Court File No. CV-17-589016-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF BANRO CORPORATION, BANRO GROUP (BARBADOS) LIMITED, BANRO CONGO (BARBADOS) LIMITED, NAMOYA (BARBADOS) LIMITED, LUGUSHWA (BARBADOS) LIMITED, TWANGIZA (BARBADOS) LIMITED AND KAMITUGA (BARBADOS) LIMITED

(the "**Applicants**")

REPLY BOOK OF AUTHORITIES OF THE APPLICANTS AND THE REQUISITE CONSENTING PARTIES (Plan Sanction Order)

March 26, 2018

CASSELS BROCK & BLACKWELL LLP
2100 Scotia Plaza
40 King Street West
Toronto, ON M5H 3C2

Ryan C. Jacobs LSUC# 59510J
Tel: 416.860.6465
Fax: 416.640.3189
rjacobs@casselsbrock.com

Jane O. Dietrich LSUC# 49302U
Tel: 416.860.5223
Fax: 416.640.3144
jdietrich@casselsbrock.com

Sophie Moher LSUC# 72317H
Tel: 416.860.2903
Fax : 416.640.3021
smoher@casselsbrock.com

Lawyers for the Applicants

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TAB 1

2015 ONSC 4648
Ontario Superior Court of Justice [Commercial List]

4519922 Canada Inc., Re

2015 CarswellOnt 12034, 2015 ONSC 4648, 257 A.C.W.S. (3d) 25, 28 C.B.R. (6th) 111

In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c.C-36 as Amended

In the Matter of a Plan of Compromise or Arrangement of 4519922 Canada Inc.

Newbould J.

Heard: July 15, 2015
Judgment: July 23, 2015
Docket: CV-1410791-00CL

Counsel: Robert I. Thornton, Lee M. Nicholson for Applicants
Avram Fishman, Mark E. Meland for Creditors' Committee
Evan Cobb, Rahool Agarwal, Stephen Taylor for Insurers
Sylvain Vauclair, Neil Peden for Chrysler Inc. and CIBC Mellon Trust Company
Jay A. Swartz, Dina Milivojevic, James Doris, Peter Osborne for Monitor
James H. Grout for twenty-two CLCA partners
Harry M. Fogul for nineteen CLCA partners
Lou Brzezinski, Alexandra Teodorescu for Gambazzi Group

Subject: Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.3 Arrangements
XIX.3.b Approval by court
XIX.3.b.i "Fair and reasonable"
Headnote
Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Approval by court — "Fair and reasonable"
Matter related to 22-year litigation in Quebec involving audit of CH Ltd. by CLCA — Initial order was made on December 8, 2014 granting protection to applicant under Companies' Creditors Arrangement Act to permit it to develop plan to resolve outstanding litigation in Quebec as set out in term sheet — Term sheet provided for $220 million to be contributed by CLCA partners sued in Quebec, by some non-CLCA partners, by insurers of CLCA sued in Quebec and by applicant and related corporations — In exchange, releases of contributors were to be provided — Claims procedure order had been granted — Plan of arrangement had been approved by majority of creditors — Proposed by plan was opposed by G Group, which was headed by former director of CH Ltd. — Applicant sought order sanctioning plan of arrangement and compromise concerning applicant and accounting firm CLCA pursuant to s. 6 of CCAA — Application granted — There had been strict compliance with all statutory requirements and previous orders in proceeding — Nothing had been done or purported to be done that was not authorized by CCAA — Court rejected submission of G Group that release of insurers, who were making substantial contribution to plan under term sheet, was contrary to public order provisions of Civil Code of Quebec and that CCAA could not authorize plan that was contrary to existing

laws — Plan was fair and reasonable — G Group had right to have their claim determined in claims process along with other claimants — Third party releases were justified.

Table of Authorities

Cases considered by *Newbould J.*:

ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp. (2008), 2008 ONCA 587, 2008 CarswellOnt 4811, 45 C.B.R. (5th) 163, 47 B.L.R. (4th) 123, (sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re*) 296 D.L.R. (4th) 135, (sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re*) 240 O.A.C. 245, (sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re*) 92 O.R. (3d) 513 (Ont. C.A.) — considered

Canwest Global Communications Corp., Re (2010), 2010 ONSC 4209, 2010 CarswellOnt 5510, 70 C.B.R. (5th) 1 (Ont. S.C.J. [Commercial List]) — referred to

Muscletech Research & Development Inc., Re (2007), 2007 CarswellOnt 1029, 30 C.B.R. (5th) 59 (Ont. S.C.J. [Commercial List]) — considered

Olympia & York Developments Ltd. v. Royal Trust Co. (1993), 17 C.B.R. (3d) 1, (sub nom. *Olympia & York Developments Ltd., Re*) 12 O.R. (3d) 500, 1993 CarswellOnt 182 (Ont. Gen. Div.) — referred to

Sino-Forest Corp., Re (2012), 2012 ONSC 7050, 2012 CarswellOnt 15913 (Ont. S.C.J. [Commercial List]) — referred to

Westerhof v. Gee Estate (2015), 2015 ONCA 206, 2015 CarswellOnt 3977, 124 O.R. (3d) 721, 384 D.L.R. (4th) 343, 77 M.V.R. (6th) 181, 331 O.A.C. 129 (Ont. C.A.) — considered

White Burgess Langille Inman v. Abbott and Haliburton Co. (2015), 2015 SCC 23, 2015 CSC 23, 2015 CarswellNS 313, 2015 CarswellNS 314, 383 D.L.R. (4th) 429, 18 C.R. (7th) 308, (sub nom. *Abbott and Haliburton Co. v. WBLI Chartered Accountants*) 470 N.R. 324, 67 C.P.C. (7th) 73 (S.C.C.) — considered

Statutes considered:

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

Generally — referred to

s. 6 — pursuant to

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

R. 53.03(2.1) [en. O. Reg. 438/08] — considered

APPLICATION for approval of plan of arrangement and compromise.

***Newbould J.*:**

1 The applicant, 4519922 Canada Inc., a partner of Coopers & Lybrand Chartered Accountants ("CLCA"), sought an order sanctioning a plan of arrangement and compromise dated July 2, 2015 concerning the applicant and CLCA pursuant to section 6 of the CCAA, and ancillary relief. At the conclusion of the hearing the order sought was made for written reasons to follow. These are the reasons.

2 The circumstances surrounding the 22 year litigation in Quebec involving the audit of Castor Holdings Ltd. by CLCA are set out in my endorsement of January 12, 2015 and need not be repeated. Suffice it to say, without some resolution of the outstanding claims of some $1.5 billion yet to be litigated, the litigation would no doubt continue for many years to come at incredible expense to all involved.

3 Fortunately, all of the claimants save for one group, the Gambazzi Group, have agreed to a term sheet that forms the basis of a plan of arrangement and compromise. The Gambazzi Group raise a number of issues in opposition to a sanction of the Plan. The Gambazzi Group is comprised of Dr. Marco Gambazzi, a Swiss lawyer and former director of Castor Holdings, two of his personal companies and eight other companies for which he served as a director and investment advisor.

Procedural CCAA history

4 The Initial Order was made on December 8, 2014 granting protection to the applicant under the CCAA to permit it to develop a plan to resolve the outstanding litigation in Quebec as set out in a term sheet that had been agreed to by most but not all of the claimants in the Quebec litigation. A stay of that litigation was included in the Initial Order.

5 The term sheet provided for a large amount, some $220 million, to be contributed by the CLCA partners sued in Quebec, by some non-CLCA partners exposed under an indemnity given to PwC, by the insurers of CLCA sued in Quebec and by the applicant and related corporations. In exchange, releases of the contributors were to be provided. The proceeds were to be paid first to pay the costs of the Widdrington test case, second to pay approximately $105 million to creditors who funded that amount to pursue the litigation and third to pay all creditors on account of approved claims on a *pari passu* basis. The term sheet provided that CLCA would acknowledge as approved claims for voting and distribution purposes the claims of the German Bank Group, the Canadian Bank Group and the Castor Trustee in Bankruptcy.

6 Chrysler, holding approximately 28% of the claims in the Quebec litigation, was not a party to the term sheet. Nor was the Gambazzi Group. It was disclosed in the application from the outset that the Gambazzi Group's claims against CLCA suffered from numerous alleged deficiencies and would need to be determined in a claims process.

7 Under the Initial Order, the German Bank Group, the Canadian Bank Group and the Castor Trustee in Bankruptcy formed a committee of the creditors to assist the applicant and CLCA towards presenting a plan to all creditors. A motion on a comeback hearing by Chrysler to dismiss the CCAA proceedings was later dismissed, and Chrysler eventually came to terms with the creditors' committee on an amended term sheet. Chrysler was added as a member of the creditors' committee and now supports the sanctioning of the Plan.

8 On March 10, 2015, a claims procedure order was issued establishing a claims process to determine the validity, quantum and priority of claims against the applicant and CLCA. The claims procedure order was prepared by the applicant in consultation with the Monitor, the creditors' committee, the Insurers who are defendants in an action in Quebec, and other stakeholders. The Gambazzi Group did not appear in Court to oppose the claims procedure order and took no steps to appeal it.

9 The claims procedure order provides for a claims process as follows:

> a. the submission of all claims to the Monitor;
>
> b. the right for any claimant to examine any proof of claim deposited with the Monitor and to provide documents or information to the Monitor and/or the applicant and CLCA for their consideration with respect to any claim;
>
> c. an initial review of all claims by the applicant and CLCA;
>
> d. an independent review by the Monitor of any claims accepted by the applicant and CLCA to determine if the acceptance was reasonable and the need for the Monitor to consent to an accepted claim; and
>
> e. in the event that any claim is disputed, a claims adjudication process, either before a claims officer, or the Court.

10 On June 16, 2015, a meeting order was made to establish the date for the creditors' meeting and authorizing the applicant and CLCA to file the Plan with the Court. The Honourable James Farley Q.C. was also appointed as the claims officer to adjudicate disputed claims. To date only the claims of the Gambazzi Group have been disallowed by the applicant and CLCA.

11 Under the meeting order, the claimants were to vote at the creditors' meeting in two separate classes. Claimants holding claims arising from the Castor audit formed a Castor claimant class. Claimants holding general claims and

claims related to post-retirement obligations of the applicant or CLCA formed a general claimant class. At the creditors' meeting held on July 7, 2015 the plan was approved by 100% of the general claimant class and 73.2% of the Castor claimant class holding 76.94% of the face value of the Castor claims. The only claimants who voted against the plan were claimants in the Gambazzi Group, whose claims were recognized for voting but not distribution purposes.

Request for an adjournment

12 At the opening of the hearing, counsel for the Gambazzi Group requested an adjournment in order to file further material in response to positions taken by the parties supporting the plan. This was the first occasion in which anyone appeared in these proceedings on behalf of the Gambazzi Group. I declined the adjournment request.

13 One reason for the request was to file material to answer allegations relating to the strength of the Gambazzi Group claims against CLCA. The applicants and the creditors' committee had referred to allegations and facts that would undermine the validity of the Gambazzi Group claims. I was in no position to deal with any validity issues regarding these claims and made that clear to the parties. That will be an issue to be dealt with before Mr. Farley in the claims adjudication process.

14 Another reason for the request was to file evidence that the Gambazzi Group had made a contribution to the Castor litigation in the form of a meeting with other claimants' counsel in which expert reports were discussed and thus should entitled to participate in the amounts to be paid to the claimants under the term sheet and Plan who contributed funds to pursue the Castor litigation. Counsel for the Gambazzi Group asserted that the value that should be attributed to the meeting should be $1 million. However, the payments proposed in the term sheet to those claimants who funded the Castor litigation, which did not involve the Gambazzi Group who did not provide any funds at all, was identified in the original application some seven months before the sanction hearing, and the Gambazzi Group at no time raised any concern about this. It would be unfair to the other parties to upset the process at this late date for this issue. Even assuming that a meeting of lawyers for the Gambazzi Group with other plaintiff's counsel added some benefit to the pursuit of the Castor litigation, which counsel for the plaintiffs denies, it would be different from the cash actually put up to pursue the litigation, and in any event would be a matter to be voted on by the creditors in considering the Plan. It would hardly amount to unfairness in the Plan. Other claimants in the Quebec litigation incurred their own legal and expert witness expenses and these are not to be paid under the Plan.

Analysis

15 The requirements for court approval of a plan are well established. See *Sino-Forest Corp., Re*, 2012 ONSC 7050 (Ont. S.C.J. [Commercial List]) at para. 50. The applicant must demonstrate:

a. there has been strict compliance with all statutory requirements and adherence to previous orders of the court;

b. nothing has been done or purported to be done that is not authorized by CCAA; and

c. the plan is fair and reasonable.

16 There is no issue regarding the first test. There has been strict compliance with all statutory requirements and previous orders in this proceeding.

17 The Gambazzi Group takes the position that the second test has not been met. It asserts that the release of the insurers, who are making a substantial contribution to the Plan under the term sheet, is contrary to the public order provisions of the Quebec Civil Code and that the CCAA cannot authorize a plan that is contrary to existing laws. It relies upon a purported expert report in which Mr. Nicholas Krnjevic, a solicitor qualified to practise in Quebec, opines that the settlement would violate direct public order provisions of Quebec law. For a number of reasons I cannot accept this assertion.

18 The Castor insurers have settled numerous claims, paid out the Widdrington judgment and reimbursed in excess of $70 million in costs. The insurers take the position that the insurance proceeds have been exhausted. They have been sued by plaintiffs in the Castor litigation for a declaration that the policies are governed by Quebec law and that defence costs under Quebec law are to be on top of policy limits. The insurers deny liability. The trial against the insurers was to commence in January of this year and was scheduled to take six months. That trial was stayed by the Initial Order. Needless to say, the issues are somewhat complex. Under the term sheet that is the basis for the Plan, the insurers are paying a substantial amount towards the funds to be collected under the term sheet, and in return are to be released from any further liability they may have. The Gambazzi Group asserts that what the insurers are paying is less than what they would be required to pay under Quebec law.

19 Mr. Krnjevic, the expert relied on by the Gambazzi Group, is not independent of the Gambazzi Group. He is a lawyer with the firm that has acted for the Gambazzi Group in the Quebec litigation involving Castor Holdings for two decades. Mr. Brzezinski admits that Mr. Krnjevic is not independent.

20 An expert's lack of independence and impartiality goes to the admissibility of the evidence in addition to being considered in relation to the weight to be given to the evidence if admitted. The expert must be fair, objective and non-partisan and the appropriate threshold for admissibility flows from this duty. See *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23 (S.C.C.) at paras. 45 and 46 per Cromwell J. Mr. Krnjevic cannot be said to be non-partisan. His firm and he are advocates for the Gambazzi Group.

21 In this case, Mr. Krnjevic did not sign an acknowledgement of an expert's duty to the court required by rule 53.03(2.1). Mr. Brzezinski said this was not needed as Mr. Krnjevic's opinion evidence could be considered as opinion evidence of a non-party expert where the non-party expert had formed a relevant opinion based on personal observations or examinations relating to the subject matter of the litigation. It was said that Mr. Krnjevic had acted in the Quebec litigation and therefore had formed a relevant opinion as a non-party, much like a treating physician in a personal injury action. Reliance was placed on *Westerhof v. Gee Estate*, 2015 ONCA 206 (Ont. C.A.). This reliance on *Westerhof* is misplaced. That case permitted opinion evidence of a non-party expert where the non-party expert had formed a relevant opinion based on personal observations or examinations relating to the subject matter of the litigation for a purpose other than the litigation. Mr. Krnjevic's opinion was based entirely on his and his firm's acting in the Castor litigation. He could not be considered to be like a treating physician of an injured person who makes observations and examinations of an injured client for a purpose other than litigation.

22 There are other problems with Mr. Krnjevic's opinion. It was based on what "he understood" to be the facts. Mr. Brzezinski acknowledged that what Mr. Krnjevic was relying on as his understood facts were allegations in pleadings. No evidence was led by the Gambazzi Group to establish facts to support the pleadings.

23 In the circumstances I cannot accept the evidence of Mr. Krnjevic.

24 Moreover, the argument is based on the Quebec Civil Code that provides that proceeds of insurance are to be applied exclusively to the payment of third party victims and that an insurer may not contract out of these provisions. That says nothing, however, about an insurer compromising a contested claim against it. In this case, a six month trial was to be held. Mr. Brzezinski acknowledged that it would be open in that case for the plaintiffs and insurers to settle the claims by payment of less than the amounts claimed by the plaintiffs and give the insurer a release. I fail to see why such a settlement cannot be made in this CCAA proceeding involving the same parties.

25 Finally, it has been decided by authority binding on me that Quebec provincial law cannot affect the ability under the CCAA to provide third party releases. In *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587 (Ont. C.A.) the same argument was made as made by the Gambazzi Group in this case. Blair J.A. dismissed the argument on paramountcy grounds as follows:

102 Mr. Woods and Mr. Sternberg submit that extending the reach of the CCAA process to the compromise of claims as between solvent creditors of the debtor company and solvent third parties to the proceeding is constitutionally impermissible. They say that under the guise of the federal insolvency power pursuant to s. 91(21) of the *Constitution Act, 1867*, this approach would improperly affect the rights of civil claimants to assert their causes of action, a provincial matter falling within s. 92(13), and contravene the rules of public order pursuant to the *Civil Code of Quebec*.

103 I do not accept these submissions. It has long been established that the CCAA is valid federal legislation under the federal insolvency power: *Reference re: Companies' Creditors Arrangement Act (Canada)*, [1934] S.C.R. 659. As the Supreme Court confirmed in that case (p. 661), citing Viscount Cave L.C. in *Royal Bank of Canada v. Larue*, [1928] A.C. 187, "the exclusive legislative authority to deal with all matters within the domain of bankruptcy and insolvency is vested in Parliament." Chief Justice Duff elaborated:

> Matters normally constituting part of a bankruptcy scheme but not in their essence matters of bankruptcy and insolvency may, of course, from another point of view and in another aspect be dealt with by a provincial legislature; but, when treated as matters pertaining to bankruptcy and insolvency, they clearly fall within the legislative authority of the Dominion.

104 That is exactly the case here. The power to sanction a plan of compromise or arrangement that contains third-party releases of the type opposed by the appellants is embedded in the wording of the CCAA. The fact that this may interfere with a claimant's right to pursue a civil action — normally a matter of provincial concern — or trump Quebec rules of public order is constitutionally immaterial. The CCAA is a valid exercise of federal power. Provided the matter in question falls within the legislation directly or as necessarily incidental to the exercise of that power, the CCAA governs. To the extent that its provisions are inconsistent with provincial legislation, the federal legislation is paramount. Mr. Woods properly conceded this during argument.

26 Third party releases are authorized under the CCAA if there is a reasonable connection between the third party claim being compromised in the plan and the restructuring achieved by the plan. See *Metcalfe and Mansfield* at paras. 43 and 70.

27 In my view, the second test for sanctioning a plan that nothing has been done or purported to be done that is not authorized by CCAA has been met.

28 The third test is that the Plan must be fair and reasonable. The court's role on a sanction hearing is to consider whether the plan fairly balances the interests of all stakeholders. See *Canwest Global Communications Corp., Re* (2010), 70 C.B.R. (5th) 1 (Ont. S.C.J. [Commercial List]) per Pepall J. (as she then was) at para. 19. In *Muscletech Research & Development Inc., Re* (2007), 30 C.B.R. (5th) 59 (Ont. S.C.J. [Commercial List]) Ground J. stated that the court must exercise its equitable jurisdiction and consider the prejudice to the various parties that would flow from granting or refusing to grant approval of the plan and must consider alternatives available to the applicants if the plan is not approved.

29 One important measure of whether a plan is fair and reasonable is the parties' approval of a plan, and the degree to which approval has been given. It is not the function of a court to second guess the business people with respect to the business aspects of the plan, descending into the negotiating arena and substituting its own view of what is a fair and reasonable compromise or arrangement for that of the business judgment of the participants. The parties themselves know best what is in their interests in those areas. There is a very heavy burden on parties seeking to show that a plan is not fair and reasonable, involving matters of substance, when the Plan, as here, has been approved by the requisite majority of creditors. See *Olympia & York Developments Ltd. v. Royal Trust Co.* (1993), 17 C.B.R. (3d) 1 (Ont. Gen. Div.) per Blair J. (as he then was) at paras. 36 to 40.

30 The Gambazzi Group assert that the claims process is not fair to them and that all claims should be treated equally. They assert that while the term sheet and the Plan provide for pre-arranged and pre-approved claims of creditors, their claims have not been approved. In their factum they assert that the actions of the applicant and CLCA in approving the claims is not fair, reasonable or in good faith. They do not in their factum request that the Plan not be sanctioned. They acknowledge "the salutary effect that the Plan hopes to achieve" but say that the process was flawed. They say that the claims of the Gambazzi Group should not have to be considered and approved by CLCA but only be considered and approved by the Monitor.

31 What the Gambazzi Group is doing is making a collateral attack on the claims process approved by the Court in March of this year. That process provided for claims to be reviewed by the applicant and CLCA. As the claims of all but Chrysler and the Gambazzi Group were pre-approved by the applicant and CLCA in the negotiations leading up to the term sheet and the initial application under the CCAA, there was built into the claims process a requirement that any claim approved by the applicant and CLCA had to be reviewed and consented to by the Monitor. The Gambazzi Group did not appear to oppose the claims process order or appeal from it. It is now too late after the parties have relied on the claims process and the Monitor has at great expense reviewed the claims for the Gambazzi Group to be attacking the claims procedure order. The application before me is to sanction the Plan of compromise and arrangement and consider whether it is fair and reasonable. It is not to consider whether the past claims process order was fair.

32 In any event, I see no unfairness in the process. The applicant and CLCA, along with the other parties who supported the Initial Order, have made it clear from the outset that they have difficulties with the claims of the Gambazzi Group. It is not for this Court to get into whether those claims are good or bad, but it would also not be fair to deprive those other parties from considering the claims filed by the Gambazzi Group in the CCAA process. The idea that they could not have any input into the consideration of the validity of the claims of the Gambazzi Group would be unfair to them. It would also mean that the Monitor, who has had no prior dealings with this whole affair, would be required to determine whether or not to consent to the claims without any input from those who have knowledge of the matter.

33 In this case, the Gambazzi Group has the right to have their claim determined in the claims process by the Honourable James M. Farley. I see no unfairness in that.

34 The Gambazzi Group also asserts that the claims be treated *pari passu* on a *pro rata* basis and that the priority accorded to the Participating Creditors in the Plan be struck. I do not agree. The Participating Creditors were claimants in the Castor litigation who funded the Castor litigation with over $100 million in cash by way of loans. The Participating Creditors are Chrysler, the German Bank Group and the Canadian Bank Group. The Gambazzi Group chose not to fund any of the Castor litigation.

35 If the Gambazzi Group's assertion were accepted, it would mean that they would rank equally with those claimants who funded over $100 million to support the claims in the Castor litigation. This would not be treating all claimants fairly or equally. It would mean that the Participating Creditors would receive nothing for their cash disbursements to fund the litigation and the Gambazzi Group and other claimants who did not fund the litigation would be accorded a privileged position. It is fair and reasonable for those claimants who funded the litigation to be reimbursed their funding before claimants are paid on their claims. It recognizes their financial contribution to achieving a settlement for the benefit of all claimants. If the Gambazzi Group and other claimants that are not Participating Creditors recovered *pro rata* in all of the contributed funds it would be severely inequitable as, net of costs, they would recover a higher percentage on their Castor claims compared to the Participating Creditors.

36 The third party releases are justified in this case. In order to justify third party releases, there must be a reasonable connection between the third party claim being compromised in the plan and the restructuring achieved by the plan to warrant inclusion of the third party release in the plan. See *Metcalfe and Mansfield* at para. 70. The following factors are to be considered:

(a) the claims to be released must be rationally related to the purpose of the plan;

(b) the releases must be necessary for the plan;

(c) the parties who have claims released must be contributing in a tangible and realistic way; and

(d) the plan will benefit the debtor and its creditors generally.

37 The release of the defendants or potential defendants in the Castor litigation is the whole purpose of the Plan. The releases are necessary as one could not expect the parties funding the Plan to do so if they remained at risk in the Castor litigation. The contributors who are being released are paying no small amount. The claimants who have voted in favour of the Plan are obviously satisfied with the contributions. Furthermore, the CLCA group is monetizing its assets in order to make a contribution to the Plan.

38 The Plan will benefit all concerned. Without the third party releases, there could be no Plan. The third party releases are approved.

39 The circumstances in this case cry out for a resolution of the claims. Madam Justice St. Pierre in the Widdrington test case put it simply that the time has come to put an end to the longest running judicial saga in the legal history of Quebec and Canada. Without a resolution, many more years of costly litigation will result. The assets of CLCA and its former partners currently available for settlement would be further diminished and all parties would face the risks of the continuing litigation having an unfavourable outcome. There is also the prospect of the bankruptcy of CLCA and its former partners, nearly all of whom had nothing to do with the Castor Holdings audit and are as much the victims as any plaintiffs who relied on the audit to their detriment.

40 For these reasons, the Plan is sanctioned.

Application granted.

End of Document

TAB 2

1993 CarswellOnt 228
Ontario Court of Justice (General Division — Commercial List)

Central Guaranty Trustco Ltd., Re

1993 CarswellOnt 228, [1993] O.J. No. 1479, 21 C.B.R. (3d) 139, 41 A.C.W.S. (3d) 96

Re Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36; Re Bulk Sales Act, R.S.O. 1990, c. B.14; Re Courts of Justice Act, R.S.O. 1990, c. C.43; Re Business Corporations Act, R.S.O. 1990, c. B.16; Re CENTRAL GUARANTY TRUSTCO LIMITED

Farley J.

Judgment: June 7, 1993
Docket: (Doc. B288/92)

Counsel: *B. Zarnett*, for applicant.
W. Horton and *D.L. Evans*, for Credit Suisse Canada.
S. Dunphy, for Hambros Bank Limited.
W.T. Burden, for Fonds de solidarité des travailleurs du Québec.

Subject: Corporate and Commercial; Insolvency

Related Abridgment Classifications

Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.3 Arrangements
XIX.3.b Approval by court
XIX.3.b.i "Fair and reasonable"

Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.3 Arrangements
XIX.3.b Approval by court
XIX.3.b.iv Miscellaneous

Headnote

Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangements Act — Arrangements — Approval by Court — "Fair and reasonable"

Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangements Act — Arrangements — Approval by Court

Corporations — Arrangements and compromises — Companies' Creditors Arrangement Act — Plan of arrangement — Court sanction — Overwhelming majority of creditors voting in favour of plan — Plan found reasonable and fair — Opposing creditor's claim being self-centred — Plan sanctioned — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

Corporations — Arrangements and compromises — Companies' Creditors Arrangement Act — Plan of arrangement — Costs — Costs awarded against opposing creditor where plan found reasonable and fair and where overwhelming majority of sophisticated creditors voting in favour of plan — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

After a vote of the companies' creditors, the company brought a motion for an order sanctioning its revised plan of arrangement under the *Companies' Creditors Arrangement Act* ("CCAA"). Two companies, which together were owed

about 70 per cent of the company's indebtedness, supported the sanctioning. Only one creditor opposed the sanctioning, arguing that the plan was not fair and reasonable.

The general vote of the creditors was 94.92 per cent by number in favour of the revised plan of arrangement (87.82 per cent by value) and 5.08 per cent by number opposed (12.18 per cent by value).

Held:

The plan of arrangement was sanctioned.

There is a heavy burden on a party seeking to upset a plan for which the required majority has voted. In this case the majority was overwhelming. The fact that the overwhelming majority consisted of sophisticated lenders indicated that the plan was fair and reasonable. The opposing creditor was not singled out in the plan for any special adverse treatment. The opposing creditor had tried to petition the company into bankruptcy. That petition had been stayed under the CCAA and was now dismissed under s. 43(7) of the *Bankruptcy and Insolvency Act*.

The opposing creditors' claim was "uniquely self-centred and flew in the face of the overwhelming vote of 'independent' creditors who shared the same fate" as the opposing creditor. As a result, costs of $1,500 were ordered against the opposing creditor.

Table of Authorities

Cases considered:

Algoma Steel Corp. v. Royal Bank (1992), 11 C.B.R. (3d) 11, 8 O.R. (3d) 449, 93 D.L.R. (4th) 98, 55 O.A.C. 303 (C.A.) [leave to appeal to S.C.C. refused (1992), 94 D.L.R. (4th) vii (note), 10 O.R. (3D) xv (note), *(*sub nom. *Royal Insurance Co. of Canada v. Kelsey-Hayes Canada Ltd.)* 145 N.R. 391 (note), 59 O.A.C. 326 (note)] — *distinguished*

Keddy Motor Inns Ltd., Re (1992), 13 C.B.R. (3d) 245, 90 D.L.R. (4th) 175, 6 B.L.R. (2d) 116, 110 N.S.R. (2d) 246, 299 A.P.R. 246 (C.A.) — *referred to*

Lehndorff General Partner Ltd., Re (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]) — *referred to*

Northland Properties Ltd., Re, *(*sub nom. *Northland Properties Ltd. v. Excelsior Life Insurance Co. of Canada)* 73 C.B.R. (N.S.) 195, 34 B.C.L.R. (2d) 122, [1989] 3 W.W.R. 363 (C.A.) — *referred to*

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 —

s. 43(7)

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

s. 7

s. 11

s. 11(a)

s. 11(c)

Motion for order sanctioning revised plan of arrangement under Companies' Creditors Arrangement Act.

***Farley J.*:**

1 This was a motion for an order sanctioning Trustco's Revised Plan of Arrangement under the CCAA after the vote of the creditors, all of which were unsecured. Credit Suisse and Hambros headed syndicates which were owed about 70% of the $400 million odd indebtedness. They supported the sanctioning; no other creditor but FSTQ opposed. FSTQ was owed $5 million odd. Its opposition related to the fairness and reasonableness aspect. FSTQ was concerned about the question of its Unpaid Interest Claim and the survival of its petition in bankruptcy against Trustco.

2 It appears to me that the evidence demonstrated that Trustco was a company to which CCAA applies, that the Plan was filed with the Court in accordance with its previous orders, that the meeting of creditors was duly held in accordance with further orders of the Court and that the Plan was overwhelmingly approved thereby meeting the requisite majority

test on both criteria of CCAA. I am satisfied that the first two general principles enunciated in *Re Northland Properties Ltd.* (sub nom. *Northland Properties Ltd. v. Excelsior Life Insurance Co. of Canada*) (1989), 73 C.B.R. 195 (B.C. C.A.) have been met.

3 What about the third test that the Plan must be found to be fair and reasonable? I note that that is a question to be answered in the circumstances of each case. The creditors meet as a single class pursuant to the order of Ground, J. of April 1, 1993. A quorum was present. The general vote was 94.92% by number (87.82% by value) in favour; 5.08% by number (12.18% by value) opposed. Then there was a more restricted vote in which neither Credit Suisse nor Hambros participated as they had no Unpaid Interest Claims. The Revised Plan of Arrangement had required that there be a vote on the proposed compromise re these Claims (with a majority in number representing three-quarters in value of the proven Claims). That vote was even more overwhelming as only FSTQ voted against. 92.54% by number (96.16% by value) were in favour and 7.46% by number (3.84% by value) were opposed. This on either basis is well beyond the specific majority requirement of CCAA. Clearly there is a very heavy burden on parties seeking to upset a plan that the required majority have found that they could vote for; given the overwhelming majority this burden is no lighter. This vote by sophisticated lenders speaks volumes as to fairness and reasonableness.

4 The Courts should not second guess business people who have gone along with the Plan. However FSTQ has engaged one of the others in that exercise of second guessing. It obtained a June 3, 1993 letter from Banca Commerciale Italiano of Canada which also held a $5 million note. It had indicated to Ernst & Young (as Plan Administrator appointed by the Court) and to Credit Suisse (as a member of the Creditors' Steering Committee) that payment of 66 2/3% of the Unpaid Interest Claims in full satisfaction was unfair and that it asked to be paid 100% of the unpaid interest up to March 23, 1992. It was "*also advised both by Ernst & Young and Credit Suisse Canada that if the Compromise is not approved, we will probably receive nothing for our Unpaid Interest Claim*." (emphasis added). It went on to say:

> Notwithstanding that we were of the view, and still are, that the payment of only 66 2/3% of the unpaid Interest Claim was unfair, we were forced to vote in favour of the Compromise *given that there was no real economic alternative*. In this regard, the costs involved with litigating the preference issue left us with no choice but to vote in favour of the Compromise and thus accept unfair treatment, vis-a-vis other lenders. Had we been presented with a real alternative, we would have voted against the Compromise. Additionally, we were of the view that the Revised Plan had been structured in such a way that there was no real alternative, given the economics of the situation, and thus we were forced to vote in favour of the Compromise on Unpaid Interest Claims. (emphasis added)

5 The Unpaid Interest Claims were about $700,000 — out of a Plan that envisaged the Credit Suisse and Hambros syndicates taking a bath for about 50% of their $270 million loan (i.e., a haircut of $135 million) if things go as planned. FSTQ's Claim was $24,000 so that it is out $8,000. It is difficult to believe that FSTQ would take on this fight with so little at stake. However, when one distills the Banca's position — it comes to this: it would like to be paid 100%. So, I imagine, would everyone. If wishes were horses, then beggars would ride. Clearly Banca and the rest of those holding Claims found it preferable to accept the 66 2/3% rather than vote down the Compromise and the Plan so that bankruptcy would be the alternative. Such alternative was not palatable.

6 Now FSTQ advises that it too does not wish to litigate the preference question it raised. It is too expensive to do so. Clearly if it wishes to protect what it sees as its legal right it must rely on the law to do so. However discretion is the better part of valour here — a much to be admired trait — since otherwise our courts would be overflowing (more so than now) with persons who feel that their legal rights (of whatever nature and materiality) have been affected.

7 It does not appear to me that FSTQ was singled out for special adverse treatment — nor was any other Claimant. They were just the unfortunate who did not have due dates on their loans for interest when Trustco was doling out its limited cash resources — before these resources ran out — in an effort to keep the wolf at bay (or the wolves). FSTQ was at pains to deprecate not only Hambros (whose Syndicate got about half the interest payments in the stub period) but also Credit Suisse (which got nothing).

8 In the give and take of a CCAA plan negotiation, it is clear that equitable treatment need not necessarily involve equal treatment. There is some give and some get in trying to come up with an overall plan which Blair J. in *Olympia & York* likened to a sharing of the pain. Simply put, any CCAA arrangement will involve pain — if for nothing else than the realization that one has made a bad investment/loan.

9 As was the case in *Re Keddy Motor Inns Ltd.* (1992), 13 C.B.R. (3d) 245 (N.S. C.A.) where some creditors negotiated different terms, the Court found nothing wrong so long as such different terms (as was the case here) was disclosed.

10 I do not see with this now appearing to be a liquidation (an orderly liquidation over time) scenario plan that this affects my view of the matter. See my observation at p. 11 of *Re Lehndorff General Partner Ltd.* (unreported Ont. Ct. (Gen. Div.) Jan. 6, 1993) [now reported at 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List])]. There was no evidence or suggestion that any creditor wanted a bankruptcy; rather to the contrary, it appears that they favoured the Plan. However, FSTQ wished to amend the Plan to give it $8,000 more. Is this $8,000 to come out of the air — or out of some other creditor's share?

11 In any event, could this Plan be amended as requested by FSTQ to give it that $8,000 — something that it "lost" in a vote of its fellow Unpaid Interest Claimants. In *Algoma Steel Corp. v. Royal Bank* (1992), 8 O.R. (3d) 449, the Court of Appeal determined that there were exceptional circumstances (unrelated to the Plan) which allowed it to adjust a Plan *where no interest was adversely affected*. The same cannot be said here. FSTQ aside from s. 11(*c*) of the CCAA also raised s. 7. I am of the view that s. 7 allows an amendment after an adjournment — *but not after a vote has been taken*.

12 The other element of concern for FSTQ was that the Plan voted on provided:

> 3.8 The Creditors hereby consent to the Court dismissing the Bankruptcy Petition in the Sanction Order.

Trustco relies upon s. 11 of the CCAA and s. 43(7) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985 as amended, c. B-3 to support this proposition given the vote of the Creditors. It notes that the bankruptcy legislation provides that a petition is for the benefit of *all* creditors not just the petitioner. I am not persuaded by FSTQ's position that a "stay" as contemplated by s. 11 automatically by using the word "stay" involves just a temporary suspension of proceedings. The meaning of "stay" is not so restrictive — e.g. note the "permanent" stays arising out of the *Askov* decision. However, I do note that s. 11(*a*) entails "... staying, until such time as the court may prescribe or until any further order ..." which qualification appears to contemplate a non-permanent stay. However, s. 11(*c*) which also relates to the introductory provisions concerning the *Bankruptcy Act* may approach greater permanency — although it appears that the pilot light of the gas furnace is still lit with "except with the leave of the court and subject to such terms as the court imposes." However, s. 43(7) of the *Bankruptcy and Insolvency Act* provides:

> (7) Where the court is not satisfied with the proof of the facts alleged in the petition or of the service of the petition, or is satisfied by the debtor that he is able to pay his debts, *or that for other sufficient cause no order ought to be made*, it shall dismiss the petition. (emphasis added)

Given that FSTQ's position has been compromised by the Plan and that the other creditors have decided that it would be inappropriate to bankrupt Trustco, I do not find it necessary to await a hearing of the petition to grant an order under s. 43(7) of the *Bankruptcy and Insolvency Act* to dismiss the petition. I am of the view that sufficient cause has been shown.

13 I do note that FSTQ is not without redress. As I mentioned during the hearing, it may wish to pursue the question of preference under the provincial statutes. However, given that it had no taste for further litigation, I think this avenue unlikely to be further explored by FSTQ which appears to prefer an "upset the apple cart" policy or the threat thereof to advance its position at a lesser cost.

14 In my view, FSTQ has fanned what it hoped were warm embers with the hope of eliciting some flame; however, when one looks at the situation although there may be some smoke, that smoke seems to mainly emanate from FSTQ's own smudge pot.

15 I am, in conclusion, of the view that the Plan is fair and reasonable to all affected in the circumstances. With this third test met, the Plan is sanctioned and approved without further amendment as requested by FSTQ.

16 I found the FSTQ request somewhat unusual. It was uniquely self-centred and flew in the face of the overwhelming vote of "independent" creditors who shared the same fate as FSTQ with respect to their Unpaid Interest Claims. While a Court appearance for sanctioning was required in any event and while creditors should not feel hushed in a sanction hearing, it strikes me that FSTQ went beyond the fence in trying to get its own amendment. There should, therefore, be a costs order of $1,500 against FSTQ payable forthwith to Trustco.

Order accordingly.

End of Document

TAB 3

1992 CarswellNS 46
Nova Scotia Supreme Court, Appeal Division

Keddy Motor Inns Ltd., Re

1992 CarswellNS 46, [1992] N.S.J. No. 98, 110 N.S.R. (2d) 246, 13 C.B.R. (3d) 245, 299 A.P.R. 246, 32 A.C.W.S. (3d) 1085, 6 B.L.R. (2d) 116, 90 D.L.R. (4th) 175

ROYNAT INC. and ROYAL TRUST CORPORATION OF CANADA v. KEDDY MOTOR INNS LIMITED

Clarke C.J.N.S., Matthews and Freeman JJ.A.

Heard: February 7, 1992
Judgment: March 2, 1992
Docket: Docs. S.C.A. 02595, 02598

Counsel: *Daniel M. Campbell, Q.C.*, for appellant RoyNat Inc.
Peter J. MacKeigan and *Gregory Cooper*, for Royal Trust Corporation of Canada.
John D. Stringer and *Richard Freeman*, for Keddy Motor Inns Limited.
Gerald R.P. Moir, for Central Guaranty Trust Company.

Subject: Corporate and Commercial; Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.3 Arrangements
XIX.3.b Approval by court
XIX.3.b.i "Fair and reasonable"
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.3 Arrangements
XIX.3.b Approval by court
XIX.3.b.iv Miscellaneous
Headnote
Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangements Act — Arrangements — Approval by Court — "Fair and reasonable"
Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangements Act — Arrangements — Approval by Court
Corporations — Arrangements and compromises — Companies' Creditors Arrangement Act — Plan of arrangement — Secured creditors appealing sanctioning order on grounds of voting irregularity and unfair practices — Appeal dismissed — Mere irregularity not being sufficient to invalidate ballot — No substantial unfairness found — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.
The plan of arrangement of a debtor company received the approval and sanction of the court. Two secured creditors appealed seeking to overturn the order on the grounds of voting irregularity and unfair practices. They alleged that a proxy vote that arrived late was improperly included and that this had resulted in the approval of the plan by a class of creditors. They also alleged that creditors were permitted to negotiate preferential treatment within their classes as an inducement to vote and that the creditors had been unfairly classified.
Held:

The appeal was dismissed.

The proxy vote received after the voting was complete, but before the votes were counted, had been properly admitted. The vote was carefully conducted, with due attention to fairness and security. It is important that creditors not be disenfranchised for technical reasons. Clear evidence of illegality within the spirit and purpose of the *Companies' Creditors Arrangement Act*, not mere irregularity, is necessary to invalidate the ballot. If the ballot was not invalid, it must be counted.

A creditor which withholds its support from a plan because it fails to address legitimate concerns is perfectly within its right to insist on improvements. There was no evidence that any advantages negotiated by one creditor were offset by substantial disadvantages to another, nor were the advantages so great as to constitute substantial unfairness. The process of negotiation took place in the open, and the other creditors were reasonably well advised of all amendments that were made. There was no evidence of a deliberate intention to conceal or mislead. The appellants were under no duty to negotiate for better terms. However, their failure to do so did not entitle them to destroy the plan strongly supported by the other creditors.

The classification of creditors, while not ideal, did not give rise to any substantial injustice and was carried out under a court order following a hearing at which the creditors were entitled to be heard. That order was made earlier than and was distinct from the sanctioning order. The classification order was not appealed and, therefore, the creditors and debtor company were entitled to rely upon it as a foundation for the plan. The proper procedure for attacking the classification order was by way of appeal from that order, not the sanctioning order.

Table of Authorities

Cases considered:

Alabama, New Orleans, Texas & Pacific Junction Railway Co., Re, [1891] 1 Ch. 213, [1886-90] All E.R. Rep. Ext. 1143, 60 L.J. Ch. 221, 2 Meg. 377 (C.A.) — *considered*

Exco Corp. v. Nova Scotia Savings & Loan Co. (1983), 35 C.P.C. 245 at 255, 59 N.S.R. (2d) 331, 124 A.P.R. 331 (C.A.) — *referred to*

Hongkong Bank of Canada v. Chef Ready Foods Ltd. (1990), 4 C.B.R. (3d) 311, [1991] 2 W.W.R. 136, 51 B.C.L.R. (2d) 84 (C.A.) — *considered*

McCarthy v. Acadia University (1977), 3 C.P.C. 42, 18 N.S.R. (2d) 364, 75 D.L.R. (3d) 304 (C.A.) — *referred to*

Minkoff v. Poole (1991), 101 N.S.R. (2d) 143, 275 A.P.R. 143 (C.A.) — *referred to*

Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd. (1988), 72 C.B.R. (N.S.) 20, 64 Alta. L.R. (2d) 139, [1989] 2 W.W.R. 566 (Q.B.) — *referred to*

Northland Properties Ltd., Re, (sub nom. *Northland Properties Ltd. v. Excelsior Life Insurance Co. of Canada*) 73 C.B.R. (N.S.) 195, 34 B.C.L.R. (2d) 122, [1989] 3 W.W.R. 363 (C.A.) — *considered*

NsC Diesel Power Inc. (1990), 79 C.B.R. (N.S.) 1, 97 N.S.R. (2d) 295, 258 A.P.R. 295 (T.D.) — *referred to*

Reference re Companies' Creditors Arrangement Act (Canada), [1934] S.C.R. 659, 16 C.B.R. 1, [1934] 4 D.L.R. 75 — *considered*

Shaw v. Tati Concessions Ltd., [1913] 1 Ch. 292, [1911-13] All E.R. Rep. 694, 82 L.J. Ch. 159, 20 Mans. 104 (Ch.) — *referred to*

Sovereign Life Assurance Co. v. Dodd, [1892] 2 Q.B. 573, [1891-94] All E.R. Rep. 246, 62 L.J. O.B. 19 (C.A.) — *considered*

Washington State Labour Council v. Federated America Insurance Co., 78 Wash.2d 263, 474 P.2d 98, 41 A.L.R. 3d 22 (Wash. 1970) — *referred to*

Westminer Canada Holdings Ltd. v. Coughlan (1989), 91 N.S.R. (2d) 214, 233 A.P.R. 214 (C.A.) — *referred to*

Statutes considered:

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

s. 6

Words and phrases considered:

CLASSIFICATION

The remaining grounds of appeal include the allegation that the plan for secured creditors was actually a number of plans tailored to individual creditors. This ground is closely related to the classification issue. The commonality of interests test is no longer strictly applied because of its unwieldiness. It necessarily follows that plans for broad classes of secured creditors must contain variations tailored to the situations of the various creditors within the class. Equality of treatment — as opposed to equitable treatment — is not a necessary, nor even a desirable goal. Variations are not in and of themselves unfair, provided there is proper disclosure. They must, however, be determined to be fair and reasonable within the context of the plan as a whole.

MEETING

The somewhat unusual procedure of "closing" the meeting by motion prior to the vote presumably fixed the plan in the form it had attained up to the moment of closure and cut off further discussion while the creditors turned their attentions to the actual process of voting. Voting is as much a function of the meeting as discussion of the plan; while the voting was in progress the meeting necessarily continued in existence. Counting the ballots is as much a function of the vote as casting them. Apart from the security measure of sealing the ballot box, no step was taken, no motion moved nor voted on, to end the meeting or to close the voting, between the casting of the votes and the counting of them.

The meeting must still have been an existing, though fictitious, entity at the time the votes were counted; the count necessarily occurred within the context of the meeting. The continuation of the meeting and the acceptance of the late proxy vote finds support in the case law.

PRESENT AND VOTING, EITHER IN PERSON OR BY PROXY, AT THE MEETING OR MEETINGS

The [*Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, s. 6] provides statutory requirements as to the majorities necessary to approve a plan by a class of creditors, but no guidance as to the manner of voting. The words "present and voting, either in person or by proxy, at the meeting or meetings" of the creditors or a class of creditors have been referred to by counsel as a voting directive. In context, however, they merely define the creditors to be considered in determining whether the requisite majorities for approval of the plan have been met.

VOTING

The somewhat unusual procedure of "closing" the meeting by motion prior to the vote presumably fixed the plan in the form it had attained up to the moment of closure and cut off further discussion while the creditors turned their attentions to the actual process of voting. Voting is as much a function of the meeting as discussion of the plan; while the voting was in progress the meeting necessarily continued in existence. Counting the ballots is as much a function of the vote as casting them. Apart from the security measure of sealing the ballot box, no step was taken, no motion moved nor voted on, to end the meeting or to close the voting, between the casting of the votes and the counting of them.

The meeting must still have been an existing, though fictitious, entity at the time the votes were counted; the count necessarily occurred within the context of the meeting. The continuation of the meeting and the acceptance of the late proxy vote finds support in the case law.

Appeal from order reported at (1991), 107 N.S.R. (2d) 424, 290 A.P.R. 424 (T.D.) sanctioning plan of arrangement.

The judgment of the court was delivered by *Freeman J.A.*:

1 Two secured creditors are seeking to overturn the Supreme Court order sanctioning a hotel chain's plan of arrange ment under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, on grounds of voting irregularity and unfair practices.

2 Faced with debts totalling $42,000,000 that threatened to overwhelm it, the respondent, Keddy's Motor Inns Limited ["Keddy"], brought proceedings under the Act. Under a series of court orders creditors' actions were stayed, creditors divided into classes according to interest, and a schedule established requiring a plan to be voted on by November 2, 1991.

3 Following the vote approving the plan as amended at the meetings, it was sanctioned on application to Mr. Justice Nathanson of the Trial Division [reported 107 N.S.R. (2d) 424, 290 A.P.R. 424].

4 The issues on the appeal from his decision are that he should not have allowed the inclusion of a proxy vote that arrived late, resulting in approval of the plan by the class of capital lease creditors; that creditors were permitted to negotiate preferential treatment within their classes as an inducement to vote for a plan confiscatory of secured creditors' rights; and that the creditors had been unfairly classified.

5 The appellants must overcome obstacles including strong creditor approval of the plan, a well-reasoned decision by Mr. Justice Nathanson and able submissions on behalf of both respondents.

6 The scheme of the Act is contained in s.6:

> 6. Where a majority in number representing three-fourths in value of the creditors or class of creditors, as the case may be, present and voting, either in person or by proxy, at the meeting or meetings thereof respectively held pursuant to sections 4 and 5, or either of those sections, agree to any compromise or arrangement either as proposed or as altered or modified at the meeting or meetings, the compromise or arrangement may be sanctioned by the court, and if so sanctioned is binding
>
> (*a*) on all the creditors or the class of creditors, as the case may be, and on any trustee for any such class of creditors, whether secured or unsecured, as the case may be, and on the company; ...

7 Important features are that the majority as defined in the Act can bind the minority, that the final plan is defined by the vote of the creditors at the meetings, and that modifications can be negotiated up to the time of voting.

8 The right of majority creditors of a class to bind the minority is an extraordinary one, reflecting a willingness on the part of Parliament to deprive some creditors of their contractual rights in the interest of the survival of the economic unit composed of the ailing corporation and its creditors. Fairness is preserved by the requirement for court sanction. But fairness must be understood within the spirit of the statute.

9 The Act itself, apart from the jurisprudence which has developed around it, is little encumbered by detail or nicety and provides minimal direct guidance as to procedures to be followed. It is intended to provide distressed businessmen and their creditors with a means of reaching an accommodation of benefit to both, and to the public generally. Writing for the British Columbia Court of Appeal, Mr. Justice Gibbs described the Act in *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 4 C.B.R. (3d) 311, [1991] 2 W.W.R. 136, 51 B.C.L.R. (2d) 84 [p. 318 C.B.R.]:

> The C.C.A.A. was enacted by Parliament in 1933 when the nation and the world were in the grip of an economic depression. When a company became insolvent liquidation followed because that was the consequence of the only insolvency legislation which then existed — the *Bankruptcy Act*, R.S.C. 1927, c. 11, and the *Winding-up Act*, R.S.C. 1927, c. 213. Almost inevitably liquidation destroyed the shareholders' investment, yielded little by way of recovery to the creditors, and exacerbated the social evil of devastating levels of unemployment. The government of the day sought, through the C.C.A.A., to create a regime whereby the principals of the company and the creditors could be brought together under the supervision of the court to attempt a reorganization or compromise or arrangement under which the company could continue in business.

10 The Act was considered by the Supreme Court of Canada soon after its enactment in *Reference re Companies' Creditors Arrangement Act (Canada)*, [1934] S.C.R. 659, 16 C.B.R. 1, [1934] 4 D.L.R. 75 in which Cannon J. described it as follows [p. 664 S.C.R.]:

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

11 The Act fell into disuse until recent years but now appears to be enjoying a resurgency. McEachern C.J.B.C. discussed its purpose in the influential case of *Re Northland Properties Ltd.*, (sub nom. *Northland Properties Ltd. v. Excelsior Life Insurance Co. of Canada*) 73 C.B.R. (N.S.) 195, 34 B.C.L.R. (2d) 122, [1989] 3 W.W.R. 363 [p. 201 C.B.R.] (C.A.):

> ... there can be no doubt about the purpose of the C.C.A.A. It is to enable compromises to be made for the common benefit of the creditors and of the company, particularly to keep a company in financial difficulties alive and out of the hands of liquidators. To make the Act workable, it is often necessary to permit a requisite majority of each class to bind the minority to the terms of the plan, but the plan must be fair and reasonable.

12 Nathanson J. recognized that court sanction for the plan required that the court be satisfied as to three criteria which have evolved through the case law and which were stated in the *Northland Properties* case [p. 426 N.S.R.].

> 1. There must be strict compliance with all statutory requirements.
>
> 2. All material filed and procedures carried out must be examined to determine if anything has been done or purported to be done which is not authorized by the *Companies' Creditors Arrangement Act*.
>
> 3. The plan must be fair and reasonable.

13 Each of the six classes of creditors voted in favour of the plan by the majority required under the Act. The creditors did not vote as a whole. The votes cast at the class meetings — including the proxy vote at issue in this appeal — showed 92 per cent of the creditors representing 86.6 per cent of the value of the claims favoured the plan.

14 After three days of hearings in November 1991, Mr. Justice Nathanson sanctioned the plan. It provides for three unprofitable hotel or motel properties to be sold or transferred to mortgagees, and the eight profitable "core" properties to be retained. Interest rates on the core properties were standardized at 11 per cent and amortization periods at 25 years. Numerous variations were arrived at through negotiations, as contemplated by the Act, to make the plan acceptable to the majority of creditors. Many creditors received concessions of particular interest or benefit to themselves, that were not made to their class of creditors as a whole.

15 Central Guaranty, the largest creditor, was added as respondent in this appeal. It was owed $16,600,000 secured by mortgages on hotels in Halifax, Moncton and Fredericton. Relying on provisions of its security contracts, it negotiated for monthly payments of $66,000 to cover municipal taxes and for payment of its legal fees of $25,000 as a protective disbursement out of a trust fund held for renovation expenses. The appellants did not receive equivalent benefits. It does not appear that they engaged in negotiations with the respondents to improve their positions, although they would have been free to do so. They did not expect the plan to be approved.

16 The appellants, in voting against the plan, were in the minority in the secured creditor class. They were among the few secured creditors who were fully secure. Royal Trust held a first mortgage for $985,000 on a hotel at Shediac Road, Moncton, and RoyNat Inc. held a first mortgage for $3,750,000 on Keddy's Saint John hotel. Both properties are valued in excess of the first mortgages. The appellants claim their position has worsened because their interest rates were reduced from 13 per cent, the amortization periods were increased, and they are precluded from realizing on their security during the 5-year currency of the plan. They also object that some creditors negotiated benefits for themselves

which the appellants did not receive. They say that they should not be bound by a majority of creditors voting out of self-interest in hope of realizing the benefits they had negotiated for themselves.

17 Moreover, they say the class of secured creditors is too broad, and that they are unfairly grouped with creditors secured by non-core properties, and by mechanics' lienholders. They should not, they say, be bound by the votes of secured creditors with whom they have no community of interest.

18 I will dispose of the classification of creditors issue first. Similar arguments were considered by Forsyth J. of the Alberta Queen's Bench in *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.* (1988), 72 C.B.R. (N.S.) 20, 64 Alta. L.R. (2d) 139, [1989] 2 W.W.R. 566. He discussed the "commonality of interests test" described in *Sovereign Life Assurance Co. v. Dodd*, [1892] 2 Q.B. 573, [1891-94] All E.R. Rep. 246, 62 L.J.Q.B. 19 (C.A.) in which Lord Esher stated [p. 580 Q.B.]:

> ... if we find a different state of facts existing among different creditors which may differently affect their minds and their judgment, they must be divided into different classes.

19 Bowen L.J. stated [p. 583] that a class

> ... must be confined to those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest.

20 Forsyth J. also referred to the "*bona fide* lack of oppression test" considered in the widely cited case of *Re Alabama, New Orleans, Texas & Pacific Junction Railway Co.*, [1891] 1 Ch. 213, [1886-90] All E.R. Rep. Ext. 1143, 60 L.J. Ch. 221, 2 Meg. 377 (C.A.). Lindley L.J. stated at p. 239 [Ch.]:

> The Court must look at the scheme, and see whether the Act has been complied with, whether the majority are acting *bona fide*, and whether they are coercing the minority in order to promote interests adverse to those of the class whom they purport to represent. ...

21 Forsyth J. considered an article by Ronald N. Robertson, Q.C., in a publication entitled "Legal Problems on Reorganizing of Major Financial and Commercial Debtors", Canadian Bar Association — Ontario Continuing Legal Education, April 5, 1983, at p. 15 and summarized it as follows [p. 28 C.B.R.]:

> These comments may be reduced to two cogent points. First, it is clear that the C.C.A.A. grants a court the authority to alter the legal rights of parties other than the debtor company without their consent. Second, the primary purpose of the Act is to facilitate reorganizations and this factor must be given due consideration at every stage of the process, including the classification of creditors made under a proposed plan. To accept the 'identity of interest' proposition as a starting point in the classification of creditors necessarily results in a 'multiplicity of discrete classes' which would make any reorganization difficult, if not impossible, to achieve.
>
> In the result, given that this planned reorganization arises under the C.C.A.A., I must reject the arguments put forth by the Hongkong Bank and the Bank of America, that since they hold separate security over different assets, they must therefore be classified as a separate class of creditors.

22 There is undoubtedly merit in the arguments of the appellants in the present case. Better classifications could no doubt be arranged with the benefit of hindsight. It might have been beneficial if secured creditors of core properties were in a separate class from secured creditors of non-core properties and holders of mechanics' liens. However, the Act does not require more than a single class of secured creditors, and I am satisfied the present classification of creditors does not give rise to any substantial injustice. Classification was by a court order following a hearing at which the creditors were entitled to be heard. That order was made earlier than and distinct from the order sanctioning the plan. The classification order was never appealed, and the 21-day appeal period expired before the class meetings. The creditors and the debtor company were entitled to rely upon it as a foundation for the plan. It is not specifically included in the

present appeal because it was not subject to collateral attack in the proceedings before Nathanson J. who was bound by it. The proper procedure for attacking the classification order was by way of appeal from that order, not the sanctioning order. Nevertheless, because of the overall supervisory duty of the court to ensure fairness of the plan, it is my view that we could intervene with respect to the classification order if necessary to avert substantial injustice. I am not satisfied the present circumstances warrant this court's intervention. I would reject the grounds of appeal based on classification.

23 The ground of appeal first stated by the appellants is their assertion that a late-arriving proxy vote should not have been counted in the voting for the plan for the class of capital lease creditors. Without that vote that plan would have been defeated. The assumption of the appellants appears to be that rejection of a class plan would defeat the entire plan, or at least render it unfeasible, but that is contrary to the intention of the Act and to s. 7.03 of the plan as sanctioned. They assert a right to appeal from the result of voting for a plan approved by another class of creditors because approval of that plan was essential to the overall plan which is binding on them. Without endorsing that reasoning, the duty of this court, once again, is to consider whether the trial judge erred in assessing the fairness of the plan. This includes jurisdiction over the votes of all classes of creditors; if the impugned vote is a nullity it must be rejected.

24 Meetings of the six classes of creditors took place November 1 and 2, 1991. The meeting of the capital leasing creditors was held the first day. The original draft of the entire plan, including the plan for that class, and written statements of amendments were before the creditors. Disclosures of results of the most recent negotiations were made orally at the meeting, having the effect of amending the plan to include them.

25 Marcus Wide of Coopers & Lybrand, the court-appointed monitor, acted as chairman of all the meetings. He called for a motion of "closure" of the meeting following the vote. That is, he sought a motion prior to the vote to take effect after the vote. The minutes disclose that such a motion was made and seconded but do not show that it was voted on. After this motion, the creditors and their proxies cast their votes and dispersed. There was no motion for adjournment. The ballot box was sealed. The votes were not to be counted until after the last class meeting the next day. The Bruncor proxy in favour of Martin MacKinnon, Keddy's representative, was received by Mr. Wide at 5:08 p.m. on November 1. Mr. Justice Nathanson said [at p. 427 N.S.R.] that Mr. Wide

> declined to include and count the vote in the final tabulation of votes. However, reluctant to deny a legitimate creditor an opportunity to express its view concerning the plan, he brought the matter to the attention of the Court in the monitor's final report.

26 The monitor's report on the result of the vote by the capital lease creditors, and the controversial proxy, is as follows:

> 2. Capital Lease Creditors — failed to approve the plan

	For	Against
Value of creditors voting	$679,148	$261,509
Percentage	72	28
Number of creditors voting	8	1
Percentage	89	11

> The Monitor wishes to advise the Court that a proxy, instructing Mr. Martin MacKinnon to vote in favour of the plan, was received from Bruncor Leasing Inc., a capital lease creditor in the amount of $212,959, on the afternoon of November 1, 1991, subsequent to the meeting for that class, but not before the final meeting of creditors and while the ballots were still in sealed boxes. The instruction regarding proxies circulated with the notice of Meeting provides as follows:

> A proxy may be deposited with, faxed or mailed to and received by the monitor at any time up to the respective creditor meeting, or any adjournment thereof, or may be deposited with the chairman of the meeting immediately prior to the creditors meeting, or any adjournment thereof.
>
> This vote has therefore not been tabulated.
>
> Had the vote been tabulated the Capital Lease Class of Creditors would have approved the plan with 77.3 of the value of the votes cast in that class and 90 per cent of the number.

27 Mr. Justice Nathanson cited *Re Alabama, New Orleans, Texas & Pacific Junction Railway Co.*, supra, at p. 245 as authority for the statement that the vote required for approval of a plan is "a condition precedent to the jurisdiction of the Court." He stated [at p. 427] that "[i]f the vote is not in accord with the statutory requirement, the Court cannot exercise its jurisdiction under the statute to sanction the plan. Strict compliance with the statutory requirement is mandatory."

28 The Act provides statutory requirements as to the majorities necessary to approve a plan by a class of creditors, but no guidance as to the manner of voting. The words "present and voting, either in person or by proxy, at the meeting or meetings" of the creditors or a class of creditors have been referred to by counsel as a voting directive. In context, however, they merely define the creditors to be considered in determining whether the requisite majorities for approval of the plan have been met.

29 The somewhat unusual procedure of "closing" the meeting by motion prior to the vote presumably fixed the plan in the form it had attained up to the moment of closure and cut off further discussion while the creditors turned their attentions to the actual process of voting. Voting is as much a function of the meeting as discussion of the plan; while the voting was in progress the meeting necessarily continued in existence. Counting the ballots is as much a function of the vote as casting them. Apart from the security measure of sealing the ballot box, no step was taken, no motion moved nor voted on, to end the meeting or to close the voting, between the casting of the votes and the counting of them.

30 The meeting must still have been an existing, though fictitious, entity at the time the votes were counted; the count necessarily occurred within the context of the meeting. The continuation of the meeting and the acceptance of the late proxy vote finds support in the case law. See *Shaw v. Tati Concessions Ltd.*, [1913] 1 Ch. 292, [1911-13] All E.R. Rep. 694, 82 L.J. Ch. 159, 20 Mans. 104; *Washington State Labour Council v. Federated American Insurance Co.*, 78 Wash. 2d 263, 474 P.2d 98, 41 A.L.R. 3d 22 (Wash. 1970).

31 Counsel for the appellants complain that the proxy was obviously solicited from Bruncor by representatives of Keddy. However, they specifically acknowledged that they do not allege it was induced by improper side deals or secret benefits.

32 While it was obviously intended that proxies should be produced prior to the meetings, there appears to be nothing in the Act, nor in the orders, nor in the voting instructions of the monitor, to preclude the tabulation of a proxy vote submitted prior to the counting of ballots. The common law applies. That is stated in *Company Meetings* by J.M. Wainberg, Q.C., 2d ed. (Toronto: Canada Law Book, 1969) at p. 73 in his discussion of Rules of Order:

> When a poll is demanded, it shall be taken forthwith. If the poll is on the election of a chairman or on a motion to adjourn, the votes shall be counted forthwith, and the result declared before any further business is conducted. On any other question the count may be made at such time as the chairman directs, and other business may be proceeded with pending the results of the poll. Up to the time the poll is declared closed and the chairman (or the scrutineers) begin examining ballots, any qualified voter may vote.

33 The vote was carefully conducted, with due attention to fairness and security. I am not satisfied that prejudice was suffered by creditors of any other class as a result of the counting of the vote of a creditor qualified to vote in every respect save for tardiness. It is important that creditors not be disenfranchised for technical reasons; approval of a plan

is an expression of the collective will of the creditors, and it is important that be as broadly based as possible. It must be borne in mind that this was a vote by creditors under the *Companies' Creditors Arrangement Act*, not a meeting of municipal councillors or a company board of directors. Clear evidence of illegality within the spirit and purpose of the Act, not mere irregularity, is necessary to invalidate the ballot. If the ballot was not invalid, it must be counted.

34 As McEachern C.J.B.C. said [at p. 205 C.B.R.] in *Northland*,

> As the authorities say, we should not be astute in finding technical arguments to overcome the decision of such a majority.

35 Nevertheless, late proxies are not desirable. They create uncertainty, and there exists a perceived possibility for abuse. The reason for holding the counting of the votes until all creditors had voted was to ensure that classes with the latest meetings would not have the negotiating advantage of knowing how other classes had voted. Chairmen of creditors' meetings would be well advised to have the ballots counted promptly after they are cast and then to have the meeting properly adjourned. There would be no need to announce the results until after the last meeting.

36 I am not satisfied the appellants have demonstrated that Mr. Justice Nathanson erred at law in approving the Bruncor ballot. I would dismiss this ground of appeal.

37 The remaining grounds of appeal include the allegation that the plan for secured creditors was actually a number of plans tailored to individual creditors. This ground is closely related to the classification issue. The commonality of interests test is no longer strictly applied because of its unwieldiness. It necessarily follows that plans for broad classes of secured creditors must contain variations tailored to the situations of the various creditors within the class. Equality of treatment — as opposed to equitable treatment — is not a necessary, nor even a desirable goal. Variations are not in and of themselves unfair, provided there is proper disclosure. They must, however, be determined to be fair and reasonable within the context of the plan as a whole.

38 The other grounds to be considered within the general heading of unfairness include allegations that votes of secured creditors obtained by inducements should have been excluded, that the plan was not fair and reasonable among secured creditors and that the process employed by the respondent was inherently unfair.

39 The instances complained of are set forth in Mr. Justice Nathanson's decision and need not be repeated here. In dealing with them generally, he remarked that what the appellants overlooked was "that their objections must be examined in the light of what is in the best interests of the class of secured creditors to which they belong and of the creditors as a whole."

40 He summarized his conclusions about the complaints as follows [p. 431]:

> ... some of the complaints are relatively inconsequential, others have another ... context which is not stated. What appears on the surface to be the whole truth is, in reality, of less moment

41 He stated that he applied the following principles, which he derived from the case law [pp. 431-432]:

> 1. Negotiations between the debtor company and creditors are salutary and ought to be encouraged.
>
> 2. Secret or side deals or arrangements are improper. Their impropriety can be ameliorated by making full disclosure in a timely manner.
>
> 3. There is no authoritative definition of what constitutes full disclosure or timely manner; therefore, these may be questions of fact to be determined in each individual case.
>
> 4. Members of a class of creditors must be treated fairly and equitably. Where different members are treated differently, all members of the class must have knowledge of the plan overall and for the particular class.

42 Mr. Justice Nathanson made the following findings [p. 432]:

> I find that the debtor company made full disclosure in a timely manner by setting out the essential characteristics of the proposed plan, that is, all material information needed by a creditor in order to make a fair and informed judgment, in the draft plan as filed, in the two addenda circulated to the members of the class, and in the oral communications made during the meeting which could not have been made in writing at an earlier time because of the continuance of negotiations with various creditors. I also find that the members of the secured creditors class had full knowledge of the plan in its application to all members of that class and generally in its application to all creditors of all classes.
>
> I find that the members of the secured creditors class are treated fairly and equitably in the plan as amended. Some sacrifices will be made, but the evidence discloses that at least some of those sacrifices are of windfalls which might accrue if the plan is not approved and the sacrificing creditors are able to realize on the security which they hold.
>
> I hold that the proposed plan is fair and reasonable. It is a bona fide and creditable attempt to achieve a result which is generally fair to the creditors.

43 The burden on the appellants to show otherwise is a very heavy one. In considering fairness Mr. Justice Nathanson was in the last analysis exercising his discretion in addition to identifying and applying rules of law and making findings of fact. This court has ruled repeatedly, on sound authority, that it should only interfere with discretionary findings by a trial judge if serious or substantial injustice, material injury or very great prejudice would otherwise result. See, for example, *McCarthy v. Acadia University* (1977), 3 C.P.C. 42, 18 N.S.R. (2d) 364, 75 D.L.R. (3d) 304 (C.A.); *Exco Corp. v. Nova Scotia Savings & Loan Co.* (1983), 35 C.P.C. 245 at 255, 59 N.S.R. (2d) 331, 124 A.P.R. 331 (C.A.); *Westminer Canada Holdings Ltd. v. Coughlan* (1989), 91 N.S.R. (2d) 214, 233 A.P.R. 214 (C.A.); *Minkoff v. Poole* (1991), 101 N.S.R. (2d) 143, 275 A.P.R. 143 (C.A.); and the authorities cited therein.

44 When the judicial discretion is exercised in favour of sanctioning a plan proposed by a debtor company, but in a very real way created by a resounding majority vote of its creditors, the burden on the appellants becomes even heavier.

45 Nevertheless, there remain some matters of serious concern which the appellants have raised, including the fact that the respondent Central Guaranty Trust did not support the plan until arrangements had been made for paying its legal costs and for monthly instalments of municipal taxes. If these could be characterized as inducements to procure its vote, unfairness would be apparent.

46 A creditor which withholds its support from a plan because it has failed to address legitimate concerns arising from its contractual relationship with the debtor company is perfectly within its right to insist on improvements. The Act encourages just this kind of negotiation. It is not material whether agreement occurs soon after the first draft of the plan is circulated, so the resulting amendments can also be circulated to creditors, or whether a last-minute compromise is reached moments before the vote. The disclosure to be made in the latter instance will be necessarily sketchier than the one made in the former.

47 On the other hand a creditor whose legitimate concerns have been met on a basis similar to that of other creditors in its class, but which continues to insist on a benefit to which it is not entitled as the price of its vote, is attempting to commit the debtor to an unfair practice which could invalidate the whole plan. The distinction between the two situations must be drawn by the trial judge, and there will be occasions when it is a very difficult and murky one.

48 The benefit derived by the Relax Company in the *Northlands* case is an example of the first instance. So are the benefits negotiated by the Central Guaranty Trust in the present case. It seems clear that when other complaints of instances of unfairness were found by Mr. Justice Nathanson to involve matters of substance, he was able to consign them to the first category. I am not satisfied that he was wrong in doing so.

49 The Act clearly contemplates rough-and-tumble negotiations between debtor companies desperately seeking a chance to survive and creditors willing to keep them afloat, but on the best terms they can get. What the creditors and the company must live with is a plan of their own design, not the creation of a court. The court's role is to ensure that creditors who are bound unwillingly under the Act are not made victims of the majority and forced to accept terms that are unconscionable. No amount of disclosure could compensate for such deliberately unfair treatment. Neither disclosure, nor the votes of the majority, can be used to victimize a minority creditor. On the other hand negotiated inequalities of treatment which might be characterized as unfair in another context may well be ameliorated when made part of the plan by disclosure and voted upon by a majority. Lack of disclosure, however, can transform an intrinsically fair alteration in the terms of a plan into an unfair secret deal which invalidates a plan. As a general rule the plan must include all of the arrangements made between the debtor company and the creditors; in principle, undisclosed arrangements cannot be part of the plan because they are not what the creditors voted for. Nathanson J. found there is no authoritative definition of full or timely disclosure — these were questions of fact. Consequences of inadvertent and innocent non-disclosure and imperfect or inadequate disclosure must be assessed. This involves a fine sifting of all factors to tax the skill of a trial judge; I am not satisfied Nathanson J. committed reversible error in his analysis nor in his conclusion that all material information had been disclosed.

50 Another concern of the appellants, and of this court, is that regardless of any benefits they did not receive but which were negotiated by other secured creditors in their own interests, they are left worse off under the plan than they were under the provisions of their own security contracts. The appellants had taken pains to protect their own interests when they made the loans, and they would be repaid if they were left the freedom to realize on their security.

51 In his decision on a classification order in *Re NsC Diesel Power Inc.* (1990), 79 C.B.R. (N.S.) 1, 97 N.S.R. (2d) 295, 258 A.P.R. 295 (T.D.), Mr. Justice Davison cites with approval an article by Stanley E. Edwards in (1947) 25 Can. Bar Rev., at p. 587. He quotes Mr. Edwards at p. 595 as follows:

> There can hardly be a dispute as to the right of each of the parties to receive under the proposal at least as much as he would have received if there had been no reorganization. Since the company is insolvent this is the amount he would have received upon liquidation.

52 At p. 594 Mr. Edwards said:

> A further element of feasibility is that the plan should embrace all parties if possible, but particularly secured creditors, so that they will not be left in a position to foreclose and dismember the assets after the arrangement is sanctioned as they did in one case.

53 The one major disadvantage the appellants suffer is the loss of the present right to realize on their security. They may well consider that that right has been confiscated from them. It is essential to the purpose of the Act to bring about such a result, but it must be done fairly.

54 With an exception involving a government agency which had not been receiving a commercial rate of interest, all the secured creditors have their interest rates reduced to the current market level of 11 per cent, amortization periods increased, and in one case, principal and interest blended. However, the appellants' security is unimpaired, and apart from the reduced interest, they stand to recover as much as they would have if the reorganization had not taken place. Their worst disadvantage is that they are delayed in recovering under their security, which appears to be a necessity if the plan is to succeed. There is nothing to suggest that Keddy, or the other creditors, sought to take advantage of them. Rather, they were asked to accept what appears to be the minimum disadvantage consistent with a plan which might permit the company's survival. And, had they chosen to negotiate, they might have improved the terms.

55 In the long term creditors in the position of the appellants should be required to suffer no loss, and when such appears likely courts must be vigilant to protect them in keeping with the spirit of the Act.

56 At first blush the reduction of their interest rates from approximately 13 per cent to 11 per cent appears to represent a greater loss than can fairly be imposed upon them. However, what they are entitled to is not what they would recover if the contract were to be continued to its fulfilment as originally contemplated. What they are entitled to, as Mr. Edwards points out, is what they would recover from an insolvent company upon liquidation.

57 That is, they would be entitled to recover the outstanding balance they are owed plus interest to date. The reduced interest rate relates to future interest. On liquidation they may be presumed to reinvest their recovered capital at present market rates. The 11 per cent rate fairly represents the present market rate they would likely obtain on reinvestment of the funds. The other disadvantages of which they complain are merely delays in recovery for which they will be compensated by interest. They have suffered inconvenience but no injustice. They have not been treated unfairly within the spirit of the Act.

58 The plan originally proposed by Keddy was unacceptable to many of the creditors, although it would appear to have been offered in good faith. Keddy had to try to offer an acceptable plan, without any certain knowledge of the matters of chief concern to the individual creditors. If there had been no room for movement the plan would predictably have failed. What appears to be controversial is that a process of negotiations took place within a compressed time frame between Keddy and the creditors, in which the concerns of the creditors were considered. It does not appear that advantages negotiated by any creditor were offset by substantial disadvantages to another, nor does it appear that the advantages were so great as to constitute substantial unfairness even viewed in their worst light. In keeping with the purposes of the Act, substance must prevail over merely theoretical or technical considerations. The process took place in the open, and the other creditors were reasonably well advised of all amendments that were agreed to, with the possible exception of some last-minute changes of a relatively minor nature that escaped detailed disclosure. There appears to have been no deliberate intention to conceal or mislead.

59 The appellants were aware of the process but, in the belief that the plan would fail, did not fully participate. They were under no duty to negotiate for better terms. However, their choice not to do so does not entitle them on these facts to destroy a plan so strongly supported by the other creditors. The plan does not treat the creditors equally, but it treats them equitably. In my view, both the plan and the process by which it was achieved were not perfect, nor beyond criticism, but they were roughly fair and within the objectives of the Act, as Nathanson J. determined.

60 Considered as a whole, the concerns of the appellants are understandable. But when they are examined within the framework of the purposes and objectives of the *Companies' Creditors Arrangement Act* they lack sufficient substance to justify interference by this court with the plan sanctioned by Mr. Justice Nathanson.

61 I would dismiss the appeal. As the issues involved in this appeal were not previously considered by this court, the parties should bear their own costs.

Appeal dismissed.

End of Document

TAB 4

COURT FILE NUMBER	1101-09476
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
APPLICANTS	**IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED** **AND IN THE MATTER OF THE *CANADA BUSINESS CORPORATIONS ACT*, R.S.C. 1985, c. C-44, AS AMENDED** **AND IN THE MATTER OF OPTI CANADA INC. and OPTI TECHNOLOGY INC.**
DOCUMENT	**ORDER** **(Sanction Hearing and Stay Extension)**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	Macleod Dixon LLP 3700 Canterra Tower 400 Third Avenue SW Calgary, Alberta T2P 4H2 Phone: 403-267-8222 Fax: 403-264-5973 Attention: Howard A. Gorman/Craig Hoskins File No. 269517
DATE ON WHICH ORDER WAS PRONOUNCED	September 7, 2011
NAME OF JUSTICE WHO MADE THIS ORDER	Chief Justice N.C. Wittmann

Clerk's Stamp
CLERK OF THE COURT
FILED
SEP 08 2011
JUDICIAL CENTRE OF CALGARY

I hereby certify this to be a true copy of the original
Dated this 8 day of Sept, 2011
for Clerk of the Court

UPON the application of OPTI Technology Inc., ("Technology") and OPTI Canada Inc. ("Canada") (Technology and Canada hereinafter being referred to collectively as "OPTI"), **AND UPON** having read the pleadings, proceedings and evidence filed herein, including the Affidavit of Joseph Bradford sworn September 7, 2011 (the "September 7 Bradford Affidavit"), filed, **AND UPON** reviewing the Third Report of the Monitor dated September 7, 2011 and the Initial Order

(the "**Initial Order**") granted in the within proceedings on July 13, 2011; **AND UPON** it appearing that circumstances exist that make this Order and an extension of the stay of proceedings appropriate, and that OPTI has acted, and is acting, in good faith and with due diligence; **AND UPON** hearing counsel for OPTI and other interested parties and stakeholders;

IT IS HEREBY ORDERED, ADJUDGED AND DECLARED THAT:

Interpretation, Service and Meeting

1. For the purposes of this Order, capitalized terms used herein and not otherwise defined shall have the same meaning as those terms have been given in the August 4, 2011 Noteholder Meeting Order (the "Noteholder Meeting Order") in the within Action or the Master Plan defined therein.

2. With respect to service of notice of this application and all accompanying materials, the dissemination of the Meeting Materials (including the Plan), the service of notice of the Meeting and all other matters of technical compliance under the CCAA, the CBCA, and previous Orders of the Court:

   (a) Service of notice of this application and all supporting materials is hereby abridged to the extent required and is hereby deemed to be good and sufficient such that this application is properly returnable today, and any further requirement for service of the Application and supporting materials is dispensed with;

   (b) The distribution of the Meeting Materials (including the Plan) and all accompanying materials has been duly effected in accordance with the requirements of the Noteholder Meeting Order and the August 22, 2011 Order in this Action;

   (c) Proper notice of the Meeting was duly given to all Persons entitled to vote at such Meeting; and

   (d) The Meeting was duly convened and held in accordance with the provisions of the CCAA and the CBCA.

Sanction of Plan

3. OPTI has complied in all material respects with the provisions of the CCAA, the CBCA, and the previous Orders of this Honourable Court in these proceedings.

4. The Plan has been agreed to and approved by the Required Majority of Beneficial Noteholders and Qualified Transferees in accordance with the requirements of the CCAA, the CBCA, and the Noteholder Meeting Order.

5. The Plan (including the Master Plan, the Acquisition Plan, and the Recapitalization Plan) is found to be substantively and procedurally fair and reasonable to the Second Lien Noteholders, the Existing Shareholders and any other Persons, in the best interests of OPTI and all affected parties, does not constitute oppressive conduct to the Second Lien Noteholders, the Existing Shareholders or any other Persons and is hereby finally and absolutely sanctioned and approved pursuant to the provisions of the CCAA and the CBCA.

6. The Applicable Plan shall be implemented in accordance with the provisions of Article 5 of the Master Plan.

Plan Implementation

7. With respect to the Acquisition Plan only, it is hereby declared and directed that:

   (a) as of the Plan Implementation Date, the Acquisition Plan and all associated steps, transactions, arrangements, assignments, releases and reorganizations effected thereby are approved, binding and effective as set out in the Acquisition Plan upon Canada, all Second Lien Noteholders, all Existing Shareholders and all other Persons and Parties affected by the Acquisition Plan;

   (b) the steps to occur, be taken and be effected, and the releases to be effected, on the Plan Implementation Date are deemed to occur, be taken and effected, and be effective in the sequential order contemplated by Section 5.2 of the Acquisition Plan on the Plan Implementation Date, beginning at the Effective Time;

   (c) effective upon the fulfillment, satisfaction or waiver (in accordance with Section 7.4 of the Acquisition Plan) of the conditions in Section 7.3 of the Acquisition Plan, and in the sequential order contemplated by Section 5.2 of the Acquisition Plan:

      (i) the Recapitalization Plan shall be deemed to be terminated and be of no further force or effect;

      (ii) any accrued and unpaid interest payable under the Second Lien Notes as at the Plan Implementation Date shall be capitalized by adding it to the principal outstanding under the Second Lien Notes;

      (iii) the Second Lien Notes and Second Lien Claims shall be transferred and assigned from the Second Lien Noteholders to CNOOC BVI for a purchase price equal to the Note Purchase Price (less any amounts withheld, paid or payable pursuant to Section 4.10 of the Acquisition Plan), and extinguish any

rights of the Former Noteholders under their Second Lien Notes other than to receive their pro rata shares of the Note Purchase Price;

(iv) the Rights and any Common Share Options shall be cancelled and extinguished and the Rights Plan shall be terminated;

(v) the Common Shares shall be transferred and assigned from the Existing Shareholders to CNOOC Luxembourg for a purchase price equal to the Share Purchase Price, and any rights of the Existing Shareholders under the Common Shares shall be extinguished other than to receive their pro rata shares of the Share Purchase Price (less any amounts withheld, paid or payable pursuant to Section 4.10 of the Acquisition Plan);

(vi) Technology shall be liquidated and shall distribute its property and assets to Canada and the Monitor shall be deemed to hold the amount of the Cash Flow Deficiency in trust for and on behalf of Canada;

(vii) Canada shall be deemed to have assumed the obligations of Technology under the OPTI Technology Note and OPTI Technology GSA;

(viii) the releases referred to in Section 6.1 of the Acquisition Plan shall become effective in accordance with the Acquisition Plan;

(ix) the Second Lien Indenture Trustee and the Trust Company shall comply with the provisions set out in Sections 4.1, 4.2 and 4.10 of the Acquisition Plan, as applicable, regarding the payment of the Note Purchase Price and the Share Purchase Price;

(x) the Charges shall be deemed to be terminated and discharged solely with respect to Canada and its present and future Property , except for the Administration Charge;

(xi) the Initial Order shall be amended to provide that from and after the Plan Implementation Date, in respect of Canada, the Administration Charge shall apply only with respect to payments being made by the Monitor under the Acquisition Plan;

(xii) all payments by the Trust Company to the Second Lien Note Indenture Trustee under the Acquisition Plan shall be for the account of CNOOC BVI and the fulfillment of its obligations to the Second Lien Noteholders under the Acquisition Plan;

(xiii) all payments by the Trust Company or any Depository to the Existing Shareholders under the Acquisition Plan shall be for the account of CNOOC Luxembourg and the fulfillment of its obligations to the Existing Shareholders under the Acquisition Plan;

(xiv) upon completion by the Monitor of its duties in respect of Canada pursuant to the CCAA and the Orders, including, without limitation, the Monitor's duties in respect of the payments made by the Monitor in accordance with the Acquisition Plan, the Monitor may file with the Court a certificate of termination with respect to the Acquisition Plan stating that all of its duties in respect of Canada pursuant to the CCAA and the Orders have been completed and thereupon, Ernst & Young Inc. shall be deemed to be discharged from its duties as Monitor of Canada and the Administration Charge shall be terminated and released; and

(xv) Canada, the Monitor, the Purchasers and the Requisite Majority of the Noteholder Support Group shall be entitled to apply to the Court for advice and direction in respect of any matter arising from or under the Master Plan or the Acquisition Plan.

8. With respect to the Recapitalization Plan only, it is hereby declared and directed that:

(a) as of the Plan Implementation Date, the Recapitalization Plan and all associated steps, transactions, arrangements, assignments, releases and reorganizations effected thereby are hereby approved, binding and effective as set out in the Recapitalization Plan upon Canada, all Second Lien Noteholders, all Existing Shareholders and all other Persons and Parties affected by the Recapitalization Plan;

(b) the steps to occur, be taken and be effected, and the releases to be effected, on the Plan Implementation Date are deemed to occur, be taken and effected, and be effective in the sequential order contemplated by Section 5.3 of the Recapitalization Plan on the Plan Implementation Date, beginning at the Effective Time;

(c) the terms and conditions of the issuance and exchange of the Exchange Shares, the rights (but not the obligations) to acquire New Investment Shares pursuant to the New Investment (as defined in the Recapitalization Plan) (the "New Investment Rights") and the New Shareholder Warrants to and with the Second Lien Noteholders and the Existing Shareholders, as applicable, in exchange for the Claims and the Existing Common Shares held by the Second Lien Noteholders and the Existing Shareholders, as applicable, as well as the terms and conditions of the issuance of the New Investment Shares, are hereby approved and are determined to

be substantively and procedurally "fair" to the Second Lien Noteholders, the Existing Shareholders, and all other Persons, and the Court hereby makes the following additional findings:

(i) that prior to the hearing of this application, Canada has advised the Court that it would be relying on the Section 3(a)(10) exemption under the U.S. Securities Act in order to issue, without registration under the U.S. Securities Act, the Exchange Shares, the New Investment Rights and the New Shareholder Warrants to the Second Lien Noteholders and the Existing Shareholders, as applicable,

(ii) that the Court was, and is, authorized under the CCAA and the CBCA to conduct this application and to approve the fairness of the terms and conditions of such issuance and exchange, and

(iii) that this application has been open to all of the Second Lien Noteholders, the Existing Shareholders and all other Persons and, prior to this application, all of the Second Lien Noteholders, the Existing Shareholders and all other Persons were given adequate notice thereof and that there were no impediments to the Second Lien Noteholders, the Existing Shareholders and all other Persons appearing and being heard at said hearing;

(d) effective upon the fulfillment, satisfaction or waiver (in accordance with Section 7.4 of the Recapitalization Plan) of the conditions in Section 7.3 of the Recapitalization Plan, and in the sequential order contemplated by Section 5.3 of the Recapitalization Plan:

(i) unless previously terminated, the Acquisition Plan shall be deemed to be terminated and of no further force or effect;

(ii) all New Common Shares issued and outstanding shall be deemed to be issued and outstanding as fully-paid and non-assessable;

(iii) the Existing Equity shall be extinguished and cancelled without any repayment of capital thereof;

(iv) any rights of the Second Lien Noteholders under their Second Lien Notes shall be extinguished;

(v) the New Secured Debt Indentures shall be effective;

(vi) the New Credit Agreement shall be effective;

(vii) the Rights shall be terminated and extinguished and the Rights Plan shall be terminated;

(viii) a number of New Common Shares representing an amount to be determined by the New Board, such amount not to exceed 10% of the number of New Common Shares issued and outstanding immediately upon implementation of the Recapitalization Plan, shall be reserved for issuance by OPTI to directors, officers and employees of OPTI at the discretion of the New Board;

(ix) the First Lien Note Indenture Trustee and the Trust Company shall be directed to comply with the provisions of the Recapitalization Plan;

(x) the releases referred to in Section 6.1 of the Recapitalization Plan shall become effective;

(xi) the Charges shall be terminated and discharged;

(xii) upon completion by the Monitor of its duties in respect of Canada pursuant to the CCAA and the Orders, the Monitor may file with the Court a certificate of plan termination with respect to the Master Plan and the Recapitalization Plan stating that all of its duties in respect of OPTI pursuant to the CCAA and the Orders have been completed and thereupon Ernst & Young Inc. shall be deemed to be discharged from its duties as Monitor of Canada; and

(xiii) Canada, the Monitor and the Requisite Majority of the Noteholder Support Group may apply to the Court for advice and direction in respect of any matter arising from or under the Master Plan or the Recapitalization Plan.

9. With respect to both the Acquisition Plan and the Recapitalization Plan, it is hereby declared and directed that:

(a) subject to the performance by Canada of its obligations under the Master Plan and the Applicable Plan, all obligations, agreements or leases to which Canada is a Party shall be and remain in full force and effect, unamended, as at Plan Implementation, and no Party to any such obligation or agreement shall on or following Plan Implementation accelerate, terminate, refuse to renew, rescind, refuse to perform or otherwise repudiate its obligations thereunder, or enforce or exercise (or purport to enforce or exercise) any right or remedy under or in respect of any such obligation, agreement or lease, by reason:

(i) of any event which occurred prior to, and not continuing after, Plan Implementation or which is or continues to be suspended or waived under the Master Plan or the Applicable Plan, which would have entitled any other Party thereto to enforce those rights or remedies;

(ii) that Canada has sought or obtained relief or has taken steps as part of the Master Plan, the Applicable Plan or under the CCAA or CBCA;

(iii) of any default or event of default arising as a result of the financial condition or insolvency of Canada;

(iv) of the effect upon Canada of the completion of any of the transactions contemplated under the Master Plan or the Applicable Plan; or

(v) of any restructurings or reorganizations effected pursuant to the Master Plan or the Applicable Plan;

(b) the commencing, taking, applying for or issuing or continuing any and all steps or proceedings, including, without limitation, administrative hearings and orders, declarations or assessments, commenced, taken or proceeded with or that may be commenced, taken or proceeded with against any Released Party in respect of all Claims and any other matter released pursuant to Section 6.1 of the Applicable Plan is hereby stayed; and

(c) the Monitor is authorized to perform its functions and fulfill its obligations under the Applicable Plan to facilitate the implementation of the Applicable Plan.

10. From and after the Plan Implementation Date, all Persons shall be deemed to have waived any and all defaults then existing, previously committed, or caused by OPTI, any non-compliance with or breach of or default under any covenant, warranty, representation, term, provision, condition or obligation, express or implied, in any contract, instrument, credit document, guarantee, agreement for sale, lease or other agreement, written or oral, and any and all amendments or supplements thereto (each, an "Agreement") existing between such person and OPTI or any other Person, and which non-compliance, breach or default is applicable to OPTI or results from any circumstance or event applicable to OPTI or its obligations under any Agreement and any and all notices of default and demands for payment under any Agreement shall be deemed to be of no further force or effect.

11. From and after the Plan Implementation Date, each Creditor and any Person affected by the Master Plan will be deemed to have consented and agreed to all of the provisions of the Master Plan in its entirety. In particular, each Creditor shall be deemed on its own behalf

and on behalf of its heirs, executors, administrators, successors and assigns, for all purposes:

(a) to have executed and delivered to OPTI all consents, releases, assignments and waivers, statutory or otherwise, required to implement and carry out the Master Plan in its entirety;

(b) to have waived any default by OPTI in any provision, express or implied, in any Agreement or other arrangement existing between such Creditor and OPTI that occurred on or prior to the Plan Implementation Date;

(c) to have agreed that if there is any conflict between the provision, express or implied, of any Agreement or other arrangement existing between such Creditor and OPTI as at the Plan Implementation Date (other than those entered into by OPTI on, after, or with effect from, the Plan Implementation Date) and the provisions of the Master Plan, then the provision of the Master Plan take precedence and priority and the provisions of such Agreement or other arrangement are amended accordingly; and

(d) to have released and discharged absolutely all Claims against the Released Parties in accordance with the provisions of the Applicable Plan.

12. At any time on or after the Plan Implementation Date, OPTI is authorized to complete any steps, including but not limited to the preparation, execution, and filing of necessary documentation, required to effect the discharge of any registration made against OPTI by an Affected Creditor in respect of an Affected Claim and by any Creditor in respect of a Disputed Claim.

13. The Monitor is authorized to perform its functions and fulfill its obligations under the Master Plan to facilitate the implementation of the Master Plan.

Foreign Exchange Hedge

14. OPTI is hereby directed and authorized to pay the principal amount owing under the Swaps (as that term is defined in the Initial Order), plus any accrued but unpaid interest thereon, upon the implementation of the Applicable Plan.

Stay Extension

15. The Stay Period (as that term is defined in the Initial Order), as amended and extended by the August 4, 2011 First Stay Extension Order granted in the with action, is hereby further amended and extended to extend the Stay Period to and including November 4, 2011.

General

16. OPTI shall pay all employee claims under Section 6(5) of the CCAA.

17. There are no pension payments outstanding of the nature and kind referenced in Section 6(6) of the CCAA.

18. OPTI, the Monitor and all other parties are authorized and directed to take all steps and actions necessary or appropriate to implement the Applicable Plan, including the transactions contemplated by the Applicable Plan in accordance with the terms of the Plan.

19. Notwithstanding (a) the pendency of the CCAA Proceedings, the CBCA Proceedings, and the declarations of insolvency made therein; or (b) the provisions of any federal or provincial statute, none of the transactions, payments, steps, releases or compromises made during the CCAA Proceedings or the CBCA Proceedings or contemplated to be performed or effected pursuant to the Master Plan or the Applicable Plan shall constitute settlements, fraudulent preferences, fraudulent conveyances or other challengeable or reviewable transactions under any applicable law, federal, provincial or otherwise nor shall they constitute conduct meriting an oppression remedy.

20. Pursuant to the CCAA and the CBCA, this Order shall have full force and effect in all provinces of Canada. This Court requests the aid and recognition of: (i) any court or any judicial, regulatory or administrative body in any province or territory of Canada and the Federal Court of Canada; (ii) any judicial, regulatory or administrative tribunal or other court constituted pursuant to the Parliament of Canada or the legislature of any province; (iii) any court or any judicial, regulatory or administrative body of the United States; and (iv) the states or other subdivisions of the United States and of any other nation or state to act in aid of and to be complementary to this Court in carrying out the terms hereof.

21. Service of this Order shall only be required to be made upon those parties on the service list respecting this application and those additional parties in attendance at the hearing of the within application and shall be dispensed with as against all or any other parties.

C. J.C.Q.B.A.

TAB 5

COURT FILE NUMBER	1101-09476	Clerk's Stamp
COURT	COURT OF QUEEN'S BENCH OF ALBERTA	
JUDICIAL CENTRE	CALGARY	
APPLICANTS	**IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT,* R.S.C. 1985, c. C-36, AS AMENDED** **AND IN THE MATTER OF THE *CANADA BUSINESS CORPORATIONS ACT,* R.S.C. 1985, c. C-44, AS AMENDED** **AND IN THE MATTER OF OPTI CANADA INC. and OPTI TECHNOLOGY INC.**	
DOCUMENT	**PLAN OF COMPROMISE AND REORGANIZATION (RECAPITALIZATION PLAN)**	
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	Macleod Dixon LLP 3700 Canterra Tower 400 Third Avenue SW Calgary, Alberta T2P 4H2 Phone: 403-267-8222 Fax: 403-264-5973 Attention: Howard A. Gorman / R. Craig Hoskins File No. 269517	

PLAN OF COMPROMISE AND REORGANIZATION
(RECAPITALIZATION PLAN)

RECITALS

A. OPTI Canada Inc. (the "**Company**") is a corporation amalgamated under the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44 (the "**CBCA**") and is insolvent.

B. OPTI Technology Inc. ("**OPTI Technology**") is a wholly owned subsidiary of the Company, is incorporated under the CBCA, and is solvent.

C. The Company obtained an Order made by the Honourable Mr. Justice A.D. Macleod of the Court of Queen's Bench of Alberta (the "**Alberta Court**") under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "**CCAA**") on July 13, 2011 (the "**Initial Order**") which, among other things, appointed Ernst & Young Inc. as monitor (the "**Monitor**") of the Company, stayed proceedings against the Company and permitted the Company to present a plan of compromise and reorganization to the Second Lien Noteholders.

D. The Company and OPTI Technology commenced concurrent reorganization proceedings under the CBCA.

E. The Company obtained an Order made by the Honourable Mr. Justice A.D. Macleod of the Alberta Court under the CCAA on July 22, 2011 which, among other things, approved the Support Agreement (as defined below).

F. This Plan (as defined below) is a sub-plan of the Master Plan (as defined below), and is a plan of compromise and reorganization under the CCAA and the CBCA.

G. This Plan forms part of the Master Plan, and if (i) the Master Plan is approved by the Required Majority (as defined below) and sanctioned by the Alberta Court, and (ii) this Plan proceeds to implementation in accordance with the terms of the Master Plan, it will address the liabilities of the Company in respect of its Second Lien Notes (as defined below) and will facilitate the continuation of the business of the Company as a going concern for the benefit of stakeholders generally.

NOW THEREFORE the Company hereby proposes and presents this plan of compromise and reorganization under the CCAA and the CBCA:

ARTICLE 1
INTERPRETATION

1.1 Definitions

In this Plan and the Recitals, unless otherwise stated or unless the subject matter or context otherwise requires:

"**Accredited Investor**" has the meaning given to such term in Section 501 of Regulation D promulgated pursuant to the U.S. Securities Act, as amended;

"**Acquisition Plan**" means a sub-plan of the Master Plan intended to implement the "Acquisition Agreement", as such term is defined in the Support Agreement;

"**Administration Charge**" has the meaning given to that term in paragraph 31 of the Initial Order;

"**Administrative Agent**" means the administrative agent under the Credit Agreement;

"**Alberta Court**" has the meaning given to that term in Recital C;

"**Applicable Law**" means, with respect to any Person, property, transaction, event or other matter, any Law relating or applicable to such Person, property, transaction, event or other matter, including, where appropriate, any interpretation of the Law (or any part) by any Person, court or tribunal having jurisdiction over it, or charged with its administration or interpretation;

"**Backstop Charge**" has the meaning given to that term in paragraph 34 of the Initial Order;

"**Backstop Commitment Letter**" means the backstop commitment letter dated July 12, 2011 addressed to the Company and filed with the Alberta Court, as amended;

"**Backstop Parties**" has the meaning set out in the Backstop Commitment Letter;

"**BIA**" means the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3;

"**Business**" means the Company's business of developing integrated bitumen and heavy oil projects through joint ventures with Nexen Inc.;

"**Business Day**" means a day, other than Saturday, Sunday or a statutory holiday, on which banks are generally open for business in Calgary, Alberta;

"**Canadian Dollars**" or "**Cdn. $**"means lawful currency of Canada;

"**CBCA**" has the meaning given to that term in Recital A;

"**CBCA Proceedings**" means the proceedings commenced by the Company as applicant under the CBCA as contemplated by the Interim Order;

"**CCAA**" has the meaning given to that term in Recital C;

"**CCAA Proceedings**" means the proceedings commenced by the Company in the Alberta Court under the CCAA as contemplated by the Initial Order;

"**CDS**" means CDS Clearing and Depository Services, Inc., or any successor thereof;

"**Charges**" means, collectively, the Administration Charge, the Backstop Charge, the Directors' Charge and any other charge created by an Order of the Alberta Court in the CCAA Proceedings;

"**Claim**" means any right or claim of any Person that may be asserted or made in whole or in part against the Company or any of the Directors, whether or not asserted or made, in connection with any indebtedness, liability or obligation of any kind whatsoever, and any interest accrued thereon or costs payable in respect thereof, including by reason of the commission of a tort (intentional or unintentional), by reason of any breach of contract or other agreement (oral or written), by reason of any breach of duty (including any legal, statutory, equitable or fiduciary duty) or by reason of any right of ownership of or title to property or assets or right to a trust or deemed trust (statutory, express, implied, resulting, constructive or otherwise), and whether or not any indebtedness, liability or obligation is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, unsecured, present or future, known or unknown, by guarantee, surety or otherwise, and whether or not any right or claim is executory or anticipatory in nature including any right or ability of any Person to advance a claim for contribution or indemnity or otherwise with respect to any matter, action, cause or chose in action whether existing at present or commenced in the future, together with any other rights or claims of any kind that, if unsecured, would be a debt provable in bankruptcy within the meaning of the BIA had the Company become bankrupt;

"**Class**" means the class of Second Lien Noteholders established in Section 3.1;

"**Company**" has the meaning given to that term in Recital A;

"**Credit Agreement**" means the amended and restated credit facility agreement dated as of November 20, 2009 among the Company, the initial lenders thereunder, The Toronto-Dominion Bank as administrative agent, The Bank of Nova Scotia and Credit Suisse AG, Toronto Branch as co-syndication agents, TD Securities, The Bank of Nova Scotia and Credit Suisse AG, Toronto Branch as joint lead arrangers, and TD Securities as sole bookrunner;

"**Credit Facility**" means the Cdn. $190,000,000 senior secured credit facility provided to the Company pursuant to the Credit Agreement;

"**Credit Facility Claim**" means, as of the Effective Time, any liquidated Claim of the Lenders for principal, interest or other amounts payable to them under and pursuant to the Credit Agreement;

"**Creditor**" means any Person having a Claim and may, where the context requires, include the assignee of a Claim or a personal representative, trustee, interim receiver, receiver, receiver and manager, liquidator or other Person acting on behalf of such Person;

"**Creditors' Meeting**" means the meeting of the Second Lien Noteholders to be called and held pursuant to the Meeting Order for the purpose of considering and voting upon the Master Plan, and includes any adjournment of such meeting;

"**Defaulting Backstop Party**" has the meaning given to such term in the Backstop Commitment Letter;

"**Directors**" means the directors of the Company during the period between the Filing Date and the date that the New Board is appointed;

"**Directors' Charge**" has the meaning given to that term in paragraph 22 of the Initial Order;

"**Distribution Record Date**" means the date that is the earlier of (i) three (3) Business Days before the Plan Implementation Date and (ii) October 15, 2011;

"**DTC**" means the Depository Trust Company, or any successor thereof;

"**Effective Time**" means 12:01 a.m. on the Plan Implementation Date;

"**Election Form**" has the meaning given to such term in Section 4.7(a);

"**Electing Second Lien Noteholder**" means each Backstop Party and every other Eligible Second Lien Noteholder that elects to participate in the New Investment;

"**Eligible Second Lien Noteholder**" means a Second Lien Noteholder that, to the extent resident of the United States, is an Accredited Investor and that is otherwise eligible to participate in the New Investment under Applicable Laws in the manner contemplated herein;

"**Exchange Shares**" means the New Common Shares issued pursuant to this Plan other than the New Investment Shares, and the total number of which shall be calculated as follows: 100 million minus the total number of New Investment Shares;

"**Existing Common Shares**" means the common shares in the capital of the Company that are duly issued and outstanding immediately prior to the Effective Time;

"**Existing Equity**" means all equity of the Company existing immediately prior to the Effective Time, including, (i) the Existing Common Shares, (ii) any preferred shares or other classes of shares of the Company, and (iii) any options, warrants, conversion privileges, calls, subscriptions, exchangeable securities or other rights, agreements, arrangements or commitments (pre-emptive, contingent or otherwise) obligating the Company to issue or sell shares in the capital of the Company or any securities or obligations of any kind convertible into or exchangeable for such shares, other than the New Shareholder Warrants, and including any or all rights, actions, causes of action, claims or proceedings (actual or contingent, whether or not previously asserted) relating to any of (i), (ii) or (iii) above;

"**Existing Shareholder**" means a Person holding at least one Existing Common Share on or prior to the Filing Date or any transferees or assignees thereof in compliance with Section 4.6(b);

"**Filing Date**" means July 13, 2011;

"**First Lien Claim**" means, as of the Effective Time, any liquidated Claim of the First Lien Noteholders for principal, interest or other amounts payable to them under and pursuant to the First Lien Notes;

"**First Lien Note Indenture Trustee**" means The Bank of New York Mellon or such other Person appointed as trustee from time to time under a First Lien Note Indenture;

"**First Lien Note Indentures**" means the indentures dated as of November 20, 2009 and August 20, 2010 between the Company and First Lien Note Indenture Trustee, and "**First Lien Note Indenture**" means one of them;

"**First Lien Noteholders**" means either the registered holders or beneficial holders of the First Lien Notes, as applicable in the circumstance;

"**First Lien Notes**" means, collectively, the U.S. $525,000,000 9% first lien senior secured notes of the Company due December 15, 2012 issued pursuant to the First Lien Note Indenture dated as of November 20, 2009 and the U.S. $300,000,000 9.750% first lien senior secured notes of the Company due August 15, 2013 issued pursuant to the First Lien Note Indenture dated as of August 20, 2010;

"**Government Authority**" means a federal, provincial, territorial, municipal or other government or government department, agency or authority (including a court of law) having jurisdiction over a Party, the Company, the Business or this Plan;

"**Initial Backstop Parties**" has the meaning set out in the Backstop Commitment Letter;

"**Initial Order**" has the meaning given to that term in Recital C;

"**Interim Order**" means the interim order of the Alberta Court in respect of the Company pursuant to the CBCA, such interim order to be in form and substance reasonably satisfactory to the Company and the Requisite Majority of the Noteholder Support Group;

"**Law**" means any law, rule, statute, regulation, order, judgment, decree, treaty or other requirement having the force of law;

"**Lenders**" means the lenders under the Credit Agreement;

"**Liens**" means any security interests, deemed trusts, statutory and other liens (including builders' liens), charges, mortgages, hypothecs, pledges, security deposits, letters of credit, assignments by way of security, conditional sales, title retention arrangements or other encumbrances held by any Persons;

"**Master Plan**" means the plan to which this Plan is attached;

"**Material Adverse Effect**" shall have the meaning given to that term in the Support Agreement;

"**Meeting Order**" means the Order in the CCAA Proceedings and CBCA Proceedings that, among other things, accepts the filing of the Master Plan and calls and sets the date for the Creditors' Meeting, in form and substance satisfactory to the Requisite Majority of the Noteholder Support Group, acting reasonably;

"**Monitor**" has the meaning given to that term in Recital C;

"**New Board**" means the seven person Board of Directors of the Company to be selected on a date not earlier than November 1, 2011 unless it appears highly unlikely that this Plan will proceed to implementation, such Board of Directors to be selected in accordance with the terms of the Support Agreement;

"**New Common Shares**" means the Class A common shares in the capital of the Company created in accordance with Section 5.3(a)(iii);

"**New Credit Agreement**" means the credit agreement to which the Company is a party, governing the terms and conditions of the New Credit Facility;

"**New Credit Facility**" means the new senior secured credit facility provided to the Company, the terms and conditions of which are to be governed by the New Credit Agreement;

"**New Credit Facility Security Agreements**" has the meaning given to such term in Section 7.3(j);

"**New Investment**" means the new investment by the Electing Second Lien Noteholders in the New Common Shares in the aggregate subscription amount of U.S. $375 million;

"**New Investment Discount**" means 0.20 provided that the Strip Price is equal to or greater than U.S. $90.00 for at least one of the three consecutive Business Days immediately prior to the Plan Implementation Date, and otherwise shall be determined as follows based on the highest Strip Price during the three consecutive Business Days immediately prior to the Plan Implementation Date

Strip Price	New Investment Discount
U.S. $80.00 – U.S. $89.99	0.25
U.S. $70.00 – U.S. $79.99	0.30
U.S. $60.00 – U.S. $69.99	0.35
U.S. $ 0.00 – U.S. $59.99	0.40

"**New Investment Proceeds**" means U.S. $375 million;

"**New Investment Shares**" means the New Common Shares issued in consideration of the New Investment in accordance with this Plan, the number of which shall be the quotient of the following formula: 1.05 x New Investment Proceeds ÷ Subscription Price;

"**New Secured Debt**" means the new secured debt issued by the Company in an amount equal to the New Secured Debt Amount, the terms and conditions of which are to be governed by the New Secured Debt Indentures;

"**New Secured Debt Amount**" means the amount of the New Secured Debt, such amount to be determined in accordance with the terms of the Support Agreement and not to be less than U.S. $1.1 billion;

"**New Secured Debt Indentures**" means the indenture(s) to which the Company is a party governing the terms and conditions of the New Secured Debt;

"**New Secured Debt Security Agreements**" has the meaning given to such term in Section 7.3(i);

"**New Shareholder Warrant Indenture**" means the warrant indenture between the Company and the Trust Company, to be dated as of the Plan Implementation Date, providing for the issuance of the New Shareholder Warrants;

"**New Shareholder Warrants**" means the warrants to be issued to Existing Shareholders, exercisable for 25,535,597 New Common Shares in the aggregate, each warrant (i) to be exercisable for one New Common Share with a strike price of U.S. $22.27 per New Common Share, (ii) to expire on the date that is seven (7) years after the Plan Implementation Date, if not exercised earlier than such date, and (iii) to have such other terms and conditions as are set forth in the New Shareholder Warrant Indenture;

"**OPTI Technology**" has the meaning given to that term in Recital B;

"**Order**" means any order of the Alberta Court in the CCAA Proceedings or CBCA Proceedings, in each case such order to be reasonably satisfactory to the Company and the Requisite Majority of the Noteholder Support Group, acting reasonably;

"**Outside Date**" means December 1, 2011;

"**Party**" means a party to any agreement, including this Plan, and any reference to a Party includes its successors and permitted assigns; and "**Parties**" means every Party;

"**Person**" is to be broadly interpreted and includes any individual, firm, corporation, limited or unlimited liability company, general or limited partnership, association, trust, unincorporated organization, joint venture, Government Authority or any agency, officer or instrumentality thereof or any other entity, wherever situate or domiciled, and whether or not having legal status;

"**Plan**" means this plan of compromise and reorganization filed by the Company as a sub-plan to the Master Plan under the CCAA and under the CBCA, as such Plan may be amended, varied or supplemented by the Company from time to time in accordance with the terms hereof;

"**Plan Implementation**" means the fulfillment, satisfaction or waiver (to the extent permitted under Section 7.4) of the conditions set out in Section 7.3 and the occurrence or effecting of the steps set out in Section 5.3;

"**Plan Implementation Date**" means the Business Day on which this Plan becomes effective, which shall be the Business Day on which the Monitor has delivered the certificate pursuant to Section 7.5 confirming that the conditions to Plan Implementation have been fulfilled, satisfied or waived in accordance with this Plan;

"**Plan Sanction Date**" means the date that the Plan Sanction Order is made by the Alberta Court;

"**Plan Sanction Order**" means an Order which, among other things, shall approve and sanction the Master Plan under the CCAA and the CBCA and shall include provisions as may be necessary or appropriate to give effect to the Master Plan, in form and substance satisfactory to the Company and the Requisite Majority of the Noteholder Support Group, acting reasonably;

"**Pro Rata Share**" has the meaning given to such term in the Backstop Commitment Letter;

"**Released Party**" has the meaning given to that term in Section 6.1;

"**Required Majority**" means a majority in number of the Second Lien Noteholders who represent at least two-thirds in value of the Voting Claims of such Second Lien Noteholders who actually vote on the resolution approving the Master Plan (in person or by proxy) at the Creditors' Meeting;

"**Requisite Majority of the Noteholder Support Group**" has the meaning given to that term in the Support Agreement;

"**Rights**" means the rights held by the Existing Shareholders pursuant to the Rights Plan;

"**Rights Plan**" means the shareholder rights plan of the Company dated as of April 27, 2006 between the Company and Valiant Trust Company, as rights agent, as amended.

"**Second Lien Claim**" means, as of July 13, 2011, any liquidated Claim of the Second Lien Noteholders for principal, interest or other amounts payable to them under and pursuant to the Second Lien Notes;

"**Second Lien Note Indenture Trustee**" means The Bank of New York Mellon or such other Person appointed as trustee from time to time under a Second Lien Note Indenture;

"**Second Lien Note Indentures**" means indentures dated as of December 15, 2006 and July 5, 2007 between the Second Lien Note Indenture Trustee and the Company, and "**Second Lien Note Indenture**" means one of them;

"**Second Lien Noteholders**" means either the registered holders or beneficial holders of the Second Lien Notes, as applicable in the circumstance;

"**Second Lien Notes**" means, collectively, the U.S. $1 billion 8.25% senior secured notes due December 15, 2014 issued pursuant to the Second Lien Note Indenture dated as of December 15, 2006, and the U.S. $750 million 7.875% senior secured notes due December 15, 2014 issued pursuant to the Second Lien Note Indenture dated as of July 5, 2007;

"**Second Lien Principal Claim**" means, as of July 13, 2011, any claim of the Second Lien Noteholders for principal, excluding any accrued and unpaid interest or other amount payable to them under and pursuant to the Second Lien Notes;

"**Strip Price**" means the Bloomberg Nymex Crude Oil 12 Month Futures Price (Ticker: NRGSCL12), as quoted by Bloomberg;

"**Subscription Price**" means the subscription price per New Investment Share, which shall be the quotient of the following formula:

$$\frac{\text{U.S. \$1.725 billion x (1 – New Investment Discount) – New Secured Debt Amount – U.S. \$10 million – U.S. \$56 million + New Investment Proceeds}}{\text{100 million}}$$

"**Support Agreement**" means the amended and restated support agreement dated as of July 19, 2011 among the Company, CNOOC Luxembourg S.à r.l., CNOOC International Limited, and certain Second Lien Noteholders, as amended;

"**Trust Company**" means a trust company incorporated under the laws of the United States of America or the state of New York that is selected by the Company and is satisfactory to the Requisite Majority of the Noteholder Support Group, acting reasonably;

"**Unaffected Claims**" means Claims of Creditors other than the Second Lien Claims;

"**Unaffected Creditor**" means a Creditor who has an Unaffected Claim, but only in respect of and to the extent of such Unaffected Claim;

"**U.S. Dollars**" or "**U.S. $**"means the lawful currency of the United States of America;

"**U.S. Securities Act**" means the United States Securities Act of 1933, as amended;

"**Voting Claim**" means the amount of a Second Lien Claim as determined for voting and payment purposes in accordance with the provisions of the Meeting Order and the Master Plan; and

"**Voting Record Date**" has the meaning set out in the Meeting Order.

1.2 Certain Rules of Interpretation

For the purposes of this Plan:

(a) Any reference in this Plan to a contract, instrument, release, indenture, or other agreement or document being in a particular form or on particular terms and conditions means that such document shall be substantially in such form or substantially on such terms and conditions;

(b) Any reference in this Plan to an Order or an existing document or exhibit filed or to be filed means such document or exhibit as it may have been or may be amended, modified, or supplemented;

(c) The division of this Plan into articles and sections is for convenience of reference only and does not affect the construction or interpretation of this Plan, nor are the descriptive headings of articles and sections intended as complete or accurate descriptions of the content thereof;

(d) The use of words in the singular or plural, or with a particular gender, including a definition, shall not limit the scope or exclude the application of any provision of this Plan to such Person (or Persons) or circumstances as the context otherwise permits;

(e) The words "**includes**" and "**including**" and similar terms of inclusion shall not, unless expressly modified by the words "**only**" or "**solely**", be construed as terms of limitation, but rather shall mean "**includes but is not limited to**" and "**including but not limited to**", so that references to included matters shall be regarded as illustrative without being either characterizing or exhaustive;

(f) Unless otherwise specified, all references to time herein and in any document issued pursuant hereto mean local time in Calgary, Alberta (Mountain Time) and any reference to an event occurring on a Business Day shall mean prior to 5:00 p.m. on such Business Day;

(g) Unless otherwise specified, time periods within or following which any payment is to be made or act is to be done shall be calculated by excluding the day on which the period commences and including the day on which the period ends and by extending the period to the next succeeding Business Day if the last day of the period is not a Business Day;

(h) Unless otherwise provided, any reference to a statute or other enactment of parliament, a legislature or other Government Authority includes all regulations made thereunder, all amendments to or re-enactments of such statute or regulations in force from time to time, and, if applicable, any statute or regulation that supplements or supersedes such statute or regulation;

(i) References to a specific Recital, Article or Section shall, unless something in the subject matter or context is inconsistent therewith, be construed as references to that specific Recital, Article or Section of this Plan, whereas the terms "**this Plan**", "**hereof**", "**herein**", "**hereto**", "**hereunder**" and similar expressions shall be deemed to refer generally to this Plan and not to any particular Recital, Article, Section or other portion of this Plan and include any documents supplemental hereto; and

(j) The word "or" is not exclusive.

1.3 Successors and Assigns

This Plan shall be binding upon and shall enure to the benefit of the heirs, administrators, executors, legal personal representatives, successors and assigns of any Person or Party named or referred to in this Plan.

1.4 Governing Law

This Plan shall be governed by and construed in accordance with the laws of Alberta and the federal laws of Canada applicable therein. All questions as to the interpretation of or application of this Plan and all proceedings taken in connection with this Plan and its provisions shall be subject to the jurisdiction of the Alberta Court.

ARTICLE 2
PURPOSE AND EFFECT OF THIS PLAN AND OPERATIONS

2.1 Purpose

The purpose of this Plan is to restructure the Company financially and to provide the Company with additional liquidity to enable the Company to continue its Business as a going concern from and after the Plan Implementation Date in the expectation that all Persons with an economic interest in the Company will derive a greater benefit from the implementation of this Plan than would result from a bankruptcy, receivership or other liquidation of the Company.

2.2 Effectiveness

This Plan will become effective in the sequence described in Section 5.3 from and after the Effective Time on the Plan Implementation Date and shall be binding on and enure to the benefit of the Company, the Second Lien Noteholders, all Existing Shareholders, past and present directors and officers of the Company and all other Persons named or referred to in, or subject to, this Plan.

2.3 Persons Not Affected

For greater certainty, this Plan does not affect the Unaffected Creditors with respect to and to the extent of their Unaffected Claims. Nothing in this Plan shall affect the Company's rights and defences, both legal and equitable, with respect to any Unaffected Claims, including, but not limited to, all rights with respect to legal and equitable defences or entitlements to set-offs or recoupments against such Unaffected Claims.

ARTICLE 3
CLASSIFICATION OF CREDITORS, VOTING CLAIMS AND RELATED MATTERS

3.1 Class of Second Lien Noteholders

For the purposes of considering and voting on the Master Plan, there shall be one class of Creditors affected by this Plan consisting of the Second Lien Noteholders.

3.2 Second Lien Claims

Second Lien Noteholders shall be entitled to vote their Voting Claims at the Creditors' Meeting in respect of the Master Plan, in accordance with the Meeting Order.

3.3 Creditors' Meeting

The Creditors' Meeting shall be held in accordance with the Master Plan, this Plan, the Meeting Order and any further Order in the CCAA Proceedings and CBCA Proceedings.

ARTICLE 4
PROVISIONS GOVERNING PAYMENTS & ASSIGNMENTS

4.1 Payments to Unaffected Creditors

The Company shall, subject to and in accordance with the Initial Order, make payments on account of the Claims of Unaffected Creditors in the ordinary course both before and after the Plan Implementation Date.

4.2 Currency

All payments to be made hereunder shall be paid in U.S. Dollars.

4.3 Delivery of New Securities

(a) The delivery of certificates representing the New Common Shares and New Shareholder Warrants to be distributed under this Plan will be made no later than the second Business Day following the Plan Implementation Date.

(b) The Second Lien Notes are held by DTC, through its nominee Cede & Co. The delivery of Exchange Shares pursuant to Section 5.3(a)(vii) will be made through the facilities of DTC to DTC participants, who, in turn, will make delivery of such Exchange Shares to the beneficial holders of such Second Lien Notes pursuant to standing instructions and customary practices. The Company and the Second Lien Note Indenture Trustees will have no liability or obligation in respect of all deliveries from DTC, or its nominee, to DTC participants or to beneficial holders.

(c) The delivery of New Shareholder Warrants pursuant to Section 5.3(a)(v) to Existing Shareholders who held Existing Common Shares at the Distribution Record Date through DTC or CDS will be made through the facilities of CDS to CDS participants and through DTC to DTC participants, as applicable, who, in turn, will make delivery of such New Shareholder Warrants to the beneficial holders of such Existing Common Shares pursuant to standing instructions and customary practices. The Company will have no liability or obligation in respect of all deliveries from CDS, or its nominee, to CDS participants or from DTC, or its nominee, to DTC participants, or to beneficial holders.

(d) A registered Existing Shareholder who is to receive New Shareholder Warrants pursuant to Section 5.3(a)(v) will only receive the certificates representing such Shareholder Warrants upon receipt by the Company or a depositary appointed by the Company of a duly completed letter of transmittal together with a certificate or certificates representing the Existing Common Shares held by such Existing Shareholder, and all other required documentation.

(e) The delivery of New Investment Shares to Electing Second Lien Noteholders pursuant to Section 5.3(a)(viii) and to Backstop Parties pursuant to Section

5.3(a)(ix) will be made through the facilities of CDS to CDS participants and through DTC to DTC participants, as applicable, who, in turn, will make delivery of such New Investment Shares to the Electing Second Lien Noteholders and Backstop Parties in accordance with the instructions of such parties. The Company will have no liability or obligation in respect of all deliveries from CDS, or its nominee, to CDS participants or from DTC, or its nominee, to DTC participants, or to beneficial holders.

(f) Securities issued pursuant to this Plan shall bear any restrictive or other legends required pursuant to applicable securities and other laws.

4.4 Crown Priority Claims

Within six (6) months after the Plan Implementation Date, the Company shall pay in full to Her Majesty in Right of Canada or any province all amounts of a kind that could be subject to a demand under the statutory provision enumerated in Section 6(3) of the CCAA that were outstanding on the Filing Date and which have not been paid by the Plan Implementation Date.

4.5 Treatment of Second Lien Noteholders

In accordance with and pursuant to Sections 4.7 and 5.3(a), each Second Lien Noteholder shall receive, in full and final satisfaction of its Second Lien Claim, (i) its *pro rata* share of the Exchange Shares, and (ii) the right, but not the obligation, to participate in the New Investment, provided that such right may only be exercised by an Eligible Second Lien Noteholder. Such Exchange Shares and right to participate in the New Investment shall be first in consideration of the principal amount of the Second Lien Notes and the balance, if any, shall then be in consideration of the accrued and unpaid interest and penalties, if any, on the Second Lien Notes.

4.6 Recognition of Assignments of Second Lien Claims and Existing Common Shares

(a) Subject to the terms and conditions of the Support Agreement (including the requirement that the assignee execute and return to the Company a joinder agreement to the Support Agreement, if applicable), a Second Lien Noteholder may transfer or assign the whole or part of its Second Lien Claim prior to the Creditors' Meeting and the Company shall not be obliged to deal with any such transferee or assignee as a Second Lien Noteholder in respect thereof, including allowing such transferee or assignee to vote at the Creditors' Meeting, unless and until actual notice of the transfer or assignment, together with satisfactory evidence of such transfer or assignment, has been received by the Company and the Monitor by no later than 5 p.m. on the Business Day immediately prior to the Creditors' Meeting (or any adjournment thereof). Thereafter, such transferee or assignee shall, for all purposes in accordance with this Plan, constitute a Second

Lien Noteholder and shall be bound by any and all notices previously given to the transferor or assignor in respect of such Second Lien Claim.

(b) An Existing Shareholder may transfer or assign all of its Existing Common Shares and the Company and the Monitor shall not be obliged to issue New Shareholder Warrants or otherwise deal with such transferee or assignee as an Existing Shareholder in respect thereof unless and until actual notice of the transfer or assignment, together with satisfactory evidence of such transfer or assignment, has been received by the Company and the Monitor on the day that is at least ten (10) Business Days immediately prior to the Distribution Record Date. Thereafter, such transferee or assignee shall, for all purposes in accordance with this Plan constitute an Existing Shareholder and shall be bound by any and all notices previously given to the transferor or assignor in respect of such Existing Common Shares. Transfers or assignments of fractional Existing Common Shares shall be void and not recognized by the Company or the Monitor.

4.7 New Investment

(a) Pursuant to and in accordance with the Meeting Order, the Company shall deliver an election form ("**Election Form**") to each Second Lien Noteholder as of the Voting Record Date pursuant to which each Eligible Second Lien Noteholder shall have the right, conditional upon the implementation of this Plan and effective on the Plan Implementation Date in accordance with Section 5.3, but not the obligation, to elect irrevocably to participate in the New Investment up to a maximum of such Eligible Second Lien Noteholder's *pro rata* share (based on such Eligible Second Lien Noteholder's share of the Second Lien Principal Claim as at the Voting Record Date) of 70% of the New Investment. In order to elect to participate in the New Investment, the Eligible Second Lien Noteholder shall return the duly executed Election Form to the Company and to the Monitor (with a copy to the Requisite Majority of the Noteholder Support Group in accordance with Section 8.8(c)) on or before October 15, 2011.

(b) In accordance with the Backstop Commitment Letter, the Backstop Parties shall subscribe, based on each Backstop Parties' Pro Rata Share, for the remaining 30% of the New Investment and any other amount of the New Investment not otherwise subscribed for by Eligible Second Lien Noteholders in accordance with Section 4.7(a).

(c) On or before November 7, 2011, the Monitor shall inform each Electing Second Lien Noteholder of the exact amount of funds required to be deposited in escrow with the Trust Company by such party to subscribe for the New Investment.

(d) Ten Business Days prior to the expected Plan Implementation Date, the Monitor shall inform each Electing Second Lien Noteholder (i) that this Plan is expected to

be implemented in ten Business Days, and (ii) that the funds required to be deposited in escrow with the Trust Company by such Electing Second Lien Noteholder must be deposited no later than five Business Days prior to the expected Plan Implementation Date.

(e) If the whole amount of the New Investment Proceeds has not been deposited with the Trust Company by no later than five Business Days prior to the expected Plan Implementation Date, then four Business Days prior to the expected Plan Implementation Date, the Monitor shall inform each Backstop Party (i) the exact amount of additional funds required to be deposited in escrow with the Trust Company by such party, and (ii) that the additional funds required to be deposited in escrow with the Trust Company by such Backstop Party must be deposited no later than two Business Days prior to the expected Plan Implementation Date.

4.8 Lost Existing Common Share Certificates

In the event any certificate which immediately prior to the Effective Time represented one or more outstanding Existing Common Shares shall have been lost, stolen or destroyed, upon the making of an affidavit of that fact by the Person claiming such certificate to be lost, stolen or destroyed, the Company shall provide such Person with the certificates representing such Shareholder Warrants deliverable in accordance with such Peron's letter of transmittal in accordance with Section 4.3(d). When providing such certificates in exchange for any lost, stolen or destroyed certificate, the Person to whom such payment is to be delivered shall, at the discretion of the Company, as a condition precedent to the delivery of such certificate, give a bond satisfactory to the Company in such sum as the Company may direct, or otherwise indemnify the Company in a manner satisfactory to the Company, acting reasonably, against any claim that may be made against the Company with respect to the certificate alleged to have been lost, stolen or destroyed.

ARTICLE 5
COMPANY REORGANIZATION

5.1 Corporate Authorizations

The adoption, execution, delivery, implementation and consummation of all matters contemplated under this Plan involving corporate action of the Company will occur and be effective as of the Plan Implementation Date, and will be authorized and approved under this Plan and by the Alberta Court, where appropriate, as part of the Plan Sanction Order, in all respects and for all purposes without any requirement of further action by shareholders, directors or officers of the Company. All necessary approvals to take actions shall be deemed to have been obtained from the directors or the shareholders of the Company, as applicable, including the deemed passing by any class of shareholders of any resolution or special resolution and no shareholders' agreement

or agreement between a shareholder and another Person limiting in any way the right to vote shares held by such shareholder or shareholders with respect to any of the steps contemplated by this Plan shall be deemed to be effective and no such agreement shall have any force or effect.

5.2 Fractional Interests

No certificates or scrip representing fractional New Common Shares shall be allocated under this Plan, and fractional share interests shall not entitle the owner thereof to vote or to any rights of a shareholder of the Company. Any legal, equitable, contractual and any other rights or claims (whether actual or contingent, and whether or not previously asserted) of any Person with respect to fractional New Common Shares pursuant to this Plan shall be rounded down to the nearest whole New Common Share.

5.3 Plan Implementation Date Transactions

(a) Upon the fulfillment, satisfaction or waiver of the conditions set out in Section 7.3, the following steps and releases to be taken and effected in the implementation of this Plan shall occur, and be deemed to have occurred and be taken and effected, immediately in sequence in the following order, without any further act or formality, on the Plan Implementation Date beginning at the Effective Time:

(i) Unless previously terminated, the Acquisition Plan shall be deemed to be terminated and of no further force or effect;

(ii) The Company shall pay all reasonable fees and disbursements of the Company's counsel, the Company's financial advisors, the Monitor, the Monitor's counsel, Bennett Jones LLP and Canaccord Genuity Corp.;

(iii) The articles of amalgamation of the Company shall be amended by the articles of reorganization to create the New Common Shares, which class of shares shall consist of an unlimited number of shares designated as "Class A Common Shares", having the following rights, privileges, restrictions and conditions attaching thereto:

(A) Dividends: The holders of the New Common Shares are entitled to receive dividends, if, as and when declared by the board of directors of the Company, out of the assets of the Company properly applicable to the payment of dividends in such amounts and payable at such times and at such place or places in Canada as the board of directors may from time to time determine. Subject to the rights of the holders of any other class of shares of the Company entitled to receive dividends in priority to or rateably with the New Common Shares, the board of directors

may in its sole discretion declare dividends on the New Common Shares to the exclusion of any other class of shares of the Company;

(B) Voting Rights: The holders of the New Common Shares are entitled to receive notice of and to attend all annual and special meetings of the shareholders of the Company, and to one vote at all such meetings in respect of each New Common Share held; and

(C) Participation upon Liquidation, Dissolution or Winding-Up: In the event of the liquidation, dissolution or winding-up of the Company or other distribution of assets of the Company among its shareholders for the purpose of winding-up its affairs, the holders of the New Common Shares shall, subject to the rights of the holders of any other class of shares of the Company upon such a distribution in priority to the New Common Shares, be entitled to participate rateably in any distribution of the assets of the Company;

(iv) The Rights shall be cancelled and extinguished and shall be deemed to be cancelled and extinguished and the Rights Plan shall be terminated and shall be deemed to be terminated, all without any consideration;

(v) The Company shall issue to each Existing Shareholder its *pro rata* share (based on the percentage interest such Existing Shareholder holds of the total number of the Existing Common Shares) of the New Shareholder Warrants;

(vi) The Existing Equity shall be cancelled and shall be deemed to be cancelled without any repayment of capital thereof or any other compensation therefor and, for greater certainty, no Existing Shareholder shall be entitled to receive any interest, dividends, premium or other payment in connection therewith;

(vii) Each of the Second Lien Noteholders shall and shall be deemed to irrevocably exchange and transfer its Second Lien Notes and all of such Second Lien Noteholders' rights under such Second Lien Notes and Second Lien Note Indentures to the Company in consideration for Exchange Shares and the right, but not the obligation, to participate in the New Investment, in each case to be allocated as set out below and further to such exchange and contemporaneous therewith:

(A) The Company shall issue to each Second Lien Noteholder its pro-rata share (based on the percentage interest such Second Lien

Noteholder holds of the total amount of the Second Lien Claims on the Distribution Record Date) of the Exchange Shares;

(B) Except for the purpose of facilitating the distributions under this Plan, the Second Lien Indentures and the Second Lien Notes shall be cancelled and shall be deemed to be cancelled, and all of the Second Lien Noteholders' entitlements with respect to the Second Lien Indentures and the Second Lien Notes shall be irrevocably extinguished and eliminated. For greater certainty, the Second Lien Indentures and the Second Lien Notes shall not be cancelled, deemed to be cancelled, extinguished or eliminated until all distributions under this Plan have been made;

(viii) The conditional elections made in accordance with Section 4.7(a) shall be effective and the Trust Company shall cease to hold the New Investment Proceeds in trust for and on behalf of the Electing Second Lien Noteholders, shall hold, and shall be deemed to be holding, the New Investment Proceeds in trust for and on behalf of the Company, and shall pay to the Company the New Investment Proceeds and the Company shall issue to each Electing Second Lien Noteholder its *pro rata* share (based on the percentage interest such Electing Second Lien Noteholder subscribed and paid for in accordance with the terms of this Plan of the total amount of the New Investment) of 95.2381% of the New Investment Shares;

(ix) The Company shall issue to each Backstop Party (other than any Defaulting Backstop Party) its Pro Rata Share of 4.7619% of the New Investment Shares;

(x) All New Common Shares issued and outstanding pursuant to this Plan and upon the exercise of the New Shareholder Warrants shall be deemed to be issued and outstanding as fully-paid and non-assessable;

(xi) The Company shall pay to each Initial Backstop Party (other than any Defaulting Backstop Party) its Pro Rata Share of U.S. $10 million;

(xii) If the Implementation Date shall not have occurred on or before September 30, 2011, the Company shall pay to each Backstop Party (other than any Defaulting Backstop Party) its Pro Rata Share of a monthly fee of U.S. $3.75 million, which monthly fee shall accrue daily to and including the Plan Implementation Date;

(xiii) The New Secured Debt Indentures shall become effective and the New Secured Debt shall be evidenced and governed by the New Secured Debt Indentures (and any notes issued in accordance with the terms thereof)

and secured by the New Secured Debt Security Agreements. The New Secured Debt Indentures shall be deemed to be effective and binding on all holders of the New Secured Debt pursuant to this Plan at the same time as the New Secured Debt Indentures become effective;

(xiv) The Company shall pay to the First Lien Note Indenture Trustee, for the benefit of the First Lien Noteholders, the total amount of the First Lien Claim, in full and final satisfaction of the First Lien Claim, and all security with respect to the First Lien Note Indentures shall be discharged;

(xv) The New Credit Agreement shall become effective and the New Credit Facility shall be evidenced and governed by the New Credit Agreement (and any notes issued in accordance with the terms thereof) and secured by the New Credit Facility Security Agreements. The New Credit Agreement shall be deemed to be effective and binding on all holders of the New Credit Facility pursuant to this Plan at the same time as the New Credit Facility becomes effective;

(xvi) The Company shall pay to the Administrative Agent, for the benefit of the Lenders, the total amount of the Credit Facility Claim, in full and final satisfaction of the Credit Facility Claim, and all security with respect to the Credit Agreement shall be discharged;

(xvii) A number of New Common Shares representing an amount to be determined by the New Board, such amount not to exceed 10% of the number of New Common Shares issued and outstanding immediately upon implementation of this Plan, shall be reserved for issuance by the Company to directors, officers and employees of the Company pursuant to equity-based compensation arrangements to be determined at the discretion of the New Board;

(xviii) Each of the Charges shall be terminated, discharged and released;

(xix) The releases referred to in Section 6.1 shall become effective; and

(xx) The New Board shall be deemed to have been appointed.

5.4 U.S. Securities Laws Matters

The Company intends that the issuance of the Exchange Shares and the New Shareholder Warrants (but not the New Common Shares issuable upon exercise of the New Shareholder Warrants) pursuant to this Plan will be exempt from the registration requirements of the U.S. Securities Act, to the extent applicable, pursuant to Section 3(a)(10) thereof, will not be subject to registration or qualification under state "blue sky" or securities laws and will otherwise be issued in compliance with all applicable U.S. securities laws. The Company also intends that the issuance of the New Investment

Shares pursuant to this Plan will be exempt from the registration requirements of the U.S. Securities Act, to the extent applicable, pursuant to Section 4(2) thereof or Regulation D promulgated thereunder, will not be subject to registration or qualification under state "blue sky" or securities laws and will otherwise be issued in compliance with all applicable U.S. securities laws. The Company also intends that the issuance of the New Common Shares upon the exercise of the New Shareholder Warrants will be exempt from the registration requirements of the U.S. Securities Act, to the extent applicable, pursuant to Section 4(2) thereof or Regulation D promulgated thereunder or another applicable exemption, as determined at the time of exercise, will not be subject to registration or qualification under state "blue sky" or securities laws and will otherwise be issued in compliance with all applicable U.S. securities laws, failing which, the Company agrees that it shall take such actions as are necessary to put holders of New Shareholder Warrants in the United States in a similar economic position as other holders of New Shareholder Warrants. Upon the Alberta Court's granting of the Plan Sanction Order, any Person or Party named or referred to in this Plan, and the heirs, administrators, executors, legal personal representatives, successors and assigns of any such Person or Party, shall act in good faith to ensure the intended treatment of the issuance of the Exchange Shares, the New Shareholder Warrants and the New Investment Shares and any New Common Shares issued upon exercise of New Shareholder Warrants set forth in this Section 5.4.

ARTICLE 6
RELEASES

6.1 Plan Releases

On Plan Implementation, and in accordance with the sequential order of steps set out in Section 5.3, the Company, the Second Lien Noteholders, the Monitor and each and every Director, officer, member of any governance council, employee and legal counsel and agents thereof (and each of their respective employees, agents, partners and representatives) who has acted at any time in any such capacity from and after the Filing Date (being herein referred to individually as a "**Released Party**") shall be released and discharged from any and all demands, claims, actions, causes of action, counterclaims, suits, debts, sums of money, accounts, covenants, damages, judgments, orders, including for injunctive relief or specific performance and compliance orders, expenses, executions, Liens and other recoveries on account of any liability, obligation, demand or cause of action of whatever nature which any Creditor or other Person may be entitled to assert (other than for any Unaffected Claims), including any and all Claims in respect of statutory liabilities of directors, officers, members and employees of the Company and any alleged fiduciary or other duty, whether known or unknown, matured or unmatured, foreseen or unforeseen, existing or hereafter arising, based in whole or in part on any act or omission, transaction, duty, responsibility, indebtedness, liability,

obligation, dealing or other occurrence existing or taking place on or prior to the Plan Implementation Date in any way relating to, arising out of or in connection with the Claims, this restructuring, the business and affairs of the Company in connection with this restructuring, the administration and/or management of this Plan, the CCAA Proceedings, and all Claims arising out of such actions or omissions shall be forever waived and released, all to the full extent permitted by Law; provided that nothing in this Plan shall release or discharge a Released Party from (a) any obligation created by or existing under this Plan or any related document, (b) any criminal, fraudulent or other wilful misconduct, (c) any claim with respect to matters set out in Section 5.1(2) of the CCAA, or (d) any claim to the extent it is based upon or attributable to such Released Party gaining in fact a personal profit to which such Released Party was not legally entitled.

ARTICLE 7
COURT SANCTION, CONDITIONS PRECEDENT AND IMPLEMENTATION

7.1 Application for Plan Sanction Order

If the Required Majority approves the Master Plan, the Company shall apply for the Plan Sanction Order on or before the date set for the hearing for the Plan Sanction Order or such later date as the Alberta Court may set.

In such notice of motion in connection with the application for the Plan Sanction Order, the Company shall inform the Alberta Court that upon the approval of the Master Plan by the Required Majority and subsequently by the Alberta Court, such court approval will be relied upon by the Company as an approval of the Master Plan for the purpose of relying on the exemption from the registration requirements of the U.S. Securities Act pursuant to Section 3(a)(10) thereof for the issuance of the Exchange Shares and the New Shareholder Warrants to the Second Lien Noteholders and the Existing Shareholders, as applicable.

7.2 [Intentionally Deleted]

7.3 Conditions to Plan Implementation

The implementation of this Plan shall be conditional upon the fulfillment, satisfaction or waiver (to the extent permitted by Section 7.4) of the following conditions:

(a) The Master Plan shall have been approved by the Required Majority of the Second Lien Noteholders;

(b) The Alberta Court shall have granted the Plan Sanction Order, the operation and effect of which shall not have been stayed, reversed or amended, and all applicable appeal periods in respect of the Plan Sanction Order shall have

expired and in the event of an appeal or application for leave to appeal, final determination shall have been made by the applicable appellate court;

(c) The Company shall have taken all necessary or desirable corporate actions and proceedings in connection with this Plan;

(d) No Applicable Law shall have been passed and become effective, the effect of which makes the consummation of this Plan illegal or otherwise prohibited;

(e) All necessary judicial consents and any other necessary or desirable third party consents, if any, to deliver and implement all matters related to this Plan shall have been obtained;

(f) All documents necessary to give effect to all material provisions of this Plan shall have been executed and delivered by all relevant Persons;

(g) The Company shall have made arrangements for the payment in full of all amounts owing by the Company pursuant to or in respect of the First Lien Note Indentures and the discharge on implementation of all security with respect thereto, such arrangements to be satisfactory to the Requisite Majority of the Noteholder Support Group, acting reasonably;

(h) The Company shall have made arrangements for the payment in full of all amounts owing by the Company pursuant to or in respect of the Credit Facility and the discharge on implementation of all security with respect thereto, such arrangements to be satisfactory to the Requisite Majority of the Noteholder Support Group, acting reasonably;

(i) The Company shall have entered into the New Secured Debt Indenture (which shall become effective pursuant to Section 5.3(a)(xiii)), all guarantees, security agreements (collectively, the "**New Secured Debt Security Agreements**"), and all other documents contemplated thereunder shall have been executed and delivered, and all required registrations and filings contemplated in the New Secured Debt Indenture shall have been made, and funds shall be available thereunder to pay payments to be made pursuant to this Plan;

(j) The Company shall have entered into the New Credit Agreement (which shall become effective pursuant to Section 5.3(a)(xv)), all guarantees, security agreements (collectively, the "**New Credit Facility Security Agreements**"), and all other documents contemplated thereunder shall have been executed and delivered, and all required registrations and filings contemplated in the New Credit Agreement shall have been made, and funds shall be available thereunder to pay payments to be made pursuant to this Plan

(k) The cash in respect of the New Investment shall have been deposited by the Electing Second Lien Noteholders with the Trust Company;

(l) The Company shall have filed articles of reorganization pursuant to Section 191 of the CBCA in form and substance satisfactory to the Requisite Majority of the Noteholder Group, acting reasonably, which articles of reorganization shall, among other things, increase the authorized capital of the Company by creating the New Common Shares, cancel all issued and outstanding Existing Common Shares, decrease the authorized capital by removing the authorized Existing Common Shares in the Company's share capital, remove each authorized series of preferred shares from the authorized capital of the Company, and provide that that after giving effect to the foregoing, the authorized capital of the Company shall consist of an unlimited number of New Common Shares and an unlimited number of Preferred Shares, issuable in series;

(m) The New Investment Shares, Exchange Shares and the New Shareholder Warrants to be issued pursuant to this Plan and the New Common Shares to be issued upon the exercise of New Shareholder Warrants shall be exempt from the prospectus requirements of Canadian provincial securities laws and, subject to any changes in applicable Canadian provincial securities laws subsequent to the date hereof, the resale of the New Investment Shares, Exchange Shares and New Shareholder Warrants to be issued pursuant to this Plan and the New Common Shares to be issued upon the exercise of New Shareholder Warrants shall be exempt from the prospectus requirements of Canadian provincial securities laws, except that New Investment Shares, Exchange Shares or New Shareholder Warrants held by Persons who are "control persons" (as defined in Canadian provincial securities laws) of the Company after the implementation of this Plan may be resold by such Persons only in compliance with an exemption from the prospectus requirements of Canadian provincial securities laws;

(n) The Exchange Shares and the New Shareholder Warrants to be issued pursuant to this Plan shall be exempt from the registration requirements of the U.S. Securities Act pursuant to Section 3(a)(10) thereof and, subject to any changes in U.S. securities laws subsequent to the date hereof, the resale of the Exchange Shares and the New Shareholder Warrants to be issued pursuant to this Plan shall be exempt from the registration requirements of the U.S. Securities Act, except that the Exchange Shares or the New Shareholder Warrants held by Persons who are "affiliates" (as defined in Rule 144 under the U.S. Securities Act) of the Company at the time of resale or who have been affiliates of the Company within 90 days of such resale date may be resold by such Persons only in compliance with the resale provisions of Regulation S or Rule 144 under the U.S. Securities Act or as otherwise permitted under the U.S. Securities Act or other applicable exemptions therefrom;

(o) The New Investment Shares to be issued pursuant to this Plan shall be exempt from the registration requirements of the U.S. Securities Act pursuant to Section 4(2) thereof or Regulation D promulgated thereunder and, subject to any changes in U.S. securities laws subsequent to the date hereof, resales of the New Investment Shares to be issued pursuant to this Plan may be made only in compliance with the resale provisions of Regulation S or Rule 144 under the U.S. Securities Act or as otherwise permitted under the U.S. Securities Act or other applicable exemptions therefrom;

(p) There shall not be any proceeding pending before or threatened by the United States Securities and Exchange Commission or any provincial, state or other securities commission or similar body in connection with any issuance of securities pursuant to this Plan, including the issuance of the Exchange Shares, the New Shareholder Warrants and the New Investment Shares; and

(q) All conditions set out in Section 10 of the Support Agreement shall have been satisfied or waived in accordance with the provisions thereof.

7.4 Waiver of Conditions

(a) The Company and the Requisite Majority of the Noteholder Support Group may at any time and from time to time waive the fulfillment or satisfaction, in whole or in part, of the conditions set out in Subsections 7.3(b) (only with respect to appeal periods), 7.3(m), 7.3(n), 7.3(o), and 7.3(p), to the extent and on such terms as the Company and the Requisite Majority of the Noteholder Support Group may agree to.

(b) The Requisite Majority of the Noteholder Support Group may at any time and from time to time waive the fulfillment or satisfaction, in whole or in part, of the conditions set out in Subsections 7.3(c) (only with respect to desirable corporate actions and proceedings), 7.3(e) (only with respect to third party consents), 7.3(g), 7.3(h), 7.3(i), 7.3(j), and 7.3(q).

7.5 Monitor's Certificate

Upon the fulfillment, satisfaction or waiver of the conditions set out in Section 7.3, the Company shall so confirm with the Requisite Majority of the Noteholder Support Group and then so advise the Monitor in writing. The Monitor shall then forthwith deliver to the Company (with a copy to the Requisite Majority of the Noteholder Support Group in accordance with Section 8.8(c)) a certificate stating that the conditions to Plan Implementation have been satisfied or waived in accordance with this Plan. Following the Plan Implementation Date, the Monitor shall forthwith file such certificate with the Alberta Court and post a copy of such certificate on its website.

7.6 Implementation Provisions

If the conditions contained in Section 7.3 are not satisfied or waived by the Outside Date, unless the Company and the Requisite Majority of the Noteholder Support Group agree in writing to extend such period, this Plan and the Plan Sanction Order shall cease to have any further force or effect and will not be binding on any Person.

ARTICLE 8
GENERAL

8.1 Binding Effect

At the Effective Time:

(a) This Plan will become effective;

(b) The treatment of Second Lien Noteholders and Existing Shareholders under this Plan shall be final and binding for all purposes and enure to the benefit of the Company, all Second Lien Noteholders, all Existing Shareholders, all Released Parties and all other Persons and Parties named or referred to in, or subject to, this Plan and their respective heirs, executors, administrators and other legal representatives, successors and assigns;

(c) Each provision of this Plan in its entirety shall have been deemed to have been consented to and agreed to by all necessary Person; and

(d) All consents, releases, assignments and waivers, statutory or otherwise, required to implement and carry out this Plan in its entirety shall be deemed to have been executed and delivered to the Company.

8.2 Waiver of Defaults

From and after the Plan Implementation Date, all Persons shall be deemed to have waived any and all defaults or events of default of the Company then existing or previously committed by the Company, or caused by the Company, any of the provisions in this Plan or steps contemplated in this Plan, or non-compliance with any covenant, warranty, representation, term, provision, condition or obligation, expressed or implied, in any contract, instrument, credit document, lease, guarantee, agreement for sale or other agreement, written or oral, and any and all amendments or supplements thereto, existing between such Person and the Company and any and all notices of default and demands for payment or any step or proceeding taken or commenced in connection therewith under any such agreement shall be deemed to have been rescinded and of no further force or effect, provided that nothing shall be deemed to excuse the Company from performing its obligations under this Plan or be a waiver of defaults by the Company under this Plan and the related documents. This section does not affect the

rights of any Person to pursue any recoveries for a Claim that may be obtained from a guarantor (other than the Company) and any security granted by such guarantor.

8.3 Deeming Provisions

In this Plan, the deeming provisions are not rebuttable and are conclusive and irrevocable.

8.4 Non-Consummation

If Plan Implementation does not occur within the period provided for in Section 7.6 hereof, (a) this Plan shall be null and void in all respects, and (b) nothing contained in this Plan, and no acts taken in preparation for consummation of this Plan, shall (i) constitute or be deemed to constitute a waiver or release of any Claims by or against the Company or any other Person; (ii) prejudice in any manner the rights of the Company or any other Person in any further proceedings involving the Company; or (iii) constitute an admission of any sort by the Company or any other Person.

8.5 Modification of Plan

(a) The Company shall, at any time and from time to time (i) on its own initiative when required or desired, subject to the prior consent of the Requisite Majority of the Noteholder Support Group, acting reasonably, or (ii) at the request of the Requisite Majority of the Noteholder Support Group, subject to the consent of the Company, acting reasonably: amend, restate, modify and/or supplement this Plan, provided that any such amendment, restatement, modification or supplement must be contained in a written document which is filed with the Alberta Court and (a) if made prior to the Creditors' Meeting, communicated to the Second Lien Noteholders in the manner required by the Alberta Court (if so required), and (b) if made following the Creditors' Meeting, approved by the Alberta Court following notice to the Requisite Majority of the Noteholder Support Group.

(b) Notwithstanding Section 8.5(a), any amendment, restatement, modification or supplement may be made by the Company (i) on its own initiative, subject to the consent of the Monitor and the Requisite Majority of the Noteholder Support Group, each acting reasonably, or (ii) at the request of the Requisite Majority of the Noteholder Support Group, subject to the consent of the Company and the Monitor, each acting reasonably, provided in either case that it concerns a matter which, in the opinion of the Company, the Monitor and the Requisite Majority of the Noteholder Support Group, each acting reasonably, is of an administrative nature required to better give effect to the implementation of this Plan and the Plan Sanction Order or to cure any errors, omissions or ambiguities and is not materially adverse to the financial or economic interests of the Company or the Second Lien Noteholders.

(c) Any amended, restated, modified or supplementary plan or plans of arrangement and reorganization filed with the Alberta Court and, if required by this Section 8.5, approved by the Alberta Court with the prior consent of the Requisite Majority of the Noteholder Support Group, acting reasonably, shall, for all purposes, be and be deemed to be a part of and incorporated in this Plan.

8.6 Severability of Plan Provisions

If, prior to the Plan Sanction Date, any term or provision of this Plan is held by the Alberta Court to be invalid, void or unenforceable, at the request of the Company, the Alberta Court shall have the power to either (a) sever such term or provision from the balance of this Plan and provide the Company and the Requisite Majority of the Noteholder Support Group with the option to proceed with the implementation of the balance of this Plan as of and with effect from the Plan Implementation Date, or (b) alter and interpret such term or provision to make it valid or enforceable to the maximum extent practicable, consistent with the original purpose of the term or provision held to be invalid, void or unenforceable, and such term or provision shall then be applicable as altered or interpreted, provided that the Requisite Majority of the Noteholder Support Group has approved such alteration or interpretation, acting reasonably. Notwithstanding any such holding, alteration or interpretation, and provided that the Company proceeds with the implementation of this Plan, the remainder of the terms and provisions of this Plan shall remain in full force and effect and shall in no way be affected, impaired or invalidated by such holding, alteration or interpretation.

8.7 Responsibilities of the Monitor

The Monitor is acting in its capacity as Monitor in the CCAA Proceedings and this Plan with respect to the Company and will not be responsible or liable for any obligations of the Company.

8.8 Notices

Any notice or other communication to be delivered hereunder must be in writing and refer to this Plan and may, subject as hereinafter provided, be made or given by personal delivery, ordinary mail, email or by facsimile addressed to the respective Parties as follows:

(a) If to the Company:

OPTI Canada Inc.
1600, 555 4th Avenue S.W.
Calgary, Alberta T2P 3E7

Attention: Chris Slubicki / Joseph Bradford
Fax: (403) 262-9484

Email: jbradford@opticanada.com

with a copy to:

Macleod Dixon LLP
Barristers and Solicitors
3799 Canterra Tower
400 Third Avenue SW
Calgary, Alberta T2P 4H2

Attention: Howard Gorman / Craig Hoskins
Fax: (403) 264-5973
Email: howard.gorman@macleoddixon.com / craig.hoskins@macleoddixon.com

(b) If to the Monitor:

Ernst & Young Inc.
Ernst & Young Tower
1000, 440-2nd Avenue S.W.
Calgary, AB T2P 5E9

Attention: Neil Narfason
Fax: (403) 290-4265
Email: neil.narfason@ca.ey.com

with a copy to:

Borden Ladner Gervais LLP
1900, 520 3rd Avenue S.W.
Calgary, Alberta T2P 0R3

Attention: Pat McCarthy / Josef Kruger
Fax: (403) 266-1395
Email: pmccarthy@blg.com / jkruger@blgcanada.com

(c) If to the Requisite Majority of the Noteholder Support Group:

Bennett Jones LLP
3400 One First Canadian Place
P.O. Box 130
Toronto, Ontario M5X 1A4

Attention: Rick Orzy / Kevin Zych
Fax: (416) 863-1716

Email: orzyr@bennettjones.com / zychk@bennettjones.com

or to such other address as any Party may from time to time notify the others in accordance with this Section 8.8. Any such communication so given or made shall be deemed to have been given or made and to have been received on the day of delivery if delivered, or on the day of faxing, email or sending by other means of recorded electronic communication, provided that such day in either event is a Business Day and the communication is so delivered, faxed, emailed or sent before 5:00 p.m. on such day. Otherwise, such communication shall be deemed to have been given and made and to have been received on the next following Business Day.

8.9 Paramountcy

From and after the Effective Time (a) this Plan will take precedence and priority over any and all rights related to the Existing Equity and the Second Lien Notes issued prior to the Effective Time, (b) the rights and obligations of Existing Shareholders and Second Lien Noteholders and any trustee and transfer agent therefor, will be solely as provided for in this Plan, and (c) all actions, causes of action, claims or proceedings (actual or contingent, whether or not previously asserted) based on or in any way relating to the Existing Equity and the Second Lien Notes shall be and shall be deemed to be settled, compromised, released and determined without liability except as set forth specifically herein.

8.10 Further Assurances

Each of the Persons named or referred to in, or subject to, this Plan will execute and deliver all such documents and instruments and do all such acts and things as may be necessary or desirable to carry out the full intent and meaning of this Plan and to give effect to the transactions contemplated herein.

DATED as of the 29th day of July, 2011.

Court File No. CV-17-589016-00CL

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF BANRO CORPORATION, BANRO GROUP (BARBADOS) LIMITED, BANRO CONGO (BARBADOS) LIMITED, NAMOYA (BARBADOS) LIMITED, LUGUSHWA (BARBADOS) LIMITED, TWANGIZA (BARBADOS) LIMITED AND KAMITUGA (BARBADOS) LIMITED

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

PROCEEDING COMMENCED AT TORONTO

REPLY BOOK OF AUTHORITIES THE APPLICANTS AND THE REQUISITE CONSENTING PARTIES
(Plan Sanction Order)

Cassels Brock & Blackwell LLP
2100 Scotia Plaza
40 King Street West
Toronto, ON M5H 3C2

Ryan C. Jacobs LSUC# 59510J
Tel: 416.860.6465
Fax: 416.640.3189
rjacobs@casselsbrock.com

Jane O. Dietrich LSUC# 49302U
Tel: 416.860.5223
Fax: 416.640.3144
jdietrich@casselsbrock.com

Sophie Moher LSUC # 72317H
Tel: 416.860.2903
Fax: 416.640.3021
smoher@casselsbrock.com

Lawyers for the Applicants