QUEEN'S BENCH FOR SASKATCHEWAN

Citation: **2021 SKQB 273**

Date: **2021 10 19**
Docket: QBG 77 of 2020
Judicial Centre: Melfort

BETWEEN:

CONEXUS CREDIT UNION 2006

Plaintiff

- and -

VOYAGER RETIREMENT II GENPAR INC., VOYAGER RETIREMENT II LP, and CALEB MANAGEMENT LTD.

Defendants

Docket: QBG 221 of 2020
Judicial Centre: Yorkton

BETWEEN:

CONEXUS CREDIT UNION 2006

Plaintiff

- and -

VOYAGER RETIREMENT III GENPART INC., VOYAGER RETIREMENT III LP, and CALEB MANAGEMENT LTD.

Defendants

Docket: QBG 880 of 2021
Judicial Centre: Saskatoon

IN THE MATTER OF THE RECEIVERSHIP OF VOYAGER RETIREMENT II LP AND ITS GENERAL PARTNER, VOYAGER RETIREMENT II GENPAR INC., and of VOYAGER RETIREMENT III LP AND ITS GENERAL PARTNER, VOYAGER RETIREMENT III GENPAR INC.

Counsel:

Rick M. Van Beselaere, Q.C.	for the plaintiff/applicant
Michael J. Russell	for the defendants/respondents, Voyager
Kevin N. Hoy	for the defendant, Caleb Management Ltd.
Jeffrey M. Lee, Q.C.	for the proposed monitor, The Bowra Group Inc.

FIAT ELSON J.
October 19, 2021

Introduction

[1] There are multiple applications before the Court, now filed in three different judicial centres. The first two applications are brought in the judicial centres of Melfort and Yorkton, pursuant to the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 [*BIA*]. In those applications, Conexus Credit Union 2006 [Conexus] seeks receivership orders in respect of two seniors' residences respectively located in Tisdale and Melville, Saskatchewan. The two borrowers built the respective residences in 2012 and have owned the operations since that time. The borrowers are separately created, but closely associated, limited partnerships. The proposed receiverships relate to outstanding indebtedness incurred by the borrowers in the construction and operation of the businesses. The debt owed to Conexus, in respect of each residence, is substantial.

[2] The third application is brought in the judicial centre of Saskatoon. In it, the borrowers seek remedies pursuant to the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 [*CCAA*]. Specifically, the borrowers seek an initial order which, *inter alia*, permits them to remain in possession of their current and future assets and to carry on operations under the oversight of the Bowra Group Inc. [Bowra], as the proposed monitor. As part of the initial order, they also seek an order imposing a stay on any proceedings that might be commenced or continued against them. A particularly significant remedy sought in the initial order is the Court's authorization to seek and

obtain interim financing under which the interim lender would have a charge on certain of the borrowers' property that would rank in priority to all other interests, including the secured interest of Conexus.

[3] The Court is faced with the task of deciding whether any relief is to be ordered and, if so, the form of that relief.

Background

[4] The background facts in this matter are not significantly in dispute.

[5] The borrowers are Voyager Retirement II LP [Tisdale LP] and its general partner, Voyager Retirement II Genpar Inc., (collectively described as "Voyager II"), and Voyager Retirement III LP [Melville LP] and its general partner, Voyager Retirement III Genpar Inc., (collectively described as "Voyager III"). Voyager II presently owns and operates the seniors' residence in Tisdale, and Voyager III presently owns and operates the seniors' residence in Melville.

[6] The principal and operating mind behind the business of the two borrowers is Sirous Tosh, who deposed two affidavits in these proceedings. Mr. Tosh is the sole director, shareholder and president of the general partners in Voyager II and III. He is also the director and president of Caleb Management Ltd. [Caleb], which is the majority partnership unit holder in each of the limited partnerships within Voyager II and III. Mr. Tosh also confirms that each of Voyager II and III were established to develop, construct, own and operate seniors' retirement residences in Saskatchewan. In addition to the residences in Tisdale and Melville, the borrowers' sister entities own residences in Kindersley, Humboldt and North Battleford, respectively.

[7] The borrowers completed construction of the Tisdale and Melville residences in 2012. Both residences were intended, at least in part, to serve as

condominium projects. Each residence consists of 94 residential units. Of those units, the Court understands that Voyager II owns 67 units in the Tisdale residence, while Voyager III owns 64 units in the Melville residence. This accords with the borrowers' business plan which, as described by Mr. Tosh, calls for Voyager II and III to sell roughly one third of the units and then retain ownership of the remaining units for rental purposes.

[8] Voyager II and III each entered into management agreements with Caleb through which Caleb agreed to provide food preparation, maintenance and operating services in each of the Tisdale and Melville residences. The term for each management agreement expires on December 31, 2058.

[9] Conexus has been the primary lender for both Voyager II and III since construction began on each residence. The evidence supporting Conexus' request for a receiver is set out in the initial and supplemental affidavits of Terry Wrishko, Risk Manager for Conexus. They reveal that Conexus agreed to loan to each borrower the sum of $10 million. In return, each borrower granted Conexus security in the following forms:

(a) Voyager II security:

(i) a mortgage, dated May 2, 2011, registered against the residential units owned by Voyager II;

(ii) an assignment of rents, dated May 2, 2011;

(iii) a security interest to Conexus over all present and after-acquired equipment, inventory, furnishings, fixtures, appliances and HVAC equipment situated at or used in connection with the Tisdale residence, all pursuant to a specific security agreement, dated May 2, 2011.

(b) Voyager III security

(i) a mortgage, dated December 5, 2011, registered against the residential units owned by Voyager III;

(ii) an assignment of rents, dated December 5, 2011;

(iii) a security interest to Conexus over all present and after-acquired equipment, inventory, furnishings, fixtures, appliances and HVAC equipment situated at or used in connection with the Melville residence, all pursuant to a specific security agreement, dated December 5, 2011.

[10] In addition to the financing from Conexus, Voyager II and III each received five-year property tax abatements from the Town of Tisdale and the City of Melville, respectively. The abatements expired in 2017.

[11] The evidence also discloses that the borrowers are indebted to Caleb. Specifically, Caleb is a secured creditor under four assignments of loan and security it had received from Voyager II and III beginning in 2014. To secure this debt, Caleb received subordinate mortgages registered against the various units in the Tisdale and Melville residences. According to the evidence of Caleb's Chief Executive Officer, Voyager II currently owes the company $625,000, while Voyager III owes it $701,000, all with interest accruing at 2.5% per annum. No payments have yet been made on these mortgages, and Caleb has not issued any demand for payment. If demand is made, both limited partners would default.

[12] There is no dispute that both Voyager II and III have defaulted on their respective obligations to Conexus. The evidence discloses that, as of July 5, 2021, the particulars of each borrower's debt to Conexus is as follows:

(a) Voyager II owed Conexus the sum of $6,319,561.26, consisting of a principal debt of $5,544,481.50 and interest owing of $775,079.76;

(b) Voyager III owed Conexus the sum of $5,968,421.99, consisting of a principal debt of $5,273,570.26 and interest owing of $694,851.73.

The evidence further discloses that no payments on the respective loans have been made since January 2019. That said, it is clear that regular payments on the loans essentially ceased in 2017. Moreover, the terms of each borrower's loan expired on January 4, 2020. As such, all amounts are presently due, owing and in arrears.

[13] Conexus made written demands for payment from each borrower on January 9, 2020. This was later followed by the issuance of statements of claim in the judicial centres of Melfort and Yorkton on December 15, 2020.

[14] In addition to the borrowers' failure to pay the amounts due and owing to it, Conexus asserts defaults in three other respects: (1) failure to pay property taxes since the expiry of the tax abatement; (2) failure to maintain operating bank accounts with Conexus; and (3) making payments to other creditors, particularly to Caleb.

[15] With respect to property taxes, the evidence discloses that, almost immediately after the abatement expired, both Voyager II and III defaulted on their tax payments. As of May 31, 2021, Voyager II owed the Town of Tisdale the sum of $730,258.92, inclusive of $27,219.45 in accrued interest. As of the same date, Voyager III owed the City of Melville the sum of $731,301.55, inclusive of penalties and interest. Both municipalities have registered tax liens against the condominium units owed by the respective borrowers. It is expected that the interest charges and penalties now accruing on the unpaid property taxes will escalate as they are added to

the amount owing for each of the prior years when property taxes were not paid.

[16] Excluding the debt owed to Caleb, the total indebtedness owed to Conexus and the respective municipalities can be summarily approximated. Voyager II's total indebtedness, to Conexus and the Town of Tisdale, amounts to more than $7 million. Meanwhile, Voyager III's total indebtedness, to Conexus and the City of Melville, amounts to more than $6.7 million.

[17] In April 2021, Conexus obtained appraisals of the residential units respectively owned by Voyager II and III, both valued as of March 6, 2021. One appraisal valued each of the 67 Tisdale units owned by Voyager II and determined their aggregate value at $8,940,000. The appraiser also opined that the value would be $4,150,000 if the units were sold as a block. As for the 64 units owned by Voyager III in Melville, the same appraiser concluded that their aggregate value amounted to $8,515,000. If sold as a block, the value amounted to $4,500,000,

[18] Mr. Tosh, on behalf of Voyager II and III, does not take issue with the debt picture described in evidence. He admits the indebtedness to both Conexus and Caleb, as well as the outstanding property taxes owed to the two municipalities. Indeed, Mr. Tosh candidly acknowledges that both Voyager II and III are insolvent.

[19] The evidence discloses some forbearance discussions. Mr. Tosh confirms that an agreement was reached with Conexus whereby the interest rate would be increased by 0.5% in return for interest-only payments from December 2017 to March 2018, with regular principal and interest payments to resume in April 2018. As part of this arrangement, interest and legal fees of $196,000 and $177,000 were respectively added to the Voyager II and III loans with Conexus. Any positive expectations the parties may have had from this arrangement did not materialize.

[20] In his affidavit evidence, Mr. Tosh explained the reasons for the

insolvency. Specifically, he said that, despite operating in accordance with the usual business plan, the markets for the residential units did not perform as well as expected. Both Voyager II and III experienced lower than projected rental occupancy. Mr. Tosh opined that the depressed rental market conditions in both Tisdale and Melville affected profitability during the five-year property tax abatement. When the tax abatements expired and property taxes came due, neither operation could meet both the tax obligations and their obligations to Conexus. Indeed, they have never meaningfully met their tax payment obligations, except for certain months in late 2019 and early 2020.

[21] Mr. Tosh further deposed that Voyager II and III contacted counsel for Conexus in July 2017 and advised of efforts made to resolve the financial difficulties. According to him, these efforts included cash calls in the aggregate amount of $1,300,000, additional credit facilities by way of loans by the limited partners, as well as a variety of marketing incentives intended to increase occupancy rates in both residences. The proposed arrangement did not pan out and the situation remained unresolved.

[22] Following these efforts, Mr. Tosh's evidence suggests that, between 2017 and 2020, Voyager II and III focused their resources on maintaining daily operations as well as the comfort and security of the residents. He said that during this time, resources for these purposes were severely limited. Circumstances were made worse in early 2020 with the global COVID-19 pandemic. In particular, Mr. Tosh deposed that: (1) the extraordinary health measures increased operating costs; (2) routine operations became materially altered and more complicated; (3) increased demand for additional or alternative care resulted in residents leaving the residences; and (4) virtual obliteration of the remaining market to attract new residents. Despite these efforts, Mr. Tosh acknowledged that efforts to obtain alternate financing had, to this point, been unsuccessful.

[23] Even so, Mr. Tosh's evidence included expressions of cautious optimism. In a supplemental affidavit, he exhibited a report prepared earlier this year by Cushman & Wakefield and related to the Seniors' Housing Industry. The report suggested two main reasons for disruption in the senior residence market. One reason was declining occupancy rates due to curtailed leasing during periods of government-mandated shutdowns. The second reason was described as cost escalation due to increased labour, enhanced infection control and increased insurance costs. The report concluded that occupancy rates are expected to recover within a reasonable time and that there will be an increased demand for senior residences in the future. In particular, the report compared the seniors' housing market during the 2007-2009 global financial crisis with the pandemic circumstances and found them comparable.

[24] The Court also received information about Caleb's interventions. According to Mr. Tosh, Caleb did not have enough majority units in the two limited partners to take certain actions which it considered necessary and appropriate. He went on to say that, in order to control the situation better, Caleb acquired the majority of partnership units in each of the two limited partners, 80% in Tisdale LP and 86% in Melville LP.

[25] Mr. Tosh deposed that, since taking majority control, Caleb has taken steps to improve circumstances by doing the following: (a) continuing to maintain facilities; (b) streamlining operations through staffing efficiencies and controlling food costs; (c) upgrading website and social media pages; (d) materially revising marketing strategies, including emphasizing the operations' track record in preventing any COVID-19 cases in residents; (e) hiring key management personnel in both facilities; and (f) working with the Tisdale manager for the creation of a professional video promoting the facility on social media.

[26] Mr. Tosh asserted that Voyager II and III have both acted in good faith

and with due diligence in their efforts to address the issues and challenges facing their operations.

[27] Given the insolvencies, it is acknowledged that Voyager II and III will be required to sell their respective operations. Even so, Mr. Tosh deposed to his view that the disposition of the operations is best carried out as a going concern, and not through a court-appointed receiver. In particular, he expressed the opinion that "a company-driven sales process is the least costly and most likely way to achieve the mutually-agreed-upon goals of maximizing value and preserving the status quo vis-à-vis operations and stability for residents and their families." To further such a process, Mr. Tosh stated that Voyager II and III would work with their advisors in good faith and with due diligence to put forward a sale and investment solicitation process [SISP]. In his view, the value of the assets to be sold is maximized by retaining the business model of "selling a lifestyle" as opposed to "selling condominium units and parking stalls", which he suggests is the proposal coming from Conexus. Having said all this, the borrowers presented no valuation evidence to support Mr. Tosh's opinion – an opinion which was not meaningfully qualified as expert evidence.

[28] Mr. Tosh also presented evidence of his own background and skill set with respect to seniors' residences, which, in his view, qualifies him to express his opinion. He deposed that he has an MBA, a doctorate in economics and a doctorate in business administration. He further said that he has been successful in building and selling every type of business with material returns to investors. A recent example of this is the sale of a seniors' residence in Edmonton to Chartwell Retirement Homes. In addition, Mr. Tosh deposed that over the last seven years, he has sold or facilitated the sale of seven other seniors' residences in Saskatoon, Regina, Swift Current, Moose Jaw and Yorkton, including sales to Revera Living, which he regards as a another major owner/operator of seniors' residences in North America.

[29] At this point, I depart from the narrative simply to emphasize that, despite his proclaimed expertise, Mr. Tosh was not properly qualified as an "independent" expert witness in accordance with the principles laid down by the Supreme Court of Canada. See *White Burgess Langille Inman v Abbott and Haliburton Co.*, 2015 SCC 23, [2015] 2 SCR 182.

[30] As earlier mentioned, the Court also received an affidavit deposed by the Chief Executive Officer of Caleb, Celia-Ann Koturbash. She described Caleb's business as the ownership and management of retirement communities. As part of its business, it manages the two borrowers' operations as well as the other three sister operations in Saskatchewan. Caleb's management is carried out through separate long-term management agreements for each operation. Each community is operated under the name "Caleb Village", a business name registered to Caleb. At present, Caleb is the owner of 80% and 86% of the total limited partnership units issued by the respective limited partners within Voyager II and III.

[31] In her affidavit, Ms. Koturbash expressed concern, on behalf of Caleb, that the appointment of the proposed receiver would imperil Caleb's ability to continue to provide managerial services to the retirement communities in question. She understands that if a receivership order is granted, Caleb would be required to cooperate with the receiver in the management of the business and affairs of Voyager II and III. She further expressed the concern that the added responsibility of cooperating and communicating with the receiver would add to the workload of Caleb's employees and would imperil its ability to continue to manage the communities. Finally, she also expressed concern about the erosion of Caleb's security if a receiver is appointed.

[32] In addition to the above background facts, I should note the contents of the Pre-Filing Report [Report] filed by Bowra. The Report includes information relating to the background of Voyager II and III, the causes of their financial difficulty, a

13-week cash flow forecast and a description of proposed debtor-in-possession [DIP] financing. The Report concludes with Bowra's conclusions and recommendations.

[33] The cash flow forecast in the Report is drawn from information respectively provided by Voyager II and III, covering a 13-week period from August 30, 2021, to November 28, 2021. It assumes that an initial order under the *CCAA* will be granted and that payments to creditors for pre-filing arrears will be stayed and compromised as part of the *CCAA* proceedings. Based on these assumptions, Bowra summarized the forecast as follows:

13 Week Total		
	Tisdale LP	**Melville LP**
	$'s	
Beginning Cash Balance	**6,534**	**26,887**
Receipts		
Collection of rent	265,000	285,000
DIP Financing	200,000	200,000
Collection of lifestyles	19,000	15,000
Miscellaneous	17,728	13,289
Total Receipts	**501,728**	**513,289**
Disbursements		
Professional fees	190,000	190,000
Payroll and benefits	150,120	159,950
Supplier purchases	48,000	52,500
Condo fees	44,857	44,364
Management fees	26,991	26,991
Utilities, repairs, and maintenance	19,200	21,400
Miscellaneous	12,000	12,000
Total Disbursements	**491,168**	**507,205**
Ending Cash Balance	**17,094**	**32,971**

[34] The DIP financing contemplated in the above forecast will be required as working capital to fund operations for both residences. In this respect, it is acknowledged that, without the DIP financing, there will be insufficient funds to continue operations during the initial stay period. It is expected that Caleb will agree to provide $200,000 of DIP financing for the operation of each residence.

[35] Bowra's conclusions and recommendations appear in the last three full

paragraphs of the Report:

> **CONCLUSIONS AND RECOMMENDATIONS**
>
> 50. The Proposed Monitor agrees that the Applicants are insolvent and are facing serious liquidity issues which have created the need to obtain protection from their creditors under the CCAA.
>
> 51. The Applicants are in default of their current debt obligations. They have ceased paying these obligations in the ordinary course of business as they generally become due. The CCAA Proceedings will provide the Applicant's with a meaningful opportunity to successfully restructure their business and financial affairs (including by proposing a Sale and Investment Solicitation Process to market their assets for consideration by stakeholders, creditors and this Honourable Court).
>
> 53. The Proposed Monitor has reviewed the materials filed by the Applicants in support of the CCAA Proceedings and has consented to act as Monitor should this Honourable Court grant the Proposed Initial Order.

Law

Appointment of Receiver

[36] Conexus' application for the judicial appointment of a receiver is brought pursuant to s. 243 of the *BIA*. For the purpose of this application, and having regard to the positions of the parties, it is not necessary to recite the wording of s. 243 here. Suffice it to say that in order for the Court to appoint a receiver under s. 243 of the *BIA*, the applicant must establish two essential elements. Firstly, it must establish that the relevant debtor is an insolvent person within the meaning of the *BIA*. Secondly, once insolvency is established, the applicant must further persuade the court that it is "just or convenient" for the court to appoint a receiver over the property, assets and undertakings of the debtor. See *Pillar Capital Corp. v Harmon International Industries Inc.*, 2020 SKQB 19; *Affinity Credit Union 2013 v Vortex Drilling Ltd.*, 2017 SKQB 228, 50 CBR (6th) 220 [*Vortex*]; and *Paragon Capital Corp. v Merchants & Traders Assurance Co.*, 2002 ABQB 430, 46 CBR (4th) 95 [*Paragon Capital*].

[37] In the present case, the evidence and the candid admission of Mr. Tosh clearly establish the insolvency of both borrowers. The remaining question, relating to whether it is "just or convenient" for the court to appoint a receiver, is more contextual. It depends on a number of factors. In *Paragon Capital*, Romaine J. listed a number of helpful, but non-exhaustive, factors at paragraph 27:

> [27] ...
>
> a) whether irreparable harm might be caused if no order were made, although it is not essential for a creditor to establish irreparable harm if a receiver is not appointed, particularly where the appointment of a receiver is authorized by the security documentation;
>
> b) the risk to the security holder taking into consideration the size of the debtor's equity in the assets and the need for protection or safeguarding of the assets while litigation takes place;
>
> c) the nature of the property;
>
> d) the apprehended or actual waste of the debtor's assets;
>
> e) the preservation and protection of the property pending judicial resolution;
>
> f) the balance of convenience to the parties;
>
> g) the fact that the creditor has the right to appoint a receiver under the documentation provided for the loan;
>
> h) the enforcement of rights under a security instrument where the security-holder encounters or expects to encounter difficulty with the debtor and others;
>
> i) the principle that the appointment of a receiver is extraordinary relief which should be granted cautiously and sparingly;
>
> j) the consideration of whether a court appointment is necessary to enable the receiver to carry out its' duties more efficiently;
>
> k) the effect of the order upon the parties;
>
> l) the conduct of the parties;
>
> m) the length of time that a receiver may be in place;
>
> n) the cost to the parties;
>
> o) the likelihood of maximizing return to the parties;

p) the goal of facilitating the duties of the receiver.

Consideration of these factors also plays a role in the Court's consideration of the borrowers' request for relief under the *CCAA*.

Relief Under the CCAA

[38] As expressed in the long title of the *CCAA*, the object of the statute is "to facilitate compromises and arrangements between companies and their creditors". In its most recent consideration of the statute, the Supreme Court of Canada discussed the object and purpose of the *CCAA* in broad terms, observing its historical significance and its flexibility. This discussion appeared in *Century Services Inc. v Canada (Attorney General)*, 2010 SCC 60 at paras 15 to 21, [2010] 3 SCR 379 [*Century Services*]. A concise description of the purpose of the *CCAA* is set out in paragraph 15, where Deschamps J. wrote the following:

> [15] As I will discuss at greater length below, the purpose of the *CCAA* – Canada's first reorganization statute – is to permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets. Proposals to creditors under the *BIA* serve the same remedial purpose, though this is achieved through a rules-based mechanism that offers less flexibility. Where reorganization is impossible, the *BIA* may be employed to provide an orderly mechanism for the distribution of a debtor's assets to satisfy creditor claims according to predetermined priority rules.

[39] In the immediately following paragraphs, Deschamps J. reviewed the history of the *CCAA* from its first enactment in 1933, during the Great Depression, to its then current version. In doing so, she commented on the remedial objectives of the legislation – objectives which implicitly recognized the benefit of maintaining an insolvent company as a going concern. This recognition was premised on the understanding that liquidation of an insolvent company had the potential to harm other interested parties, particularly the company's creditors and employees.

[40] Deschamps J. also observed that judicial consideration of both *CCAA* and

BIA remedies fits, in an ordered way, within the collectivized remedy process, something she described as the "single proceeding model". The comments of Deschamps J. in this regard appear at paragraph 22:

> [22] While insolvency proceedings may be governed by different statutory schemes, they share some commonalities. The most prominent of these is the single proceeding model. The nature and purpose of the single proceeding model are described by Professor Wood in *Bankruptcy and Insolvency Law*:
>
> > They all provide a collective proceeding that supersedes the usual civil process available to creditors to enforce their claims. The creditors' remedies are collectivized in order to prevent the free-for-all that would otherwise prevail if creditors were permitted to exercise their remedies. In the absence of a collective process, each creditor is armed with the knowledge that if they do not strike hard and swift to seize the debtor's assets, they will be beat out by other creditors. [pp. 2-3]
>
> The single proceeding model avoids the inefficiency and chaos that would attend insolvency if each creditor initiated proceedings to recover its debt. Grouping all possible actions against the debtor into a single proceeding controlled in a single forum facilitates negotiation with creditors because it places them all on an equal footing, rather than exposing them to the risk that a more aggressive creditor will realize its claims against the debtor's limited assets while the other creditors attempt a compromise. With a view to achieving that purpose, both the *CCAA* and the *BIA* allow a court to order all actions against a debtor to be stayed while a compromise is sought.

[41] Bearing in mind the object and purpose of the *CCAA*, the central provision of the statute in this case is s. 11.02, which reads as follows:

> **11.02** (1) A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 10 days,
>
> > (a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;
> >
> > (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

From:Court of Queen's Bench Local R To:913063478350 10/19/2021 16:10 #031 P.017/028

> (c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.
>
> (2) A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,
>
> (a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);
>
> (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
>
> (c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.
>
> (3) The court shall not make the order unless
>
> (a) the applicant satisfies the court that circumstances exist that make the order appropriate; and
>
> (b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.
>
> (4) Orders doing anything referred to in subsection (1) or (2) may only be made under this section. [Emphasis added]

[42] In identifying s. 11.02 as central to this application, I disregard neither the relevant definitions in the *CCAA* nor the provisions which inform the Court's jurisdiction to consider the borrowers' application. As I received counsel's submissions, it was clear that the issues of jurisdiction and eligibility are not in dispute. There is little doubt that the borrowers are "financially troubled" to the extent that they qualify as "debtor companies" within the meaning of s. 2(1) of the *CCAA*. Similarly, there is no issue about the borrowers' respective indebtedness meeting the threshold of $5 million, as described in s. 3(1) of the *CCAA*.

[43] The principal issue engaged by the borrowers' application relates to whether they have met the burden imposed by s. 11.02(3). This requires the borrowers

to satisfy the Court that there are "appropriate circumstances" for the order and that the borrowers have acted, and continue to act, in "good faith and with due diligence".

[44] On the question of appropriate circumstances, I do not discern any disagreement between the parties about the applicable legal principles. They agree that the Saskatchewan Court of Appeal properly addressed this question in *Industrial Properties Regina Limited v Copper Sands Land Corp.*, 2018 SKCA 36 [*Copper Sands*]. After giving due regard to the observations in *Century Services*, the Court in *Copper Sands* concluded that the burden of establishing appropriate circumstances is "not exceptionally onerous". At paragraphs 20 and 21 of *Copper Sands*, Herauf J.A. described the nature of a debtor company's task in establishing appropriate circumstances:

> [20] As the Supreme Court noted in *Century Services*, initial *CCAA* orders are made in the "hothouse of real-time litigation" (at para 58). The debtor corporation is often in crisis-mode due to its failure to meet creditor obligations and is seeking *CCAA* protection to obtain some breathing room to enable it to get its affairs in order without creditors knocking at the door. Therefore, to obtain an initial 30-day order, the applicant is not required to prove it has a "feasible plan" but merely "a germ of a plan": *Alberta Treasury* [2013 ABQB 432] at para 14. The court must assess whether the circumstances are such that, with the initial order, the debtor corporation has a "reasonable possibility of restructuring": *Matco* [*Matco Capital Ltd. v Interex Oilfield Services Ltd.* (1 August 2006) Docket No. 06108395 (Alta QB)]. To require the applicant corporation to present a fully-developed restructuring plan or have the support of all its creditors at the initial stage of *CCAA* proceedings, although desirable, is not expected. To impose such a threshold to establish "appropriate circumstances" would unduly hinder the purpose of an initial order which, as the Supreme Court explained in Century Services, is to provide the conditions under which the debtor can attempt to reorganize.
>
> [21] For the purposes of an initial order, the debtor corporation must convince the court that the initial order will "usefully further" its efforts towards attempted reorganization. If the debtor corporation satisfies this onus, the court may grant the initial application and provide the conditions under which the debtor corporation can attempt to reorganize, namely, staying creditor enforcement to preserve the debtor corporation's status quo for a limited period of time. If, however, the debtor corporation fails to satisfy this onus and the court

> determines that the application is merely an effort by the debtor corporation to avoid its obligations to its creditors and postpone an inevitable liquidation, the initial application should be denied: *Rescue! The Companies' Creditors Arrangement Act* at 53-54.

[45] Although Herauf J.A. did not cite the decision of this Court in *Vortex*, I find the approach followed in that case is consistent with that in *Copper Sands*. In *Vortex*, Scherman J. confirmed the burden an applicant must meet, at paragraph 18. He also identified five principles from the relevant jurisprudence that apply to *CCAA* applications. In this regard, Scherman J. wrote the following at paragraph 17:

> [17] Jurisprudence establishes that the following principles are applicable to *CCAA* applications:
>
> a. The legislative purpose of the *CCAA* is to permit qualifying debtors to carry on business and where possible avoid the social and economic costs of liquidating its assets: See *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60 (S.C.C.) at para 15, [2010] 3 S.C.R. 379 (S.C.C.) [*Century*].
>
> b. The remedial purpose of the *CCAA* is to facilitate the making of a compromise or arrangement between an insolvent debtor company and its creditors to the end that the company is able to continue in business: See *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), [1991] 2 W.W.R. 136 (B.C. C.A.).
>
> c. The requirements of appropriateness, good faith and due diligence are baseline considerations that a court should always bear in mind when exercising *CCAA* jurisdiction: *Century* at para 70.
>
> d. Appropriateness is assessed by inquiring whether the order sought advances the remedial purpose of the *CCAA*: *Century* at para 70
>
> e. Section 11.02(3)(a) of the *CCAA* states that the court shall not grant a stay of proceedings unless:
>
> (a) the applicant satisfies the court that circumstances exist that make the order appropriate...

[46] In the present case, the borrowers acknowledge that relief under the *CCAA* is frequently sought where a debtor company is seeking an arrangement in which it will continue to conduct business with most or all of the assets it presently holds.

Despite this acknowledgement, the borrowers observe, accurately in my view, that relief under the *CCAA* can also assist a debtor company in winding down its operations and liquidating its assets. In this regard, the borrowers describe the arrangement they propose as a "liquidating insolvency", which the Court can authorize pursuant to s. 36 of the *CCAA*.

[47] I do not find it necessary to recite the words of s. 36 here. Suffice it to say that s. 36(3) lists six non-exhaustive factors which a court must consider in deciding whether it will authorize the disposition of assets outside the ordinary course of business. These are:

(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.

[48] In opposing the positions taken by Voyager II and III, Conexus has expressed serious concerns about the borrowers' stated intention to seek interim DIP financing from Caleb. This intention engages s. 11.2 of the *CCAA*, which was

substantially amended in September 2009. The amendments essentially codified a court's authority to address requests for DIP financing. The current version of s. 11.2 reads as follows:

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

[49] In a nutshell, s. 11.2 provides the Court with the jurisdiction to make declaratory orders that all or part of a debtor company's property shall be subject to a security or charge in favour of a person who agrees to advance interim financing to the debtor company. In doing so, the Court may order that the security or charge in favour of the interim lender shall have greater priority to the claims of any existing secured creditors. The reference to this form of financing as "DIP financing" is more a colloquial term than one recognized by law, a colloquialism predating the 2009 amendments.

[50] The *CCAA* sets out, in s. 11.2(4), seven non-exhaustive factors a court is obliged to consider in determining whether to authorize DIP financing. In addition to those factors, there is jurisprudence which suggests there are three other prerequisites to this authorization. In *Canwest Global Communications Corp. (Re)* (2009), 59 CBR (5th) 72 (Ont Sup Ct), Pepall J. concluded that the language of s. 11.2(1) contemplated three specific prerequisites before a court could authorize DIP financing. As drawn from paragraphs 32 to 34 of the decision, these prerequisites are:

(a) notice must be provided to secured creditors likely to be affected by the security granted to the interim lender;

(b) the amount of the proposed financing must be appropriate having regard to the borrower's cashflow statement; and

(c) the charge for the interim financing should not secure an obligation that existed prior to the date the order authorizing the financing is made.

More recently, the analysis of Pepall J. on this point was adopted by Morawetz R.S.J.,

as he then was, in *Index Energy Mills Road Corporation (Re)*, 2017 ONSC 4944, 51 CBR (6th) 216.

[51] Aside from the prerequisites and factors to be considered, the question of authorizing DIP financing, with a prior charge over the interest of a current secured creditor, simply comes down to an exercise of the Court's discretion. The essence of this discretion is concisely encapsulated in Roderick J. Wood, *Bankruptcy and Insolvency Law*, 2d ed (Toronto: Irwin Law, 2015). Citing *United Used Auto & Truck Parts Ltd. (Re)* (1999), 12 CBR (4th) 144 (BCSC) at para 28, Professor Wood writes the following at page 388:

> In determining whether it is appropriate to give a DIP lender priority over existing secured creditors, courts considered the extent to which the secured creditors would be adversely affected. They indicated that there should be "cogent evidence that the benefit of DIP financing clearly outweighs the potential prejudice to the lenders whose security is being subordinated." To make this assessment, the court must be given information as to the value of the collateral and the amount of the secured obligations.

[52] In contested applications for *CCAA* relief, the matter of DIP financing has had a material impact, particularly in cases where courts denied relief. One such case is the decision of Butler J., as he then was, in *Marine Drive Properties Ltd. (Re)*, 2009 BCSC 145, 52 CBR (5th) 47 [*Marine Drive*]. The case concerned real estate developers who had become insolvent and sought both an initial order and an order for $1.7 million in DIP financing. The initial order was granted *ex parte*, with the stipulation that the request for DIP financing be heard later and with notice. Subsequently, multiple secured creditors applied to set the order aside. They also strenuously opposed the debtors' application for $1.7 million in DIP financing.

[53] Through the contested application, it became apparent that the debtors had run out of money more than a year before the application was brought. The Court also noted that, in the interim, the debtors had failed to sell their land holdings, arrange

additional financing or find a new partner. Butler J. was unimpressed and set aside the *ex parte* order. In doing so, he commented, at paragraph 38, that the application reflected an inappropriate use of the *CCAA* remedy:

> [38] To put it bluntly, the Petitioners have sought *CCAA* protection to buy time to continue their attempts to raise new funding. As counsel for the Petitioners stated in argument, they need time to "try to pull something out of the hat". They have sought DIP financing so that they can do this at the expense of their creditors. This is not an appropriate use of the extraordinary remedy offered by the *CCAA*.

[54] The decision in *Marine Drive* was favourably considered by Kent J. in *Octagon Properties Group Ltd. (Re)*, 2009 ABQB 500, 58 CBR (5th) 276 [*Octagon*]. There, the Court denied a *CCAA* stay application which included a request for $1.5 million in DIP financing. At paragraph 17, Kent J. observed that, if the requested relief was granted, the first mortgagees "would be paying the cost to permit Octagon to buy some time".

[55] Decisions of this Court have also addressed this question. In *Vortex*, the debtor sought approval of up to $1 million in DIP financing as part of its request for *CCAA* relief. Scherman J. denied the request and appointed a receiver, basing his decision on 11 separate circumstances. One circumstance related to the debtor's request for DIP financing. The comments of Scherman J. on this matter appear in paragraph 37(k) of the decision:

> [37] … [T]he evidence satisfies me that:
>
> …
>
> k. If Vortex were granted *CCAA* protection, Affinity would effectively bears the risks and costs associated with that action since, with the exception of the relatively insignificant dollar amount owed to unsecured creditors (some $193,000), Affinity is the only creditor. If Vortex were given *CCAA* protection then, under the usual DIP financing protocols of *CCAA* protection, costs arising from the continuing operation of Vortex that are in excess of its revenue, including the costs of the Monitor and its legal

> counsel, will effectively be borne by the security Affinity holds. The Pre-Filing Report of the Proposed Monitor contemplates approval of up to $1,000,000 in DIP financing for the proposed 13-week cash flow period which includes $500,000 in professional fees. Such DIP financing would, of course, assume a super priority position over the secured financing of Affinity. Thus the risks associated with *CCAA* protection are effectively borne by Affinity and the unsecured lenders if the security cushion suggested by Vortex turns out not to exist.

Analysis

[56] Having regard to the evidence and the applicable legal principles engaged in these applications, I am not persuaded that relief under the *CCAA* is either warranted or justified. My reasons for arriving at this conclusion are not substantially dissimilar from those advanced by Conexus in its submissions to the Court. I will address those reasons in the ensuing paragraphs.

[57] First, I am not persuaded that the sale of the two operations, as a going concern, will be materially different from liquidation under a receivership. In saying this, I understand that, from a purely intuitive perspective, one could reasonably expect that the sale of an actively operated business is likely to generate more sale proceeds than a forced liquidation. Intuition, however, is not a substitute for evidence. In the present case, the only valuation evidence for the two operations came from Conexus. While that evidence consists of real estate appraisals, it raises serious concerns about a disposition, by either a receiver or the borrowers, generating sufficient proceeds to cover the indebtedness owing to Conexus and the two municipalities.

[58] The appraisal evidence was not meaningfully contradicted by Mr. Tosh. In this respect, it must again be emphasized that he was not qualified to give any expert opinion on valuation. Further, as an interested party, any opinion he expressed in this regard was clearly self-serving. Aside from these obvious difficulties, Mr. Tosh's opinion on the outcome of any disposition was vague and non-specific. He presented

no business valuations, whether based on asset values or capitalized income, for either Voyager II or III. Moreover, Mr. Tosh demonstrated no inclination to abandon the business plan that required the two operations to retain ownership of roughly two thirds of the residential units. Given this inclination, and without a formal business valuation, it is difficult for me to accept the proposition that sale of the business as a going concern would provide more proceeds than the block sale valuations described in the two appraisals submitted by Conexus.

[59] Secondly, I am not persuaded that Voyager II and III have acted with due diligence. The property tax abatements expired four years ago. Since then, particularly after 2017, the borrowers have ignored their property tax obligations. While it is clear that both operations have experienced serious cash flow crises, I agree with Conexus that the efforts to address these issues have been superficial. In particular, there is no evidence before the Court that either Voyager II or III is prepared to reconsider its business plan of selling only one-third of its units. To date, that business plan is unblemished with success. If the borrowers continue to believe in this business plan, they should have presented substantive evidence to back up their belief and to explain why it would be ill advised to modify or adjust it. They did not do so.

[60] The third, fourth and fifth reasons for my conclusion all relate to the borrowers' request for DIP financing. In my view, the lack of any meaningful valuation from the borrowers is significant. Bearing in mind Professor Wood's comments, it is difficult for the Court to conclude that the benefit of any such financing "clearly outweighs" the prejudice Conexus is likely to experience from the subordination of its security. Without the valuation, the outweighing of prejudice is completely speculative.

[61] I am also concerned that, as in the *Marine Drive*, *Octagon* and *Vortex* cases, the request for *CCAA* relief and associated DIP financing is little more than an attempt to buy time and add it to the four years that has already passed. While the

amount of DIP financing sought in this application is considerably less than the amounts requested in the above cited cases, I do not regard that as a significant distinction.

[62] Finally, I cannot ignore the fact that the borrowers' proposal involves financing advanced by Caleb. Most DIP lenders are commercial lenders who stand at arm's length from the debtors who seek the funding. That is clearly not the case here. Caleb, the proposed interim lender, not only stands within arm's length of Voyager II and III, it is also a secured creditor for both operations, albeit subordinate to Conexus' security. Caleb also plays a central role in the day-to-day management and operation of both borrowers.

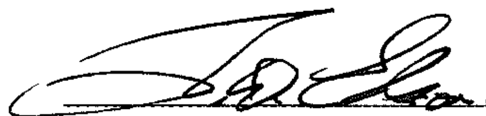
[63] The evidence suggests that Voyager II and III cumulatively owe more than $13 million to Caleb. I appreciate that, if the Court were to authorize the proposed DIP financing, any priority for that financing would not apply to this existing debt. Even so, I have considerable discomfort with the notion that Caleb should have priority over Conexus for any additional financing. Aside from the prospect of prejudice to Conexus through any form of DIP financing, I am concerned about the potential for mischief, such as Caleb managing and operating the businesses for its own benefit, with less than due regard to the interests of Conexus.

[64] In making the above comments, I am not unmindful of Mr. Tosh's evidence about the impact of the COVID-19 pandemic. While I accept that the pandemic has impacted the operations of both Voyager II and III, it is obvious that their financial difficulties predated any such impact. I am not persuaded that circumstances would have been materially different had the pandemic not occurred.

Conclusion

[65] In the result, the application for an initial stay under the *CCAA* is dismissed. Further, the application for the appointment of a receiver is allowed. I expect

that the appointment order will be in the form of latest draft order filed. That said, Rule 10-4 of *The Queen's Bench Rules* is not waived. I shall remain seized with this matter solely for the purpose of addressing the form of the order.



J.
R.W. ELSON