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DEUS EX MACHINA, OR GARGANTUA? INTERIM FINANCING UNDER THE *COMPANIES' CREDITORS ARRANGEMENT ACT*

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I. INTRODUCTION

"Believe me, it is a Divine thing to lend. . ."[1]

The *CCAA* is the primary formal mechanism for resolving complex corporate insolvencies in Canada.[2] The process of insolvency "restructuring"—a term of art that is not defined in

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1 Francois Rabelais, *The Works of F Rabelais, MD, or, The Lives, Heroic Deeds and Sayings of Gargantua and Pantagruel with a Large Account of the Life and Works of the Author, particularly an Explanation of the Most Difficult Passages in them Never Before Publish'd in Any Language / Done Out of French by Sir Tho Urchard, Kt, and Others* (London: Printed for Richard Baldwin, 1694) at 49.

2 *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 [*CCAA*]. Traditionally, the *CCAA* was used to develop formal plans of arrangement that insolvent debtors would present to their creditors for a vote—if the plan was accepted, the debtor entity itself would be restructured and continue operating. Over the past few decades, this paradigm has given way to "liquidating *CCAA*s" in which the debtor's assets are sold either piecemeal or on a going concern basis. At the same time, private and court-appointed receiverships remain common, as are commercial proposal proceedings under the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 [*BIA*]. However, the average debtor size in these types of proceedings (measured by total value of assets) tends to be much smaller than in *CCAA* proceedings. See Roderick J Wood, "Receiverships in Canada: Myth and Reality" (2017) 80:1 Sask L Rev 231 at 239–45.

the Act[3]—may involve an operational reorganization of the insolvent enterprise, a renegotiation of its debt obligations, or changes to its capital structure. The process is initiated when the insolvent debtor files an *ex parte* application to be recognized as an entity to which the *CCAA* applies, that is, an insolvent "debtor company" or corporate group having more than $5 million in debt in the aggregate.[4] Upon the granting of an initial order by the court, a broad stay is imposed on proceedings against the debtor pursuant to section 11.02 of the Act. This protective stay provides the debtor with "breathing space" in which to negotiate with its creditors and develop a viable restructuring plan.[5]

Understandably, once a debtor has obtained *CCAA* protection, its existing creditors may be reluctant to extend the additional financing required to keep the debtor's business operational while it negotiates, develops, and implements a restructuring plan. At the same time, the inability to access additional financing on favourable terms could be fatal to the debtor's restructuring efforts. In response to this dilemma, *CCAA* courts exercised their inherent and equitable jurisdiction, along with their general power under section 11 to make any orders deemed appropriate in the circumstances, to develop a novel remedy: an order granting a super-priority charge over all of the assets of the

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[3] The terms "restructuring" and "reorganization" are typically used interchangeably. See Stephanie Ben-Ishai & Thomas GW Telfer (eds), *Bankruptcy and Insolvency Law in Canada: Cases, Materials, and Problems* (Toronto: Irwin Law, 2019) at 505.

[4] Over time, the definition has been expanded to include entities other than corporations, such as partnerships. See *Canwest Global Communications Corp (Re)*, 2009 CanLII 63368 (ONSC). In addition, ss 4–5 of the *CCAA* and the courts have recognized that creditors also have standing to initiate the *CCAA* process. See e.g. *Miniso International Hong Kong Limited v Migu Investments Inc*, 2019 BCSC 1234 at para 45 [*Miniso International*]; Katherine Forbes, "An Exploration of Creditor-Initiated CCAA Proceedings" (2024) 13 J Insolvency Inst Can 1.

[5] *Century Services Inc v Canada (AG)*, 2010 SCC 60 at para 14 [*Century Services*]. Amendments to the *CCAA* in 2019 reduced the maximum duration of this initial stay from 30 days to 10 days, during which time affected stakeholders may scrutinize the debtor's plans and apply to the court for various forms of relief. Typically, a debtor will apply for multiple extensions of the initial stay while it develops its restructuring plan.

insolvent debtor in favour of any lender willing to extend the fresh financing needed to complete the restructuring.[6] As with many other judicial innovations under the *CCAA*, the granting of interim financing orders, commonly referred to as debtor-in-possession (DIP) financing orders, gradually became a common feature of *CCAA* proceedings.[7] Eventually, Parliament codified the authority of supervising judges to grant DIP financing charges in section 11.2 of the Act.[8]

Recognizing the extraordinary nature of a super-priority charge that ranks ahead of all other claims against the insolvent debtor's assets, subsection 11.2(1) expressly provides that the super-priority charge "may not secure an obligation that exists before the order is made."[9] In other words, the language of the Act clearly states that only post-filing debts can be secured by the DIP charge, such that where the DIP lender is an existing creditor, the DIP lender's claims for pre-filing debts will not receive super-priority status. This ensures that the debtor only uses the DIP funds to finance its ongoing operations during the restructuring, not to repay pre-filing debts.

In practice, despite the express prohibition set out in subsection 11.2(1), *CCAA* courts have authorized DIP charges that secured pre-filing debts in two categories of cases. The first category is the "creeping" DIP, wherein the insolvent debtor is permitted to repay certain pre-filing debts owed to the DIP lender by using the debtor's operational revenues during the restructuring period, provided that the DIP loan itself is only

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6 See *Royal Oak Mines Inc, Re*, 1999 CanLII 14840 (ON Ct J (GD)). For the inherent and equitable jurisdiction of a *CCAA* court, see also *Century Services*, *supra* note 5 at para 64.

7 The terms "interim financing" and "DIP financing" are used interchangeably throughout, as they are in practice, although the Act only uses the former term. Other examples of novel forms of relief that were later codified in the *CCAA*, *supra* note 2, include court-supervised asset sales (*ibid*, s 36) and the appointment of the *CCAA* monitor (*ibid*, s 11.7).

8 *An Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act, the Wage Earner Protection Program Act and chapter 47 of the Statutes of Canada*, 2005, SC 2007, c 36 [*Act to Amend*].

9 *CCAA*, *supra* note 2, s 11.2(1).

used to finance the debtor's ongoing operations.[10] The second category of cases is the "rollup" DIP, in which part of the DIP loan is used to repay the pre-filing claims of the DIP lender in whole or in part, thereby "rolling up" the pre-filing debts into the DIP loan.[11] Whereas there is general consensus that creeping DIPs comply with subsection 11.2(1), rollups remain controversial.

This article examines the conflicting lines of jurisprudence on rollups in Canada, with reference to the purposes of section 11.2 and the Supreme Court of Canada's recent decisions in *Callidus*[12] and *Canada North*.[13] Specifically, this article argues that, although the *CCAA* empowers courts to authorize rollups, courts should exercise this power sparingly and only where all of the debtor's affected creditors agree on the terms of the rollup. In particular, *CCAA* courts should resist pressure by aggressive DIP lenders to sanction permanent changes to the property rights or security positions of other creditors through initial or interim orders. Such alterations of the respective rights of a debtor's different creditors should only be made after all creditors have had an opportunity to scrutinize the proposed terms of the rollup. In these regards, the key *CCAA* process that protects creditors is the process for developing a formal plan of arrangement, to be voted upon in a creditors' meeting and submitted for the court's approval pursuant to section 6.[14]

More generally, in considering applications for DIP financing, *CCAA* courts should be mindful of the fact that although DIP lending is an important and often beneficial practice in modern restructurings, it also comes with certain risks. Specifically, there is always a risk that an aggressive DIP lender could demand loan terms that would give it significant control over the debtor,

10 See *Comark Inc (Re)*, 2015 ONSC 2010 [*Comark*]; *Performance Sports Group Ltd (Re)*, 2016 ONSC 6800 [*Performance Sports Group*].

11 See *Hartford Computer Hardware Inc (Re)*, 2012 ONSC 964 [*Hartford Computer*]; *Re Toys "R" Us (Canada) Ltd*, 2017 ONSC 5571 [*Toys "R" Us*].

12 *9354-9186 Québec inc v Callidus Capital Corp*, 2020 SCC 10 [*Callidus*].

13 *Canada v Canada North Group Inc*, 2021 SCC 30 [*Canada North*].

14 Among other things, pursuant to s 6, the court must be satisfied that the statutory requirements for sanction have been met and that the plan is fair and reasonable.

thereby steering the restructuring process toward an outcome that benefits the DIP lender at the expense of the debtor itself as well as its other creditors. In such cases, the DIP lender can no longer be likened to a deus ex machina who saves the distressed debtor from a certain demise but instead to a Gargantua—that is, a giant who consumes everything in his path.

Part II examines the origins and purposes of DIP financing under the *CCAA*, beginning with the early jurisprudence prior to the addition of section 11.2. It then examines the 2009 amendments to the Act, which codified the judicial power to authorize DIP loans in section 11.2. Part III examines the post-2009 jurisprudence, with emphasis on the Supreme Court of Canada's recent decisions in *Callidus* and *Canada North*. The upshot of this analysis is that section 11.2 is not mandatory or restrictive and that *CCAA* courts may rely on their broad power under section 11 to authorize DIP financing. The implications of this conclusion are then considered, along with potential reforms that could be expected to better align section 11.2 with modern *CCAA* practice. Part IV concludes.

II. ORIGINS AND PURPOSES OF DIP FINANCING

> *"I have nothing; I owe a great deal; and the rest I leave to the poor."*[15]

A. PURPOSES OF THE *CCAA*

The role and purposes of DIP financing under section 11.2 must be understood within the broader context of the remedial objectives of the Act, as well as the considerable discretion that it grants to supervising judges in furtherance of those objectives. Although the *CCAA* has no express purpose clause, its structure and its long title gives some indication of its aims: "[a]n Act to facilitate compromises and arrangements between companies

15 Aidan Reynolds & William E Charlton, *Arthur Machen: A Short Account of His Life and Work* (London: John Baker for The Richard Press, 1963) at 186.

and their creditors".[16] Parliament enacted the *CCAA* in 1933 in order to provide a formal mechanism for insolvent Canadian corporations to reorganize and avoid bankruptcy: "we should adopt some method whereby compromises might be carried into effect under the supervision of the courts without utterly destroying the company or . . . forcing the improvident sales of its assets."[17] The underlying premise was that creditors would be better served by a regime that, rather than liquidating the assets of insolvent enterprises piecemeal, preserved them as going concerns and returned them to profitability. This approach could be expected to maximize the value of insolvent enterprises for the benefit of their creditors, while saving jobs and preserving customer and supplier relationships, thus serving the broader public interest as well.[18]

In *Century Services*, the Supreme Court of Canada reiterated that the *CCAA* is remedial legislation designed to "permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets."[19] In

16 *CCAA*, *supra* note 2. See also Roderick J Wood, "Rescue and Liquidation in Restructuring Law" (2013), 53:3 Can Bus LJ 407 at 410 [Wood, "Rescue and Liquidation"].

17 *House of Commons Debates*, 17-4, vol 4 (20 April 1933) at 4091 (Hon CH Cahan), online: <parl.canadiana.ca/view/oop.debates_HOC1704_04/634>. See also Alfonso Nocilla, "The History of the Companies' Creditors Arrangement Act and the Future of Restructuring Law in Canada" (2014) 56:1 Can Bus LJ 73.

18 Stanley E Edwards, "Reorganizations Under the Companies' Creditors Arrangement Act" (1947), 25:6 Can Bar Rev 587 at 592–93. See also *Reference re constitutional validity of the Companies' Creditors Arrangement Act (Dom)*, [1934] SCR 659 at 664, 1934 CanLII 72 (SCC):

> Therefore, if the proceedings under this new Act of 1933 are not, strictly speaking, 'bankruptcy' proceedings, because they had not for object the sale and division of the assets of the debtor, they may, however, be considered as 'insolvency proceedings' with the object of preventing a declaration of bankruptcy and the sale of these assets, if the creditors directly interested for the time being reach the conclusion that an opportune arrangement to avoid such sale would better protect their interest, as a whole or in part.

19 *Century Services*, *supra* note 5 at para 15. See also *Century Services* at para 59, citing *Elan Corp v Comiskey*, [1990] OJ No 2180 at para 57, 1990 CanLII 6979 (ONCA), Doherty JA, dissenting:

light of the Act's remedial nature, its provisions are entitled to "an appropriately purposive and liberal interpretation".[20] In addition, in furtherance of its remedial objectives, the Act grants broad discretion to a *CCAA* court to "make any order that it considers appropriate in the circumstances."[21] As the Supreme Court later held in *Indalex*, such orders may include, for example, the granting of a DIP charge that supersedes in priority a statutory deemed trust for the unpaid pension liabilities of the insolvent debtor, where the DIP loan is necessary to ensure a successful restructuring.[22]

More recently, in *Callidus*, the Supreme Court expanded on its earlier statements about the *CCAA*'s objectives, stating that the Act:

> has the simultaneous objectives of maximizing creditor recovery, preservation of going-concern value where possible, preservation of jobs and communities affected by the firm's financial distress . . . and enhancement of the credit system generally.[23]

The Supreme Court went on to explain that *CCAA* proceedings have evolved to encompass outcomes other than the reorganization of the insolvent debtor as such, including liquidating CCAAs that:

> take diverse forms and may involve, among other things: the sale of the debtor company as a going concern; an 'en bloc' sale of assets that are capable of being operationalized by a buyer; a

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> 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.

20 *Century Services*, *supra* note 5 at para 73.

21 *CCAA*, *supra* note 2, s 11; *Century Services*, *supra* note 5 at para 68.

22 *Sun Indalex Finance, LLC v United Steelworkers*, 2013 SCC 6 at para 58 [*Indalex*].

23 *Callidus*, *supra* note 12 at para 42, citing Janis P Sarra, *Rescue! The Companies' Creditors Arrangement Act*, 2nd ed (Toronto: Carswell, 2013) at 14.

> partial liquidation or downsizing . . . or a piecemeal sale of assets.[24]

The question of which specific form the restructuring should take is left to the supervising judge, to whom the Act grants "broad discretion" anchored in section 11, which the Supreme Court referred to as the "the engine" that drives the *CCAA* process.[25] In subsequent decisions, the Supreme Court has reiterated that this broad discretion is the "fundamental"[26] and "most important feature"[27] of the *CCAA*, which is "key in allowing the *CCAA* to adapt and evolve to meet contemporary business and social needs."[28]

B. EMERGENCE OF DIP FINANCING

Restructuring is an expensive process.[29] Insolvent entities that restructure under the *CCAA* typically will incur significant direct costs in the form of the fees of monitors, legal counsel, and other restructuring professionals. They are also likely to incur various indirect costs, including loss of goodwill, damage to relationships with customers and suppliers, and higher costs of accessing credit.[30] Against this backdrop, the need for additional financing

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24 *Callidus*, *supra* note 12 at para 43.

25 *Ibid* at para 48, citing *Stelco Inc (Re)*, 2005 CanLII 8671 at para 36 (ONCA).

26 *Montréal (City) v Deloitte Restructuring Inc*, 2021 SCC 53 at para 48.

27 *Canada North*, *supra* note 13 at para 21.

28 *Ibid* at para 138, Karakatsanis J, concurring, citing *Century Services*, *supra* note 5 at paras 58–61.

29 A 2019 quantitative study of *CCAA* proceedings found that the average total debts of *CCAA* entities were approximately $124,000,000 in liquidating *CCAA*s and $349,000,000 in traditional reorganizations. Average overall returns to creditors, calculated as percentages of total debt, ranged from 35% in liquidating *CCAA*s to 21% in traditional reorganizations. Average direct costs of proceedings (lawyers', monitors' and other professional fees), calculated as percentages of overall returns, were 13% for liquidating *CCAA*s and 14% for traditional reorganizations. See Alfonso Nocilla, "Reorganizations, Sales, and the Changing Face of Restructuring in Canada: Quantitative Outcomes of 2012 and 2013 *CCAA* Proceedings" (2019) 42:2 Dal LJ 371 at 383–87.

30 *Ibid* at 386–87. See also Alfonso Nocilla & Vern DaRe, "The Trouble with Pre-Packs" [2020] Ann Rev Insol L 224; Jeremy Opolsky, Jacob Babad & Mike

to maintain the debtor's business on a going concern basis while developing and implementing a restructuring plan is often critical. Prior to the addition of section 11.2 in the 2009 amendments to the Act, *CCAA* courts were asked to approve DIP financing arrangements pursuant to their general power under section 11, as well as their inherent and equitable jurisdiction. In *Royal Oak Mines*, for example, the debtor filed for *CCAA* protection and applied for an order authorizing DIP charges in favour of two senior secured lenders who were owed approximately $180 million and $264 million, respectively. The application was opposed by a second group of lenders who were owed approximately $50 million and who would be "primed" by the DIP charges.[31] Noting that the terms of the DIP loan had been negotiated prior to the debtor's application for *CCAA* protection and without notice to the objecting creditors, Blair J (as he then was) declined to authorize the loan.[32] In doing so, however, he also confirmed that section 11 of the *CCAA* empowered judges to authorize DIP loans as a general matter:

> What is at issue here is not the principle of the Court granting relief of the foregoing nature in CCAA proceedings. That principle is well enough imbedded in the broad jurisdiction referred to earlier in these reasons. In particular, it is not the tenet of DIP financing itself, or super priority financing, which were being questioned. There is sufficient authority for present purposes to justify the granting of such relief in principle. . . . It was the granting of such relief on the broad terms sought here, and the wisdom of that growing practice—without the benefit of

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Noel, "Receivership Versus *CCAA* in Real Property Development: Constructing a Framework for Analysis" [2020] Annual Rev Insolvency L 229.

31 *Royal Oak Mines*, *supra* note 6 at para 3.

32 *Ibid* at para 11:

> The Hedge Lenders, at least, received only very short notice of the Application on February 15th. Neither the Kemess Lien Claimants in British Columbia nor Export Development Corporation were given any notice. Yet the Court was asked to grant super priority funding, which would rank ahead of even the Lien Claimants (who have admitted priority over everyone), without their knowledge or consent, and which would rank ahead of the Hedge Lenders who had not yet had a reasonable opportunity to consider their position or (given an American holiday) for their counsel to obtain meaningful instructions.

> interested persons having the opportunity to review such terms and, if so advised, to comment favourably or neutrally or unfavourably, on them—which was called into question.[33]

The Court went on to say that given the "extraordinary" nature of DIP financing, it should be "kept, in Initial Orders, to what is reasonably necessary to meet the debtor company's urgent needs", or in other words, to "keep the lights . . . on".[34]

The importance of DIP financing to modern restructurings was highlighted in the 2003 report of the Senate Committee on Banking, Trade and Commerce.[35] Stating that DIP financing "may be instrumental in ensuring the continued operation of businesses during restructuring," the Senate Committee recommended amendments to the *CCAA* that would expressly empower courts to authorize DIP loans that "can rank prior to such other existing security interests as [the court] may specify."[36] The Senate Committee also recommended a list of factors for *CCAA* courts to consider when deciding whether to grant an application for DIP financing. These recommendations were adopted in the 2009 amendments to the Act adding section 11.2, which read as follows:

> **Interim financing**
>
> **11.2 (1)** On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard

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33 *Ibid* at para 12.

34 *Ibid* at para 24.

35 Senate, Standing 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: Richard H Kroft) [Senate Report].

36 *Ibid* at 103.

to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.

Priority—secured creditors

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

Priority—other orders

(3) The court may order that the security or charge rank in priority over any security or charge arising from a previous order made under subsection (1) only with the consent of the person in whose favour the previous order was made.

Factors to be considered

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

(*a*) the period during which the company is expected to be subject to proceedings under this Act;

(*b*) how the company's business and financial affairs are to be managed during the proceedings;

(*c*) whether the company's management has the confidence of its major creditors;

(*d*) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;

(*e*) the nature and value of the company's property;

(*f*) whether any creditor would be materially prejudiced as a result of the security or charge; and

(*g*) the monitor's report referred to in paragraph 23(1)(*b*), if any.[37]

The requirements in subsection 11.2(1) that the amount of the DIP loan be "approved by the court as being required by the company, having regard to its cash-flow statement" and that the "charge may not secure an obligation that exists before the order is made" both reflect the statement in *Royal Oak Mines* that the

37 *Act to Amend*, *supra* note 8, s 65.

amount of the DIP loan should be limited to what is necessary to "keep the lights on" during the restructuring. Likewise, the factors in subsection 11.2(4) reflect the importance of giving affected parties an opportunity to scrutinize and consider the effects of the proposed terms of the DIP loan.[38] As discussed below, these considerations were echoed in the early cases on section 11.2.

III. INTERPRETATION AND APPLICATION OF SECTION 11.2

"Appetite comes with eating . . ."[39]

A. EARLY JURISPRUDENCE ON SECTION 11.2

Section 11.2 was considered for the first time in *Canwest Global*.[40] Pepall J (as she then was) of the Ontario Superior Court of Justice began her analysis by noting that section 11.2 had codified much of the earlier jurisprudence on DIP financing. Previously, *CCAA* courts had relied upon their broad power under section 11 of the Act, as well as their inherent and equitable jurisdiction, to authorize DIP financing.[41] She further explained that the "premise underlying DIP financing is that it is a benefit to all stakeholders as it allows the debtors to protect going-concern value while they attempt to devise a plan acceptable to creditors".[42] She then considered each of the factors in subsection 11.2(4) in turn, concluding that the requested amount and terms of the DIP loan were appropriate and necessary in order to complete the restructuring.[43] Notably, Pepall J also concluded that there would be no prejudice to any other creditors of the insolvent debtors if the DIP charge were granted.[44] Furthermore,

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38 *Royal Oak Mines*, *supra* note 6 at para 12.

39 Rabelais, *supra* note 1 at 17.

40 *Canwest Global Communications Corp, (Re)*, 2009 CanLII 55114 (ONSC) [*Canwest Global*].

41 *Ibid* at para 31.

42 *Ibid*.

43 *Ibid* at paras 31–36.

44 *Ibid* at para 35.

in subsequent additional reasons, she stated that "[t]he charge does not secure any amounts that were owing prior to the filing", and as such, the DIP loan complied with subsection 11.2(1).[45]

Similarly, in *Pacific Shores*, Fitzpatrick J of the British Columbia Supreme Court stated that the "granting of DIP financing is to be considered in accordance with s. 11.2 of the *CCAA*" and proceeded to apply each of the factors listed in subsection 11.2(4) to the facts before her.[46] She found that the DIP loan was "necessary in the circumstances" to allow the debtor's restructuring to proceed and that it would "enhance the prospects of a viable compromise or arrangement".[47] In addition, the amount of the proposed DIP loan was approximately what was required for the initial period of the restructuring based upon the debtor's cash-flow statement,[48] "and the Monitor support[ed] the granting of" the DIP order.[49] Although some secured creditors had objected to the DIP charge, it was questionable whether those creditors would suffer any prejudice as a result of the charge. Specifically, if the restructuring were to end, the objecting creditors intended to continue the debtor's operations through a receivership, the effect of which would have

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45 *Canwest Publishing Inc*, 2010 ONSC 222 at para 43. This approach was followed in many subsequent decisions. See *Timminco Limited (Re)*, 2012 ONSC 948 (referring to *Canwest Global* and the criteria in s 11.2, in particular "whether the DIP charge secures an obligation that existed before the order was made (which it should not)" at para 33); *Cinram International Inc (Re)*, 2012 ONSC 3767 (granting an initial order including a DIP charge where the charge did not secure pre-filing obligations); *Comark*, *supra* note 10 (approving a creeping DIP but providing that the DIP advances could not be used to repay pre-filing debts); *Bondfield Construction Company, Re*, 2019 ONSC 2310 (stating that "[s]ection 11.2(1) of the *CCAA* provides that a DIP lending charge may not secure an obligation that existed before the order was made. Accordingly, the proposed DIP Lending Charge will not secure any of the applicants' pre-filing obligations" at para 22).

46 *Pacific Shores Resort & Spa Ltd, Re*, 2011 BCSC 1775 at paras 48–49 [*Pacific Shores*]. See also *League Assets Corp, Re*, 2013 BCSC 2043 [*League Assets*] (which follows a similar approach at para 24).

47 *Pacific Shores*, *supra* note 46 at para 49.

48 *Ibid* at para 45.

49 *Ibid* at para 49.

eroded their security "in the same manner as DIP financing".[50] On the other hand, granting the DIP loan would allow the debtor to continue operating while maintaining its goodwill and enhancing values, benefits which "outweigh[ed] any potential prejudice" to the objecting creditors.[51]

In short, the early jurisprudence following the addition of section 11.2 adopted a fairly strict interpretation of the new provisions. There was no question that upon an application for DIP financing, the court was to apply section 11.2—without necessarily referring to the court's general power under section 11 or its inherent and equitable jurisdiction—and to consider carefully each of the factors in subsection 11.2(4) with reference to the facts of each case. In addition, it was clearly understood that the express language of subsection 11.2(1) prohibited rollups. As discussed below, recent cases have adopted a more relaxed interpretation of section 11.2, arguably eroding its substance.

B. EMERGENCE OF CREEPING AND ROLLUP DIPS: CONFLICTING APPROACHES

Despite subsection 11.2(1)'s express prohibition on the use of DIP charges to secure pre-filing debts, *CCAA* courts have authorized the repayment of pre-filing debts in two types of cases. Firstly, in a "creeping" DIP, although the DIP loan itself can only be used to fund the debtor's restructuring, the debtor is nonetheless required to repay certain of its pre-filing debts to the DIP lender using the debtor's operational revenues. As Newbould J explained in *Performance Sports Group*, creeping DIPs comply with subsection 11.2(1):

> Section 11.2(1) of the *CCAA* provides that security for a DIP facility may not secure an obligation that existed before the order authorizing the security was made. The effect of this provision is that advances under a DIP facility may not be used to repay pre-filing obligations. . . . By requiring that the PSG Entities only use post-filing cash receipts to pay down the accrued balance

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[50] *Ibid.*

[51] *Ibid.*

> under the revolving credit facility, the ABL DIP Lenders are in no better position with respect to the priority of their pre-filing debt relative to other creditors. I accept that no advances under the ABL DIP Facility will be used to pay pre-filing obligations and there has been inserted in the Initial Order a provision that expressly prevents that. The provision that receipts from operations of the PSG Entities post-filing may be used to pay down the existing ABL Facility is approved.[52]

Likewise, in *Comark*, the Ontario Superior Court of Justice approved a DIP facility where an express term of the facility was that it would not be used to repay pre-filing obligations, and those obligations would not be secured by the DIP charge.[53] Pre-filing obligations would only be repaid using the proceeds from the debtor's operations during the restructuring period.[54]

In the second category of cases, rollups, the DIP funds are used to repay some or all of the debtor's pre-filing debts. Such cases typically arise in the context of cross-border proceedings where the *CCAA* proceedings are ancillary to foreign main proceedings in a US bankruptcy court. For example, in the cross-border proceedings of *Hartford Computer*, Morawetz J (as he then was) granted recognition of the US court's orders in proceedings under Chapter 11 of the US Bankruptcy Code that authorized a "partial 'rollup'", pursuant to which the insolvent debtors would use part of the DIP loan to repay a pre-filing revolving credit facility.[55] Morawetz J noted that pursuant to section 49 of the *CCAA*, the court "may make any order that it considers appropriate, provided the court is satisfied that it is necessary for the protection of the debtor company's property or the interests

52 *Performance Sports Group*, *supra* note 10 at para 22.

53 *Comark*, *supra* note 10 at paras 18–19.

54 *Ibid* at para 19. See also *Structured Solutions Inc c Gestion Rer inc*, 2015 QCCS 4114 (stating that "the interim financing charge cannot cover a pre-filing obligation, i.e. an obligation that exists before the initial order is made" at para 22).

55 *Hartford Computer*, *supra* note 11 at para 6.

of the creditor or creditors."[56] He concluded that the DIP loan was necessary to facilitate a successful restructuring, that there would "be no material prejudice to the Canadian creditors", and that the recognition order was not "contrary to public policy" within the meaning of subsection 61(2) of the *CCAA*.[57] Subsequently, in *Xinergy*, Newbould J acknowledged that the terms of the DIP loan granted by the US bankruptcy court would have violated subsection 11.2(1) in a domestic CCAA proceeding because the funds would be used to repay pre-filing debts but nonetheless authorized the loan:

> The authorization by the U.S. Court to use the proceeds of the DIP Facility to pay out the First Lien Loans, called a "rollup" provision, is not something that can be ordered in a *CCAA* proceeding as subsection 11.2(1) of the *CCAA* provides that DIP security may not secure an obligation that existed prior to an Initial Order. However, the issue is whether our Court should recognize the U.S. Court order authorizing that DIP facility under the principles of comity recognized in section 44 of Part IV of the *CCAA*.[58]

More recently, in *Re Toys "R" Us*, the Canadian subsidiary of Toys "R" Us Inc applied for *CCAA* protection following a Chapter 11 filing by its US parent company. Among other relief, the debtor

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56 *Ibid* at para 11. See also, more recently, *Diebold Nixdorf, Incorporated*, 2023 ONSC 4230 at para 43 [*Diebold*]:

> Although Section 11.2(1) of the CCAA precludes a Canadian court from making an order which secures an obligation that exists before the order is made, the situation is viewed differently by Canadian courts in the context of a foreign recognition proceeding. Section 49 of the CCAA permits a Canadian court, once it has recognized a foreign proceeding, to make any order that it considers appropriate if it is satisfied that the order is necessary for the protection of the debtor's property or the interests of its creditor or creditors.

57 *Hartford Computer*, *supra* note 11 at paras 12–16.

58 *Xinergy Ltd, Re*, 2015 ONSC 2692 at para 19 [*Xinergy*]. But see also *Horsehead Holding Corp, Re*, 2016 ONSC 958 [*Horsehead Holding*] (recognizing a rollup that had been authorized by the US bankruptcy court, but stipulating that a sufficient amount of the DIP loan must be set aside to fund the debtor's working capital requirements: "if in the interim period a request is made for further funding for working capital requirements . . . because not enough available cash was kept for that purpose, I would be extremely loathe to grant any such further relief" at paras 38–39).

sought approval of a DIP lending facility that would be used, in part, to repay various pre-filing debts. Myers J noted that although DIP charges are fairly standard in *CCAA* restructurings, section 11.2 "makes it clear however, that security cannot be granted for pre-filing claims".[59] Nonetheless, he authorized the DIP charge on the basis that it would not improve the priority ranking of the DIP lenders' security interests because they already held first priority over all other pre-filing claims.[60] At the same time, Myers J declined to grant the DIP lenders' application to lift the *CCAA* stay of proceedings against them, noting that there was little risk of default by the Canadian debtor and that the DIP lenders were already receiving "$20 million in fees plus enhanced interest for a loan that is protected not only by equitable priority but by court-ordered security".[61]

The approach taken in cases such as *Hartford Computer, Xinergy,* and *Toys "R" Us* stands in contrast to the approach taken in wholly domestic proceedings such as *Medipure*.[62] In *Medipure*, the debtors sought approval of a DIP loan from a US-based lender, SHP Capital, LLC ("SHP").[63] Most of the DIP funds would be used to repay pre-filing debts, for which SHP would receive a super-priority charge ranking ahead of a previous DIP lender as well as a deemed trust in favour of the Canada Revenue Agency (CRA).[64] Walker J began by observing that the debtors were "in dire financial distress" and had no funds to meet their outstanding liabilities "let alone carry on business."[65] The debtors were also subject to a cease trade order issued by the BC Securities Commission for failing to meet ongoing filing

59 *Toys "R" Us*, *supra* note 11 at para 10.

60 *Ibid* (finding that "[t]he court-ordered charge is not being used to improve the security of the pre-filing ABL lenders or to fill any gaps in their security coverage. In my view therefore, the takeout DIP is not prohibited by s. 11.2" at para 10).

61 *Ibid* at para 14.

62 *Medipure Pharmaceuticals Inc, (Re)*, 2022 BCSC 1771 [*Medipure*].

63 *Ibid*.

64 *Ibid* at para 1.

65 *Ibid* at para 5.

requirements.[66] Turning to the specific terms of the DIP loan, Walker J of the British Columbia Supreme Court noted that SHP was proposing to use approximately 60% of its loan "solely to pay out in full the amount owing under SHP's pre-filing secured loan", with interest of 15% per annum charged on the advance.[67] In addition, SHP requested the following key terms:

- an origination fee of 1.75% of the initial $1.4 million working capital advance, with interest charged at 8% per annum on all working capital advances;
- the right to submit a stalking horse bid to purchase the debtors' property; and
- termination of most of the debtors' employees.[68]

As the debtors were "entirely without funds" by the time of the application for approval of the DIP loan, SHP took the lead during the motion hearing.[69] During the hearing, SHP acknowledged that it wanted to acquire the debtors through a sales and investment solicitation process but stated that it would not provide the DIP loan unless it was granted a super-priority charge over all of the debtors' assets and its pre-filing claims were repaid in full.[70] SHP's main concern in structuring the terms of the DIP loan seemed to be how best to position itself in a bidding war for the debtors' assets.[71] SHP argued that if the DIP loan were not granted, then the debtors' assets would likely be "liquidated on a fire sale basis".[72] It further submitted that the Supreme Court of Canada's recent decision in *Canada North* confirmed that the supervising judge could exercise his section 11 power to grant super-priority to a DIP lender over the CRA's

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66 *Ibid.*

67 *Ibid* at para 7.

68 *Ibid.*

69 *Ibid* at para 8.

70 *Ibid* at para 9. The DIP charge would have ranked ahead of all other secured claims except for administration charges and a charge for the Chief Restructuring Officer.

71 *Ibid.*

72 *Ibid* at para 11.

deemed trust.[73] The CRA opposed the application on the basis that the terms of the proposed loan—in particular, the requirement that funds be used to repay pre-filing obligations—were "prohibited by s. 11.2 of the *CCAA*."[74]

Walker J agreed with SHP's submission that *Canada North* allowed *CCAA* judges to grant DIP charges that prime deemed trust claims, acknowledging that the *CCAA* confers "vast" power on supervising judges "to make orders appropriate in the circumstances where truly necessary".[75] However, Walker J dismissed the application on the basis that the terms of the proposed DIP loan violated the prohibition in subsection 11.2(1), concluding that "[t]he weight of the authorities interpreting s. 11.2(1) of the *CCAA* confirms that SHP's requirement that new money from the proposed DIP must pay out its pre-filing secured loan . . . is prohibited."[76] In reaching his decision, Walker J canvassed the jurisprudence on section 11.2. He began by noting that Parliament's intention was that subsection 11.2(1) only provide a super-priority charge for financing that is advanced to a debtor "during the period of distress, such that the DIP cannot 'cover' a pre-filing obligation".[77] Furthermore, although in various circumstances *CCAA* courts had authorized creeping DIPs—that is, the use of the debtor's operational receipts to repay pre-filing debts—section 11.2 expressly prohibited the use of DIP funds to pay pre-filing debts.[78] Walker J also noted that in the recent decision of *Mountain Equipment Co-Op*, Fitzpatrick J had approved a creeping DIP only where "she was satisfied that no secured creditor would be materially prejudiced since the charge preserved the pre-filing *status quo*".[79] To the extent that some cases had permitted rollups, such as *Toys "R" Us*, they did

[73] *Ibid*.

[74] *Ibid* at para 12.

[75] *Ibid* at para 42.

[76] *Ibid* at para 48.

[77] *Ibid* at para 50, citing *Structured Solutions*, *supra* note 54.

[78] *Medipure*, *supra* note 62 at paras 50–52, citing *Performance Sports Group*, *supra* note 10 & *Comark*, *supra* note 10.

[79] *Medipure*, *supra* note 62 at para 53–54, citing *Mountain Equipment Co-Operative (Re)*, 2020 BCSC 1586 at para 54(e).

so only on the consent of all parties and were therefore distinguishable from *Medipure*.[80] As discussed earlier, even before the addition of section 11.2, courts were mindful that DIP charges are an extraordinary form of relief that should only be granted to the extent required to assist the debtor in its restructuring efforts and not to benefit some creditors while prejudicing others.[81] These are factors that a *CCAA* court must consider when asked to approve DIP financing in both domestic and cross-border proceedings.

It is worth considering whether the Court in *Medipure* might have approved the rollup if, hypothetically, the debtor had initiated main proceedings under Chapter 11 of the US Bankruptcy Code and obtained an order from the US court approving the rollup. In such a scenario, the debtor would have asked the Canadian court to recognize the rollup pursuant to section 49 in ancillary *CCAA* proceedings. However, it seems unlikely that the Court in *Medipure* would have authorized the rollup even in such circumstances, for several reasons. Firstly, in the cross-border proceedings of *Angiotech Pharmaceuticals* in 2011, the parties deliberately structured the DIP loan as a creeping DIP rather than a rollup so as to comply with subsection 11.2(1).[82] Based on *Angiotech*, the Court in *Medipure* might well have asked why the loan could not have been structured as a creeping DIP instead of a rollup. Secondly, and most importantly, the facts in *Medipure* were quite different from those in the cross-border cases discussed earlier. Specifically, in *Medipure*, the application for the DIP loan was opposed by at least two major creditors, and it appeared that the DIP lender, SHP, was attempting to use the terms of the DIP loan to enhance its

80 *Medipure*, *supra* note 62 at para 70.

81 *Royal Oak Mines*, *supra* note 6 at para 24.

82 *Angiotech Pharmaceuticals, Inc (Re)*, 2011 BCSC 450. The parties were concerned that even though the rollup was permitted under Chapter 11, it would have been rejected by the Canadian court. See Weil, Gotshal & Manges LLP, "Creeping Rollups: Repaying Pre-Petition Secured Debt Under the *CCAA* Under a DIP Facility" (21 May 2011), online: <restructuring.weil.com/north-of-the-border-update/creeping-rollups-repaying-pre-petition-secured-debt-under-the-*CCAA*-under-a-dip-facility>.

position as a potential purchaser of the debtor's assets. By contrast, in *Toys "R" Us*, the debtor's creditors consented to the terms of the rollup, and there was no suggestion that the DIP lenders were attempting to take control of the restructuring process for their own benefit. As Myers J stated, "[t]here do not appear to be any terms that provide incentives for the DIP lenders to try to execute loan-to-own or other strategies to somehow extract more value than is made available in fees and interest on the face of the DIP loan documents".[83] Ultimately, in *Toys "R" Us*, the insolvent US parent company was able to sell Toys "R" Us Canada to Fairfax Financial for $300 million,[84] a result that clearly benefitted the creditors as a whole by preventing the failure of "Canada's leading retailer of toys and baby products" and preserving a profitable business.[85]

Put another way, even an expansive interpretation of section 49 of the *CCAA* likely would not support the approval of a rollup on facts such as those in *Medipure*, where the terms of the rollup would have benefitted the DIP lender at the expense of the debtor and its other creditors. Here, it is helpful to consider the role of section 49 within the broader scheme of the Act. Section 49 falls under Part IV of the *CCAA*, which sets out procedures for recognizing insolvency proceedings that are being carried out in foreign jurisdictions. Part IV is the *CCAA*'s version of the *UNCITRAL Model Law on Cross-Border Insolvency*, which was designed to facilitate cross-border insolvencies:

> [The Model Law] respects the differences among national procedural laws and focuses on authorizing and encouraging cooperation and coordination between jurisdictions rather than

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83 *Toys "R" Us*, *supra* note 11 at para 11.

84 Armina Ligaya, "Fairfax eyeing some U.S. stores after Toys 'R' Us Canada purchase", *CTV News* (26 April 2018), online: <ctvnews.ca/business/Fairfax-eyeing-some-u-s-stores-after-toys-r-us-canada-purchase-1.3903661?cache=>.

85 Notably, Toys "R" Us Canada was "generally cash flow positive" and only filed for *CCAA* protection because its assets formed part of the collateral for loans on which the US parent company had defaulted, thus leaving the Canadian subsidiary "without borrowing facilities and within two weeks of being unable to meet its obligations as they come due": *Toys "R" Us*, *supra* note 11 at para 5.

> attempting the unification of substantive insolvency law. It sets out rules that govern:
>
> - access by foreign insolvency representatives and foreign creditors to courts in the enacting jurisdictions;
> - recognition by courts in the enacting jurisdictions of foreign insolvency proceedings;
> - relief, including staying actions against the debtor in the enacting jurisdiction and the enforcement of foreign insolvency orders by the courts of the enacting jurisdictions; and
> - cooperation and coordination between courts. [86]

Part IV is premised upon comity, that is, the principle according to which one nation will recognize "the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens".[87] In the *CCAA* context, courts have acknowledged the value of comity and cooperation in promoting "efficiency, certainty and consistency" in restructuring.[88] In general, *CCAA* courts have adopted an approach known as "modified universalism" in which they seek to promote comity in cross-border proceedings while operating within the constraints of domestic public policy and retaining their independent authority.[89] For example, in *Voyager Digital*, Kimmel J acknowledged "the importance of comity and cooperation in cross border insolvency proceedings" and "the need for consistency and fair treatment of all creditors across multiple

86 Ben-Ishai & Telfer, *supra* note 3 at 774; United Nations Commission on International Trade Law, "UNCITRAL Model Law on Cross-Border Insolvency" (30 May 1997), online: <uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency>.

87 *Morguard Investments Ltd v De Savoye*, [1990] 3 SCR 1077 at 1096, 1990 CanLII 29 (SCC), citing *Hilton v Guyot*, 159 US 113 (1895) at 163–64.

88 *Babcock & Wilcox Canada Ltd, Re*, 2000 CanLII 22482 at paras 9–10 (ONSC).

89 Jane Dietrich & Michelle Pickett, "Stranger Things: Recent Developments in Recognition Proceedings" (2023) 12 J Insolvency Inst Can 155. See also Ben-Ishai & Telfer, *supra* note 3 at 771.

jurisdictions under a single proceeding model."[90] Importantly, however, the Canadian approach does not require courts to recognize foreign orders that violate Canadian law. As Fitzpatrick J emphasized in *Veris Gold*, although comity is "a factor in terms of promoting cooperation . . . and encouraging a fair and efficient administration of cross-border insolvency proceedings", the Court must still "apply Canadian law".[91]

Given the foregoing, one might ask whether section 49 provides an adequate basis for authorizing rollups in cross-border cases despite the prohibition in subsection 11.2(1). Put another way, how can *CCAA* courts in cases such as *Hartford Computer* and *Xinergy* be said to have been "applying Canadian law" when they approved rollups? One explanation may be that although the rollups in those cases violated the strict language of subsection 11.2(1), no creditors were materially prejudiced by the rollups, and the DIP loans facilitated successful restructurings. As such, the underlying principles of DIP financing as first articulated in *Royal Oak Mines* were upheld because all creditors were given a "reasonable opportunity to think about [the] potential impact" of the DIP loans and to consider whether they would be materially prejudiced or not.[92] As discussed below, this explanation is consistent with the Supreme Court of Canada's recent decisions in *Callidus* and *Canada North*, which reaffirmed that a *CCAA* court's authority to grant DIP charges ultimately is derived from the court's general power under section 11 to make any order that it deems appropriate in the circumstances, rather than from section 11.2.

C. *CALLIDUS* AND *CANADA NORTH*: MISSED OPPORTUNITIES TO CLARIFY THE ROLE OF SECTION 11.2?

The Supreme Court of Canada had the opportunity to interpret and apply section 11.2 in different scenarios in two recent cases.

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90 *In the Matter of Voyager Digital Ltd*, 2022 ONSC 4553 at paras 9, 12, citing *Hollander Sleep Products, LLC (Re)*, 2019 ONSC 3238 at para 42 & *Century Services*, *supra* note 5 at para 22.

91 *Veris Gold Corp (Re)*, 2015 BCSC 399 at para 74 [*Veris Gold*].

92 *Royal Oak Mines*, *supra* note 6 at para 24.

In *Callidus*, the Supreme Court addressed the question of whether third party litigation funding could be approved as DIP financing under section 11.2.[93] In determining that litigation funding could qualify as DIP financing, the Supreme Court stated that DIP financing "at its core enables the preservation and realization of the value of a debtor's assets".[94] Although super-priority charges subordinate the interests of other secured creditors, this is a trade-off that Parliament accepted when it enacted section 11.2, as super-priority charges reduce risk for DIP lenders and incentivize them to lend to insolvent corporations, thus furthering the remedial objectives of the *CCAA*.[95] In particular, the Supreme Court stated that whether DIP financing should be approved "is a question that the supervising judge is best-placed to answer".[96] In this regard, the factors listed in subsection 11.2(4) help guide the supervising judge's exercise of discretion.[97] However, since section 11.2 "largely codifies" the approaches taken by *CCAA* courts prior to 2009, "guidance may be drawn from the pre-codification interim financing jurisprudence" as well.[98] DIP financing therefore remains "a flexible tool that may take different forms or attract different considerations in each case."[99] Ultimately, as Virginia Torrie notes, *Callidus* "provides clarity that, in spite of amendments which have codified certain practices under the Act, the CCAA continues to afford a large measure of discretion to judges to supervise restructuring and liquidation efforts".[100]

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93 *Callidus*, *supra* note 12.

94 *Ibid* at para 85.

95 *Ibid* at para 89.

96 *Ibid* at para 90.

97 *Ibid*.

98 *Ibid* at para 91. The Supreme Court acknowledged that prior to 2009, courts had been approving interim financing pursuant to their general power under s 11.

99 *Ibid* at para 92.

100 Virginia Torrie, "Implications of the *Bluberi* Decision: An Affirmation of Broad Judicial Discretion in *CCAA* and a 'Green Light' for Litigation Funding in Canada" (2021) 36:2 BFLR 277 at 289.

Subsequently, in a 5-4 decision in *Canada North*,[101] the Supreme Court held that a DIP charge over the insolvent debtor's property ranked ahead in priority of a statutory deemed trust created by subsection 227(4.1) of the *Income Tax Act* for unremitted source deductions.[102] Per Côté J (writing for Wagner CJC and Kasirer J), it was unnecessary to determine whether the supervising judge's order was authorized by section 11.2 specifically, as it was within the judge's discretion to prime the *ITA* deemed trust by exercising her general power under section 11 of the *CCAA*:

> I do not need to definitively determine if Her Majesty falls within the definition of "secured creditor" under the *CCAA* by virtue of Her trust. Instead, I would ground the supervising court's power in s. 11, which "permits courts to create priming charges that are not specifically provided for in the *CCAA*" (p. 98). I respectfully disagree with the suggestion of my colleagues Brown and Rowe JJ. that Professor Wood or any other author has suggested that s. 11 is limited by the specific provisions that follow it (para. 228). To the contrary, this Court said in *Century Services*, at paras. 68-70, that s. 11 provides a very broad jurisdiction that is not restricted by the availability of more specific orders.[103]

Likewise, Karakatsanis and Martin JJ, concurring in the result, held that section 11 empowers a supervising judge to order a super-priority charge ahead of all other interests where interim financing cannot be obtained otherwise, and where the financing is necessary to further the remedial objectives of the Act.[104] A majority of the Supreme Court therefore clearly rejected the assertion of Brown and Rowe JJ that section 11.2 operated as an internal limitation on the *CCAA* judge's discretionary authority to grant super-priority charges under section 11.[105] As Roderick Wood notes, the Supreme Court "endorsed a view that gives the supervising court a much greater latitude than that envisaged in

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[101] *Canada North*, *supra* note 13.

[102] RSC 1985, c 1 (5th Supp) [*ITA*].

[103] *Canada North*, *supra* note 13 at para 70.

[104] *Ibid* at para 174.

[105] *Ibid* at para 70.

the Brown and Rowe dissent".[106] Notably, the majority's view is consistent with a preponderance of the *CCAA* jurisprudence, which holds that courts may "make orders under section 11 even though the matter is addressed by a specific statutory provision".[107]

D. Conclusions Regarding DIP Financing Jurisprudence

Notwithstanding their other virtues, the *Callidus* and *Canada North* decisions may have been missed opportunities for the Supreme Court to clarify the role of section 11.2 in both domestic and cross-border proceedings. In *Callidus*, the supervising judge did not even mention the factors listed in subsection 11.2(4) when deciding to authorize the DIP loan. Although the Supreme Court of Canada was at pains to state that the supervising judge must have been aware of and considered the key facts relevant to the subsection 11.2(4) factors in reaching his decision, it nonetheless acknowledged that he "did not canvass each of the factors . . . individually".[108] In light of earlier cases such as *Canwest*, *Pacific Shores*, and *Timminco* that carefully applied each of the subsection 11.2(4) factors, the supervising judge's approach in *Callidus* was unusual. Yet the Supreme Court's statement that the supervising judge's failure to consider and apply subsection 11.2(4) "was not itself an error" suggests that section 11.2 is not restrictive and that supervising judges will still have recourse to their general power under section 11 when considering whether to approve DIP financing.[109] This interpretation was confirmed by the majority in *Canada North*.[110] Put another way, as the Québec Superior Court stated in *White*

106 Roderick J Wood, "Going with the Flow: *Canada v. Canada North Group Inc.*" (2022) 65:3 Can Bus LJ 353 at 366 [Wood, "Going with the Flow"].

107 *Ibid.*

108 *Callidus*, *supra* note 12 at para 106. See also Janis Sarra, "Brueghel's Brush: A Portrait of the *CCAA*" (2020) 64:1 Can Bus LJ 72 at 92.

109 *Callidus*, *supra* note 12 at 106.

110 *Canada North*, *supra* note 13 (stating "[a]s discussed above, a supervising court's authority to order super-priority charges is grounded in its broad discretionary power under s. 11 of the *CCAA* and also in the more specific grants of authority under ss. 11.2, 11.4, 11.51 and 11.52" at para 70).

Birch, the factors in subsection 11.2(4) are "neither mandatory nor limitative", and courts "need not consider all of the said criteria".[111]

Arguably, the foregoing interpretation neuters section 11.2, raising the question of what purpose the section serves, and undermining Parliament's goal of providing guidance to courts on DIP financing applications. This concern was pointed up in the recent case of *Port Capital Development*.[112] In that case, the *CCAA* debtor received a conditional offer to purchase its assets from an entity controlled by one of the debtor's directors.[113] Pursuant to the terms of the purchase offer, the parties sought approval of a DIP loan under section 11, which they hoped would give the debtor time to secure new financing in order to complete a major construction project:

> 129 does not seek court approval pursuant to s. 11.2 of the *CCAA*, being the express statutory provision that allows this Court to approve interim financing in *CCAA* proceedings and grant priority over existing secured creditors, such as 129 (on behalf of the Petitioners) proposes here. Further, the Petitioners are not the entities arranging this refinancing and seeking court approval of it. This is an outside party (129) that seeks to refinance the debt. Section 11.2(1) specifically provides that the debtor company may apply for interim financing.[114]

The British Columbia Supreme Court declined to approve the DIP loan, but the Court of Appeal reversed this decision and approved the DIP loan pursuant to section 11, without applying section 11.2.[115] The Court of Appeal stated that section 11.2 merely codified the authority of *CCAA* courts to approve DIP financing:

> Court approval of interim financing is a more obvious example of the evolution of the court's jurisdiction under the *Act* in accord

111 *White Birch Paper Holdings Co, Re*, 2010 QCCS 1176 at para 35 [*White Birch*].

112 *Port Capital Development (EV) Inc (Re)*, 2021 BCSC 1272 [*Port Capital Development* SC].

113 *Ibid* at para 28.

114 *Ibid* at para 66.

115 *Port Capital Development (EV) Inc v 1296371 BC Ltd*, 2021 BCCA 382 at paras 77–86.

> with its broadening objectives: even *prior to the enactment of* s. 11.2 *in 2009*, courts regularly approved such financing as a necessary part of facilitating restructurings aimed at continuing the debtor's business as a going concern while more permanent solutions were sought.[116]

While technically correct, the Court of Appeal's analysis may have missed the point that on the facts of the case, the *CCAA* supervising judge was not satisfied that the DIP loan would enhance the prospects of a viable restructuring.[117] Furthermore, the supervising judge found that the plan to obtain new construction financing in order to repay the DIP loan was "speculative at best."[118] Based on these factual findings, and setting aside that the parties did not directly address the factors in subsection 11.2(4), the supervising judge still would not have exercised her general power under section 11 to authorize the DIP loan.[119]

In the wake of *Callidus* and *Canada North*, it is worth asking whether references to the *CCAA* court's general power under section 11 have simply taken the place of references to inherent and equitable jurisdiction that were once commonplace in the jurisprudence. In the past, when the *CCAA* was still a skeletal statute,[120] supervising judges regularly invoked their inherent and equitable jurisdiction so as to fill gaps in the legislation.[121] However, this approach led to controversy and raised questions regarding both the sources and limits of a *CCAA* court's authority.[122] As Richard Jones has observed, an expansive view of inherent jurisdiction could lead to decisions that appeared

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116 *Ibid* at para 61 [emphasis in original].

117 This was in part because the parties did not submit any evidence to support such a finding. See *Port Capital Development* SC, *supra* note 112 at para 70.

118 *Ibid* at para 89.

119 *Ibid* at para 92.

120 *Century Services*, *supra* note 5 at para 57.

121 *Ibid* (asserting that "[i]n authorizing measures during *CCAA* proceedings, courts have on occasion purported to rely upon their equitable jurisdiction to advance the purposes of the Act or their inherent jurisdiction to fill gaps in the statute" at para 64).

122 *Ibid* at paras 61–63.

arbitrary, straining conventional conceptions of the rule of law and eroding public confidence in the integrity of the restructuring system.[123] Accordingly, there are good reasons to think that inherent jurisdiction should be "substantially limited to the power of the court to control its own proceedings . . . [and] is not a source of jurisdiction of the court to exercise substantive powers to add to or extend powers specifically granted by legislation".[124] Thus, as the Supreme Court explained in *Century Services*, the preferred approach to decision making in modern *CCAA* proceedings is "a hierarchical one in which courts first rely on an interpretation of the provisions of the *CCAA* text before turning to inherent or equitable jurisdiction to anchor measures taken in a *CCAA* proceeding".[125]

The Supreme Court reaffirmed this "hierarchical" approach in *Callidus*.[126] Furthermore, although both *Callidus* and *Canada North* emphasized the importance of a *CCAA* judge's discretion under section 11, these decisions also acknowledged that such discretion "is not boundless" and must be exercised only "in furtherance of the remedial objectives of the *CCAA*".[127] These statements also echo the Supreme Court's earlier decision in *Century Services*. *Century Services* held that the availability of orders under more specific provisions of the *CCAA* should not be read as a limitation on the general power granted by section 11 and encouraged courts to be "mindful that chances for successful reorganizations are enhanced where participants achieve

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123 Richard B Jones, "The Evolution of Canadian Restructuring: Challenges for the Rule of Law" [2005] Annual Rev Insolvency L 481 (stating that "[t]he rapid development of Canadian insolvency restructuring practice and some of its current trends give rise to concerns as to whether such proceedings always conform to established principles of the Rule of Law both procedurally and substantively" at 520)

124 *Ibid* at 515, citing *Stelco*, *supra* note 25.

125 *Century Services*, *supra* note 5 at para 65, citing Madam Justice Georgina R Jackson & Janis Sarra, "Selecting the Judicial Tool to Get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters" [2007] Annual Rev Insolvency L 41.

126 *Callidus*, *supra* note 12 at para 65.

127 *Callidus*, *supra* note 12 at para 49. See also *Canada North*, *supra* note 13 at para 170, Karakatsanis J concurring.

common ground and all stakeholders are treated as advantageously and fairly as the circumstances permit".[128] This consideration is part of the "baseline consideration" of appropriateness which must inform a *CCAA* judge's exercise of her discretion under section 11.[129]

Writing in dissent in *Canada North*, Brown and Rowe JJ stated that "[n]either s. 11 nor the court's inherent jurisdiction can 'empower a judge . . . to make an order negating the unambiguous expression of the legislative will'".[130] In their view, although section 11 can serve as a source of general authority even when other more specific provisions are available, it cannot be a "source of unfettered authority to circumvent . . . unambiguous restrictions".[131] Intuitively, this seems to be the only interpretation of section 11 that preserves the substance of other provisions of the Act, such as section 11.2. Yet, the majority did not adopt this interpretation of section 11 in *Canada North*.[132]

On its face, the majority's interpretation in *Canada North* may not square with the statement that the exercise of discretionary authority under section 11 must be informed by the "baseline requirements of appropriateness, good faith and due diligence".[133] It is axiomatic that a party cannot apply, in good faith, for relief that violates the Act itself. Canadian courts have declined to grant such relief in various contexts. In *Target*, for example, Morawetz RSJ (as he then was) refused to permit the filing of a *CCAA* plan that proposed to violate the terms of an earlier court order.[134] Specifically, certain landlords of Target Canada had agreed not to oppose its proposed liquidation under the *CCAA*, and not to seek enforcement of guarantees given by Target's US parent company to the landlords, provided that those

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128 *Century Services*, *supra* note 5 at para 70.

129 *Ibid.*

130 *Canada North*, *supra* note 13 at para 228.

131 *Ibid.*

132 *Ibid* at paras 70–72, 228–230.

133 *Ibid* at para 21, citing *Century Services*, *supra* note 5 at paras 69–70. See also *Callidus*, *supra* note 12 at paras 49, 70.

134 *Target Canada Co (Re)*, 2016 ONSC 316 [*Target*].

guarantees would be unaffected by the restructuring. This agreement was enshrined in the Court's amended initial order granting Target protection under the *CCAA*. Subsequently, however, the debtor proposed a restructuring plan that involved releasing its US parent company from those same guarantees, thereby reneging on the agreement and changing the terms of the Court's previous order. Morawetz RSJ stated that the restructuring plan could not even be submitted for a creditor vote, as it was impossible for the Court to sanction the plan as fair and reasonable:

> The *CCAA* process is one of building blocks. In [these] proceedings, a stay has been granted and a plan developed. During these proceedings, this court has made a number of orders. It is essential that court orders made during *CCAA* proceedings be respected. In this case, the Amended Restated Order was an order that was heavily negotiated by sophisticated parties. They knew that they were entering into binding agreements supported by binding orders. Certain parties now wish to restate the terms of the negotiated orders. Such a development would run counter to the building block approach underlying these proceedings since the outset. . . .
>
> It cannot be fair and reasonable to ignore post-filing agreements concerning the *CCAA* process after they have been relied upon by counter-parties or to rescind consent orders of the court without grounds to do so.[135]

In a similar vein, Pepall J (as she then was) held in *Ventas* that "a proposal made in breach of a contractual obligation not to make such a proposal cannot be considered to be bona fide".[136] In that case, Sunrise REIT held an auction process for the sale of its assets. One of the bidders, Health Care Property Investors, Inc (HCPI), withdrew from the auction process in the second round, and did not submit a bid at that time. Subsequently, after it

135 *Ibid* at paras 81, 85.

136 *Ventas Inc v Sunrise Senior Living Real Estate Investment Trust*, 2007 CanLII 8934 at para 37 (ONSC) [*Ventas* SC], aff'd, 2007 ONCA 205 [*Ventas* CA]. It should be noted that the target in *Ventas* was solvent—the point here is simply that a party cannot be said to act in good faith when it violates its contractual or statutory obligations.

learned the terms of the only bid that had been submitted prior to the deadline, HCPI submitted a late "top-up" bid.[137] One of the requirements of the auction process, to which all bidders were contractually bound, was that bids needed to be "bona fide". HCPI's late bid could not be considered "bona fide" because it violated the terms of the auction process itself, and it was therefore rejected.[138]

An overly expansive interpretation of section 11 may also be inconsistent with Parliament's addition of several new provisions to the Act in 2019. Firstly, Parliament added section 11.001, which provides that any order made under section 11 as part of an initial order granting *CCAA* protection "shall be limited to relief that is reasonably necessary for the continued operations of the debtor company in the ordinary course of business" during the period of the initial stay of proceedings.[139] Secondly, Parliament added subsection 11.2(5), which provides that where an application for DIP financing is made as part of the initial application for *CCAA* protection, "no order shall be made . . . unless the court is also satisfied that the terms of the loan are limited to what is reasonably necessary for the continued operations of the debtor company in the ordinary course of business" during the period of the initial stay.[140] Unfortunately, *Canada North* made no mention of these provisions, while *Callidus* mentioned subsection 11.2(5) in a footnote, stating simply that "it may [restrict] the ability of supervising judges" to approve different forms of DIP financing when granting the initial order for *CCAA* protection.[141]

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137 *Ventas* CA, *supra* 136 at para 3.

138 *Ventas* SC, *supra* note 136 at para 37. See also Jassmine Girgis, "A Generalized Duty of Good Faith in Insolvency Proceedings: Effective or Meaningless?" (2020) 64:1 Can Bus LJ 98 at 117.

139 *CCAA*, *supra* note 2, s 11.001. See Sarra, *supra* note 108 (explaining that this provision was intended to prevent overreaching orders from "steering the debtor company to liquidation or sale before any negotiations were conducted" and to enhance the participation of all stakeholders at 81).

140 *Ibid*, s 11.2(5).

141 *Callidus*, *supra* note 12 at para 87, n 5.

On the other hand, the 2019 amendments largely reflect the principles underlying DIP financing that had been articulated in the jurisprudence already, a fact of which the Supreme Court of Canada was certainly aware when it rendered its decisions in *Callidus* and *Canada North*. As Fitzpatrick J noted in *Miniso International*, Parliament's intention to restrict the scope of relief granted on initial applications through section 11.001 and subsection 11.2(5) is consistent with the earliest cases on DIP financing.[142] More specifically, the restrictions set out in section 11.001 and subsections 11.2(1) and 11.2(5) are designed to protect the *CCAA* debtor's creditors as a group by ensuring that the extraordinary remedy of a DIP charge, granted through an interim order, does not result in permanent material prejudice to creditors unless it is necessary for the restructuring. These new sections also further one of the key purposes of subsection 11.2(1), namely, preserving the pre-insolvency status quo among the creditors of the insolvent debtor to the extent possible.[143] Viewed in these terms, the conflict between cases such as *Medipure* and *Toys "R" Us* is perhaps less stark than it might appear at first glance. As a factual matter, the affected creditors in *Toys "R" Us* supported the DIP loan application and ultimately benefitted after the debtor had resolved its liquidity crisis through the restructuring process. This practical outcome highlights the potential benefits of the more flexible interpretation of section 11.2 that the Supreme Court adopted in *Callidus* and *Canada North*. The alternative approach, as articulated in the dissent of Brown and Rowe JJ in *Canada North*, is that section 11.2 operates as an internal restriction on the *CCAA* judge's section 11 power. Had the Court adopted this more restrictive view in *Toys "R" Us*, it would have been forced to reject the DIP loan application, likely leading to a failure of the restructuring and suboptimal outcomes for all participants. In this sense, adhering to the strict language of section 11.2 may be less important than fulfilling the underlying purpose of

142 *Miniso International supra* note 4 at para 80, citing *Royal Oak Mines*, *supra* note 6 at para 24.

143 *Performance Sports Group*, *supra* note 10 at para 22; *Comark*, *supra* note 10 at para 40; *Mountain Equipment Co-op*, *supra* note 79 at para 54(e).

protecting creditors by ensuring that the extraordinary remedy of DIP financing does not permanently alter their rights without giving them due consideration.[144]

E. Implications for Canadian Insolvency Law and Reform Recommendations

The value of the flexible approach to DIP financing that the Supreme Court of Canada adopted in *Callidus* and *Canada North* must be balanced against the attendant risks to creditors' rights. These sorts of risks were apparent in *Medipure*, where they factored into the supervising judge's decision to reject the DIP financing application, and they have been recognized in other jurisdictions, as well. In the United States, for example, section 364 of Chapter 11 permits a bankruptcy court to authorize DIP charges that prime all other secured claims. Section 364 has been the subject of extensive debate among academics and practitioners, particularly in respect of rollups.[145] Various

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144 It is possible, and perhaps preferable, to read *Canada North* more narrowly. For example, in their concurring reasons, Karakatsanis and Martin JJ stated the following in the *Canada North* judgment, *supra* note 13 at para 176 [emphasis in original]:

> While I agree that s. 11 is restricted by the provisions set out in the *CCAA* and cannot be used to violate specific provisions in the Act, s 11 is not "restricted by the availability of more specific orders". The fact that specific provisions of the *CCAA* allow the court to rank priming charges ahead of a secured creditor does not mean that the court can *only* rank priming charges ahead of a secured creditor. Such an interpretation would amount to reading words into ss. 11.2, 11.51 and 11.52 that do not exist.

On this interpretation, courts are empowered by s 11 to grant super-priority charges over the interests of parties that are not "secured creditors"—such as the beneficiaries of deemed trusts—but not to authorize DIP charges on terms that violate the express language of s 11.2, e.g. the prohibition in s 11.2(1) on charges that secure pre-filing obligations. We might infer from Côté J's comments at para 21 of *Canada North* that the majority agreed with Karakatsanis and Martin JJ on this point, but unfortunately, the precise role of s 11.2 and its relationship to ss 11 and 49 was not addressed in *Canada North*.

145 American Bankruptcy Institute, *ABI Commission to Study the Reform of Chapter 11: Final Report and Recommendations*, 2015 (Virginia: America Bankruptcy Institute, 2015) at 74–75, online: <commission.abi.org/full-report>.

commentators have noted that distressed debt investing has created "uncertainty and unease" in Chapter 11 proceedings, with some distressed debt investors "vying for control of the debtor, at the expense of the debtor and its other stakeholders."[146] Significantly, following a three-year study of Chapter 11 by leading academics and practitioners, the American Bankruptcy Institute's Commission to Study the Reform of Chapter 11 recommended that courts:

> [S]hould not approve any proposed postpetition financing under section 364 of the Bankruptcy Code that contains a provision to roll up prepetition debt into the postpetition facility or to pay down prepetition debt in part or in full with proceeds of the postpetition facility . . .[147]

The Commission explained that while a balance must be struck between incentivizing DIP lenders to extend credit and protecting the debtor's other creditors, rollups create various opportunities for abuse, particularly where the "new credit" being extended by the DIP lender is nominal compared to the amount of the pre-filing debts that are being rolled up into the facility.[148]

Although subsection 11.2(1) of the *CCAA* prohibits charges that secure pre-filing obligations, it is clear from the jurisprudence that this prohibition does not apply to creeping DIPs, and, arguably, it may not apply to rollups that are approved pursuant to section 11. Nor does section 11.2 apply in cross-border restructurings where the *CCAA* proceedings are ancillary to foreign main proceedings—in such cases, section 49 permits the *CCAA* court to recognize a rollup that has been authorized by the foreign court.[149] It may be time for Parliament to address these wrinkles by amending the foregoing sections to

146 Michelle M Harner, "Trends in Distressed Debt Investing: An Empirical Study of Investors' Objectives" (2008) 16:1 Am Bankr Inst L Rev 69 at 71–72. See also Harvey R Miller, "Chapter 11 Reorganization Cases and the Delaware Myth" (2002) 55:6 Vand L Rev 1987 at 2016.

147 American Bankruptcy Institute, *supra* note 145 at 73.

148 *Ibid* at 77–78.

149 See especially *Diebold*, *supra* note 56.

clarify that section 11.2 operates as an internal limitation on section 11, section 49, or both. Alternatively, Parliament could clarify that where the requirements of section 11.2 are not met, courts should only rely upon section 11 or section 49 to authorize DIP financing in exceptional circumstances and that any initial or interim orders granting such relief should not result in permanent alterations of the affected creditors' rights without their express consent, as reflected in a formal plan of arrangement or its equivalent under foreign law. Such amendments would help to balance the need for flexibility in restructuring proceedings with the need to protect creditors, as well as the integrity of the restructuring process.

It may be overly optimistic to expect that Parliament will intervene soon, but intervention is both necessary and appropriate. As Wood observes, the historic failure of comprehensive insolvency law reform in the 1980s has led to a piecemeal and haphazard insolvency law reform process in Canada:

> Piecemeal insolvency law reform produces a loss of coherence because the reform centres on the creation of a particular provision designed to address a specific problem. This focus on the immediate often results in a failure to consider how the new element interacts with other elements of the system. The benefit of comprehensive insolvency law reforms is that there is an opportunity to consider the proper integration of all the elements of the insolvency system.[150]

The 2009 reform process which introduced section 11.2 is instructive. Already a relatively modest project compared to the comprehensive reform efforts that had failed in the 1980s, the 2009 reform process was dogged by political headwinds, such that the final text of the legislation suffered from hurried drafting and never received the more fulsome review that the Senate Committee had envisioned.[151] In the result, Parliament left it to

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150 Wood, "Going with the Flow", *supra* note 106 at 372.

151 See Thomas GW Telfer, "Canadian Insolvency Law Reform and 'Our Bankrupt Legislative Process'" [2010] Annual Rev Insolvency L 583 at 587–91; Jacob S Ziegel, "New and Old Challenges in Approaching Phase

the courts to determine how to interpret the new *CCAA* provisions and reconcile them with the existing jurisprudence. This reliance on judicial discretion as a substitute for deliberation and policymaking by Parliament has led to a hodgepodge of decisions not only with respect to DIP financing but also asset sales and the powers of Monitors, among other key features of the modern *CCAA* regime.[152] Accordingly, although a systematic overhaul of Canadian insolvency law should not be undertaken lightly, the alternative is to continue to "muddle through an increasingly complex and incoherent insolvency system where repeated trips to the highest court are the order of the day".[153]

In the meantime, *CCAA* supervising judges must guard against aggressive DIP lenders who attempt to use the terms of DIP loans to steer the restructuring process in their favour at the expense of the debtor and its other creditors. Courts must ensure that affected parties have a reasonable opportunity to consider the effects of any proposed DIP loan, and if necessary, present alternatives. This includes ensuring that parties receive adequate advance notice of proposals that could alter their property rights and security positions. Relatedly, courts should be mindful that the *CCAA* was designed as a creditor remedy[154] and that the chances for successful restructurings are enhanced by broad

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Three Amendments to Canada's Commercial Insolvency Laws" (2002) 37:1 Can Bus LJ 75 at 76; Nocilla, *supra* note 17 at 84–85, 101.

152 After decades of piecemeal reforms, the problem has become pervasive. See e.g. Alfonso Nocilla, "Asset Sales under the Companies' Creditors Arrangement Act and the Failure of Section 36" (2012) 52:2 Can Bus LJ 226 (arguing that s 36 fails to provide substantive guidance to courts on whether to approve asset sales at 243–44); Vern W DaRe & Alfonso Nocilla, "Bestriding the Narrow World: Is It Time to Bifurcate the Role of the *CCAA* Monitor?" [2020] Annual Rev Insolvency L 261 (arguing that, for better or worse, *CCAA* courts can still rely on s 11 as well as their inherent and equitable jurisdiction to delegate additional powers to monitors, even where the requirements of the applicable provision, s 23(1), have not been met).

153 Wood, "Going with the Flow", *supra* note 106 at 373.

154 Virginia Torrie, *Reinventing Bankruptcy Law: A History of the Companies' Creditors Arrangement Act* (Toronto: University of Toronto Press, 2020) at 48–49.

creditor participation in the process.[155] The whole structure of the Act is "geared towards the development of a plan of arrangement that will be presented before the creditors for their acceptance or rejection".[156] At critical junctures in *CCAA* proceedings, it is often key creditors, rather than the debtor, who are driving the process. In some cases, *CCAA* plans have been entirely creditor-led. For example, in *Nelson Financial*, the debtor had sold some $80 million of promissory notes and preferred shares to the public, of which $37 million remained outstanding at the time of the debtor's *CCAA* filing.[157] Although incumbent management remained in place initially, it became apparent that management had "committed a number of wrongful and fraudulent acts".[158] The creditors established an advisory committee and appointed representative counsel, who then obtained an order replacing incumbent management with an interim operating officer with "full powers as the Chief Executive Officer and . . . particular authority to review the circumstances of the debtor company and its assets and, if practicable, to develop a plan for its restructuring".[159] The interim operating officer then developed a formal plan of arrangement upon which the creditors as a whole "voted overwhelmingly in favour" and which received court approval approximately one year after the initial *CCAA* filing.[160] Over a decade after implementation of the plan, the creditors have been made whole and the restructured business continues to operate.[161] *Nelson Financial* illustrates the potential benefits of the *CCAA*'s flexibility and of broad creditor participation in the process. The case also reflects the value of the procedures established by the Act for negotiating, developing, and voting on a formal plan of arrangement to be submitted for

155 *Century Services*, *supra* note 5 at para 70.

156 Wood, "Rescue and Liquidation", *supra* note 16 at 410.

157 *Nelson Financial Group Ltd (Re)*, 2011 ONSC 2750 at para 5 [*Nelson Financial*].

158 *Ibid* at para 24.

159 *Ibid* at paras 10–11.

160 *Ibid* at paras 36–39.

161 Nelson Finance, "Home Page", online: <nelsonfinance.ca/>.

the court's review and sanction. These procedures offer opportunities for parties to consider proposed changes to their pre-insolvency entitlements and can—together with the supervising judge, assisted by the Monitor— act as a check on an aggressive creditor that may seek to control the restructuring process for its own benefit.

IV. CONCLUSION

> *". . . to long after things forbidden, and to desire what is denied us."*[162]

An examination of the jurisprudence shows that the specific language of section 11.2 does not fully and accurately reflect current *CCAA* practice. In particular, although section 11.2 sets out a test for court approval of DIP financing, the Supreme Court of Canada's decisions in *Callidus* and *Canada North* make it clear that section 11.2 does not necessarily limit a *CCAA* judge's broad power under section 11. The upshot is that *CCAA* judges can authorize DIP financing pursuant to section 11 and without reference to section 11.2. In addition, despite the express prohibition on rollups in subsection 11.2(1), *CCAA* courts have approved rollups in cross-border proceedings pursuant to section 49. This reality raises the question of what purpose section 11.2 currently serves. It also leaves open the door to aggressive DIP lenders who might steer the restructuring process towards their own ends, thereby undermining the collective restructuring process. All of this suggests that it may be time for Parliament to amend the *CCAA* in order to clarify the role of section 11.2 within the larger scheme of the Act.

As Myers J stated in *Toys "R" Us*, "[s]crutinizing complicated, lengthy DIP terms on an urgent initial hearing is a dangerous pursuit".[163] Regardless of whether Parliament amends the *CCAA* in the near future, supervising judges can enhance predictability and creditor protection in the context of DIP financing orders in two ways. Firstly, courts should ensure that affected creditors

[162] Rabelais, *supra* note 1 at 225.

[163] *Toys "R" Us*, *supra* note 11 at para 11.

have received adequate notice and time to consider the impact of any proposed DIP loan. Creditors should be encouraged to participate in the restructuring process and present alternatives to the DIP lender's proposal, where appropriate.[164] Secondly, courts should require that any permanent alterations to creditors' entitlements are made only by way of a formal plan of arrangement that has been scrutinized and voted upon in a creditors' meeting. Cases such as *Target* and *Nelson Financial* provide examples of how the *CCAA*'s procedures for developing a formal plan of arrangement can facilitate successful restructurings while protecting creditors both individually and collectively from abuse by incumbent management or another creditor, as the case may be. When considering applications for DIP financing, judges should be mindful of the risk that overly broad initial or interim relief could short-circuit important *CCAA* procedures and undermine the goals of protecting creditors as well as the integrity of the restructuring regime.

164 It is difficult to overstate the potential value of enhanced creditor participation, and particularly competition among DIP lenders, in restructuring proceedings. For example, in Brooks Brothers' Chapter 11 proceedings in the U.S., competition among DIP lenders ultimately led to the debtor obtaining an $80 million loan with no interest or closing fees. See *In re Brooks Brothers Group*, *Inc.*, No. 20-11785 (Bankr D Del 2020). See also Steven Church, "Brooks Brothers Gets Bankruptcy Loan with Zero Interest Rate", *BNN Bloomberg* (10 July 2020), online: <bnnbloomberg.ca/brooks-brothers-gets-bankruptcy-loan-with-zero-interest-rate-1.1463754>.