

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF
1682 VICTORIA PARK AVENUE INC.

**BOOK OF AUTHORITIES OF THE APPLICANT,
FINDEV LENDING INC.**

DATE: July 15, 2026

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TAB 1

2019 ANNREVINSOLV 14

Annual Review of Insolvency Law

Editor: Janis P. Sarra

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

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

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 *CCAAs*.

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 voluntarily, 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 *CCAAs*, 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 *CCAAs*: 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 *CCAAs*.

The concept of liquidating *CCAAs* 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 *CCAAs* 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 *CCAAs* 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 Inc 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 *CCAAs* 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 *CCAAs* 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 *CCAAs*, 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 *CCAAs* 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 *CCAAs* 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 SISF. When it became obvious that the SISF 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 SISF 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 receiver⁷⁵ 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 Lehdorff 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 *CCAAs*,” 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 CCAAs: 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 Bkcty) [*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 Bkcty) [*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.

**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
1682 VICTORIA PARK AVENUE INC.**

Court File No. CL-26-00000319-0000

ONTARIO
SUPERIOR COURT OF JUSTICE
(Commercial List)

Proceeding commenced at
TORONTO

**BOOK OF AUTHORITIES OF THE APPLICANT,
FINDEV LENDING INC.**

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