to all Persons on the service list. Each motion shall specify a date (the "**Initial Return Date**") and time (the "**Initial Return Time**") for the hearing.

[77] **ORDERS** that any Person wishing to object to the relief sought on a motion in these CCAA proceedings must serve responding motion materials or a notice stating the objection to the motion and the grounds for such objection (a "**Notice of Objection**") in writing to the moving party, the Petitioners and the Monitor, with a copy to all Persons on the service list, no later than 5 p.m. Montreal Time on the date that is three (3) calendar days prior to the Initial Return Date (the "**Objection Deadline**").

[78] **ORDERS** that, if no Notice of Objection is served by the Objection Deadline, the Judge having carriage of the motion (the "**Presiding Judge**") may determine: (a) whether a hearing is necessary; (b) whether such hearing will be in person, by telephone or by written submissions only; and (c) the parties from whom submissions are required (collectively, the "**Hearing Details**"). In the absence of any such determination, a hearing will be held in the ordinary course.

[79] **ORDERS** that, if no Notice of Objection is served by the Objection Deadline, the Monitor shall communicate with the Presiding Judge regarding whether a determination has been made by the Presiding Judge concerning the Hearing Details. The Monitor shall thereafter advise the service list of the Hearing Details and the Monitor shall report upon its dissemination of the Hearing Details to the Court in a timely manner, which may be contained in the Monitor's next report in these proceedings.

[80] **ORDERS** that, if a Notice of Objection is served by the Objection Deadline, the interested parties shall appear before the Presiding Judge on the Initial Return Date at the Initial Return Time, or such earlier or later time as may be directed by the Court, to, as the Court may direct: (a) proceed with the hearing on the Initial Return Date and at the Initial Return Time; or (b) establish a schedule for the delivery of materials and the hearing of the contested motion and such other matters, including interim relief, as the Court may direct.

[81] **DECLARES** that this Order and any proceeding or affidavit leading to the Order, shall not, in and of themselves, constitute a default or failure to comply by the Petitioners under any statute, regulation, licence, permit, contract, permission, covenant, agreement, undertaking or other written document or requirement.

[82] **DECLARES** that, except as otherwise specified herein, the Petitioners and the Monitor are at liberty to serve any notice, proof of claim form, proxy, circular or other document in connection with these proceedings by forwarding copies by prepaid ordinary mail, courier, personal delivery or electronic transmission to Persons or other appropriate parties at their respective given addresses as last shown on the records of the Petitioners and that any such service shall be deemed to be received on the date of delivery if by personal delivery or electronic transmission, on the following business day if delivered by courier, or three business days after mailing if by ordinary mail.

[83] **DECLARES** that the Petitioners and any party to these proceedings may serve any court materials in these proceedings on all represented parties electronically, by emailing a PDF or other electronic copy of such materials to counsels' email addresses, provided that the Petitioners shall deliver "hard copies" of such materials upon request to any party as soon as practicable thereafter.

[84] **ORDERS** that the summary of the DIP financing solicitation process produced under seal of confidentiality as Exhibit R-14 to the Initial Petition and as Exhibit R-12 to the Second Petition, the summary of the LOIs produced under seal of confidentiality as Exhibit R-8 to the Third Petition and as Exhibit R-4 to the Stay Extension Petition, the Letters of Intent produced under seal of confidentiality as Exhibit R-9 to the Third Petition and as Exhibit R-5 to the Stay Extension Petition, the Key Employee Summary produced under seal of confidentiality as Exhibit R-10 to the Third Petition and the KERP Summaries produced under seal of confidentiality as Exhibits R-11 and R-11A to the Third Petition, shall be sealed, kept confidential and not form part of the public record, but rather shall be placed, separate and apart from all other contents of the Court file, in a sealed envelope attached to a notice that sets out the title of these proceedings and a statement that the contents are subject to a sealing order and shall only be opened upon further Order of the Court.

[85] **DECLARES** that, unless otherwise provided herein, under the CCAA, or ordered by this Court, no document, order or other material need be served on any Person in respect of these proceedings, unless such Person has served a Notice of Appearance on the solicitors for the Petitioners and the Monitor and has filed such notice with this Court, or appears on the service list prepared by the Monitor, the Petitioner or their respective attorneys, save and except when an order is sought against a Person not previously involved in these proceedings.

[86] **DECLARES** that the Monitor may, from time to time, apply to this Court for directions concerning the exercise of their respective powers, duties and rights hereunder or in respect of the proper execution of the Order on notice only to each other.

[87] **DECLARES** that any interested Person may apply to this Court to vary or rescind the Order or seek other relief upon five (5) calendar days' notice to the Petitioners, the Monitor and to any other party likely to be affected by the order sought or upon such other notice, if any, as this Court may order, such application or motion shall be filed by no later than 15 days from the date hereof, unless otherwise ordered by this Court.

[88] **DECLARES** that the Order and all other orders in these proceedings shall have full force and effect in all provinces and territories in Canada.

[89] **AUTHORIZES** the Monitor to apply as it may consider necessary or desirable, with or without notice, to any other court or administrative body, whether in Canada, the United States of America or elsewhere, for orders which aid and complement this Order and any subsequent orders of this Court and, without limitation to the foregoing, any orders under Chapter 15 of the U.S. Bankruptcy Code, including an order for recognition of these CCAA proceedings as "Foreign Main Proceedings" in the United States of America (the "**Chapter 15 Relief**"), and for which the Monitor or any of the Petitioners shall be the foreign representative of the Petitioners (in such capacity, the "**Foreign Representative**"). All courts and administrative bodies of all such jurisdictions are hereby respectively requested to make such orders and to provide such assistance to the Monitor and the Petitioners as may be deemed necessary or appropriate for that purpose.

[90] **REQUESTS** the aid and recognition of any Court, tribunal, regulatory or administrative body in any Province of Canada and any Canadian federal court or in the United States of America and any court or administrative body elsewhere, to give effect to this Order and to assist the Petitioners, the Monitor and their respective agents in carrying out the terms of this Order. All Courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Petitioners and the Monitor as may be necessary or desirable to give effect to this Order, including by recognizing the present CCAA proceedings as "Foreign Main Proceedings" for the purpose of the Chapter 15 Relief, to grant representative status to the Foreign Representative in any foreign proceeding, to assist the Petitioners and the Monitor, and to act in aid of and to be complementary to this Court, in carrying out the terms of this Order.

[91] **DECLARES** that, for the purposes of the Chapter 15 Relief and/or any applications authorized by paragraphs [89] and [90], Petitioners' centre of main interest is located in the province of Québec, Canada.

[92] **ORDERS** the provisional execution of the Order notwithstanding any appeal.

The Honourable Michel A. Pinsonnault, J.S.C.

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Attorneys for the Interim Lender

Date of hearing: July 31, 2018

Schedule A – Interim Financing Agreement

See attached.