Court of Appeal File No.: CA47585

COURT OF APPEAL

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

IN THE MATTER OF THE *BUSINESS CORPORATIONS ACT*,
S.B.C. 2002, c. 57, AS AMENDED

AND

IN THE MATTER OF THE PLAN OF COMPROMISE AND ARRANGEMENT OF PORT CAPITAL DEVELOPMENT (EV) INC. and EVERGREEN HOUSE DEVELOPMENT LIMITED PARTNERSHIP

BETWEEN:

PORT CAPITAL DEVELOPMENT (EV) INC. and EVERGREEN HOUSE DEVELOPMENT LIMITED PARTNERSHIP APPELLANTS

RESPONDENTS
(PETITIONERS/APPLICANTS)

AND:

1296371 B.C. LTD.

APPELLANT
(RESPONDENT/APPLICANT)

AND:

CENTURA BUILDING SYSTEMS (2013) LTD. and
SOLTERRA ACQUISITIONS CORP.

RESPONDENTS
(RESPONDENTS)

REPLY BOOK FOR LEAVE TO APPEAL/STAY OF EXECUTION PENDING APPEAL/APPLICATION TO CONVENE A FIVE JUDGE PANEL OF THE RESPONDENTS, CENTURA BUILDING SYSTEMS (2013) LTD. AND SOLTERRA ACQUISITIONS CORP.

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I N D E X

TAB

PART I: STATEMENT OF FACTS

1. In the court below, the question was whether the judge, who had been overseeing the debtors' (the "**Petitioners**") *CCAA*[1] proceedings for more than a year, should exercise her discretion to grant the orders sought by the appellant ("**129**").[2] The judge determined it was inappropriate to do so in the circumstances. 129 seeks leave notwithstanding that this Court will "exercise particular caution before interfering with" such an exercise of discretion.[3]

2. 129 makes a tortured effort to characterize its appeal as being premised on an error of law to avoid the hurdle arising from the deference paid by appellate courts to *CCAA* judges exercising their statutory discretion. However, 129 is unable to articulate an actual error of law, other than to argue that the judge improperly relied on a principle enunciated in this Court's decision in *Cliffs Over Maple Bay.*[4] Ignoring the fact that *Cliffs Over Maple Bay* remains good law, 129 fails to address the fact that the judge also relied on other, more recent authority, including Supreme Court of Canada ("**SCC**") authority to guide the exercise of her discretion.

3. Contrary to 129's characterization of the applications and the judge's decision, this was not a contest among competing offers. 129's application was a cross-application to that of the Petitioners, which sought approval of an agreement to sell their assets to the respondent, Solterra Acquisitions Corp. ("**Solterra**"). 129's application (the "**129 Application**") was for various orders required to carry out what was, by its own description, a "refinancing". In essence, 129 proposed that the Petitioners be authorized and directed to borrow just under $25 million to be secured by a new court-ordered charge against the debtors' assets in priority to all other creditors (the "**Court-Ordered Charge**"). This application relied on the court's jurisdiction under s. 11 of the *CCAA.*

4. The judge held that the relief sought by 129 was not appropriate and declined to exercise her discretion under s. 11 to grant the relief sought. Critically, the judge found that 129's proposal was not supported by any evidence that it would result

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[1] *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("***CCAA***").
[2] Motion Book ("**MB**"), Tab 2, Reasons of Fitzpatrick J., June 30, 2021 ("**Reasons**") at para. 54.
[3] *Canada v. Canada North Group Inc.*, 2021 SCC 30 at para. 22.
[4] *Cliffs Over Maple Bay. v. Fisgard Capital Corp.*, 2008 BCCA 327 ("***Cliffs Over Maple Bay***") .

in any recovery for creditors other than the first mortgagee, and that there was a real risk that it would not come together, a risk which remains today. The judge's decision did not involve a comparison of offers, but rather considered the merits of the 129 Application alone.

5. The proposed appeal is without merit. It raises no point of significance to the practice. This Court's decision in *Cliffs Over Maple Bay* is consistent with subsequent SCC authority relied on by the chambers judge. There is no good reason to revisit that decision. Leave, if granted, risks the timely completion of the sale transaction that was approved by the lower court in the context of a lengthy and challenging[5] sale process undertaken in *CCAA* proceedings in favour of a proposed transaction which remains conditional and which leads to no obvious resolution of the Petitioners' financial difficulties. It is not in the interests of justice to grant leave.

B. Background

6. The background to this case is set out at paragraphs 5-42 of the Reasons where the chambers judge provides a detailed history of the prolonged sale process undertaken by the monitor, Ernst & Young Inc., in the *CCAA* proceedings.

7. At the conclusion of this process, the judge was faced with two applications: (i) an application by the Petitioners for approval of Solterra's offer to acquire the assets of the Petitioners (the "**Solterra PSA**")[6]; and (ii) the 129 Application. Facts relevant to the appeal relate mainly to the transactions for which 129 sought court approval (the "**Refinancing Transactions**") and related orders 129 required to facilitate those transactions.[7] In essence, 129 proposed to have three new lenders (the "**New Lenders**"), including 129 and a related company ("**126**"), pay out the interim lending facility and the amount owing to the first mortgagee, CMLS Financial Ltd. ("**CMLS**"). The First Mortgagee's loan and security agreements were to be purchased by and assigned

[5] MB, Tab 2, Reasons at paras. 14 and 102.
[6] This application evolved as subsequent offers were submitted by Solterra and another party, including the improved offer by Solterra that was ultimately approved by the court.
[7] The proposed transactions and orders are set out at paras. 44-49 of the Reasons.

to the New Lenders, who would enter into amending agreements with the Petitioners to increase significantly both the amount secured and the interest rate of the loan.[8]

8. 129 sought orders authorizing and approving the foregoing transactions and the creation of the Court-Ordered Charge, which was to rank in priority to all other creditors to secure the Petitioners' obligations to the New Lenders. The amount secured under the Court-Ordered Charge would be approximately $3.5 million more than was secured under CMLS' security and at interest rates of up to 24% per annum, compounding monthly (as opposed to prime plus 2.25% per annum under the CMLS loan agreement). Concurrently, 129 sought authorization for the debtors to borrow up to $750,000 from 126 on an unsecured basis, with the right for 126, in its sole discretion, to convert such debt into limited partnership units preferential to all classes of existing partnership units. 129's stated intention was "to create an opportunity to secure new construction financing that will allow the Petitioners to repay the New Loan Facility, exit *CCAA* proceedings and ultimately proceed with the Project as intended."

9. The judge found that there was no suggestion that 129, the Petitioners or any other party had any intention to put forward a plan of arrangement to the Petitioners' creditors. All 129's principal spoke of was "securing the new construction financing and then restructuring the limited partnership interests."[9] There was also no evidence that 129's intended course of action would permit any recovery by creditors other than CMLS, i.e. the first secured creditor.[10] The judge found that the possibility of 129 securing new construction financing was "speculative at best" and that it was "anyone's guess that the completion of the Project is still feasible while also allowing for a full credit of over $16 million from the pre-sale deposits… There is no evidence as to how that might be addressed."[11]

10. The judge concluded: "There is nothing to suggest that Mr. Reyes is seeking to obtain relief from this Court of the purposes of resolving the current creditor claims against the Petitioners within the context of these *CCAA* proceedings." Rather,

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[8] MB, Tab 2, Reasons at paras. 63, 64 and 77.
[9] MB, Tab 2, Reasons at para. 87.
[10] MB, Tab 2, Reasons at paras. 88 and 90.
[11] MB, Tab 2, Reasons at para. 89.

Mr. Reyes, through 129, sought the benefit of an indefinite stay of proceedings "with no true intention to address creditors claims in the future." [12]

11. The judge found "that the relief sought by 129 is not appropriate, including the stay and the refinancing approvals in 129's draft order" and declined to exercise her discretion to grant the relief sought. She then approved the Solterra PSA. The Solterra PSA allows the Petitioners to terminate if it does not close by September 30, 2021.

12. 129 seeks to adduce new evidence through the 5th affidavit of Mr. Reyes. The respondents do not object to the introduction of such evidence, but note that: (a) the total amount proposed to be funded has increased by $20,000; (b) the funding date has now changed so as to be after October 22, 2021; (c) effectively all of the conditions precedent to Domain's funding outstanding as at June 4, 2021 remain outstanding almost two months later; and (d) presently, the full amount of the funding proposed by 129 is unavailable as $400,000 of such funding was paid out of 129's solicitor's trust account and "directed to other projects."

PART II: STATEMENT OF THE POINTS IN ISSUE

13. The respondents agree that if leave is granted execution of the order approving the Solterra PSA should be stayed and the appeal should be heard on an expedited basis. The respondents take no position on 129's application to adduce new evidence. The issues on this application are: (a) whether leave to appeal should be granted; and (b) if leave is granted, whether a five-justice division should be convened.

PART III: ARGUMENT

A. Leave to Appeal Should Not be Granted

14. The factors to consider on a leave application are set out in 129's memorandum at paragraph 31.[13] Leave is granted sparingly in *CCAA* proceedings given the nature of the *CCAA* and the highly discretionary nature of *CCAA* orders. *CCAA* judges in most cases have overseen the proceedings since their inception and have

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[12] MB, Tab 2, Reasons at paras. 50, 90, and 91.

[13] *Southern Star Developments Ltd. v. Quest University Canada,* 2020 BCCA 364 ("***Southern Star***") at paras. 21-25.

deep familiarity with the facts and history of the debtor's circumstances and restructuring. The question is whether it is in the interests of justice to grant leave.[14]

a. The Appeal is Without Merit

15. At paragraph 33 of its memorandum, 129 sets out its proposed grounds of appeal. Despite characterizing the first two grounds of appeal as being errors of mixed "fact and law", the appellant later (at para. 34) suggests that all grounds of appeal are errors of law, thereby attracting a correctness standard of review. These characterizations are strategically framed and misconceived. This Court must closely scrutinize them.[15] In reality, ground (a) alleges an error of mixed fact and law; the standard of palpable and overriding error applies. Ground (b) seeks to extract an error of principle within the judge's exercise of discretion—that the judge relied on an incorrect principle in deciding not to exercise her discretion to grant the relief sought by 129—but just fails to do so. Ground (c) proposes an error of principle without actually identifying a recognized principle which the judge failed to consider. The core complaint for all grounds, but in particular ground (b), is really that the judge did not exercise her discretion in 129's favour. Accordingly, this Court should proceed on the basis that a reviewing Court would apply significant deference to the chambers judge's decision.

1. The nature of the Refinancing Transactions

16. The appellant alleges that the chambers judge erred in concluding that the Refinancing Transactions were not a redemption of the CMLS Mortgage. However, the appellant fails to point to a error of law or misapprehension of any fact by the judge.

17. Citing *Classic Mortgage Corporation*,[16] the judge correctly concluded that the Petitioners had no right to redeem the CMLS Mortgage, having transferred that right to Aviva as the holder of the second mortgage. The appellant does not seem to take issue with that law or that part of the decision.[17]

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[14] *Southern Star* at para. 25; *Edgewater Casino Inc., (Re),* 2009 BCCA 40 at para. 20; *9354-9186 Québec inc. v. Callidus Capital Corp*., 2020 SCC 10 ("***Callidus***") at paras. 53–54.
[15] *Teal Cedar Products Ltd. v. British Columbia*, 2017 SCC 32 at para. 45; P. Senkpiel, C. Ohama-Darcus, T. Posyniak, *Civil Appeal Handbook*, CLEBC, Vancouver, 2002, p. 2.42.
[16] *Classic Mortgage Corporation v. 0768723 B.C. Ltd.*, 2017 BCSC 1100 at paras. 13-16.
[17] MB, Tab 26, Appellant's Memorandum of Argument at para. 38.

18. What the appellant appears to be arguing—for the first time in this Court—is that the Refinancing Transactions were "in effect" a redemption of the CMLS Mortgage by Aviva rather than the Petitioners. This (new) argument ignores any number of important facts. Nowhere in any of the materials before the lower court was it suggested that Aviva was redeeming the CMLS Mortgage or even that the Petitioners were doing so. Importantly, it was never proposed that the New Lenders advance funds to or on behalf of Aviva to redeem the CMLS Mortgage.

19. To the contrary, among the orders sought by 129 were orders "approving the loans from the [New Lenders] to the Petitioners… for the purposes of allowing the Petitioners to repay the Interim Lending Facility and assign the CMLS Facility and CMLS Security to the New Lenders"; and "approving the purchase and assignment of the CMLS Facility and the CMLS Security by the New Lenders… upon repayment thereof". In the body of its application, 129 describes the purpose of the new funding to be "for the New Lenders to acquire the CMLS Facility and the CMLS Security."[18]

20. The appellant relies on *BCIMC Construction Fund*[19] to support this argument. That case does not assist the appellant. That case concerned a proposed advance of funds to the mortgagor to redeem a mortgage that it had the right to redeem.

21. At its core, 129's argument is that the mere consent of Aviva to the Refinancing Transactions, including the acquisition of the CMLS Mortgage, constitutes a redemption of the CMLS Mortgage by Aviva. Not surprisingly, 129 cites no authority which would support such a proposition. There is no basis on which to suggest any error of law by the chambers judge in relation to this issue, or any failure by the chambers judge to consider a relevant fact relating to this issue.

2. The chambers judge's decision not to exercise her discretion

22. The appellant argues that the chambers judge erred by failing "to consider all of the circumstances and focused her analysis on only one issue: the lack of evidence of an intention to propose a plan of arrangement or compromise to creditors."

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[18] MB, Tab 12, 129 Notice of Application at paras. 1(c) and (d) and 17 [emphasis added].
[19] 2020 ONSC 3659.

The appellant says the judge's analysis was improperly "premised on the basis that *Cliffs* stands for the broad principle that a debtor must provide evidence of their intention to propose a plan of arrangement to creditors in order to obtain relief under the *CCAA*."

23. With respect, the foregoing is an unsupportable characterization of the principles on which the chambers judge relied and the circumstances considered by the chambers judge in declining to exercise her discretion.

24. 129's application was, by necessity, premised on s. 11 of the *CCAA* and the broad discretion of the court thereunder—there is no specific provision in the *CCAA* that otherwise permits a *CCAA* to make the orders sought by 129. The court's broad discretion under s. 11 was recognized by the chambers judge, who quoted extensively from the SCC's decisions in *Century Services*[20] and, more recently, *Callidus* concerning the jurisdiction conferred on the court by s. 11.

25. As is apparent from the judge's decision, she appreciated that the analysis as to whether to exercise her discretion to grant the orders sought by 129 was "a circumstance-specific inquiry" that "must further the remedial objectives of the *CCAA* and be guided by the baseline considerations of appropriateness, good faith and due diligence." The judge was also cognizant that "[t]he discretionary authority conferred by the *CCAA*, while broad in nature, is not boundless."[21] The judge cited other cases concerning the exercise of the court's discretion, including the decision of Tysoe J.A. in *Cliffs Over Maple Bay* for the uncontentious proposition that "the imposition of the stay must be consistent with the fundamental statutory objectives of the *CCAA*, including 'to facilitate compromises and arrangements between companies and their creditors' as expressed in the statute's long title: *Cliffs Over Maple Bay* at paras. 26-29."[22]

26. The judge cited the following proposition from *Cliffs Over Maple Bay*:

> [38] … What the Debtor Company was endeavouring to accomplish in this case was to freeze the rights of all of its creditors while it undertook its restructuring plan without giving the creditors an opportunity to vote on the plan. The *CCAA* was not intended, in my view, to accommodate a non-

[20] *Century Services Ltd. v. Canada,* 2010 SCC 60 ("***Century Services***").
[21] MB, Tab 2, Reasons at paras. 52 and 53, citing *Callidus* at paras. 49, 70 and 76.
[22] MB, Tab 2, Reasons at para. 83.

> consensual stay of creditors' rights while a debtor company attempts to carry out a restructuring plan that does not involve an arrangement or compromise upon which the creditors may vote.

The judge also relied on her decision in *North American Tungsten* for the proposition that "[w]hen granting an extension, it is a prerequisite for the petitioner to provide evidence of what it intends to do in order to demonstrate to the court and stakeholders that extending the proceedings will advance the purpose of the *CCAA*. The debtor company must show that it has at least "a kernel of a plan".[23]

27. It is obvious that the chambers judge was <u>not</u> operating on the premise that 129 "must provide evidence of their intention to propose a plan of arrangement to creditors in order to obtain relief under the *CCAA*." The judge considered whether the relief sought by 129 was appropriate in all the circumstances. In doing so, and with regard to the relevant authorities, the judge was entitled to, and did, take note of the fact that there was no evidence of any intention on the part of 129 or the Petitioners to resolve or even address the claims of creditors affected by the proposed Refinancing Transactions, let alone seek approval of those transaction from affected creditors by proposing a plan on which creditors could vote.

28. The chambers judge was clear that 129 need not put forward a fully fleshed-out plan as a condition of obtaining relief under s. 11 of the *CCAA*. However, she did find that the relief sought by Mr. Reyes through 129 was sought "with no true intention to address [affected creditors'] claims in the future."[24] <u>That</u> was the nub of the chambers judge's concerns regarding the orders sought by 129 without regard for affected creditors. Those concerns are reflected and grounded in the principles set out in, among other cases, *Callidus* and *Cliffs Over Maple Bay*.

29. It is equally apparent that the judge had concerns about the commercial viability of Mr. Reyes' overall "Restructuring Plan" as set out in 129's Notice of Application. She found that the new construction financing 129 intended to secure at a later date was "speculative at best", and that there was no evidence as to how

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[23] *North American Tungsten Corporation Ltd. (Re)*, 2015 BCSC 1376 ("***NATC***") at para. 26.
[24] MB, Tab 2, Reasons at para. 90.

"completion of the Project is still feasible while also allowing for a full credit of over $16 million from the pre-sale deposits (which would reduce sale revenues)."[25]

30. In short, the judge found that the relief sought by 129, including the creation of the Court-Ordered Charge to the prejudice of subordinate secured creditors and the creation of rights in favour of 126 to the prejudice of limited partnership investors, all without the ability or even intention to resolve those stakeholders' claims, was not appropriate. That is an eminently reasonable exercise of discretion with regard to the principles guiding such exercise as set out in the authorities.

31. What 129 seeks to argue before this Court is no different from what was argued in the court below: that because the Refinancing Transactions (if they were to complete) <u>might</u> result in a better outcome for the Petitioners' stakeholders than the Solterra PSA (a fact of which the judge was well aware), no further analysis as to appropriateness need be undertaken. 129 premises its argument on the decision in *Callidus* where the Court, citing *Century Services*, held that the exercise of discretion under s. 11 "generally prioritizes 'avoiding the social and economic losses resulting from liquidation of an insolvent company'".[26]

32. 129 disregards the full analysis of the SCC in *Century Services*, which went on to hold that "appropriateness extends not only to the purpose of the order, <u>but also to the means it employs</u>. Courts should be mindful that chances for successful reorganizations are enhanced where participants achieve common ground and all stakeholders are treated as advantageously and fairly as the circumstances permit."[27] Put simply, one cannot justify the ends (a potentially better result for stakeholders), if in doing so one employs means which trample the rights of those stakeholders.

33. 129 suggests that it had the support of the first two secured creditors, CMLS and Aviva, suggesting it "found common ground amongst the stakeholders". Consistent with its submissions in the court below, the appellant conveniently ignores the interests of all other stakeholders, including lien holders, who would be prejudiced

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[25] MB, Tab 2, Reasons at para. 89.
[26] *Callidus* at para. 41.
[27] *Century Services* at para. 70 [emphasis added].

by the orders sought by 129. There is no basis on which one could suggest that 129 had "found common ground amongst the stakeholders".

34. Finally, as to the issue of notice to affected creditors, 129 misses the chambers judge's point. The question of notice in relation to the 129 Application concerned the question of consultation with affected stakeholders—the very issue the SCC identified in *Century Services*. There is no doubt 129, in seeking to materially prejudice their interests, should have notified and sought to consult with affected stakeholders, including subordinate secured creditors and limited partnership investors. It did not do so, a fact noted by the judge in the exercise of her discretion.

35. There was no issue with respect to notice of the application to approve a sale transaction under s. 36 of the *CCAA*. There was no argument that the application was in that or any other way deficient. There is no doubt that the creditors actually affected by the proposed sale (i.e. those in, or potentially in, the money, being CMLS and Aviva) were consulted and notified. Counsel for each attended at the hearing.

36. Try as it might, the appellant is unable to point to any error on the part of the chambers judge in declining to exercise her discretion to grant the relief sought by 129. She relied on appropriate principles guiding her discretion. She considered all relevant circumstances. Her decision is accorded the utmost deference. This Court is exceedingly unlikely to substitute its discretion for that of an experienced *CCAA* judge "steeped in the intricacies" of the proceeding she has overseen since its inception.

3. The chambers judge had no reason to compare options

37. The appellant argues that the chambers judge "erred in principle by not balancing the options available in determining whether the 129 Refinancing was appropriate." This argument is premised on an unsupportable construct as to the manner in which the hearing proceeded and as to the chambers judge's decision.

38. As a reminder, there were two applications before the judge: one by 129 for approval of the Refinancing Transactions and related relief, and one by the Petitioners for approval of the Solterra PSA. It was generally accepted that if the 129 Application were granted, there would be no need to consider the offers to purchase the

Petitioners' assets. The hearing proceeded on that basis with the 129 Application being heard first. For obvious reasons, the judge's decision was structured accordingly.

39. The chambers judge held that she was not prepared to exercise her discretion so as to grant the relief sought by 129. Only after having arrived at that conclusion did she go on to consider which purchase offer to approve. Having already determined that she would not approve the Refinancing Transactions, it would have been pointless to compare any of the offers to those transactions. There is no legal principle which requires a comparison of an offer capable of approval to one the court has already declined to approve. The appellant cites no authority for such proposition.

c. The proposed appeal raises no point of interest to the practice

40. The proposed appeal raises no point of interest to the practice. The judge's decision involved the exercise of her discretion with reference to established authorities. It did not require consideration of a novel or even contentious points of law.

41. The judge's decision was premised on a consideration of the most fundamental and oft-cited principle applicable to the exercise of discretion under s. 11 of the *CCAA*: that any order made must be appropriate and consistent with the statutory objectives of the *CCAA*.[28] Within the context of such considerations, the judge considered the question of whether the relief sought was appropriate if it was not coupled with an intention to address the claims of creditors affected by such relief.[29] The court's decision turned on the unique circumstances of the case. There is little point in this Court hearing the proposed appeal simply to restate well-established law.

42. The appellant suggests it is of interest to the practice to know "[w]hether the equity of redemption ought to be balanced as part of an appropriateness analysis under s. 11 of the *CCAA*".[30] Not only was that question not canvassed by the chambers judge, it is premised on a conclusion that the equity of redemption was in some manner engaged in this case. As set out above, it was not and could not have been engaged.

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[28] *Century Services* at paras. 58-59; *Callidus* at paras. 40-42, 48-49.
[29] *Cliffs Over Maple Bay* at paras. 35-37; *NATC* at para. 26.
[30] MB, Tab 26, Appellant's Memorandum of Argument at para. 63.

b. The appeal will unduly hinder the progress of the action

43. The Solterra PSA must close before the end of September 2021. The parties, including Solterra, the Petitioners, and the Monitor, are engaged in pre-closing matters to ensure a timely closing, all of which involves a significant amount of work at significant cost. It is not in the parties' interests to delay the closing given the deadline in of September 30, 2021, after which the Petitioners may terminate the agreement.

44. Leave, if granted, will create uncertainty as to the timely completion of the Solterra PSA—or whether it can be completed at all. It will be recalled that the agreement may be terminated by either party if it does not complete prior to September 30, 2021. That is not only prejudicial to Solterra, but also to the Petitioners and their other stakeholders, including trades whose equipment has remained on site since the inception of the *CCAA* proceedings in May 2020 and presale purchasers.

45. Also relevant is that there is no certainty that 129's "plan" has any hope of coming to fruition, let alone in a timely fashion. As noted by the judge, there is no evidence that creditors other than the First Mortgagee will make any recovery; 129's hoped-for new construction financing is "speculative at best"; and "[i]t is anyone's guess that the completion of the Project is still feasible while also allowing for a full credit of over $16 million from the pre-sale deposits."[31] Moreover, on 129's evidence, the funding required for the Refinancing Transactions is <u>not</u> presently available, and that, if the Refinancing Transactions were approved and were capable of closing, funding would not be advanced until the end of October 2021. There is no indication how 129 proposes to deal with the additional costs and interest arising due to such delay.

d. It is not in the interests of justice to grant leave

46. It is not in the interests of justice to grant leave. Doing so risks the completion of the Solterra PSA, an all-cash transaction which ensures the timely recommencement of construction of the development, in favour of the unrealistic hopes of 129 that it will be able to succeed on appeal and—more concerningly—complete multiple refinancing transactions in order to fund a project that is already significantly underwater. The proposed appeal rests entirely on convincing this Court that the

[31] MB, Tab 2, Reasons at paras. 88 and 89.

chambers judge, who has overseen the *CCAA* proceedings for more than a year, made a decision to exercise her discretion that was based on a wrong principle or that she unreasonably exercised her discretion. The likelihood of such a result is effectively nil.

B. Convening a Five-Justice Division

47. The Court will direct that a five-justice division be convened only if there is "good reason" to reconsider a previous decision.[32] The appellant has requested a five-justice division because *Cliffs Over Maple Bay* "ought to be overruled because it no longer reflects current judicially endorsed practices under the [*CCAA*]".

48. This Court should refuse this request. The appellant has raised no basis on which a five-justice division of this Court would overrule *Cliffs Over Maple Bay*.

49. The overriding problem facing the appellant is that the appeal does not propose a legal question that needs to be resolved in this case by a five-justice division: the judge could have exercised her discretion in the same way without reference to *Cliffs Over Maple Bay,* having relied in any event on subsequent SCC authority which is entirely consistent with the principles articulated by Tysoe J.A.

50. *Cliffs Over Maple Bay* came out before the amendments to the *CCAA* came into force which granted debtor companies the right to sell assets out of the ordinary course of business with court approval. Tysoe J.A.'s musings as to whether a debtor company might avail itself of the *CCAA* in order to carry out a liquidation of its assets[33]—which might at best be considered *obiter dicta*—have been overtaken by the 2008 amendments to the *CCAA*, which specifically contemplate such a result.[34]

51. The balance of Tysoe J.A.'s decision deals with—and is a proper articulation of—the basis for the court's broad jurisdiction to make orders under s. 11 of the *CCAA* and the considerations applicable to the exercise of discretion thereunder. That portion of the decision accords with subsequent decisions, including of the SCC. At paragraphs 26 and 27, Tysoe J.A. observed that the Court's ability to order a stay under

[32] *Andreychuk v. RBC Life Insurance Co.*, 2008 BCCA 492 at paras. 34-35.
[33] *Cliffs Over Maple Bay* at paras. 32 and 33.
[34] *CCAA*, s. 36.

s. 11 is not a free standing remedy. Rather, that section and the ability to grant a stay thereunder is ancillary to the "fundamental purpose of the *CCAA*", which is to "facilitate compromises and arrangements between companies and their creditors".

52. Two years later, the SCC in *Century Services* confirmed the wisdom of Tysoe J.A.'s observation. "Judicial discretion must of course be exercised in furtherance of the *CCAA's* purposes." These purposes include avoiding the effects of bankruptcy while a court-supervised attempt to reorganize the debtor company is made.[35] In 2020, the SCC, in reliance on *Century Services*, again confirmed that the exercise of discretion under the *CCAA* should be made with the purposes of the legislation in mind. In other words, both SCC decisions effectively restate what Tysoe J.A. held in *Cliffs Over Maple Bay*, i.e. the exercise of the court's discretion under s. 11 of the *CCAA* must be in furtherance of the fundamental purpose of the *CCAA*, being "to facilitate the reorganization and survival of the pre-filing debtor company in an operational state", or, more recently, to facilitate a liquidation of the debtor company.[36]

53. The appellant argues that *Cliffs Over Maple Bay* is "too rigid" because it "fetters a court's discretion under s. 11". The appellant says that Tysoe J.A.'s decision mandates that debtor companies articulate an intention to propose a plan to creditors as a precondition for relief under s. 11.[37] This is an unfair reading of the decision.

54. What the Court in *Cliffs Over Maple Bay* does say is that a stay under s. 11 requires that the debtor company evidence some plan to address the claims of its creditors, or, as the chambers judge in this case put it, to resolve the claims of the creditors it seeks to stay or otherwise affect. This is entirely consistent with *Century Services* and *Callidus*. At its core, it is a refinement of the more broadly stated principles intended to deal with the circumstances of the case before the court.

55. As a result of the amendments to the *CCAA* coming in to force after Tysoe J.A.'s decision, an intention to liquidate assets is an acceptable use of the *CCAA* and a plan for dealing with stakeholders. What has not changed is the reticence of courts to

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[35] *Century Services* at paras. 58 and 59, 70.
[36] *Callidus* at paras. 40-42.
[37] MB, Tab 26, Appellant's Memorandum of Argument at paras. 84 and 88.

grant far-reaching relief in reliance on their discretion under s. 11 without regard for the interests of affected stakeholders. In each case where such relief is sought, the court will rightly ask what the debtor's plan is for dealing with those stakeholders. Without some indication as to the debtor's intention in that regard, the court would be acting well within its authority to decline the orders sought, as it did in this case.

56. Given the concordance between *Cliffs Over Maple Bay* and subsequent SCC authority, it is unsurprising that the appellant can point to no conflicting appellate or trial level authorities concerning the principle the appellant takes issue with.[38] To the contrary, *Cliffs Over Maple Bay* is consistent with subsequent authorities. Tysoe J.A. considered the relevant legislation and existing decisions on point. The decision was also based in part on a question of policy as evidenced by the long title of the *CCAA*. In such cases, a five-justice division is not appropriate.[39]

57. In sum, should leave to appeal be granted, this Court should decline to convene a five-justice panel to reconsider Tysoe J.A.'s decision in *Cliffs Over Maple Bay*. The appellant is bound by subsequent SCC authority to the same effect and, accordingly, must convince this Court that the chambers judge exercised her discretion on a wrong principle or unreasonably in any event. It is unlikely to do so.

PART IV: NATURE OF ORDER REQUESTED

58. That 129's application for leave to appeal be dismissed with costs.

Date: August 9, 2021

for:

Kibben Jackson, Counsel for the Respondents Solterra Acquisitions Corp. and Centura Building Systems (2013) Ltd.

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[38] Tysoe J.A.'s decision has been cited and distinguished but no court has disputed its general proposition: *Re Crystallex International Corporation,* 2012 ONSC 2125 at para. 45; *Worldspan Marine Inc. (Re),* 2011 BCSC 1758 at para. 21; *Asset Engineering LP v. Forest & Marine Financial Limited Partnership*, 2009 BCCA 319 at para. 24.

[39] *Bell v. Cessna Aircraft Co.,* 1983 CanLII 303 (BC CA) at para. 7; *McIsaac v. Sun Life Assurance Co. of Canada,* 1999 BCCA 299 at para. 11.

PART V

TABLE OF AUTHORITIES

TAB	CASES	PARA(S)
1	*9186 Québec inc. v. Callidus Capital Corp.,* 2020 SCC 10	14, 24, 25, 28, 31, 54
2	*Andreychuk v. RBC Life Insurance Co*., 2008 BCCA 492	47
3	*Asset Engineering LP v. Forest & Marine Financial Limited Partnership,* 2009 BCCA 319	56
4	*BCIMC Construction Fund Corporation et al. v. The Clover on Yonge Inc.,* 2020 ONSC 3659	20
5	*Bell v. Cessna Aircraft Co*., 1983 CanLII 303 (BC CA)	56
6	*Canada v. Canada North Group Inc.,* 2021 SCC 30	1
7	*Century Services Ltd. v. Canada,* 2010 SCC 60	24, 31, 32, 34, 52, 54
8	*Classic Mortgage Corporation v. 0768723 B.C. Ltd.,* 2017 BCSC 1100	17
9	*Cliffs Over Maple Bay. v. Fisgard Capital Corp.,* 2008 BCCA 327	2, 5, 22, 25, 26, 28, 47, 48, 49-57
10	*Edgewater Casino Inc., (Re),* 2009 BCCA 40	14
11	*McIsaac v. Sun Life Assurance Co. of Canada*, 1999 BCCA 299	56
12	*North American Tungsten Corporation Ltd. (Re),* 2015 BCSC 1376	26, 41
13	*Re Crystallex International Corporation,* 2012 ONSC 2125	56
14	*Southern Star Developments Ltd. v. Quest University Canada*, 2020 BCCA 364	14
15	*Teal Cedar Products Ltd. v. British Columbia*, 2017 SCC 32	15

Enactments

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

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

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

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.

Additional factor — initial application

(5) When an application is made under subsection (1) at the same time as an initial application referred to in subsection 11.02(1) or during the period referred to in an order made under that subsection, no order shall be made under subsection (1) unless the court is also satisfied that the terms of the loan are limited to what is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period.

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

Notice to creditors

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

Factors to be considered

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

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

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

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

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

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

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

Additional factors — related persons

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

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

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

Related persons

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

(a) a director or officer of the company;

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

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

Assets may be disposed of free and clear

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

Restriction — employers

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

Restriction — intellectual property

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

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