DAVIES
Academy

Canadian Insolvency Landscape During the Pandemic

March 11, 2021
Denis Ferland
Natasha MacParland

Agenda

1

Canadian Insolvency Trends in 2020

2

Key Developments in Insolvency at the SCC and Cases We're Watching

3

Plan of Arrangement Developments

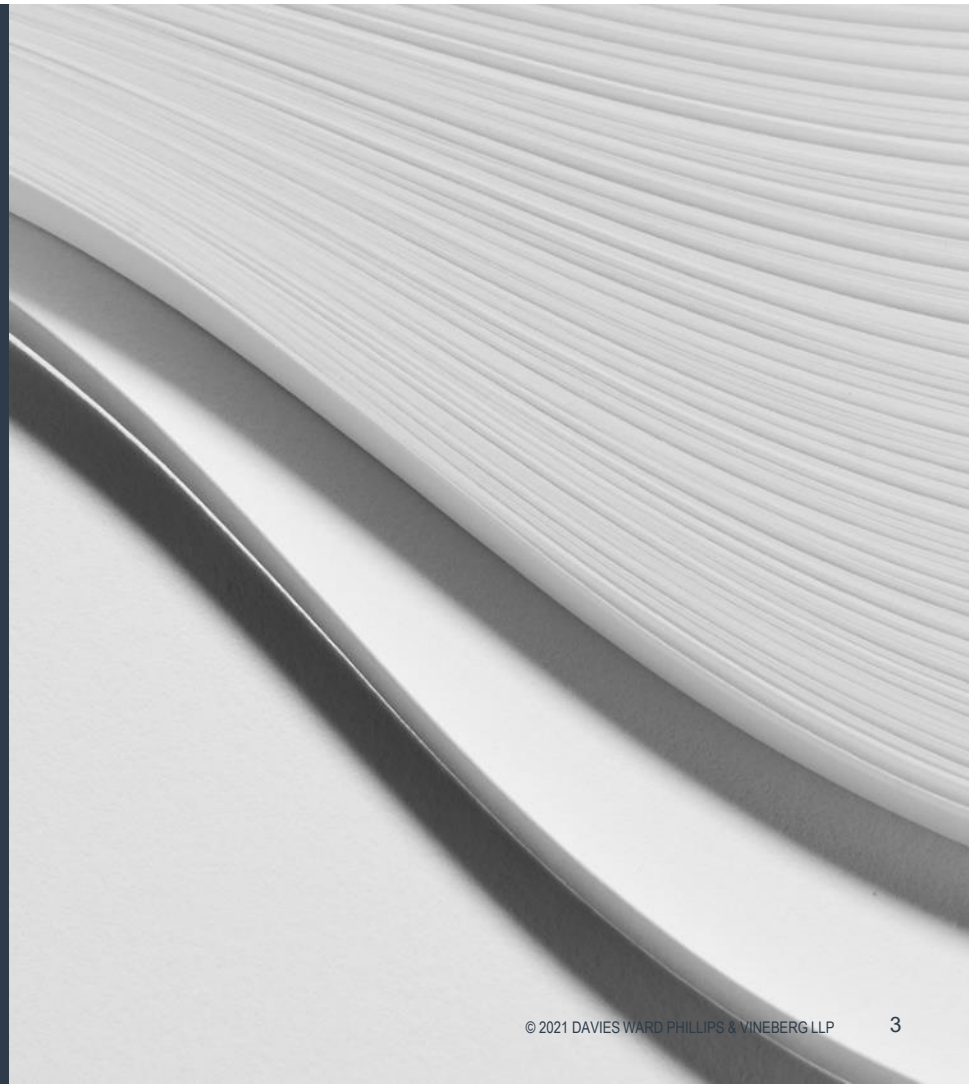
4

Reverse Vesting Orders

5

Developments in Debtors' Obligations to Pay Rent

Canadian Insolvency Trends in 2020



Economic Conditions

- Canadian GDP dropped by 5.4% in 2020.
- The Bank of Canada benchmark interest rate remains at a record low at 0.25%.
- Housing prices are at an all-time high nationally.
- The TSX has recovered completely from correction in March of 2020.
- Bond yield returns remain flat:

	2-year	3-year	5-year	7-year	10-year
Present*	0.25%	0.25%	0.50%	2.00%	0.50%
2020**	1.50%	1.00%	1.50%	2.25%	2.25%

* Based on most recently posted benchmark bond yields posted by Bank of Canada as at March 9, 2021.
** Based on selected benchmark bond yields posted by the Bank of Canada for the first period of 2020.

Economic Conditions *(Cont'd)*

From *Canadian Insolvency Trends in 2020: A Pandemic Year in Numbers* prepared by Davies Ward Phillips & Vineberg LLP.

Unprecedented economic conditions caused by COVID-19:

- Unemployment is **up**.
- Consumer confidence was **down** for most of the year.
- Businesses have **permanently closed**.
- Many other businesses are **barely holding on**.

Federal and provincial measures have been put in place to respond, including:

- Canada Emergency Relief Benefit
- Canada Emergency Business Account
- Canada Emergency Wage Subsidy
- Rent assistance
- Many provincial programs throughout the country.

DAVIES

Early Reactions to the COVID-19 Pandemic

BUSINESS News

Coronavirus will hurt Canadian economy in short term, experts predict

A Tidal Wave of Bankruptcies Is Coming

Experts foresee so many filings in the coming months that the courts could struggle to salvage the businesses that are worth saving.

Pandemic will drive Canada into 'historic recession' in 2020, CMHC says

Canada's economy is heading toward a recession as virus, oil prices take bite out of growth

Will COVID-19 Trigger Massive Wave of Mortgage Defaults?

ECONOMIC ANALYSIS

Coronavirus plunges Canada's economy into the abyss

Canada may face an historic downturn, struck by the global pandemic and fuelled by issues that were already haunting the economy

ECONOMY

Canada will fall into recession amid coronavirus impacts, RBC predicts

Business

It's official – Canada's economy is in a recession, C.D. Howe says

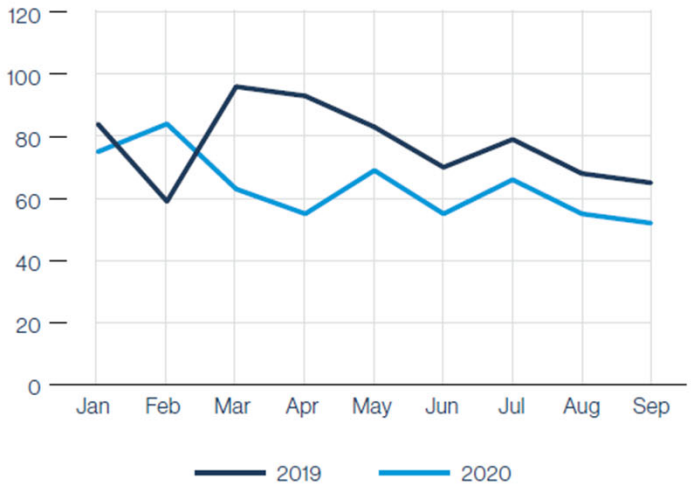
Key Observations

- Number of bankruptcies of individuals and small and medium-sized businesses has plummeted since the pandemic was declared in March 2020.
- In Canada, overall business insolvencies were up in Q3 2020, but below year-over-year 2019 levels.
  - > Total bankruptcies and proposals were up 8% from Q2 2020. All bankruptcies were down 46.7% from Q3 2019, and proposals were down 35.4%.
  - > Proposals continue to be the most popular option for both businesses and consumers.
  - > CCAA filings slowed toward the end of 2020, the trend line from 2019 to 2020 is worrisome, especially in the retail sector.
- The emerging picture for 2021 is looking to largely resemble that of 2020.

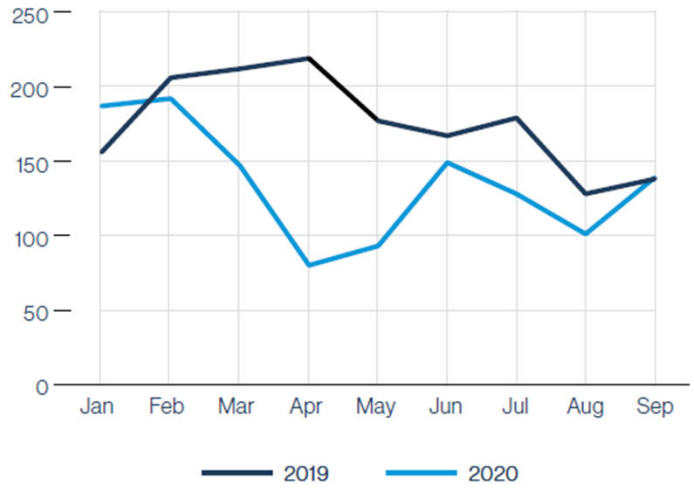
Year-over-Year Comparison of Bankruptcy Proposals

Business and Personal

Bankruptcies and Proposals in Ontario



Bankruptcies and Proposals in Québec

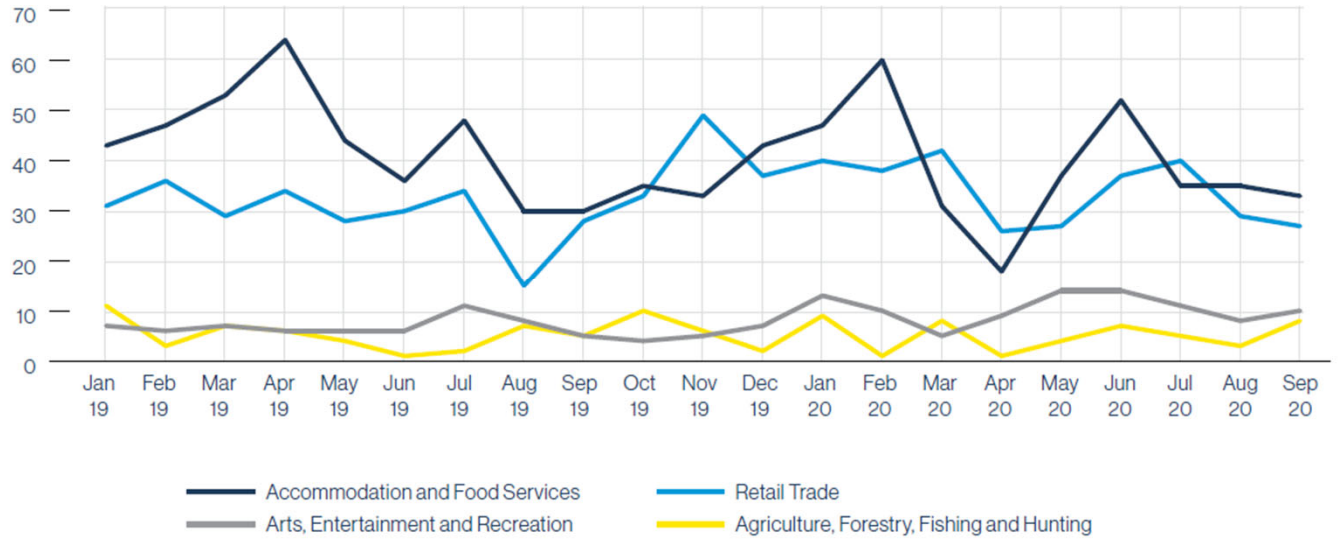


Key Observations *(Cont'd)*

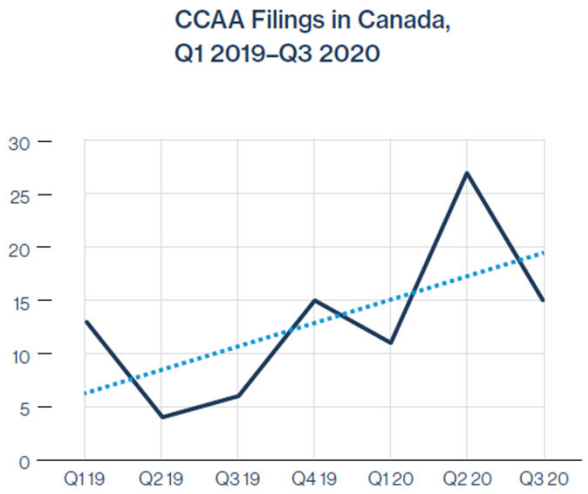
- Hardest hit sectors include:
  - Retail (up 25%);
  - Management of companies and enterprises* (up 14%); and
  - Arts, entertainment and recreation (up 20.8%).
- Court-appointed and privately appointed receiverships were down in Q3.
- CCAA filings dropped in Q3 2020, but the numbers dating back to 2019 show an overall steadily increasing trend line.
- Most companies that emerged from CCAA proceedings in 2020 were restructured.

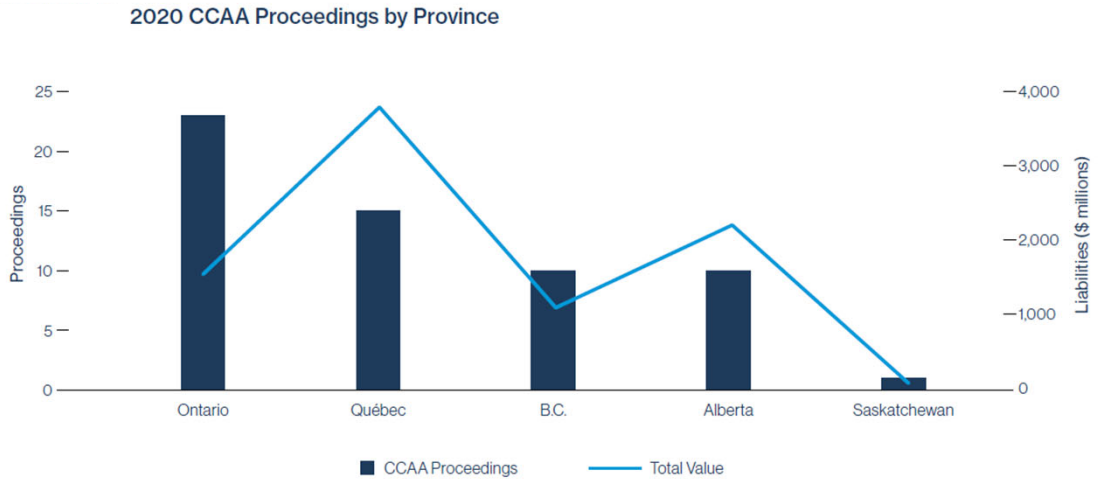
*Companies engaged in managing companies and / or holding the securities or financial assets of companies.

Total Bankruptcies and Proposals in Hardest Hit Sectors

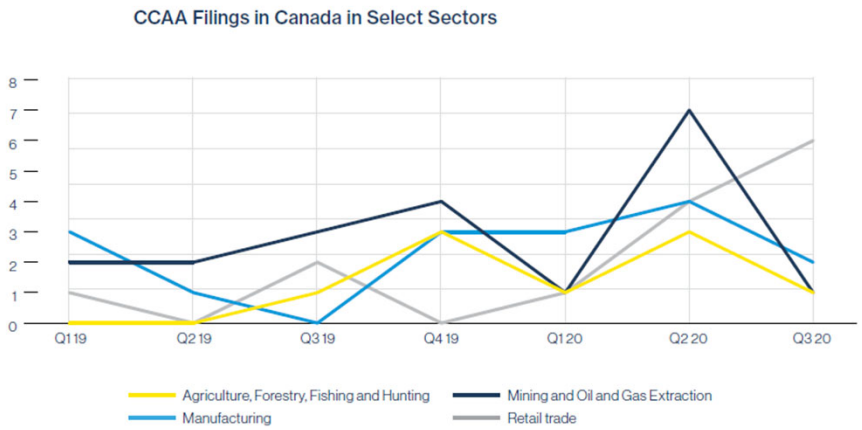


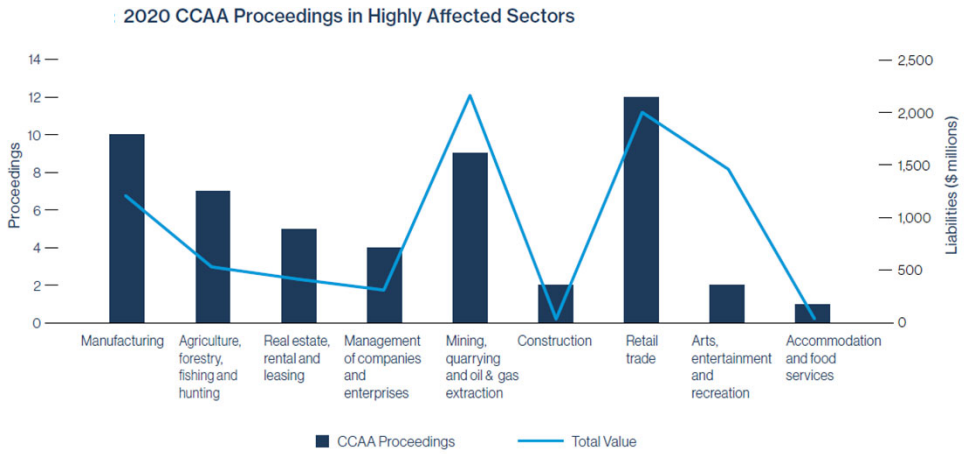
CCAA Filings in Canada





CCAA Filings in Canada *(Cont'd)*





Looking Ahead

Key questions:

- Will insolvent/near insolvent businesses hold out long enough?
  - > The pandemic-fueled recession was halted by benefits flowing from government.
- Will a rising wave of formal insolvency proceedings and consolidations crash over Canadian businesses?
  - > Easing of restrictions in 2021 and rising creditor enforcement, previously postponed during the pandemic, might cause rapid rise in insolvencies.

> Potential domino effect will depend on consumer confidence and pandemic savings poured back into the economy to the hardest hit sectors.

> The rate at which taps of governmental programs are turned off will be a factor.

> A credit crunch may have distributional effects that will hit smaller and medium-sized businesses more acutely than larger players.

DAVIES

Key Developments at the Supreme Court of Canada and Cases We're Watching

Key Cases

Canada Steel Inc. v Chandos Construction Ltd., 2020 SCC 25

Callidus Capital Corporation v 9354-9186 Québec Inc., 2020 SCC 10

Canada Steel Inc. v Chandos Construction Ltd.

Chandos: Facts

- Chandos Construction Inc. was hired as the general contractor for a condominium project, and subcontracted part of the work to Capital Steel Inc.
  - Impugned Provision:
    - In the event the Subcontractor commits any act of insolvency, bankruptcy, winding up or other distribution of assets, or permits a receiver of the Subcontractor's business to be appointed, or ceases to carry on business or closes down its operations, then in any of such events:

      …(d) the Subcontractor shall forfeit 10% of the within Subcontract Agreement price to the Contractor as a fee for the inconvenience of completing the work using alternate means and/or for monitoring the work during the warranty period ("Insolvency Clause").
- In September 2016, Capital Steel filed an assignment in bankruptcy.
  - At that time, Chandos owed approximately $150,000 to Capital Steel.
  - Chandos took the position that it was entitled to offset this amount against 10% of the total contract price pursuant to the Insolvency Clause, effectively eliminating the debt.

Chandos: Issues

– Is the Insolvency Clause valid and enforceable?

DAVIES

Chandos: Supreme Court of Canada Decision

- Fairly short decision (Justice Coté's dissent is twice as long as actual decision).
- Deals with *ipso facto* clauses and their enforceability in Canada.
- Despite being in Latin, concept is fairly straightforward.
- What you need to know:
  - *Ipso facto* clauses = Contractual provisions imposing consequences upon insolvency.
    - e.g., Remedies, including early termination, debt acceleration, etc.

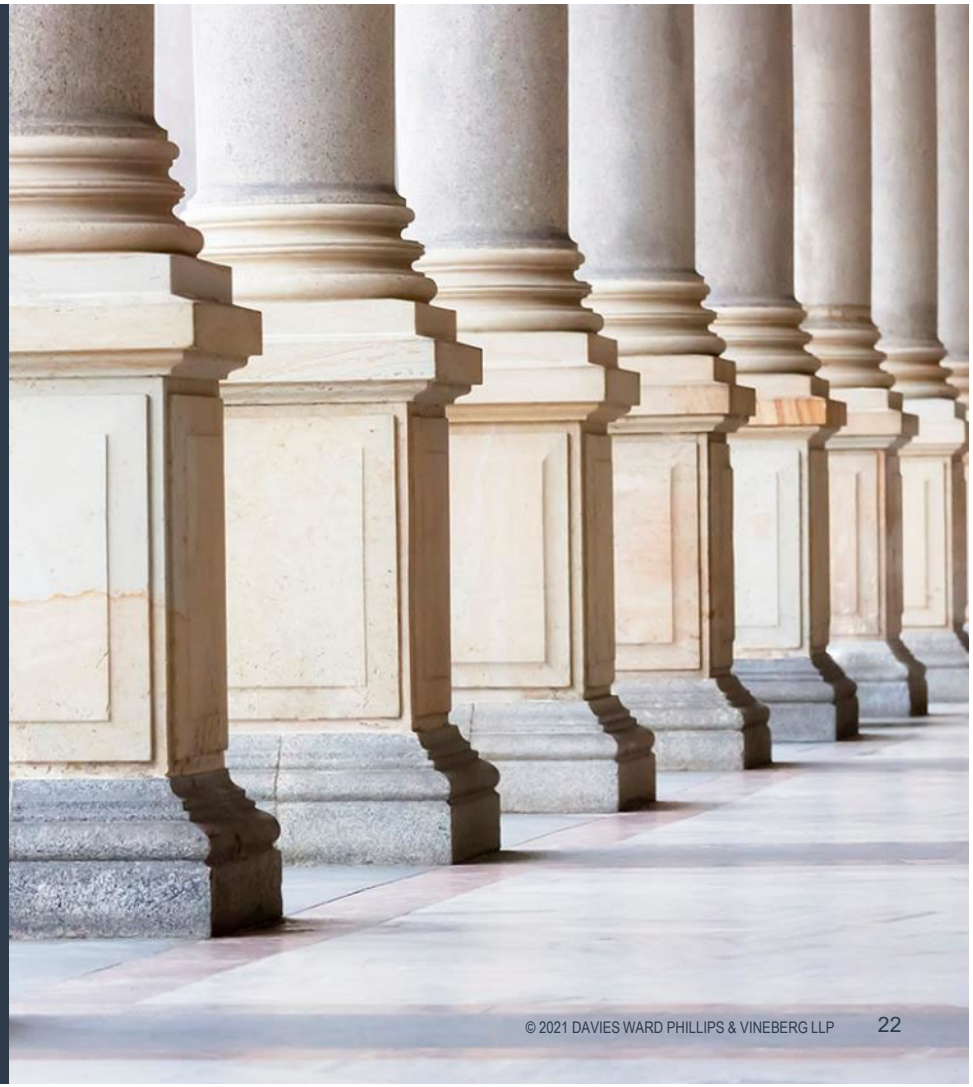
Chandos: Supreme Court of Canada Decision *(Cont'd)*

- Common law anti-deprivation rule may also invalidate certain *ipso facto* clauses.
  - The rule stems from the notion that parties cannot escape scheme of distribution under bankruptcy laws. Often equates to a preference.
- Despite limited treatment by Canadian courts, the majority held that the anti-deprivation rule exists in Canadian law.
  - Aimed at protecting creditors and ensuring an orderly and appropriate distribution of the debtor's assets.
  - The rule continues to apply in the context of corporate bankruptcies, despite the adoption of explicit legislative provisions dealing with *ipso facto* clauses in other contexts.
- Applying the anti-deprivation rule, the majority concluded that the Insolvency Clause was an *ipso facto* clause that had the **effect** of prejudicing the creditors of Capital Steel and was therefore unenforceable.

Key Takeaways

- The anti-deprivation rule exists in Canada.
- Two-part, effects-based test; if test met, clause is unenforceable:
  1. The relevant clause is triggered by an event of insolvency or bankruptcy; and
  2. The effect of the clause is to remove value from the insolvent entity's estate.
- Will impact structuring of agreements.
  - > Any clause where value potentially flows on insolvency may be an issue.

Callidus Capital Corporation v 9354-9186 Québec Inc. [Bluberi]



Bluberi: Facts

- In August 2012, Callidus extended a $24-million credit facility to Bluberi, secured in part by a share pledge agreement. By 2015, Bluberi owed Callidus approximately $86 million.
- In November 2015, an Initial Order is granted in favour of Bluberi under the CCAA.
  - Bluberi attributed its liquidity issues to Callidus and alleged that Callidus deliberately employed an illegal *loan to own* strategy and sought to deplete the equity with a view to acquiring the corporation.
  - Therefore, Bluberi contended that it had a claim against Callidus.
- In early February 2017, Bluberi sold its assets to Callidus for $134 million pursuant to a credit bid.
  - Agreement provided that Callidus would obtain all of Bluberi's assets in exchange for the extinguishing of almost all of its secured claims against Bluberi, with the exception of a secured claim of $3 million.
  - Bluberi was allowed to retain its claim for damages against Callidus.
    - As a result of the sale, this claim became Bluberi's sole remaining asset and thus the sole security for Callidus's $3-million secured claim.

Bluberi: Facts *(Cont'd)*

- In September 2017, Bluberi filed an application for interim financing in the form of a third-party litigation funding agreement (LFA) in order to pursue its claim against Callidus.
  - Bluberi concurrently sought a $20-million super-priority charge in favour of the third-party lender.
- Callidus objected, arguing that the LFA constituted a plan of arrangement.
  - One week later, Callidus filed a plan of arrangement.
    - The plan proposed to fund a $2.63-million distribution to the creditors, other than to itself, in exchange for a release from Bluberi's claim in damages. The plan was rejected by creditors. Callidus declined to vote on the plan.
- In February 2018, Bluberi applied again for interim financing to pursue its claim against Callidus. In response, Callidus filed a second, nearly identical, plan of arrangement.
  - Callidus also filed a proof of claim valuing its $3-million secured claim at nil on the basis that Bluberi's only asset was its damages claim against Callidus. Callidus thus argued that it was an unsecured creditor and sought permission to vote on the plan.

Bluberi: Québec Superior Court and Court of Appeal Decisions

- The Québec Superior Court (QSC) concluded that the result would be both unfair and unreasonable:
  - It found that Callidus had acted in bad faith and that it would be unfair to allow it to purchase its release from creditors who had no interest in releasing Callidus and to exercise control over the vote with the sole aim of obtaining its release from an eventual claim by Bluberi, thus avoiding a trial with respect to its alleged misconduct, which led to Bluberi's liquidity issue in the first place.

  The Québec Court of Appeal (QCA) set aside the ruling of the QSC:
  - The QSC did not have the jurisdiction to prevent Callidus from voting on its own plan.
  - Obtaining a release through a plan of arrangement is not inappropriate.
  - Litigation financing under the CCAA is more of the nature of a plan of arrangement than of interim financing.
- The Supreme Court of Canada (SCC) heard the appeal on January 23, 2020. On the same day, in a unanimous decision, the SCC allowed the appeal, overturning the decision of the QCA.

Bluberi: Issues

- Is litigation financing in the context of the CCAA of the nature of interim financing or a plan of arrangement that must be submitted to and subject to the vote of creditors?
- Can a creditor vote on a plan of arrangement it has proposed? Does the court have the jurisdiction to prevent the creditor from voting on a plan and, if so, under what circumstances?

Bluberi: Supreme Court of Canada Decision

Is litigation financing in the context of the CCAA of the nature of an interim financing or a plan of arrangement that must be submitted to and subject to the vote of creditors?

- The question whether to approve the LFA as interim financing requires a fact-based analysis that must take into account the wording of section 11.2 of the CCAA and the remedial objectives of the CCAA more generally.
  - Third-party litigation funding agreements may be approved as interim funding in CCAA proceedings when the supervising judge considers it would be fair and appropriate to do so, having regard to all the circumstances and the objectives of the Act. This involves taking into consideration the specific factors set out in section 11.2 (4) of the CCAA.
  - While interim financing is commonly "keep the lights on" financing, it is a flexible tool that may take on a range of forms, including a LFA.
  - At its core, interim financing enables the preservation of value and the realization of assets.
- In addition, for a third-party LFA to be approved as interim financing, it must not have terms that effectively convert it into a plan of arrangement.

Bluberi: Supreme Court of Canada Decision *(Cont'd)*

Can a creditor vote on a plan of arrangement it has proposed? Does the court have the jurisdiction to prevent the creditor from voting on a plan and, if so, under what circumstances?

- In general, a creditor can vote on a plan of arrangement or a transaction that affects its rights, subject to provisions of the CCAA that may limit the right to vote or the exercise by the supervising judge of his discretion to limit or remove this right.
- Under the CCAA regime, an essential aspect of which is the right to vote when a plan is filed, creditors should be prevented from voting only if the circumstances so require.
  - When a creditor seeks to exercise its voting rights in such a way as to thwart or undermine the remedial objectives of the CCAA or to work against them – that is, to act for an improper purpose – section 11 gives the supervising judge the discretion to prevent the creditor from voting.

Key Takeaways

A supervising judge may exercise broad discretion under the CCAA in furtherance of the remedial objectives of the Act to

- bar a creditor acting for an improper purpose from voting on a plan of arrangement;
- approve a third-party LFA as interim financing when fair and appropriate.

Cases We're Watching

Cases We're Watching

Case	Status	Issue
Pending Supreme Court of Canada Decisions		
Canada v Canada North Group	Heard by the Supreme Court of Canada on December 1, 2020. Decision has yet to be released.	Whether super-priority charges granted in a CCAA initial order have priority over a statutory deemed trust for unremitted source deductions.
Application for Leave to Appeal Filed with the Supreme Court of Canada		
7636156 Canada Inc. v OMERS Realty Corporation	Materials filed with the Supreme Court of Canada. Decision on leave application yet to be released.	The amount a landlord may draw down on a letter of credit provided by the bankrupt as security for its obligations under the lease.
Re Media5 Corporation and Acquisitions Essagal Inc. and Pricewaterhousecoopers Inc.	Materials filed with the Supreme Court of Canada. Decision on leave application yet to be released.	The scope of section 243(1) of the BIA regarding the appointment of a receiver in relation to the provisions of the *Civil Code of Québec* and whether a secured creditor can resort to the appointment of an interim receiver in order to sell the business as a going concern.

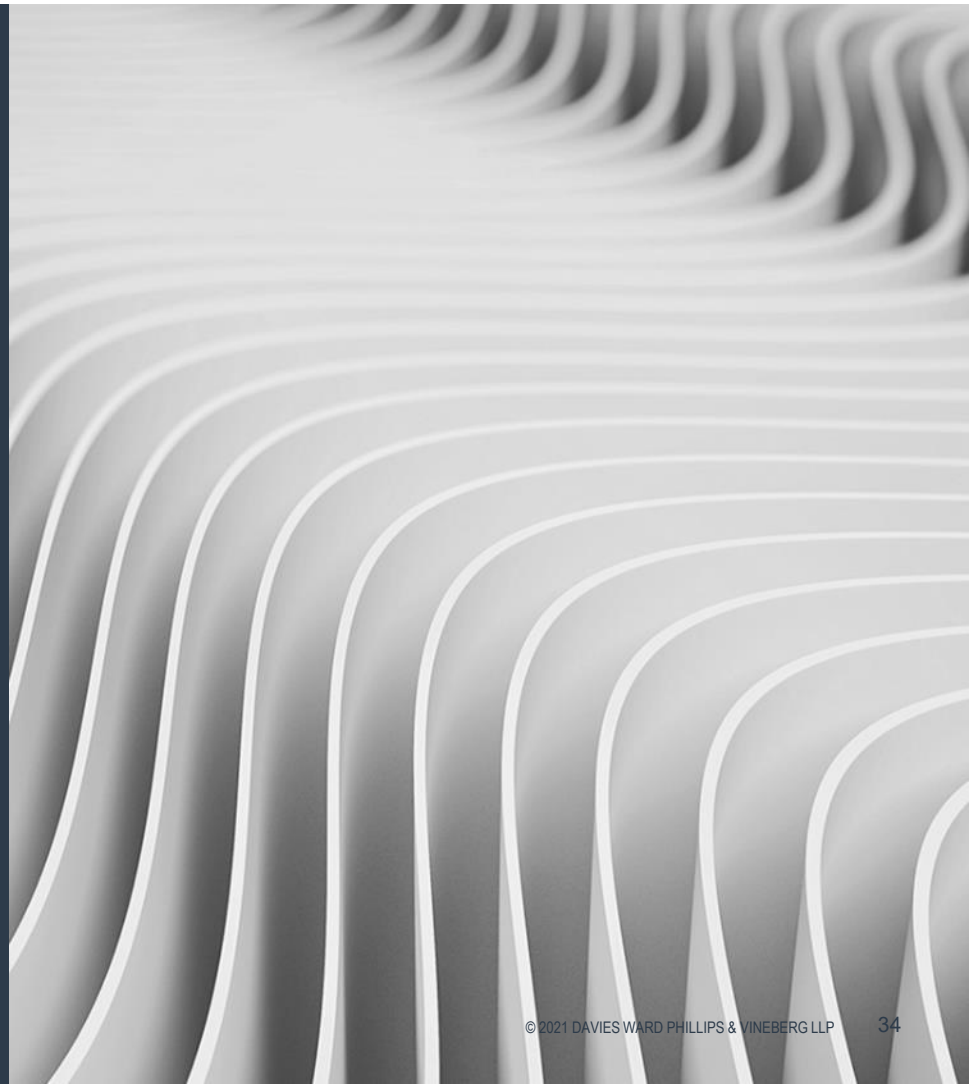
Cases We're Watching *(Cont'd)*

Case	Status	Issue
Application for Leave to Appeal Filed with the Supreme Court of Canada		
Canada v Toronto Dominion Bank	Materials filed with the Supreme Court of Canada. Decision on leave application yet to be released.	Whether a secured creditor is required to reimburse payments made to it by a borrower who failed to remit GST source deductions and whether the deemed trust provisions require a "triggering event."
12178711 Canada Inc v Wilks Brothers, LLC [Calfrac]	Materials filed with the Supreme Court of Canada. Decision on leave application yet to be released.	Whether the actions of the dissident noteholders were unfairly characterized in the court's determination that the plan was fair and reasonable.
Arrangement relatif à Nemaska Lithium Inc.	Materials filed with the Supreme Court of Canada. Decision on leave application yet to be released.	Whether the court has jurisdiction to issue a reverse vesting order in contested proceedings.
Petrowest Corporation v Peace River Hydro Partners	Materials filed with the Supreme Court of Canada. Decision on leave application yet to be released.	Whether a court-appointed receiver is bound to arbitrate disputes under contracts that include mandatory arbitration clauses.

Cases We're Watching *(Cont'd)*

Case	Status	Issue
Recently Decided		
Yukon (Government of) v Yukon Zinc Corporation	Heard by the Yukon Court of Appeal in November 2020. Decision released on March 5, 2021.	A court-appointed receiver does not have the authority to partially disclaim a lease for equipment. The extent to which an obligation to post security for potential future remediation costs is not a provable claim in bankruptcy, but such costs, once incurred are secured against the subject real property, but excluding mineral claims associated therewith.
Bellatrix Exploration Ltd. (Re)	Hearing on leave to appeal to the Alberta Court of Appeal heard in February. Decision was released March 5, 2021.	The exception to the debtor's right to disclaim an eligible financial contract under the CCAA does not create an obligation for the debtor to continue performing the contract throughout the insolvency proceedings. Non-performance of an uneconomic contract by a debtor does not constitute bad faith under section 18.6 CCAA.

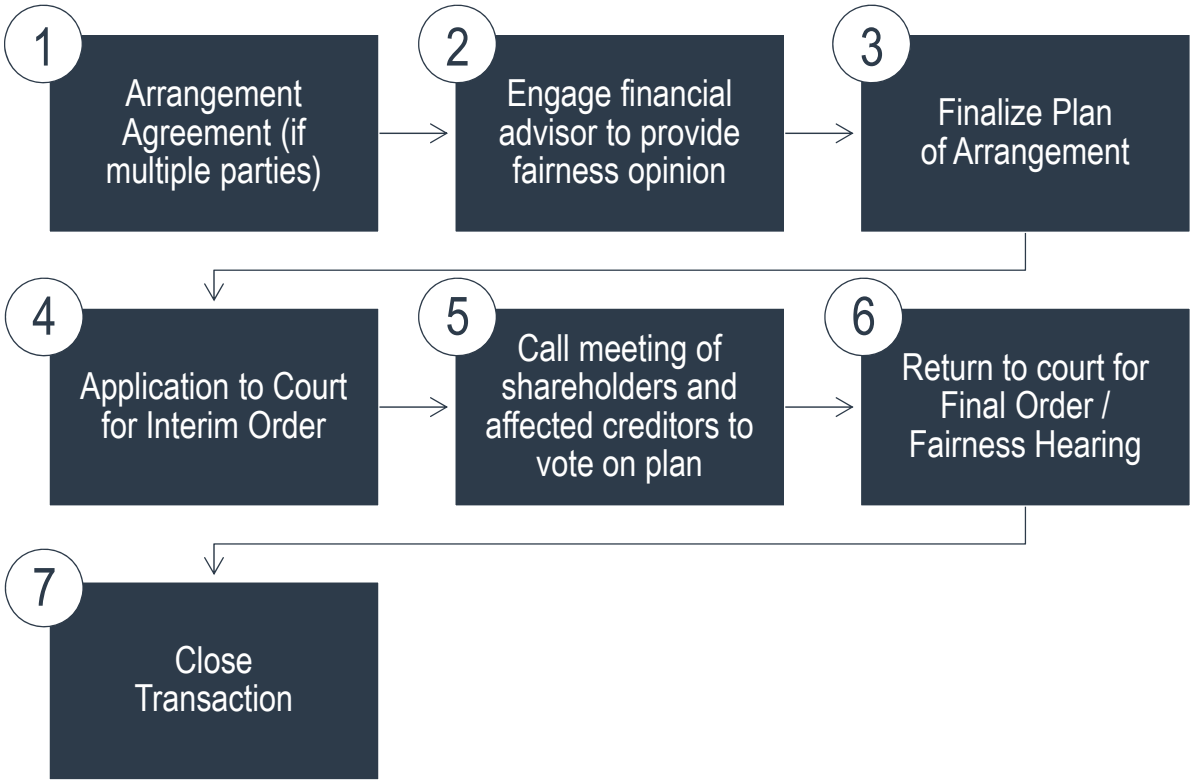
Plan of Arrangement Developments



CBCA Section 192 Arrangements: Overview

- What are they:
  - Operative provision – CBCA, Section 192(3):
    - Where it is **not practicable** for a corporation that is **not insolvent** to effect a fundamental change in the **nature of an arrangement** under any other provision of this Act, the corporation may apply to a court for an order approving an arrangement proposed by the corporation.
- Why you should care:
  - As noted by Supreme Court of Canada in *BCE Inc. 1976 Debentureholders,* the flexibility of Section 192 has led to increasing use in a broad range of situations.
  - Often used in the insolvency context.

CBCA Section 192 Arrangements: Steps

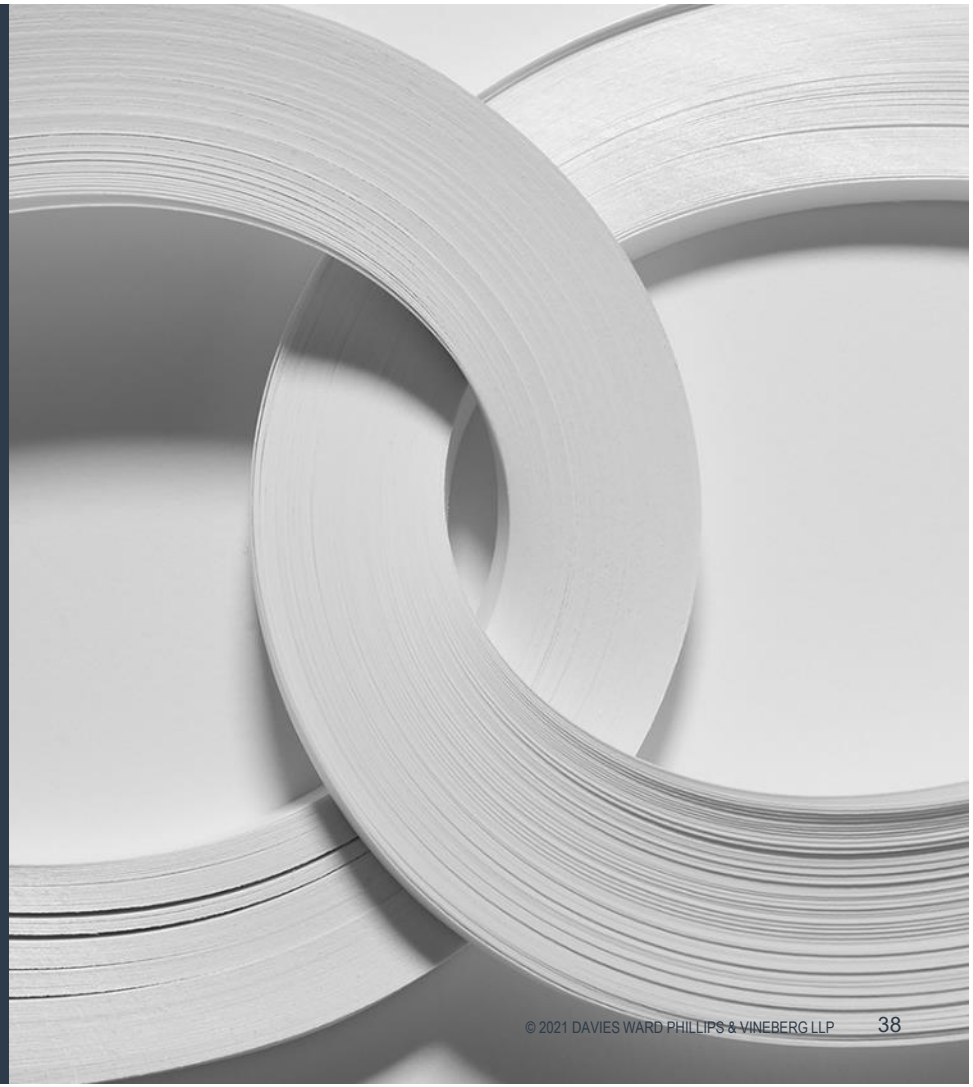


DAVIES

CBCA Section 192 Arrangements: Recent Developments

- *Canopy Rivers Inc., Re*:
  - Scope and content of motion materials at interim hearing.
  - Characterization of helpful vs. unhelpful fairness opinions.
- *12178711 Canada Inc. v Wilks Brothers, LLC* [Calfrac]:
  - Improper purpose for affected securityholders to vote on a plan.
  - Interaction between CBCA, CCAA and BIA.
- *iAnthus Capital Holdings, Inc. Re:*
  - Initial plan rejected – broad releases intended to immunize iAnthus and certain others from securities class actions and similar actions held not fair or reasonable.
  - Amended plan / releases subsequently approved.

Reverse Vesting Orders



Reverse Vesting Order (RVO)

Vesting Order

- Court-authorized sale of assets free and clear of any security, charge or other restriction.
- Existed prior to being codified.
- Now used in CCAA, BIA proceedings and receiverships.

Reverse Vesting Order

- Typical structure of a RVO:
  - New corporation is incorporated: “ResidualCo.”
  - ResidualCo is added as a debtor in CCAA proceedings.
  - Unwanted liabilities, assets and contracts are transferred to ResidualCo.
  - Shares of the original debtor are sold to purchaser free and clear of liabilities.
  - Original debtor emerges from CCAA.
  - Creditors of the original debtor now have claims against ResidualCo within CCAA.
  - ResidualCo is placed in bankruptcy or files a plan of arrangement.

RVO: Jurisdiction of Court

- Jurisdiction of Court
  - > Section 36(6), CCAA

    Assets may be disposed of free and clear

    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. *(Similar provision in the BIA at section 65.13(7))*

  - > Section 11, CCAA

    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**.

RVO: Advantages

An RVO shares the typical advantages of a share deal over an asset purchase:

- Non-transferable licences and permits may be maintained.
- Tax attributes may be preserved.
- Complex corporate structures may be maintained.
- Contracts need not be assigned.
- Employees will continue to be employed – no requirement for employment letters / offers.

RVO: History

RVOs have been approved by courts **13 times** in total and **three times in contested** proceedings.

File	Date	Industry
T. Eaton Co., Re	2000	Retail
Plasco Energy, Re	2015	Waste management / energy
Stornoway Diamond Corp., Re	2019	Mining
Wayland Group Corp., Re	2020	Cannabis
Comark Holdings Inc., Re	2020	Retail
Beleave Inc., Re	2020	Cannabis
JMB Crushing Systems Inc., Re	2020	Construction
Cirque du Soleil Canada Inc.	2020	Entertainment
Nemaska Lithium Inc., Re	2020	Mining
Tidal Health Solutions Ltd., Re	2020	Cannabis
Quest University Canada, Re	2020	Education
Green Relief Inc., Re	2020	Cannabis
JMX Contracting Inc., Re	2021	Construction

Recent Developments – Contested RVOs

RVOs have been granted twice by the courts in contested proceedings in the following cases:

- *Arrangement relatif à Nemaska Lithium Inc.* (Québec) – Leave to appeal to the QCA denied; application for leave to appeal to the SCC pending.
  - > Lithium mining operation – RVO used to complete share deal to maintain licences and preserve tax attributes.
- *Quest University Canada (Re)* (British Columbia) – Leave to appeal to the BCCA denied.
  - > Not-for-profit university in B.C. – RVO used to complete transaction to maintain statutory authority to confer degrees under the *Sea to Sky Act.*

DAVIES

Arrangement relatif à Nemaska Lithium Inc.

Nemaska: Facts

December 2019

– A lithium mining project in Québec was insolvent and CCAA proceedings were commenced in December of 2019.

Early 2020

– A SISP process was undertaken and a credit bid offer was submitted by Investissement Québec, the Pallinghurst Group and OMG Fund II (K) Ltd. and OMG Fund II (N) Ltd.

– The offer was **conditional** on the issuance of a RVO.

December 2020

– RVO is granted following a nine-day hearing.
  > first contested RVO granted by the courts; and
  > first RVO involving a public company.

Nemaska: Structure

1. New corporation was incorporated to become the parent company of the Nemaska entities and was added as an applicant under the CCAA proceedings.
2. Public company shares were exchanged for shares of the new company pursuant to court order.
3. Liabilities and excluded assets were transferred to the new parent company.
4. Parent company became a public issuer.
5. Shares of Nemaska were sold by the parent to the purchaser.
6. Purchaser amalgamated with Nemaska – resulting company is private and the corporate structure was maintained.

Nemaska: Reasons for Approval

- Jurisdiction permitted by flexible nature and purpose of CCAA.
- A fair and robust sales process resulted in the best offer.
- Monitor recommended the approval of the transaction.
- The court cannot intervene to modify the terms of the transaction.
- The potential alternatives to the transaction:
  - realization of the security held by one of the offerors;
  - debtors “put on hold” in order to possibly redo a SISP process; or
  - bankruptcy of debtors.

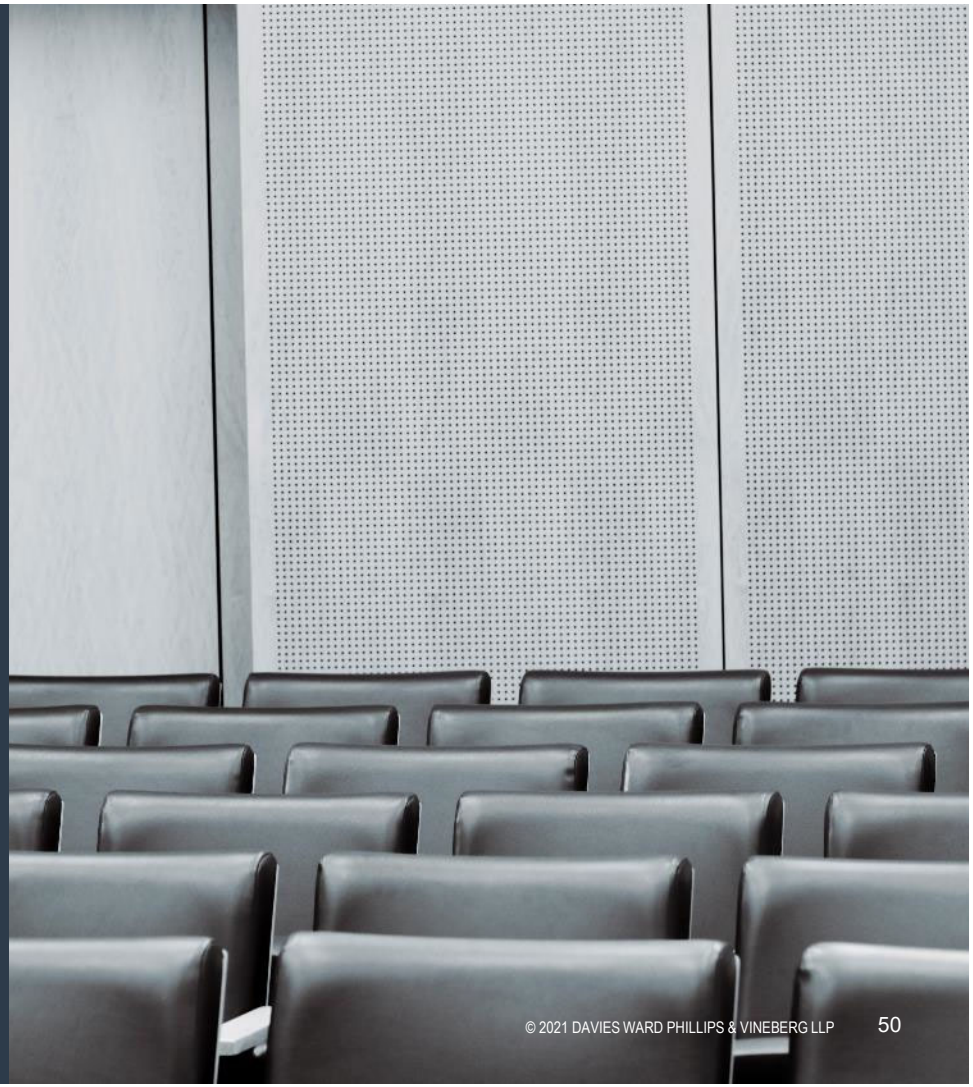
Nemaska: Creditor Conduct

- Both courts made the following observations of the conduct of the creditor Cantore:
  - Characterization by QSC:
    - [34] On several occasions, the Court was under the uncanny impression that the creditor Cantore's opposition was an exercise in negotiation with the Debtors and Offerors, thus undermining the legitimacy of the argument he was making.
    - [58] Moreover, faced with the insistent opposition of the creditor Cantore, and this, despite the disastrous consequences of the other choices, the Court asked his attorney if, in the event that the alleged *sui generis* real right was settled to Cantore's satisfaction and the agreed settlement then incorporated into the Orion / IQ / Pallinghurst Offer for approval by the Court, he would maintain his opposition, and his response was: NO.
    - [59] This says it all with regards to the legitimacy of his grounds for opposing the Request, some of which were put forth as "fundamental."
  - QCA makes similar statement:
    - **In these circumstances, I am simply not convinced that the arguments that are advanced by Cantore are anything but a "bargaining tool,"** while he pursues multidirectional attacks on the RVO with the same arguments that were dismissed in first instance.

Key Takeaways

- The transaction allowed funds to be left over to fund a plan of arrangement.
- The courts have jurisdiction to issue contested RVOs.
- Creditors should consider the purpose of CCAA proceedings prior to objecting to transaction.
- Leave to appeal to Supreme Court of Canada
  - > Applications filed on December 11, 2020 and January 11, 2021.

Quest University Canada (Re)



Quest: Facts

- Quest is a not-for-profit university in British Columbia, which obtained an initial order under the CCAA in January 2020.
- Extensive SISP was conducted leading to the execution of an asset sale agreement with Primacorp.
- Transaction was conditional upon the filing and approval of a plan of arrangement.
- However, Quest realized that Southern Star, a hostile creditor, could veto any such plan.
- Transaction was renegotiated to remove the condition precedent and instead made the transaction **conditional** on the issuance of a RVO.
- Southern Star objected to the issuance of the RVO, contending that it effectively and unfairly negated its right to vote on Quest's plan under section 6 of the CCAA.
- A RVO was issued by the BCSC and leave to appeal was denied by the BCCA.

Quest: Structure

1. Wholly owned subsidiary of Quest – ResidualCo was incorporated.
2. ResidualCo was added as an applicant in the CCAA proceedings.
3. Excluded liabilities, contracts and assets were transferred to ResidualCo. was incorporated
4. Primacorp transaction provided for

– sufficient funds to repay Quest's secured creditors;

– funding of a plan of arrangement in ResidualCo's CCAA proceedings to be voted on by ResidualCo's unsecured creditors; and

– a working capital facility and marketing and recruiting support to permit Quest to become self-sustaining as a post-secondary institution.

Quest: Reasons for Approval

- No dispute between the parties regarding the authority of the Court to grant the RVO under the general statutory jurisdiction found in section 11 CCAA.
- It advances the policy objectives underlying the CCAA and all stakeholders are treated fairly and reasonably.
- Quest's statutory ability to confer degrees cannot be transferred:

  > [162] It is a critical requirement under the Primacorp transaction that Quest remain a viable entity to continue its operations and, in particular, continue to grant degrees. That is a significant component of the **Primacorp** transaction and **the value that Primacorp is prepared to pay under the transaction reflects that component.** In other words, the **stakeholders are receiving a benefit from this transaction** by which Primacorp ensures that Quest continues after exiting these CCAA proceedings [our emphasis].

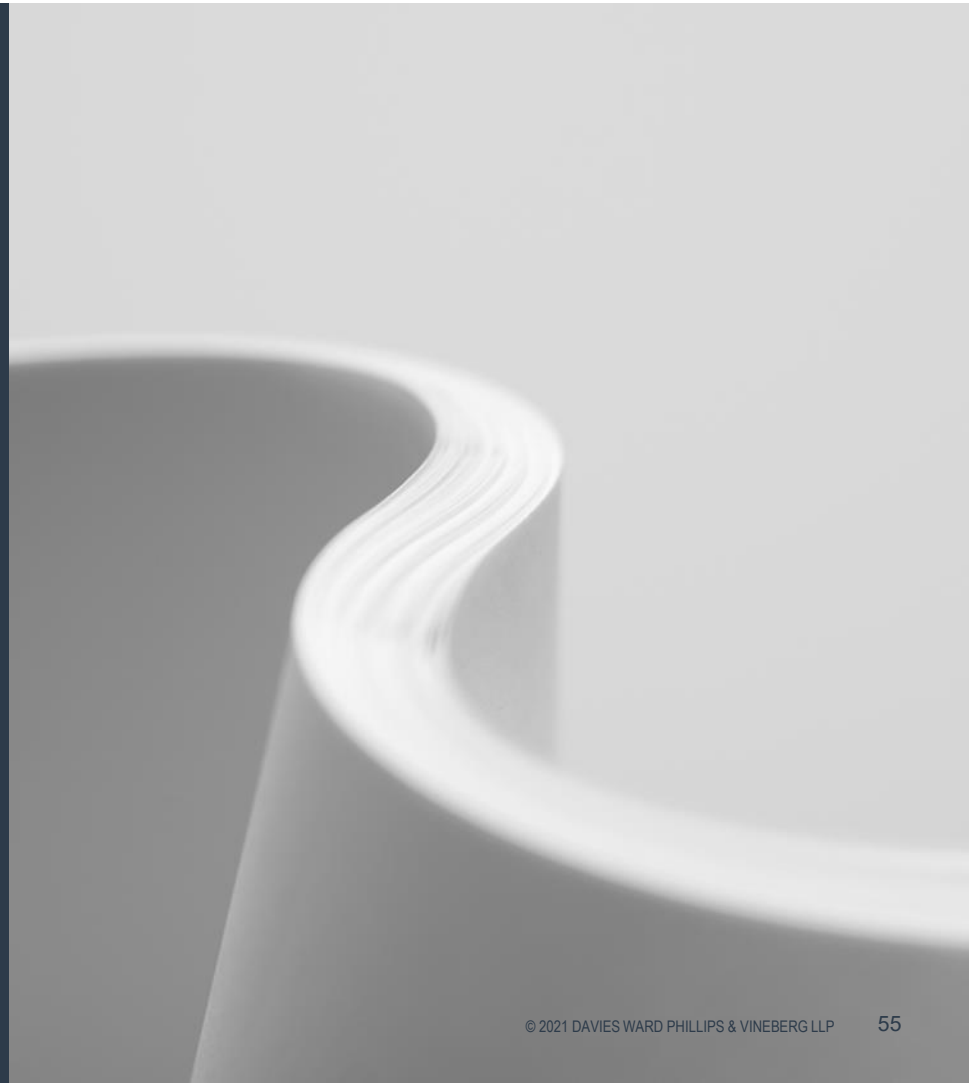
- The only other likely paths forward for Quest were receivership, liquidation or bankruptcy.

Quest: Creditor Conduct

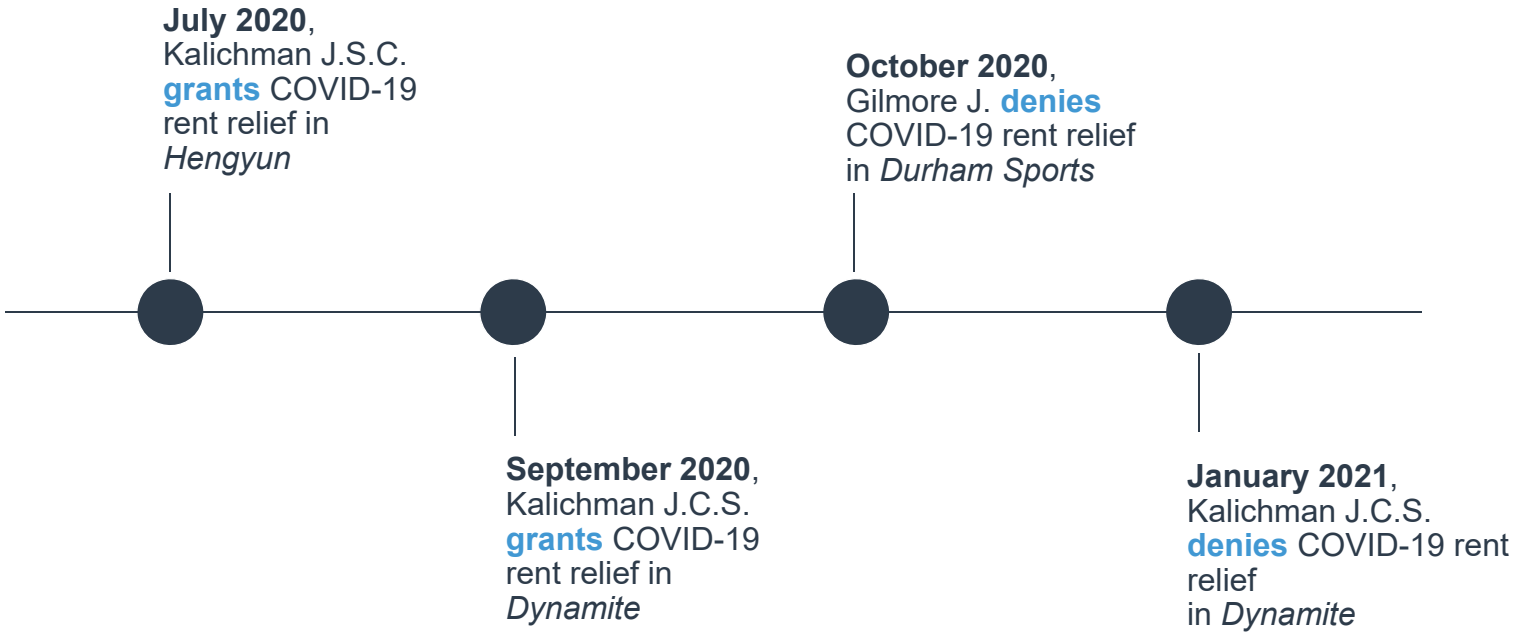
- Quest was seeking approval of a structure that would result in ResidualCo's submitting its own plan to the unsecured creditors, at which time they would be generally free to vote their "self-interest."
- Court concluded that Southern Star was actively working against the goals of the CCAA by its opposition to the RVO in that it sought to block the only reasonable outcome. However:

> [171] **I do not consider that an RVO structure would be generally employed or approved in a CCAA restructuring to simply rid a debtor of a recalcitrant creditor who may seek to exert leverage through its vote on a plan while furthering its own interests.** Clearly, every situation must be considered based on its own facts; different circumstances may dictate different results. A debtor should not seek an RVO structure simply to expedite their desired result without regard to the remedial objectives of the CCAA.

Developments in Debtors' Obligation to Pay Rent



Timeline

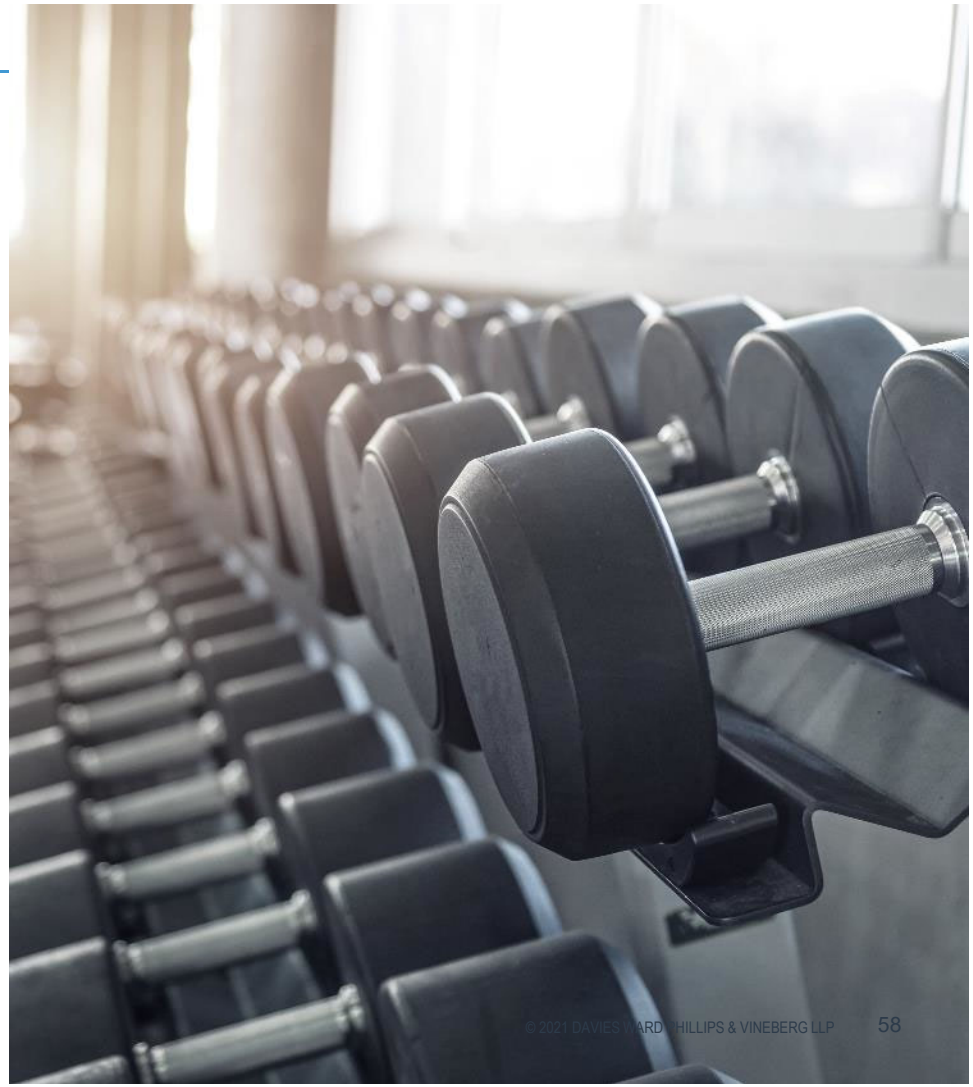


Hengyun International Investment Commerce Inc. v 9368-7614 Québec Inc., 2020 QCCS 2251 (July 16, 2020, Honourable P. Kalichman)

- The tenant leased premises to operate a gym and was unable to operate due to the COVID-19 pandemic. It remained closed throughout much of March, April, May and June 2020.
- The tenant sought a reduction in rent on the basis of the notion of peaceable enjoyment under section 1854 CCQ.
  - The tenant argued that its inability to operate was caused by a *force majeure*.
  - The landlord contested and relied on a provision in the lease that stated:
    - "If the landlord or tenant is delayed or hindered in or prevented from the performance of any term, obligation or act required hereunder by reason of superior force […] then performance of such term or obligation or act is excluded for the period of delay"

Hengyun (Cont'd)

- The Court found that the tenant was entitled to relief, but offered a different reasoning.
  - It was the landlord – not the tenant – that was unable to perform its obligation to provide peaceable enjoyment under the lease due to a *force majeure*.
    - Therefore, the tenant did not have peaceable enjoyment of the premises and thus the landlord could not insist on the payment of rent for that period.
  - The Court concluded that the provision above was inapplicable as the landlord's performance of its obligation to provide peaceable enjoyment was not "delayed" – it simply was not fulfilled.



DAVIES

Groupe Dynamite Inc. v Deloitte Restructuring Inc., 2020 QCCS 3086 (September 18, 2020, Honourable P. Kalichman)

- The tenant obtained an Initial Order under the CCAA. From the beginning of the proceedings, four of its stores located in leased premises in shopping centres in California had been closed due to the COVID-19 pandemic.
  - The tenant requested a declaration that it was not obliged to pay post-filing rent in respect of these locations.
- The Court interpreted the scope of the exception to the stay of proceedings under section 11.01(a) of the CCAA for post-filing claims.
  - The Court found that leased property does not in itself give rise to a post-filing claim, but rather that there must be use of the leased property.
    - Given that the four leased premises were closed as a result of government decrees, the Court determined that the tenant had made no use of the leased premises.
    - The Court therefore declared that no post-filing rent was due or payable with respect to those leased premises for the lockdown period.

Durham Sports Barn Inc. Bankruptcy Proposal, 2020 ONSC 5938 (October 2, 2020, Honourable Justice C. Gilmore)

- The tenant leased premises to operate an athletic performance centre. It was forced to cease operations due to the COVID-19 pandemic from March to May 2020, after which it began a phased reopening before resuming full operation in August 2020.
- The tenant requested relief of its obligation to pay rent during the lockdown period and permission to pay a prorated amount of rent during the period of phased reopening.
  - The tenant argued that the lease was frustrated during the lockdown period and that the closure constituted a *force majeure*. The tenant relied on the decision in *Hengyun*.
  - The lease contained a *force majeure* clause that relieved the landlord from its obligation to provide the tenant with quiet enjoyment of the leased premises as a result of the mandatory closure.

Durham Sports(Cont'd)

- The Court found that the tenant was not entitled to any relief on the basis of the following:
  - The *force majeure* clause relieved only the landlord of its obligations, not the tenant.
  - The obligation of the landlord to provide peaceable enjoyment was subject to payment of rent, and therefore this obligation did not arise once rent was not paid.
  - The tenant did not advise the landlord of its claim and therefore the landlord had no opportunity to help.
  - Government legislation preventing the eviction of small businesses did not suspend rent payment.

Groupe Dynamite Inc. v Deloitte Restructuring Inc., 2021 QCCS 3 (January 5, 2021, Honourable P. Kalichman)

- The tenant obtained an Initial Order under the CCAA. The tenant sent disclaimer notices regarding certain leases, while it opted to renegotiate certain other leases.
  - Among the leases being renegotiated were those to certain premises in Ontario and Manitoba that were forced to close during lockdowns in connection with the COVID-19 pandemic.
  - The tenant sought to be relieved of its obligation to pay post-filing rent in respect of the leased premises affected by the government-mandated closures.
- The Court found that while the tenant's ability to operate was severely limited, it rejected the argument that the meaning of "use" under the CCAA necessarily involves carrying on the activity for which the property was leased.
  - Rather, Canadian courts have recognized that mere possession or occupancy can constitute "use."
    - Therefore, the tenant is not entitled to relief.

Disclaimer Notice

The information and comments herein are for the general information of the reader only and do not constitute legal advice or opinions to be relied upon in relation to any particular issue or circumstance. For particular applications of the law to specific situations, the reader should seek professional advice.

Thank you

Denis Ferland
Partner

Montréal
514.841.6423
dferland@dwpv.com

Natasha MacParland
Partner

Toronto
416.863.5567
nmacparland@dwpv.com

DAVIES
Academy

MONTRÉAL

1501 McGill College Avenue
Montréal QC Canada
514.841.6400

TORONTO

155 Wellington Street West
Toronto ON Canada
416.863.0900