Court of Appeal File No. M53259
Court File No. CV-21-00658423-00CL

COURT OF APPEAL FOR ONTARIO

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 JUST ENERGY GROUP INC., JUST ENERGY CORP., ONTARIO ENERGY COMMODITIES INC., UNIVERSAL ENERGY CORPORATION, JUST ENERGY FINANCE CANADA ULC, HUDSON ENERGY CANADA CORP., JUST MANAGEMENT CORP., JUST ENERGY FINANCE HOLDING INC., 11929747 CANADA INC., 12175592 CANADA INC., JE SERVICES HOLDCO I INC., JE SERVICES HOLDCO II INC., 8704104 CANADA INC., JUST ENERGY ADVANCED SOLUTIONS CORP., JUST ENERGY (U.S.) CORP., JUST ENERGY ILLINOIS CORP., JUST ENERGY INDIANA CORP., JUST ENERGY MASSACHUSETTS CORP., JUST ENERGY NEW YORK CORP., JUST ENERGY TEXAS I CORP., JUST ENERGY, LLC, JUST ENERGY PENNSYLVANIA CORP., JUST ENERGY MICHIGAN CORP., JUST ENERGY SOLUTIONS INC., HUDSON ENERGY SERVICES LLC, HUDSON ENERGY CORP., INTERACTIVE ENERGY GROUP LLC, HUDSON PARENT HOLDINGS LLC, DRAG MARKETING LLC, JUST ENERGY ADVANCED SOLUTIONS LLC, FULCRUM RETAIL ENERGY LLC, FULCRUM RETAIL HOLDINGS LLC, TARA ENERGY, LLC, JUST ENERGY MARKETING CORP., JUST ENERGY CONNECTICUT CORP., JUST ENERGY LIMITED, JUST SOLAR HOLDINGS CORP. AND JUST ENERGY (FINANCE) HUNGARY ZRT.

APPLICANTS

BOOK OF AUTHORITIES OF THE RESPONDENT DIP LENDERS

MOTION FOR LEAVE TO APPEAL
(ORDER OF JUSTICE MCEWEN DATED FEBRUARY 9, 2022)

April 29, 2022

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

Alan Merskey LSO #: 413771
Tel: 416.860.2948
amerskey@cassels.com

John M. Picone LSO #: 58406N
Tel: 416.640.6041
jpicone@cassels.com

Christopher Selby LSO #: 65702T
Tel: 416.860.5223
cselby@cassels.com

Lawyers for the Respondent DIP Lenders

TO: The Service List

TABLE OF CONTENTS

Tab 1

SUPREME COURT OF CANADA

CITATION: 9354-9186 Québec inc. *v.* Callidus Capital Corp., 2020 SCC 10

APPEALS HEARD AND JUDGMENT RENDERED: January 23, 2020
REASONS FOR JUDGMENT: May 8, 2020
DOCKET: 38594

BETWEEN:

9354-9186 Québec inc. and 9354-9178 Québec inc.
Appellants

and

Callidus Capital Corporation, International Game Technology, Deloitte LLP, Luc Carignan, François Vigneault, Philippe Millette, Francis Proulx and François Pelletier
Respondents

- and -

Ernst & Young Inc., IMF Bentham Limited (now known as Omni Bridgeway Limited), Bentham IMF Capital Limited (now known as Omni Bridgeway Capital (Canada) Limited), Insolvency Institute of Canada and Canadian Association of Insolvency and Restructuring Professionals
Interveners

AND BETWEEN:

IMF Bentham Limited (now known as Omni Bridgeway Limited) and Bentham IMF Capital Limited (now known as Omni Bridgeway Capital (Canada) Limited)
Appellants

and

Callidus Capital Corporation, International Game Technology, Deloitte LLP, Luc Carignan, François Vigneault, Philippe Millette, Francis Proulx and François Pelletier

Respondents

- and -

Ernst & Young Inc., 9354-9186 Québec inc., 9354-9178 Québec inc., Insolvency Institute of Canada and Canadian Association of Insolvency and Restructuring Professionals
Interveners

CORAM: Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Rowe and Kasirer JJ.

JOINT REASONS FOR JUDGMENT: (paras. 1 to 117)	Wagner C.J. and Moldaver J. (Abella, Karakatsanis, Côté, Rowe and Kasirer JJ. concurring)

9354-9186 Québec inc. and
9354-9178 Québec inc. *Appellants*

v.

Callidus Capital Corporation,
International Game Technology,
Deloitte LLP, Luc Carignan,
François Vigneault, Philippe Millette,
Francis Proulx and François Pelletier *Respondents*

and

Ernst & Young Inc.,
IMF Bentham Limited (now known as Omni Bridgeway Limited),
Bentham IMF Capital Limited (now known as Omni Bridgeway Capital (Canada) Limited), Insolvency Institute of Canada and
Canadian Association of Insolvency and Restructuring Professionals *Interveners*

- and -

IMF Bentham Limited (now known as Omni Bridgeway Limited) and
Bentham IMF Capital Limited (now known as Omni Bridgeway Capital (Canada) Limited) *Appellants*

v.

Callidus Capital Corporation,

International Game Technology,
Deloitte LLP, Luc Carignan,
François Vigneault, Philippe Millette,
Francis Proulx and François Pelletier *Respondents*

and

Ernst & Young Inc.,
9354-9186 Québec inc.,
9354-9178 Québec inc., Insolvency Institute of Canada and
Canadian Association of Insolvency and Restructuring Professionals *Interveners*

Indexed as: 9354-9186 Québec inc. *v.* Callidus Capital Corp.

2020 SCC 10

File No.: 38594.

Hearing and judgment: January 23, 2020.
Reasons delivered: May 8, 2020.

Present: Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Rowe and Kasirer JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Bankruptcy and insolvency — Discretionary authority of supervising judge in proceedings under Companies' Creditors Arrangement Act — Appellate review of decisions of supervising judge — Whether supervising judge has discretion

to bar creditor from voting on plan of arrangement where creditor is acting for improper purpose — Whether supervising judge can approve third party litigation funding as interim financing — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, ss. 11, 11.2.

The debtor companies filed a petition for the issuance of an initial order under the *Companies' Creditors Arrangement Act* ("*CCAA*") in November 2015. The petition succeeded, and the initial order was issued by a supervising judge, who became responsible for overseeing the proceedings. Since then, substantially all of the assets of the debtor companies have been liquidated, with the notable exception of retained claims for damages against the companies' only secured creditor. In September 2017, the secured creditor proposed a plan of arrangement, which later failed to receive sufficient creditor support. In February 2018, the secured creditor proposed another, virtually identical, plan of arrangement. It also sought the supervising judge's permission to vote on this new plan in the same class as the debtor companies' unsecured creditors, on the basis that its security was worth nil. Around the same time, the debtor companies sought interim financing in the form of a proposed third party litigation funding agreement, which would permit them to pursue litigation of the retained claims. They also sought the approval of a related super-priority litigation financing charge.

The supervising judge determined that the secured creditor should not be permitted to vote on the new plan because it was acting with an improper purpose. As

a result, the new plan had no reasonable prospect of success and was not put to a creditors' vote. The supervising judge allowed the debtor companies' application, authorizing them to enter into a third party litigation funding agreement. On appeal by the secured creditor and certain of the unsecured creditors, the Court of Appeal set aside the supervising judge's order, holding that he had erred in reaching the foregoing conclusions.

Held: The appeal should be allowed and the supervising judge's order reinstated.

The supervising judge made no error in barring the secured creditor from voting or in authorizing the third party litigating funding agreement. A supervising judge has the discretion to bar a creditor from voting on a plan of arrangement where they determine that the creditor is acting for an improper purpose. A supervising judge can also approve third party litigation funding as interim financing, pursuant to s. 11.2 of the *CCAA*. The Court of Appeal was not justified in interfering with the supervising judge's discretionary decisions in this regard, having failed to treat them with the appropriate degree of deference.

The *CCAA* is one of three principal insolvency statutes in Canada. It pursues an array of overarching remedial objectives that reflect the wide ranging and potentially catastrophic impacts insolvency can have. These objectives include: providing for timely, efficient and impartial resolution of a debtor's insolvency; preserving and maximizing the value of a debtor's assets; ensuring fair and equitable

treatment of the claims against a debtor; protecting the public interest; and, in the context of a commercial insolvency, balancing the costs and benefits of restructuring or liquidating the company. The architecture of the *CCAA* leaves the case-specific assessment and balancing of these objectives to the supervising judge.

From beginning to end, each proceeding under the *CCAA* is overseen by a single supervising judge, who has broad discretion to make a variety of orders that respond to the circumstances of each case. The anchor of this discretionary authority is s. 11 of the *CCAA*, with empowers a judge to make any order that they consider appropriate in the circumstances. This discretionary authority is broad, but not boundless. It must be exercised in furtherance of the remedial objectives of the *CCAA* and with three baseline considerations in mind: (1) that the order sought is appropriate in the circumstances, and (2) that the applicant has been acting in good faith and (3) with due diligence. The due diligence consideration discourages parties from sitting on their rights and ensures that creditors do not strategically manoeuvre or position themselves to gain an advantage. A high degree of deference is owed to discretionary decisions made by judges supervising *CCAA* proceedings and, as such, appellate intervention will only be justified if the supervising judge erred in principle or exercised their discretion unreasonably.

A creditor can generally vote on a plan of arrangement or compromise that affects its rights, subject to any specific provisions of the *CCAA* that may restrict its voting rights, or a proper exercise of discretion by the supervising judge to constrain or

bar the creditor's right to vote. Given that the *CCAA* regime contemplates creditor participation in decision-making as an integral facet of the workout regime, the discretion to bar a creditor from voting should only be exercised where the circumstances demand such an outcome. Where a creditor is seeking to exercise its voting rights in a manner that frustrates, undermines, or runs counter to the remedial objectives of the *CCAA* — that is, acting for an improper purpose — s. 11 of the *CCAA* supplies the supervising judge with the discretion to bar that creditor from voting. This discretion parallels the similar discretion that exists under the *Bankruptcy and Insolvency Act* and advances the basic fairness that permeates Canadian insolvency law and practice. Whether this discretion ought to be exercised in a particular case is a circumstance-specific inquiry that the supervising judge is best-positioned to undertake.

In the instant case, the supervising judge's decision to bar the secured creditor from voting on the new plan discloses no error justifying appellate intervention. When he made this decision, the supervising judge was intimately familiar with these proceedings, having presided over them for over 2 years, received 15 reports from the monitor, and issued approximately 25 orders. He considered the whole of the circumstances and concluded that the secured creditor's vote would serve an improper purpose. He was aware that the secured creditor had chosen not to value any of its claim as unsecured prior to the vote on the first plan and did not attempt to vote on that plan, which ultimately failed to receive the other creditors' approval. Between the failure of the first plan and the proposal of the (essentially identical) new plan, none of the factual

circumstances relating to the debtor companies' financial or business affairs had materially changed. However, the secured creditor sought to value the entirety of its security at nil and, on that basis, sought leave to vote on the new plan as an unsecured creditor. If the secured creditor were permitted to vote in this way, the new plan would certainly have met the double majority threshold for approval under s. 6(1) of the *CCAA*. The inescapable inference was that the secured creditor was attempting to strategically value its security to acquire control over the outcome of the vote and thereby circumvent the creditor democracy the *CCAA* protects. The secured creditor's course of action was also plainly contrary to the expectation that parties act with due diligence in an insolvency proceeding, which includes acting with due diligence in valuing their claims and security. The secured creditor was therefore properly barred from voting on the new plan.

Whether third party litigation funding should be approved as interim financing is a case-specific inquiry that should have regard to the text of s. 11.2 of the *CCAA* and the remedial objectives of the *CCAA* more generally. Interim financing is a flexible tool that may take on a range of forms. This is apparent from the wording of s. 11.2(1), which is broad and does not mandate any standard form or terms. At its core, interim financing enables the preservation and realization of the value of a debtor's assets. In some circumstances, like the instant case, litigation funding furthers this basic purpose. Third party litigation funding agreements may therefore be approved as interim financing in *CCAA* proceedings when the supervising judge determines that doing so would be fair and appropriate, having regard to all the circumstances and the

objectives of the Act. This requires consideration of the specific factors set out in s. 11.2(4) of the *CCAA*. These factors need not be mechanically applied or individually reviewed by the supervising judge, as not all of them will be significant in every case, nor are they exhaustive. Additionally, in order for a third party litigation funding agreement to be approved as interim financing, the agreement must not contain terms that effectively convert it into a plan of arrangement.

In the instant case, there is no basis upon which to interfere with the supervising judge's exercise of his discretion to approve the litigation funding agreement as interim financing. A review of the supervising judge's reasons as a whole, combined with a recognition of his manifest experience with the debtor companies' *CCAA* proceedings, leads to the conclusion that the factors listed in s. 11.2(4) concern matters that could not have escaped his attention and due consideration. It is apparent that he was focussed on the fairness at stake to all parties, the specific objectives of the *CCAA*, and the particular circumstances of this case when he approved the litigation funding agreement as interim financing. Further, the litigation funding agreement is not a plan of arrangement because it does not propose any compromise of the creditors' rights. The fact that the creditors may walk away with more or less money at the end of the day does not change the nature or existence of their rights to access the funds generated from the debtor companies' assets, nor can it be said to compromise those rights. Finally, the litigation financing charge does not convert the litigation funding agreement into a plan of arrangement. Holding otherwise would effectively extinguish

the supervising judge's authority to approve these charges without a creditors' vote, which is expressly provided for in s. 11.2 of the *CCAA*.

Cases Cited

By Wagner C.J. and Moldaver J.

Applied: *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379; **considered:** *Re Crystallex*, 2012 ONCA 404, 293 O.A.C. 102; *Laserworks Computer Services Inc. (Bankruptcy), Re*, 1998 NSCA 42, 165 N.S.R. (2d) 296; **referred to:** *Bayens v. Kinross Gold Corporation*, 2013 ONSC 4974, 117 O.R. (3d) 150; *Hayes v. The City of Saint John*, 2016 NBQB 125; *Schenk v. Valeant Pharmaceuticals International Inc.*, 2015 ONSC 3215, 74 C.P.C. (7th) 332; *Re Blackburn*, 2011 BCSC 1671, 27 B.C.L.R. (5th) 199; *Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6, [2013] 1 S.C.R. 271; *Ernst & Young Inc. v. Essar Global Fund Ltd.*, 2017 ONCA 1014, 139 O.R. (3d) 1; *Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc.*, 2019 ONCA 508, 435 D.L.R. (4th) 416; *Re Canadian Red Cross Society* (1998), 5 C.B.R. (4th) 299; *Re Target Canada Co.*, 2015 ONSC 303, 22 C.B.R. (6th) 323; *Uti Energy Corp. v. Fracmaster Ltd.*, 1999 ABCA 178, 244 A.R. 93, aff'g 1999 ABQB 379, 11 C.B.R. (4th) 204; *Orphan Well Association v. Grant Thornton Ltd.*, 2019 SCC 5, [2019] 1 S.C.R. 150; *Stelco Inc. (Re)* (2005), 253 D.L.R. (4th) 109; *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24; *North American Tungsten Corp. v. Global Tungsten and Powders Corp.*, 2015 BCCA 390, 377 B.C.A.C. 6; *Re BA Energy Inc.*, 2010 ABQB 507, 70 C.B.R. (5th) 24;

HSBC Bank Canada v. Bear Mountain Master Partnership, 2010 BCSC 1563, 72 C.B.R. (5th) 276; *Caterpillar Financial Services Ltd. v. 360networks Corp.*, 2007 BCCA 14, 279 D.L.R. (4th) 701; *Grant Forest Products Inc. v. Toronto-Dominion Bank*, 2015 ONCA 570, 387 D.L.R. (4th) 426; *Bridging Finance Inc. v. Béton Brunet 2001 inc.*, 2017 QCCA 138, 44 C.B.R. (6th) 175; *New Skeena Forest Products Inc., Re*, 2005 BCCA 192, 39 B.C.L.R. (4th) 338; *Canadian Metropolitan Properties Corp. v. Libin Holdings Ltd.*, 2009 BCCA 40, 308 D.L.R. (4th) 339; *Metcalfe & Mansfield Alternative Investments II Corp. (Re)*, 2008 ONCA 587, 296 D.L.R. (4th) 135; *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601; *Re 1078385 Ontario Inc.* (2004), 206 O.A.C. 17; *ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140; *Nortel Networks Corp., Re*, 2015 ONCA 681, 391 D.L.R. (4th) 283; *Kitchener Frame Ltd.*, 2012 ONSC 234, 86 C.B.R. (5th) 274; *Royal Oak Mines Inc., Re* (1999), 6 C.B.R. (4th) 314; *Boutiques San Francisco Inc. v. Richter & Associés Inc.*, 2003 CanLII 36955; *Dugal v. Manulife Financial Corp.*, 2011 ONSC 1785, 105 O.R. (3d) 364; *Montgrain v. National Bank of Canada*, 2006 QCCA 557, [2006] R.J.Q. 1009; *Langtry v. Dumoulin* (1884), 7 O.R. 644; *McIntyre Estate v. Ontario (Attorney General)* (2002), 218 D.L.R. (4th) 193; *Marcotte v. Banque de Montréal*, 2015 QCCS 1915; *Houle v. St. Jude Medical Inc.*, 2017 ONSC 5129, 9 C.P.C. (8th) 321, aff'd 2018 ONSC 6352, 429 D.L.R. (4th) 739; *Stanway v. Wyeth*, 2013 BCSC 1585, 56 B.C.L.R. (5th) 192; *Re Crystallex International Corporation*, 2012 ONSC 2125, 91 C.B.R. (5th) 169; *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.*, 2008 BCCA 327, 296 D.L.R. (4th) 577.

Statutes and Regulations Cited

An Act respecting Champerty, R.S.O. 1897, c. 327.

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, ss. 4.2, 43(7), 50(1), 54(3), 108(3), 187(9).

Budget Implementation Act, 2019, No. 1, S.C. 2019, c. 29, ss. 133, 138, 140.

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, ss. 2(1), 3(1), 4, 5, 6, (1), 7, 11, 11.2, (1), (2), (4), (a), (b), (c), (d), (e), (f), (g), (5), 11.7, 11.8, 18.6, 22(1), (2), (3), 23(1)(d), (i), 23 to 25, 36.

Winding-up and Restructuring Act, R.S.C. 1985, c. W-11, s. 6(1).

Authors Cited

Agarwal, Ranjan K., and Doug Fenton. "Beyond Access to Justice: Litigation Funding Agreements Outside the Class Actions Context" (2017), 59 *Can. Bus. L.J.* 65.

Canada. Innovation, Science and Economic Development Canada. *Archived — Bill C-55: clause by clause analysis*, last updated December 29, 2016 (online: https://www.ic.gc.ca/eic/site/cilp-pdci.nsf/eng/cl00908.html#bill128e; archived version: https://www.scc-csc.ca/cso-dce/2020SCC-CSC10_1_eng.pdf).

Canada. Office of the Superintendent of Bankruptcy Canada. *Bill C-12: Clause by Clause Analysis*, developed by Industry Canada, last updated March 24, 2015 (online: https://www.ic.gc.ca/eic/site/bsf-osb.nsf/eng/br01986.html#a79; archived version: https://www.scc-csc.ca/cso-dce/2020SCC-CSC10_2_eng.pdf).

Canada. Senate. Standing Senate Committee on Banking, Trade and Commerce. *Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act*. Ottawa, 2003.

Houlden, Lloyd W., Geoffrey B. Morawetz and Janis P. Sarra. *Bankruptcy and Insolvency Law of Canada*, vol. 4, 4th ed. Toronto: Thomson Reuters, 2009 (loose-leaf updated 2020, release 3).

Kaplan, Bill. "Liquidating CCAAs: Discretion Gone Awry?", in Janis P. Sarra, ed., *Annual Review of Insolvency Law*. Toronto: Carswell, 2008, 79.

Klar, Lewis N., et al. *Remedies in Tort*, vol. 1, by Leanne Berry, ed. Toronto: Thomson Reuters, 1987 (loose-leaf updated 2019, release 12).

McElcheran, Kevin P. *Commercial Insolvency in Canada*, 4th ed. Toronto: LexisNexis, 2019.

Michaud, Guillaume. "New Frontier: The Emergence of Litigation Funding in the Canadian Insolvency Landscape", in Janis P. Sarra et al., eds., *Annual Review of Insolvency Law 2018*. Toronto: Thomson Reuters, 2019, 221.

Nocilla, Alfonso. "Asset Sales Under the Companies' Creditors Arrangement Act and the Failure of Section 36" (2012), 52 *Can. Bus. L.J.* 226.

Nocilla, Alfonso. "The History of the Companies' Creditors Arrangement Act and the Future of Re-Structuring Law in Canada" (2014), 56 *Can. Bus. L.J.* 73.

Rotsztain, Michael B., and Alexandra Dostal. "Debtor-In-Possession Financing", in Stephanie Ben-Ishai and Anthony Duggan, eds., *Canadian Bankruptcy and Insolvency Law: Bill C-55, Statute c. 47 and Beyond*. Markham, Ont.: LexisNexis, 2007, 227.

Sarra, Janis P. *Rescue! The Companies' Creditors Arrangement Act*, 2nd ed. Toronto: Carswell, 2013.

Sarra, Janis P. "The Oscillating Pendulum: Canada's Sesquicentennial and Finding the Equilibrium for Insolvency Law", in Janis P. Sarra and Barbara Romaine, eds., *Annual Review of Insolvency Law 2016*. Toronto: Thomson Reuters, 2017, 9.

Wood, Roderick J. *Bankruptcy and Insolvency Law*, 2nd ed. Toronto: Irwin Law, 2015.

APPEALS from a judgment of the Quebec Court of Appeal (Dutil, Schrager and Dumas JJ.A.), 2019 QCCA 171, [2019] AZ-51566416, [2019] Q.J. No. 670 (QL), 2019 CarswellQue 94 (WL Can.), setting aside a decision of Michaud J., 2018 QCCS 1040, [2018] AZ-51477967, [2018] Q.J. No. 1986 (QL), 2018 CarswellQue 1923 (WL Can.). Appeals allowed.

Jean-Philippe Groleau, *Christian Lachance*, *Gabriel Lavery Lepage* and *Hannah Toledano*, for the appellants/interveners 9354-9186 Québec inc. and 9354-9178 Québec inc.

Neil A. Peden, for the appellants/interveners IMF Bentham Limited (now known as Omni Bridgeway Limited) and Bentham IMF Capital Limited (now known as Omni Bridgeway Capital (Canada) Limited).

Geneviève Cloutier and *Clifton P. Prophet*, for the respondent Callidus Capital Corporation.

Jocelyn Perreault, *Noah Zucker* and *François Alexandre Toupin*, for the respondents International Game Technology, Deloitte LLP, Luc Carignan, François Vigneault, Philippe Millette, Francis Proulx and François Pelletier.

Joseph Reynaud and *Nathalie Nouvet*, for the intervener Ernst & Young Inc.

Sylvain Rigaud, *Arad Mojtahedi* and *Saam Pousht-Mashhad*, for the interveners the Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals.

The reasons for judgment of the Court were delivered by

THE CHIEF JUSTICE AND MOLDAVER J.—

I. Overview

[1] These appeals arise in the context of an ongoing proceeding instituted under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"), in which substantially all of the assets of the debtor companies have been liquidated. The proceeding was commenced well over four years ago. Since then, a single supervising judge has been responsible for its oversight. In this capacity, he has made numerous discretionary decisions.

[2] Two of the supervising judge's decisions are in issue before us. Each raises a question requiring this Court to clarify the nature and scope of judicial discretion in *CCAA* proceedings. The first is whether a supervising judge has the discretion to bar a creditor from voting on a plan of arrangement where they determine that the creditor is acting for an improper purpose. The second is whether a supervising judge can approve third party litigation funding as interim financing, pursuant to s. 11.2 of the *CCAA*.

[3] For the reasons that follow, we would answer both questions in the affirmative, as did the supervising judge. To the extent the Court of Appeal disagreed and went on to interfere with the supervising judge's discretionary decisions, we conclude that it was not justified in doing so. In our respectful view, the Court of Appeal failed to treat the supervising judge's decisions with the appropriate degree of

deference. In the result, as we ordered at the conclusion of the hearing, these appeals are allowed and the supervising judge's order reinstated.

II. Facts

[4] In 1994, Mr. Gérald Duhamel founded Bluberi Gaming Technologies Inc., which is now one of the appellants, 9354-9186 Québec inc. The corporation manufactured, distributed, installed, and serviced electronic casino gaming machines. It also provided management systems for gambling operations. Its sole shareholder has at all material times been Bluberi Group Inc., which is now another of the appellants, 9354-9178 Québec inc. Through a family trust, Mr. Duhamel controls Bluberi Group Inc. and, as a result, Bluberi Gaming (collectively, "Bluberi").

[5] In 2012, Bluberi sought financing from the respondent, Callidus Capital Corporation ("Callidus"), which describes itself as an "asset-based or distressed lender" (R.F., at para. 26). Callidus extended a credit facility of approximately $24 million to Bluberi. This debt was secured in part by a share pledge agreement.

[6] Over the next three years, Bluberi lost significant amounts of money, and Callidus continued to extend credit. By 2015, Bluberi owed approximately $86 million to Callidus — close to half of which Bluberi asserts is comprised of interest and fees.

A. *Bluberi's Institution of CCAA Proceedings and Initial Sale of Assets*

[7] On November 11, 2015, Bluberi filed a petition for the issuance of an initial order under the *CCAA*. In its petition, Bluberi alleged that its liquidity issues were the result of Callidus taking *de facto* control of the corporation and dictating a number of purposefully detrimental business decisions. Bluberi alleged that Callidus engaged in this conduct in order to deplete the corporation's equity value with a view to owning Bluberi and, ultimately, selling it.

[8] Over Callidus's objection, Bluberi's petition succeeded. The supervising judge, Michaud J., issued an initial order under the *CCAA*. Among other things, the initial order confirmed that Bluberi was a "debtor company" within the meaning of s. 2(1) of the Act; stayed any proceedings against Bluberi or any director or officer of Bluberi; and appointed Ernst & Young Inc. as monitor ("Monitor").

[9] Working with the Monitor, Bluberi determined that a sale of its assets was necessary. On January 28, 2016, it proposed a sale solicitation process, which the supervising judge approved. That process led to Bluberi entering into an asset purchase agreement with Callidus. The agreement contemplated that Callidus would obtain all of Bluberi's assets in exchange for extinguishing almost the entirety of its secured claim against Bluberi, which had ballooned to approximately $135.7 million. Callidus would maintain an undischarged secured claim of $3 million against Bluberi. The agreement would also permit Bluberi to retain claims for damages against Callidus arising from its alleged involvement in Bluberi's financial difficulties ("Retained Claims").[1]

[1] Bluberi does not appear to have filed this claim yet (see 2018 QCCS 1040, at para. 10 (CanLII)).

Throughout these proceedings, Bluberi has asserted that the Retained Claims should amount to over $200 million in damages.

[10] The supervising judge approved the asset purchase agreement, and the sale of Bluberi's assets to Callidus closed in February 2017. As a result, Callidus effectively acquired Bluberi's business, and has continued to operate it as a going concern.

[11] Since the sale, the Retained Claims have been Bluberi's sole remaining asset and thus the sole security for Callidus's $3 million claim.

B. *The Initial Competing Plans of Arrangement*

[12] On September 11, 2017, Bluberi filed an application seeking the approval of a $2 million interim financing credit facility to fund the litigation of the Retained Claims and other related relief. The lender was a joint venture numbered company incorporated as 9364-9739 Québec inc. This interim financing application was set to be heard on September 19, 2017.

[13] However, one day before the hearing, Callidus proposed a plan of arrangement ("First Plan") and applied for an order convening a creditors' meeting to vote on that plan. The First Plan proposed that Callidus would fund a $2.5 million (later increased to $2.63 million) distribution to Bluberi's creditors, except itself, in exchange for a release from the Retained Claims. This would have fully satisfied the claims of Bluberi's former employees and those creditors with claims worth less than $3000;

creditors with larger claims were to receive, on average, 31 percent of their respective claims.

[14] The supervising judge adjourned the hearing of both applications to October 5, 2017. In the meantime, Bluberi filed its own plan of arrangement. Among other things, the plan proposed that half of any proceeds resulting from the Retained Claims, after payment of expenses and Bluberi's creditors' claims, would be distributed to the unsecured creditors, as long as the net proceeds exceeded $20 million.

[15] On October 5, 2017, the supervising judge ordered that the parties' plans of arrangement could be put to a creditors' vote. He ordered that both parties share the fees and expenses related to the presentation of the plans of arrangement at a creditors' meeting, and that a party's failure to deposit those funds with the Monitor would bar the presentation of that party's plan of arrangement. Bluberi elected not to deposit the necessary funds, and, as a result, only Callidus's First Plan was put to the creditors.

C. *Creditors' Vote on Callidus's First Plan*

[16] On December 15, 2017, Callidus submitted its First Plan to a creditors' vote. The plan failed to receive sufficient support. Section 6(1) of the *CCAA* provides that, to be approved, a plan must receive a "double majority" vote in each class of creditors — that is, a majority in *number* of class members, which also represents two-thirds in *value* of the class members' claims. All of Bluberi's creditors, besides Callidus, formed a single voting class of unsecured creditors. Of the 100 voting

unsecured creditors, 92 creditors (representing $3,450,882 of debt) voted in favour, and 8 voted against (representing $2,375,913 of debt). The First Plan failed because the creditors voting in favour only held 59.22 percent of the total value being voted, which did not meet the s. 6(1) threshold. Most notably, SMT Hautes Technologies ("SMT"), which held 36.7 percent of Bluberi's debt, voted against the plan.

[17] Callidus did not vote on the First Plan — despite the Monitor explicitly stating that Callidus could have "vote[d] . . . the portion of its claim, assessed by Callidus, to be an unsecured claim" (Joint R.R., vol. III, at p.188).

D. *Bluberi's Interim Financing Application and Callidus's New Plan*

[18] On February 6, 2018, Bluberi filed one of the applications underlying these appeals, seeking authorization of a proposed third party litigation funding agreement ("LFA") with a publicly traded litigation funder, IMF Bentham Limited or its Canadian subsidiary, Bentham IMF Capital Limited (collectively, "Bentham"). Bluberi's application also sought the placement of a $20 million super-priority charge in favour of Bentham on Bluberi's assets ("Litigation Financing Charge").

[19] The LFA contemplated that Bentham would fund Bluberi's litigation of the Retained Claims in exchange for receiving a portion of any settlement or award after trial. However, were Bluberi's litigation to fail, Bentham would lose all of its invested funds. The LFA also provided that Bentham could terminate the litigation of the

Retained Claims if, acting reasonably, it were no longer satisfied of the merits or commercial viability of the litigation.

[20] Callidus and certain unsecured creditors who voted in favour of its plan (who are now respondents and style themselves the "Creditors' Group") contested Bluberi's application on the ground that the LFA was a plan of arrangement and, as such, had to be submitted to a creditors' vote.[2]

[21] On February 12, 2018, Callidus filed the other application underlying these appeals, seeking to put another plan of arrangement to a creditors' vote ("New Plan"). The New Plan was essentially identical to the First Plan, except that Callidus increased the proposed distribution by $250,000 (from $2.63 million to $2.88 million). Further, Callidus filed an amended proof of claim, which purported to value the security attached to its $3 million claim at *nil*. Callidus was of the view that this valuation was proper because Bluberi had no assets other than the Retained Claims. On this basis, Callidus asserted that it stood in the position of an unsecured creditor, and sought the supervising judge's permission to vote on the New Plan with the other unsecured creditors. Given the size of its claim, if Callidus were permitted to vote on the New Plan, the plan would necessarily pass a creditors' vote. Bluberi opposed Callidus's application.

[2] Notably, the Creditors' Group advised Callidus that it would lend its support to the New Plan. It also asked Callidus to reimburse any legal fees incurred in association with that support. At the same time, the Creditors' Group did not undertake to vote in any particular way, and confirmed that each of its members would assess all available alternatives individually.

[22] The supervising judge heard Bluberi's interim financing application and Callidus's application regarding its New Plan together. Notably, the Monitor supported Bluberi's position.

III. Decisions Below

A. *Quebec Superior Court (2018 QCCS 1040) (Michaud J.)*

[23] The supervising judge dismissed Callidus's application, declining to submit the New Plan to a creditors' vote. He granted Bluberi's application, authorizing Bluberi to enter into a litigation funding agreement with Bentham on the terms set forth in the LFA and imposing the Litigation Financing Charge on Bluberi's assets.

[24] With respect to Callidus's application, the supervising judge determined Callidus should not be permitted to vote on the New Plan because it was acting with an "improper purpose" (para. 48). He acknowledged that creditors are generally entitled to vote in their own self-interest. However, given that the First Plan — which was almost identical to the New Plan — had been defeated by a creditors' vote, the supervising judge concluded that Callidus's attempt to vote on the New Plan was an attempt to override the result of the first vote. In particular, he wrote:

> Taking into consideration the creditors' interest, the Court accepted, in the fall of 2017, that Callidus' Plan be submitted to their vote with the understanding that, as a secured creditor, Callidus would not cast a vote. However, under the present circumstances, it would serve an improper purpose if Callidus was allowed to vote on its own plan, especially when

> its vote would very likely result in the New Plan meeting the two thirds threshold for approval under the CCAA.
>
> As pointed out by SMT, the main unsecured creditor, Callidus' attempt to vote aims only at cancelling SMT's vote which prevented Callidus' Plan from being approved at the creditors' meeting.
>
> It is one thing to let the creditors vote on a plan submitted by a secured creditor, it is another to allow this secured creditor to vote on its own plan in order to exert control over the vote for the sole purpose of obtaining releases. [paras. 45-47]

[25] The supervising judge concluded that, in these circumstances, allowing Callidus to vote would be both "unfair and unreasonable" (para. 47). He also observed that Callidus's conduct throughout the *CCAA* proceedings "lacked transparency" (at para. 41) and that Callidus was "solely motivated by the [pending] litigation" (para. 44). In sum, he found that Callidus's conduct was contrary to the "requirements of appropriateness, good faith, and due diligence", and ordered that Callidus would not be permitted to vote on the New Plan (para. 48, citing *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379, at para. 70).

[26] Because Callidus was not permitted to vote on the New Plan and SMT had unequivocally stated its intention to vote against it, the supervising judge concluded that the plan had no reasonable prospect of success. He therefore declined to submit it to a creditors' vote.

[27] With respect to Bluberi's application, the supervising judge considered three issues relevant to these appeals: (1) whether the LFA should be submitted to a creditors' vote; (2) if not, whether the LFA ought to be approved by the court; and (3)

if so, whether the $20 million Litigation Financing Charge should be imposed on Bluberi's assets.

[28] The supervising judge determined that the LFA did not need to be submitted to a creditors' vote because it was not a plan of arrangement. He considered a plan of arrangement to involve "an arrangement or compromise between a debtor and its creditors" (para. 71, citing *Re Crystallex*, 2012 ONCA 404, 293 O.A.C. 102, at para. 92 ("*Crystallex*")). In his view, the LFA lacked this essential feature. He also concluded that the LFA did not need to be accompanied by a plan, as Bluberi had stated its intention to file a plan in the future.

[29] After reviewing the terms of the LFA, the supervising judge found it met the criteria for approval of third party litigation funding set out in *Bayens v. Kinross Gold Corporation*, 2013 ONSC 4974, 117 O.R. (3d) 150, at para. 41, and *Hayes v. The City of Saint John*, 2016 NBQB 125, at para. 4 (CanLII). In particular, he considered Bentham's percentage of return to be reasonable in light of its level of investment and risk. Further, the supervising judge rejected Callidus and the Creditors' Group's argument that the LFA gave too much discretion to Bentham. He found that the LFA did not allow Bentham to exert undue influence on the litigation of the Retained Claims, noting similarly broad clauses had been approved in the *CCAA* context (para. 82, citing *Schenk v. Valeant Pharmaceuticals International Inc.*, 2015 ONSC 3215, 74 C.P.C. (7th) 332, at para. 23).

[30] Finally, the supervising judge imposed the Litigation Financing Charge on Bluberi's assets. While significant, the supervising judge considered the amount to be reasonable given: the amount of damages that would be claimed from Callidus; Bentham's financial commitment to the litigation; and the fact that Bentham was not charging any interim fees or interest (i.e., it would only profit in the event of successful litigation or settlement). Put simply, Bentham was taking substantial risks, and it was reasonable that it obtain certain guarantees in exchange.

[31] Callidus, again supported by the Creditors' Group, appealed the supervising judge's order, impleading Bentham in the process.

B. *Quebec Court of Appeal (2019 QCCA 171) (Dutil and Schrager JJ.A. and Dumas J. (ad hoc))*

[32] The Court of Appeal allowed the appeal, finding that "[t]he exercise of the judge's discretion [was] not founded in law nor on a proper treatment of the facts so that irrespective of the standard of review applied, appellate intervention [was] justified" (para. 48 CanLII)). In particular, the court identified two errors of relevance to these appeals.

[33] First, the court was of the view that the supervising judge erred in finding that Callidus had an improper purpose in seeking to vote on its New Plan. In its view, Callidus should have been permitted to vote. The court relied heavily on the notion that creditors have a right to vote in their own self-interest. It held that any judicial

discretion to preclude voting due to improper purpose should be reserved for the "clearest of cases" (para. 62, referring to *Re Blackburn*, 2011 BCSC 1671, 27 B.C.L.R. (5th) 199, at para. 45). The court was of the view that Callidus's transparent attempt to obtain a release from Bluberi's claims against it did not amount to an improper purpose. The court also considered Callidus's conduct prior to and during the *CCAA* proceedings to be incapable of justifying a finding of improper purpose.

[34] Second, the court concluded that the supervising judge erred in approving the LFA as interim financing because, in its view, the LFA was not connected to Bluberi's commercial operations. The court concluded that the supervising judge had both "misconstrued in law the notion of interim financing and misapplied that notion to the factual circumstances of the case" (para. 78).

[35] In light of this perceived error, the court substituted its view that the LFA was a plan of arrangement and, as a result, should have been submitted to a creditors' vote. It held that "[a]n arrangement or proposal can encompass both a compromise of creditors' claims as well as the process undertaken to satisfy them" (para. 85). The court considered the LFA to be a plan of arrangement because it affected the creditors' share in any eventual litigation proceeds, would cause them to wait for the outcome of any litigation, and could potentially leave them with nothing at all. Moreover, the court held that Bluberi's scheme "as a whole", being the prosecution of the Retained Claims and the LFA, should be submitted as a plan to the creditors for their approval (para. 89).

[36] Bluberi and Bentham (collectively, "appellants"), again supported by the Monitor, now appeal to this Court.

IV. Issues

[37] These appeals raise two issues:

(1) Did the supervising judge err in barring Callidus from voting on its New Plan on the basis that it was acting for an improper purpose?

(2) Did the supervising judge err in approving the LFA as interim financing, pursuant to s. 11.2 of the *CCAA*?

V. Analysis

A. *Preliminary Considerations*

[38] Addressing the above issues requires situating them within the contemporary Canadian insolvency landscape and, more specifically, the *CCAA* regime. Accordingly, before turning to those issues, we review (1) the evolving nature of *CCAA* proceedings; (2) the role of the supervising judge in those proceedings; and (3) the proper scope of appellate review of a supervising judge's exercise of discretion.

(1) The Evolving Nature of *CCAA* Proceedings

[39] The *CCAA* is one of three principal insolvency statutes in Canada. The others are the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"), which covers insolvencies of both individuals and companies, and the *Winding-up and Restructuring Act*, R.S.C. 1985, c. W-11 ("*WURA*"), which covers insolvencies of financial institutions and certain other corporations, such as insurance companies (*WURA*, s. 6(1)). While both the *CCAA* and the *BIA* enable reorganizations of insolvent companies, access to the *CCAA* is restricted to debtor companies facing total claims in excess of $5 million (*CCAA*, s. 3(1)).

[40] Together, Canada's insolvency statutes pursue an array of overarching remedial objectives that reflect the wide ranging and potentially "catastrophic" impacts insolvency can have (*Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6, [2013] 1 S.C.R. 271, at para. 1). These objectives include: providing for timely, efficient and impartial resolution of a debtor's insolvency; preserving and maximizing the value of a debtor's assets; ensuring fair and equitable treatment of the claims against a debtor; protecting the public interest; and, in the context of a commercial insolvency, balancing the costs and benefits of restructuring or liquidating the company (J. P. Sarra, "The Oscillating Pendulum: Canada's Sesquicentennial and Finding the Equilibrium for Insolvency Law", in J. P. Sarra and B. Romaine, eds., *Annual Review of Insolvency Law 2016* (2017), 9, at pp. 9-10; J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* 2nd ed. (2013), at pp. 4-5 and 14; Standing Senate Committee on Banking, Trade and Commerce, *Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act*

(2003), at pp. 9-10; R. J. Wood, *Bankruptcy and Insolvency Law* (2nd ed. 2015), at pp. 4-5).

[41] Among these objectives, the *CCAA* generally prioritizes "avoiding the social and economic losses resulting from liquidation of an insolvent company" (*Century Services*, at para. 70). As a result, the typical *CCAA* case has historically involved an attempt to facilitate the reorganization and survival of the pre-filing debtor company in an operational state — that is, as a going concern. Where such a reorganization was not possible, the alternative course of action was seen as a liquidation through either a receivership or under the *BIA* regime. This is precisely the outcome that was sought in *Century Services* (see para. 14).

[42] That said, the *CCAA* is fundamentally insolvency legislation, and thus it also "has the simultaneous objectives of maximizing creditor recovery, preservation of going-concern value where possible, preservation of jobs and communities affected by the firm's financial distress . . . and enhancement of the credit system generally" (Sarra, *Rescue! The Companies' Creditors Arrangement Act*, at p. 14; see also *Ernst & Young Inc. v. Essar Global Fund Ltd.*, 2017 ONCA 1014, 139 O.R. (3d) 1, at para. 103). In pursuit of those objectives, *CCAA* proceedings have evolved to permit outcomes that do not result in the emergence of the pre-filing debtor company in a restructured state, but rather involve some form of liquidation of the debtor's assets under the auspices of the Act itself (Sarra, "The Oscillating Pendulum: Canada's Sesquicentennial and Finding the Equilibrium for Insolvency Law", at pp. 19-21). Such scenarios are referred

to as "liquidating CCAAs", and they are now commonplace in the *CCAA* landscape (see *Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc.*, 2019 ONCA 508, 435 D.L.R. (4th) 416, at para. 70).

[43] Liquidating CCAAs take diverse forms and may involve, among other things: the sale of the debtor company as a going concern; an "en bloc" sale of assets that are capable of being operationalized by a buyer; a partial liquidation or downsizing of business operations; or a piecemeal sale of assets (B. Kaplan, "Liquidating CCAAs: Discretion Gone Awry?", in J. P. Sarra, ed., *Annual Review of Insolvency Law* (2008), 79, at pp. 87-89). The ultimate commercial outcomes facilitated by liquidating CCAAs are similarly diverse. Some may result in the continued operation of the business of the debtor under a different going concern entity (e.g., the liquidations in *Indalex* and *Re Canadian Red Cross Society* (1998), 5 C.B.R. (4th) 299 (Ont. C.J. (Gen. Div.)), while others may result in a sale of assets and inventory with no such entity emerging (e.g., the proceedings in *Re Target Canada Co.*, 2015 ONSC 303, 22 C.B.R. (6th) 323, at paras. 7 and 31). Others still, like the case at bar, may involve a going concern sale of most of the assets of the debtor, leaving residual assets to be dealt with by the debtor and its stakeholders.

[44] *CCAA* courts first began approving these forms of liquidation pursuant to the broad discretion conferred by the Act. The emergence of this practice was not without criticism, largely on the basis that it appeared to be inconsistent with the *CCAA* being a "restructuring statute" (see, e.g., *Uti Energy Corp. v. Fracmaster Ltd.*, 1999

ABCA 178, 244 A.R. 93, at paras. 15-16, aff'g 1999 ABQB 379, 11 C.B.R. (4th) 204, at paras. 40-43; A. Nocilla, "The History of the Companies' Creditors Arrangement Act and the Future of Re-Structuring Law in Canada" (2014), 56 *Can. Bus. L.J.* 73, at pp. 88-92).

[45] However, since s. 36 of the *CCAA* came into force in 2009, courts have been using it to effect liquidating CCAAs. Section 36 empowers courts to authorize the sale or disposition of a debtor company's assets outside the ordinary course of business.[3] Significantly, when the Standing Senate Committee on Banking, Trade and Commerce recommended the adoption of s. 36, it observed that liquidation is not necessarily inconsistent with the remedial objectives of the *CCAA*, and that it may be a means to "raise capital [to facilitate a restructuring], eliminate further loss for creditors or focus on the solvent operations of the business" (p. 147). Other commentators have observed that liquidation can be a "vehicle to restructure a business" by allowing the business to survive, albeit under a different corporate form or ownership (Sarra, *Rescue! The Companies' Creditors Arrangement Act*, at p. 169; see also K. P. McElcheran, *Commercial Insolvency in Canada* (4th ed. 2019), at p. 311). Indeed, in

[3] We note that while s. 36 now codifies the jurisdiction of a supervising court to grant a sale and vesting order, and enumerates factors to guide the court's discretion to grant such an order, it is silent on when courts ought to approve a liquidation under the *CCAA* as opposed to requiring the parties to proceed to liquidation under a receivership or the *BIA* regime (see Sarra, *Rescue! The Companies' Creditors Arrangement Act*, at pp. 167–68; A. Nocilla, "Asset Sales Under the Companies' Creditors Arrangement Act and the Failure of Section 36" (2012) 52 *Can. Bus. L.J.* 226, at pp. 243-44 and 247). This issue remains an open question and was not put to this Court in either *Indalex* or these appeals.

Indalex, the company sold its assets under the *CCAA* in order to preserve the jobs of its employees, despite being unable to survive as their employer (see para. 51).

[46] Ultimately, the relative weight that the different objectives of the *CCAA* take on in a particular case may vary based on the factual circumstances, the stage of the proceedings, or the proposed solutions that are presented to the court for approval. Here, a parallel may be drawn with the *BIA* context. In *Orphan Well Association v. Grant Thornton Ltd.*, 2019 SCC 5, [2019] 1 S.C.R. 150, at para. 67, this Court explained that, as a general matter, the *BIA* serves two purposes: (1) the bankrupt's financial rehabilitation and (2) the equitable distribution of the bankrupt's assets among creditors. However, in circumstances where a debtor corporation will never emerge from bankruptcy, only the latter purpose is relevant (see para. 67). Similarly, under the *CCAA*, when a reorganization of the pre-filing debtor company is not a possibility, a liquidation that preserves going-concern value and the ongoing business operations of the pre-filing company may become the predominant remedial focus. Moreover, where a reorganization or liquidation is complete and the court is dealing with residual assets, the objective of maximizing creditor recovery from those assets may take centre stage. As we will explain, the architecture of the *CCAA* leaves the case-specific assessment and balancing of these remedial objectives to the supervising judge.

(2) The Role of a Supervising Judge in *CCAA* Proceedings

[47] One of the principal means through which the *CCAA* achieves its objectives is by carving out a unique supervisory role for judges (see Sarra, *Rescue!*

The Companies' Creditors Arrangement Act, at pp. 18-19). From beginning to end, each *CCAA* proceeding is overseen by a single supervising judge. The supervising judge acquires extensive knowledge and insight into the stakeholder dynamics and the business realities of the proceedings from their ongoing dealings with the parties.

[48] The *CCAA* capitalizes on this positional advantage by supplying supervising judges with broad discretion to make a variety of orders that respond to the circumstances of each case and "meet contemporary business and social needs" (*Century Services*, at para. 58) in "real-time" (para. 58, citing R. B. Jones, "The Evolution of Canadian Restructuring: Challenges for the Rule of Law", in J. P. Sarra, ed., *Annual Review of Insolvency Law 2005* (2006), 481, at p. 484). The anchor of this discretionary authority is s. 11, which empowers a judge "to make any order that [the judge] considers appropriate in the circumstances". This section has been described as "the engine" driving the statutory scheme (*Stelco Inc. (Re)* (2005), 253 D.L.R. (4th) 109 (Ont. C.A.), at para. 36).

[49] The discretionary authority conferred by the *CCAA*, while broad in nature, is not boundless. This authority must be exercised in furtherance of the remedial objectives of the *CCAA*, which we have explained above (see *Century Services*, at para. 59). Additionally, the court must keep in mind three "baseline considerations" (at para. 70), which the applicant bears the burden of demonstrating: (1) that the order sought is appropriate in the circumstances, and (2) that the applicant has been acting in good faith and (3) with due diligence (para. 69).

[50] The first two considerations of appropriateness and good faith are widely understood in the *CCAA* context. Appropriateness "is assessed by inquiring whether the order sought advances the policy objectives underlying the *CCAA*" (para. 70). Further, the well-established requirement that parties must act in good faith in insolvency proceedings has recently been made express in s. 18.6 of the *CCAA*, which provides:

> **Good faith**
>
> **18.6 (1)** Any interested person in any proceedings under this Act shall act in good faith with respect to those proceedings.
>
> **Good faith — powers of court**
>
> **(2)** If the court is satisfied that an interested person fails to act in good faith, on application by an interested person, the court may make any order that it considers appropriate in the circumstances.
>
> (See also *BIA*, s. 4.2; *Budget Implementation Act*, *2019, No. 1*, S.C. 2019, c. 29, ss. 133 and 140.)

[51] The third consideration of due diligence requires some elaboration. Consistent with the *CCAA* regime generally, the due diligence consideration discourages parties from sitting on their rights and ensures that creditors do not strategically manoeuver or position themselves to gain an advantage (*Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. C.J. (Gen. Div.)), at p. 31). The procedures set out in the *CCAA* rely on negotiations and compromise between the debtor and its stakeholders, as overseen by the supervising judge and the monitor. This necessarily requires that, to the extent possible, those involved in the proceedings be on equal footing and have a clear understanding of their respective rights (see McElcheran, at p. 262). A party's failure to participate in *CCAA* proceedings in a

diligent and timely fashion can undermine these procedures and, more generally, the effective functioning of the *CCAA* regime (see, e.g., *North American Tungsten Corp. v. Global Tungsten and Powders Corp.*, 2015 BCCA 390, 377 B.C.A.C. 6, at paras. 21-23; *Re BA Energy Inc.*, 2010 ABQB 507, 70 C.B.R. (5th) 24; *HSBC Bank Canada v. Bear Mountain Master Partnership*, 2010 BCSC 1563, 72 C.B.R. (5th) 276, at para. 11; *Caterpillar Financial Services Ltd. v. 360networks Corp.*, 2007 BCCA 14, 279 D.L.R. (4th) 701, at paras. 51-52, in which the courts seized on a party's failure to act diligently).

[52] We pause to note that supervising judges are assisted in their oversight role by a court appointed monitor whose qualifications and duties are set out in the *CCAA* (see ss. 11.7, 11.8 and 23 to 25). The monitor is an independent and impartial expert, acting as "the eyes and the ears of the court" throughout the proceedings (*Essar*, at para. 109). The core of the monitor's role includes providing an advisory opinion to the court as to the fairness of any proposed plan of arrangement and on orders sought by parties, including the sale of assets and requests for interim financing (see *CCAA*, s. 23(1)(d) and (i); Sarra, *Rescue! The Companies' Creditors Arrangement Act*, at pp- 566 and 569).

(3) Appellate Review of Exercises of Discretion by a Supervising Judge

[53] A high degree of deference is owed to discretionary decisions made by judges supervising *CCAA* proceedings. As such, appellate intervention will only be justified if the supervising judge erred in principle or exercised their discretion

unreasonably (see *Grant Forest Products Inc. v. Toronto-Dominion Bank*, 2015 ONCA 570, 387 D.L.R. (4th) 426, at para. 98; *Bridging Finance Inc. v. Béton Brunet 2001 inc.*, 2017 QCCA 138, 44 C.B.R. (6th) 175, at para. 23). Appellate courts must be careful not to substitute their own discretion in place of the supervising judge's (*New Skeena Forest Products Inc., Re*, 2005 BCCA 192, 39 B.C.L.R. (4th) 338, at para. 20).

[54] This deferential standard of review accounts for the fact that supervising judges are steeped in the intricacies of the *CCAA* proceedings they oversee. In this respect, the comments of Tysoe J.A. in *Canadian Metropolitan Properties Corp. v. Libin Holdings Ltd.*, 2009 BCCA 40, 305 D.L.R. (4th) 339 ("*Re Edgewater Casino Inc.*), at para. 20, are apt:

> . . . one of the principal functions of the judge supervising the *CCAA* proceeding is to attempt to balance the interests of the various stakeholders during the reorganization process, and it will often be inappropriate to consider an exercise of discretion by the supervising judge in isolation of other exercises of discretion by the judge in endeavoring to balance the various interests. . . . *CCAA* proceedings are dynamic in nature and the supervising judge has intimate knowledge of the reorganization process. The nature of the proceedings often requires the supervising judge to make quick decisions in complicated circumstances.

[55] With the foregoing in mind, we turn to the issues on appeal.

B. *Callidus Should Not Be Permitted to Vote on Its New Plan*

[56] A creditor can generally vote on a plan of arrangement or compromise that affects its rights, subject to any specific provisions of the *CCAA* that may restrict its

voting rights (e.g., s. 22(3)), or a proper exercise of discretion by the supervising judge to constrain or bar the creditor's right to vote. We conclude that one such constraint arises from s. 11 of the *CCAA*, which provides supervising judges with the discretion to bar a creditor from voting where the creditor is acting for an improper purpose. Supervising judges are best-placed to determine whether this discretion should be exercised in a particular case. In our view, the supervising judge here made no error in exercising his discretion to bar Callidus from voting on the New Plan.

(1) Parameters of Creditors' Right to Vote on Plans of Arrangement

[57] Creditor approval of any plan of arrangement or compromise is a key feature of the *CCAA*, as is the supervising judge's oversight of that process. Where a plan is proposed, an application may be made to the supervising judge to order a creditors' meeting to vote on the proposed plan (*CCAA*, ss. 4 and 5). The supervising judge has the discretion to determine whether to order the meeting. For the purposes of voting at a creditors' meeting, the debtor company may divide the creditors into classes, subject to court approval (*CCAA*, s. 22(1)). Creditors may be included in the same class if "their interests or rights are sufficiently similar to give them a commonality of interest" (*CCAA*, s. 22(2); see also L. W. Houlden, G. B. Morawetz and J. P. Sarra, *Bankruptcy and Insolvency Law of Canada* (4th ed. (loose-leaf)), vol. 4, at N§149). If the requisite "double majority" in each class of creditors — again, a majority in *number* of class members, which also represents two-thirds in *value* of the class members' claims — vote in favour of the plan, the supervising judge may sanction the plan

(*Metcalfe & Mansfield Alternative Investments II Corp. (Re)*, 2008 ONCA 587, 296 D.L.R. (4th) 135, at para. 34; see *CCAA*, s. 6). The supervising judge will conduct what is commonly referred to as a "fairness hearing" to determine, among other things, whether the plan is fair and reasonable (Wood, at pp. 490-92; see also Sarra, *Rescue! The Companies' Creditors Arrangement Act*, at p. 529; Houlden, Morawetz and Sarra at N§45). Once sanctioned by the supervising judge, the plan is binding on each class of creditors that participated in the vote (*CCAA*, s. 6(1)).

[58] Creditors with a provable claim against the debtor whose interests are affected by a proposed plan are usually entitled to vote on plans of arrangement (Wood, at p. 470). Indeed, there is no express provision in the *CCAA* barring such a creditor from voting on a plan of arrangement, including a plan it sponsors.

[59] Notwithstanding the foregoing, the appellants submit that a purposive interpretation of s. 22(3) of the *CCAA* reveals that, as a general matter, a creditor should be precluded from voting on its own plan. Section 22(3) provides:

> **Related creditors**
>
> **(3)** A creditor who is related to the company may vote against, but not for, a compromise or arrangement relating to the company.

The appellants note that s. 22(3) was meant to harmonize the *CCAA* scheme with s. 54(3) of the *BIA*, which provides that "[a] creditor who is related to the debtor may vote against but not for the acceptance of the proposal." The appellants point out that,

under s. 50(1) of the *BIA*, only debtors can sponsor plans; as a result, the reference to "debtor" in s. 54(3) captures *all* plan sponsors. They submit that if s. 54(3) captures all plan sponsors, s. 22(3) of the *CCAA* must do the same. On this basis, the appellants ask us to extend the voting restriction in s. 22(3) to apply not only to creditors who are "related to the company", as the provision states, but to any creditor who sponsors a plan. They submit that this interpretation gives effect to the underlying intention of both provisions, which they say is to ensure that a creditor who has a conflict of interest cannot "dilute" or overtake the votes of other creditors.

[60] We would not accept this strained interpretation of s. 22(3). Section 22(3) makes no mention of conflicts of interest between creditors and plan sponsors generally. The wording of s. 22(3) only places voting restrictions on creditors who are "related to the [debtor] company". These words are "precise and unequivocal" and, as such, must "play a dominant role in the interpretive process" (*Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601, at para. 10). In our view, the appellants' analogy to the *BIA* is not sufficient to overcome the plain wording of this provision.

[61] While the appellants are correct that s. 22(3) was enacted to harmonize the treatment of related parties in the *CCAA* and *BIA*, its history demonstrates that it is not a general conflict of interest provision. Prior to the amendments incorporating s. 22(3) into the *CCAA*, the *CCAA* clearly allowed creditors to put forward a plan of arrangement (see Houlden, Morawetz and Sarra, at N§33, *Red Cross*; *Re 1078385*

Ontario Inc. (2004), 206 O.A.C. 17). In contrast, under the *BIA*, only debtors could make proposals. Parliament is presumed to have been aware of this obvious difference between the two statutes (see *ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140, at para. 59; see also *Third Eye*, at para. 57). Despite this difference, Parliament imported, with necessary modification, the wording of the *BIA* related creditor provision into the *CCAA*. Going beyond this language entails accepting that Parliament failed to choose the right words to give effect to its intention, which we do not.

[62] Indeed, Parliament did not mindlessly reproduce s. 54(3) of the *BIA* in s. 22(3) of the *CCAA*. Rather, it made two modifications to the language of s. 54(3) to bring it into conformity with the language of the *CCAA*. First, it changed "proposal" (a defined term in the *BIA*) to "compromise or arrangement" (a term used throughout the *CCAA*). Second, it changed "debtor" to "company", recognizing that companies are the only kind of debtor that exists in the *CCAA* context.

[63] Our view is further supported by Industry Canada's explanation of the rationale for s. 22(3) as being to "reduce the ability of debtor companies to organize a restructuring plan that confers additional benefits to related parties" (Office of the Superintendent of Bankruptcy Canada, *Bill C-12: Clause by Clause Analysis*, developed by Industry Canada, last updated March 24, 2015 (online), cl. 71, s. 22 (emphasis added); see also Standing Senate Committee on Banking, Trade and Commerce, at p. 151).

[64] Finally, we note that the *CCAA* contains other mechanisms that attenuate the concern that a creditor with conflicting legal interests with respect to a plan it proposes may distort the creditors' vote. Although we reject the appellants' interpretation of s. 22(3), that section still bars creditors who are related to the debtor company from voting in favour of *any* plan. Additionally, creditors who do not share a sufficient commonality of interest may be forced to vote in separate classes (s. 22(1) and (2)), and, as we will explain, a supervising judge may bar a creditor from voting where the creditor is acting for an improper purpose.

(2) Discretion to Bar a Creditor From Voting in Furtherance of an Improper Purpose

[65] There is no dispute that the *CCAA* is silent on when a creditor who is otherwise entitled to vote on a plan can be barred from voting. However, *CCAA* supervising judges are often called upon "to sanction measures for which there is no explicit authority in the *CCAA*" (*Century Services*, at para. 61; see also para. 62). In *Century Services*, this Court endorsed a "hierarchical" approach to determining whether jurisdiction exists to sanction a proposed measure: "courts [must] rely first on an interpretation of the provisions of the *CCAA* text before turning to inherent or equitable jurisdiction to anchor measures taken in a *CCAA* proceeding" (para. 65). In most circumstances, a purposive and liberal interpretation of the provisions of the

CCAA will be sufficient "to ground measures necessary to achieve its objectives" (para. 65).

[66] Applying this approach, we conclude that jurisdiction exists under s. 11 of the *CCAA* to bar a creditor from voting on a plan of arrangement or compromise where the creditor is acting for an improper purpose.

[67] Courts have long recognized that s. 11 of the *CCAA* signals legislative endorsement of the "broad reading of *CCAA* authority developed by the jurisprudence" (*Century Services*, at para. 68). Section 11 states:

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

On the plain wording of the provision, the jurisdiction granted by s. 11 is constrained only by restrictions set out in the *CCAA* itself, and the requirement that the order made be "appropriate in the circumstances".

[68] Where a party seeks an order relating to a matter that falls within the supervising judge's purview, and for which there is no *CCAA* provision conferring more specific jurisdiction, s. 11 necessarily is the provision of first resort in anchoring

jurisdiction. As Blair J.A. put it in *Stelco*, s. 11 "for the most part supplants the need to resort to inherent jurisdiction" in the *CCAA* context (para. 36).

[69] Oversight of the plan negotiation, voting, and approval process falls squarely within the supervising judge's purview. As indicated, there are no specific provisions in the *CCAA* which govern when a creditor who is otherwise eligible to vote on a plan may nonetheless be barred from voting. Nor is there any provision in the *CCAA* which suggests that a creditor has an absolute right to vote on a plan that cannot be displaced by a proper exercise of judicial discretion. However, given that the *CCAA* regime contemplates creditor participation in decision-making as an integral facet of the workout regime, creditors should only be barred from voting where the circumstances demand such an outcome. In other words, it is necessarily a discretionary, circumstance-specific inquiry.

[70] Thus, it is apparent that s. 11 serves as the source of the supervising judge's jurisdiction to issue a discretionary order barring a creditor from voting on a plan of arrangement. The exercise of this discretion must further the remedial objectives of the *CCAA* and be guided by the baseline considerations of appropriateness, good faith, and due diligence. This means that, where a creditor is seeking to exercise its voting rights in a manner that frustrates, undermines, or runs counter to those objectives — that is, acting for an "improper purpose" — the supervising judge has the discretion to bar that creditor from voting.

[71] The discretion to bar a creditor from voting in furtherance of an improper purpose under the *CCAA* parallels the similar discretion that exists under the *BIA*, which was recognized in *Laserworks Computer Services Inc. (Bankruptcy), Re*, 1998 NSCA 42, 165 N.S.R. (2d) 296. In *Laserworks*, the Nova Scotia Court of Appeal concluded that the discretion to bar a creditor from voting in this way stemmed from the court's power, inherent in the scheme of the *BIA*, to supervise "[e]ach step in the bankruptcy process" (at para. 41), as reflected in ss. 43(7), 108(3), and 187(9) of the Act. The court explained that s. 187(9) specifically grants the power to remedy a "substantial injustice", which arises "when the *BIA* is used for an improper purpose" (para. 54). The court held that "[a]n improper purpose is any purpose collateral to the purpose for which the bankruptcy and insolvency legislation was enacted by Parliament" (para. 54).

[72] While not determinative, the existence of this discretion under the *BIA* lends support to the existence of similar discretion under the *CCAA* for two reasons.

[73] First, this conclusion would be consistent with this Court's recognition that the *CCAA* "offers a more flexible mechanism with greater judicial discretion" than the *BIA* (*Century Services*, at para. 14 (emphasis added)).

[74] Second, this Court has recognized the benefits of harmonizing the two statutes to the extent possible. For example, in *Indalex*, the Court observed that "in order to avoid a race to liquidation under the *BIA*, courts will favour an interpretation of the *CCAA* that affords creditors analogous entitlements" to those received under the

BIA (para. 51; see also *Century Services*, at para. 24; *Nortel Networks Corp., Re*, 2015 ONCA 681, 391 D.L.R. (4th) 283, at paras. 34-46). Thus, where the statutes are capable of bearing a harmonious interpretation, that interpretation ought to be preferred "to avoid the ills that can arise from [insolvency] 'statute-shopping'" (*Kitchener Frame Ltd.*, 2012 ONSC 234, 86 C.B.R. (5th) 274, at para. 78; see also para. 73). In our view, the articulation of "improper purpose" set out in *Laserworks* — that is, any purpose collateral to the purpose of insolvency legislation — is entirely harmonious with the nature and scope of judicial discretion afforded by the *CCAA*. Indeed, as we have explained, this discretion is to be exercised in accordance with the *CCAA*'s objectives as an insolvency statute.

[75] We also observe that the recognition of this discretion under the *CCAA* advances the basic fairness that "permeates Canadian insolvency law and practice" (Sarra, "The Oscillating Pendulum: Canada's Sesquicentennial and Finding the Equilibrium for Insolvency Law", at p. 27; see also *Century Services*, at paras. 70 and 77). As Professor Sarra observes, fairness demands that supervising judges be in a position to recognize and meaningfully address circumstances in which parties are working against the goals of the statute:

> The Canadian insolvency regime is based on the assumption that creditors and the debtor share a common goal of maximizing recoveries. The substantive aspect of fairness in the insolvency regime is based on the assumption that all involved parties face real economic risks. Unfairness resides where only some face these risks, while others actually benefit from the situation . . . . If the *CCAA* is to be interpreted in a purposive way, the courts must be able to recognize when people have conflicting interests and are working actively against the goals of the statute.

("The Oscillating Pendulum: Canada's Sesquicentennial and Finding the Equilibrium for Insolvency Law", at p. 30 (emphasis added))

In this vein, the supervising judge's oversight of the *CCAA* voting regime must not only ensure strict compliance with the Act, but should further its goals as well. We are of the view that the policy objectives of the *CCAA* necessitate the recognition of the discretion to bar a creditor from voting where the creditor is acting for an improper purpose.

[76] Whether this discretion ought to be exercised in a particular case is a circumstance-specific inquiry that must balance the various objectives of the *CCAA*. As this case demonstrates, the supervising judge is best-positioned to undertake this inquiry.

(3) The Supervising Judge Did Not Err in Prohibiting Callidus From Voting

[77] In our view, the supervising judge's decision to bar Callidus from voting on the New Plan discloses no error justifying appellate intervention. As we have explained, discretionary decisions like this one must be approached from the appropriate posture of deference. It bears mentioning that, when he made this decision, the supervising judge was intimately familiar with Bluberi's *CCAA* proceedings. He had presided over them for over 2 years, received 15 reports from the Monitor, and issued approximately 25 orders.

[78] The supervising judge considered the whole of the circumstances and concluded that Callidus's vote would serve an improper purpose (paras. 45 and 48). We agree with his determination. He was aware that, prior to the vote on the First Plan, Callidus had chosen not to value *any* of its claim as unsecured and later declined to vote at all — despite the Monitor explicitly inviting it do so[4]. The supervising judge was also aware that Callidus's First Plan had failed to receive the other creditors' approval at the creditors' meeting of December 15, 2017, and that Callidus had chosen not to take the opportunity to amend or increase the value of its plan at that time, which it was entitled to do (see *CCAA*, ss. 6 and 7; Monitor, I.F., at para. 17). Between the failure of the First Plan and the proposal of the New Plan — which was identical to the First Plan, save for a modest increase of $250,000 — none of the factual circumstances relating to Bluberi's financial or business affairs had materially changed. However, Callidus sought to value the *entirety* of its security at *nil* and, on that basis, sought leave to vote on the New Plan as an unsecured creditor. If Callidus were permitted to vote in this way, the New Plan would certainly have met the s. 6(1) threshold for approval. In these circumstances, the inescapable inference was that Callidus was attempting to strategically value its security to acquire control over the outcome of the vote and thereby circumvent the creditor democracy the *CCAA* protects. Put simply, Callidus was seeking to take a "second kick at the can" and manipulate the vote on the New

[4] It bears noting that the Monitor's statement in this regard did not decide whether Callidus would ultimately have been entitled to vote on the First Plan. Because Callidus did not even attempt to vote on the First Plan, this question was never put to the supervising judge.

Plan. The supervising judge made no error in exercising his discretion to prevent Callidus from doing so.

[79] Indeed, as the Monitor observes, "Once a plan of arrangement or proposal has been submitted to the creditors of a debtor for voting purposes, to order a second creditors' meeting to vote on a substantially similar plan would not advance the policy objectives of the CCAA, nor would it serve and enhance the public's confidence in the process or otherwise serve the ends of justice" (I.F., at para. 18). This is particularly the case given that the cost of having another meeting to vote on the New Plan would have been upwards of $200,000 (see supervising judge's reasons, at para. 72).

[80] We add that Callidus's course of action was plainly contrary to the expectation that parties act with due diligence in an insolvency proceeding — which, in our view, includes acting with due diligence in valuing their claims and security. At all material times, Bluberi's Retained Claims have been the sole asset securing Callidus's claim. Callidus has pointed to nothing in the record that indicates that the value of the Retained Claims has changed. Had Callidus been of the view that the Retained Claims had no value, one would have expected Callidus to have valued its security accordingly prior to the vote on the First Plan, if not earlier. Parenthetically, we note that, irrespective of the timing, an attempt at such a valuation may well have failed. This would have prevented Callidus from voting as an unsecured creditor, even in the absence of Callidus's improper purpose.

[81] As we have indicated, discretionary decisions attract a highly deferential standard of review. Deference demands that review of a discretionary decision begin with a proper characterization of the basis for the decision. Respectfully, the Court of Appeal failed in this regard. The Court of Appeal seized on the supervising judge's somewhat critical comments relating to Callidus's goal of being released from the Retained Claims and its conduct throughout the proceedings as being incapable of grounding a finding of improper purpose. However, as we have explained, these considerations did not drive the supervising judge's conclusion. His conclusion was squarely based on Callidus' attempt to manipulate the creditors' vote to ensure that its New Plan would succeed where its First Plan had failed (see supervising judge's reasons, at paras. 45-48). We see nothing in the Court of Appeal's reasons that grapples with this decisive impropriety, which goes far beyond a creditor merely acting in its own self-interest.

[82] In sum, we see nothing in the supervising judge's reasons on this point that would justify appellate intervention. Callidus was properly barred from voting on the New Plan.

[83] Before moving on, we note that the Court of Appeal addressed two further issues: whether Callidus is "related" to Bluberi within the meaning of s. 22(3) of the *CCAA*; and whether, if permitted to vote, Callidus should be ordered to vote in a separate class from Bluberi's other creditors (see *CCAA*, s. 22(1) and (2)). Given our conclusion that the supervising judge did not err in barring Callidus from voting on the

New Plan on the basis that Callidus was acting for an improper purpose, it is unnecessary to address either of these issues. However, nothing in our reasons should be read as endorsing the Court of Appeal's analysis of them.

C. *Bluberi's LFA Should Be Approved as Interim Financing*

[84] In our view, the supervising judge made no error in approving the LFA as interim financing pursuant to s. 11.2 of the *CCAA*. Interim financing is a flexible tool that may take on a range of forms. As we will explain, third party litigation funding may be one such form. Whether third party litigation funding should be approved as interim financing is a case-specific inquiry that should have regard to the text of s. 11.2 and the remedial objectives of the *CCAA* more generally.

(1) Interim Financing and Section 11.2 of the *CCAA*

[85] Interim financing, despite being expressly provided for in s. 11.2 of the *CCAA*, is not defined in the Act. Professor Sarra has described it as "refer[ring] primarily to the working capital that the debtor corporation requires in order to keep operating during restructuring proceedings, as well as to the financing to pay the costs of the workout process" (*Rescue! The Companies' Creditors Arrangement Act*, at p. 197). Interim financing used in this way — sometimes referred to as "debtor-in-possession" financing — protects the going-concern value of the debtor company while it develops a workable solution to its insolvency issues (p. 197; *Royal Oak Mines Inc., Re* (1999), 6 C.B.R. (4th) 314 (Ont. C.J. (Gen. Div.)), at paras. 7, 9 and 24; *Boutiques*

San Francisco Inc. v. Richter & Associés Inc., 2003 CanLII 36955 (Que. Sup. Ct.), at para. 32). That said, interim financing is not limited to providing debtor companies with immediate operating capital. Consistent with the remedial objectives of the *CCAA*, interim financing at its core enables the preservation and realization of the value of a debtor's assets.

[86] Since 2009, s. 11.2(1) of the *CCAA* has codified a supervising judge's discretion to approve interim financing, and to grant a corresponding security or charge in favour of the lender in the amount the judge considers appropriate:

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

[87] The breadth of a supervising judge's discretion to approve interim financing is apparent from the wording of s. 11.2(1). Aside from the protections regarding notice and pre-filing security, s. 11.2(1) does not mandate any standard form

or terms.[5] It simply provides that the financing must be in an amount that is "appropriate" and "required by the company, having regard to its cash-flow statement".

[88] The supervising judge may also grant the lender a "super-priority charge" that will rank in priority over the claims of any secured creditors, pursuant to s. 11.2(2):

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

[89] Such charges, also known as "priming liens", reduce lenders' risks, thereby incentivizing them to assist insolvent companies (Innovation, Science and Economic Development Canada, *Archived — Bill C-55: clause by clause analysis*, last updated December 29, 2016 (online), cl. 128, s. 11.2; Wood, at p. 387). As a practical matter, these charges are often the only way to encourage this lending. Normally, a lender protects itself against lending risk by taking a security interest in the borrower's assets. However, debtor companies under *CCAA* protection will often have pledged all or substantially all of their assets to other creditors. Accordingly, without the benefit of a super-priority charge, an interim financing lender would rank behind those other creditors (McElcheran, at pp. 298-99). Although super-priority charges do subordinate

[5] A further exception has been codified in the 2019 amendments to the *CCAA*, which create s. 11.2(5) (see *Budget Implementation Act, 2019, No. 1*, s. 138). This section provides that at the time an initial order is sought, "no order shall be made under subsection [11.2](1) unless the court is also satisfied that the terms of the loan are limited to what is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period". This provision does not apply in this case, and the parties have not relied on it. However, it may be that it restricts the ability of supervising judges to approve LFAs as interim financing at the time of granting an Initial Order.

secured creditors' security positions to the interim financing lender's — a result that was controversial at common law — Parliament has indicated its general acceptance of the trade-offs associated with these charges by enacting s. 11.2(2) (see M. B. Rotsztain and A. Dostal, "Debtor-In-Possession Financing", in S. Ben-Ishai and A. Duggan, eds., *Canadian Bankruptcy and Insolvency Law: Bill C-55, Statute c. 47 and Beyond* (2007), 227, at pp. 228-229 and 240-50). Indeed, this balance was expressly considered by the Standing Senate Committee on Banking, Trade and Commerce that recommended codifying interim financing in the *CCAA* (pp. 100-4).

[90] Ultimately, whether proposed interim financing should be approved is a question that the supervising judge is best-placed to answer. The *CCAA* sets out a number of factors that help guide the exercise of this discretion. The inclusion of these factors in s. 11.2 was informed by the Standing Senate Committee on Banking, Trade and Commerce's view that they would help meet the "fundamental principles" that have guided the development of Canadian insolvency law, including "fairness, predictability and efficiency" (p. 103; see also Innovation, Science and Economic Development Canada, cl. 128, s. 11.2). In deciding whether to grant interim financing, the supervising judge is to consider the following non-exhaustive list of factors:

> **Factors to be considered**
>
> (4) In deciding whether to make an order, the court is to consider, among other things,
>
> **(a)** the period during which the company is expected to be subject to proceedings under this Act;
>
> **(b)** how the company's business and financial affairs are to be managed during the proceedings;

> **(c)** whether the company's management has the confidence of its major creditors;
>
> **(d)** whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;
>
> **(e)** the nature and value of the company's property;
>
> **(f)** whether any creditor would be materially prejudiced as a result of the security or charge; and
>
> **(g)** the monitor's report referred to in paragraph 23(1)(b), if any.
>
> (*CCAA*, s. 11.2(4))

[91] Prior to the coming into force of the above provisions in 2009, courts had been using the general discretion conferred by s. 11 to authorize interim financing and associated super-priority charges (*Century Services*, at para. 62). Section 11.2 largely codifies the approaches those courts have taken (Wood, at p. 388; McElcheran, at p. 301). As a result, where appropriate, guidance may be drawn from the pre-codification interim financing jurisprudence.

[92] As with other measures available under the *CCAA*, interim financing is a flexible tool that may take different forms or attract different considerations in each case. Below, we explain that third party litigation funding may, in appropriate cases, be one such form.

(2) Supervising Judges May Approve Third Party Litigation Funding as Interim Financing

[93] Third party litigation funding generally involves "a third party, otherwise unconnected to the litigation, agree[ing] to pay some or all of a party's litigation costs,

in exchange for a portion of that party's recovery in damages or costs" (R. K. Agarwal and D. Fenton, "Beyond Access to Justice: Litigation Funding Agreements Outside the Class Actions Context" (2017), 59 *Can. Bus. L. J.* 65, at p. 65). Third party litigation funding can take various forms. A common model involves the litigation funder agreeing to pay a plaintiff's disbursements and indemnify the plaintiff in the event of an adverse cost award in exchange for a share of the proceeds of any successful litigation or settlement (see *Dugal v. Manulife Financial Corp.*, 2011 ONSC 1785, 105 O.R. (3d) 364; *Bayens*).

[94] Outside of the *CCAA* context, the approval of third party litigation funding agreements has been somewhat controversial. Part of that controversy arises from the potential of these agreements to offend the common law doctrines of champerty and maintenance.[6] The tort of maintenance prohibits "officious intermeddling with a lawsuit which in no way belongs to one" (L. N. Klar et al., *Remedies in Tort* (loose-leaf), vol. 1, by L. Berry, ed., at p. 14-11, citing *Langtry v. Dumoulin* (1884), 7 O.R. 644 (Ch. Div.), at p. 661). Champerty is a species of maintenance that involves an agreement to share in the proceeds or otherwise profit from a successful suit (*McIntyre Estate v. Ontario (Attorney General)* (2002), 218 D.L.R. (4th) 193 (Ont. C.A.), at para. 26).

[6] The extent of this controversy varies by province. In Ontario, champertous agreements are forbidden by statute (see *An Act respecting Champerty*, R.S.O. 1897, c. 327). In Quebec, concerns associated with champerty and maintenance do not arise as acutely because champerty and maintenance are not part of the law as such (see *Montgrain v. National Bank of Canada*, 2006 QCCA 557 [2006] R.J.Q. 1009; G. Michaud, "New Frontier: The Emergence of Litigation Funding in the Canadian Insolvency Landscape" in J. P. Sarra et al., eds., *Annual Review of Insolvency Law 2018* (2019), 221, at p. 231).

[95] Building on jurisprudence holding that *contingency fee* arrangements are not champertous where they are not motivated by an improper purpose (e.g., *McIntyre Estate*), lower courts have increasingly come to recognize that *litigation funding* agreements are also not *per se* champertous. This development has been focussed within class action proceedings, where it arose as a response to barriers like adverse cost awards, which were stymieing litigants' access to justice (see *Dugal*, at para. 33; *Marcotte v. Banque de Montréal*, 2015 QCCS 1915, at paras. 43-44 (CanLII); *Houle v. St. Jude Medical Inc.*, 2017 ONSC 5129, 9 C.P.C. (8th) 321, at para. 52, aff'd 2018 ONSC 6352, 429 D.L.R. (4th) 739 (Div. Ct.); see also *Stanway v. Wyeth*, 2013 BCSC 1585, 56 B.C.L.R. (5th) 192, at para. 13). The jurisprudence on the approval of third party litigation funding agreements in the class action context — and indeed, the parameters of their legality generally — is still evolving, and no party before this Court has invited us to evaluate it.

[96] That said, insofar as third party litigation funding agreements are not *per se* illegal, there is no principled basis upon which to restrict supervising judges from approving such agreements as interim financing in appropriate cases. We acknowledge that this funding differs from more common forms of interim financing that are simply designed to help the debtor "keep the lights on" (see *Royal Oak*, at paras. 7 and 24). However, in circumstances like the case at bar, where there is a single litigation asset that could be monetized for the benefit of creditors, the objective of maximizing creditor recovery has taken centre stage. In those circumstances, litigation funding

furthers the basic purpose of interim financing: allowing the debtor to realize on the value of its assets.

[97] We conclude that third party litigation funding agreements may be approved as interim financing in *CCAA* proceedings when the supervising judge determines that doing so would be fair and appropriate, having regard to all the circumstances and the objectives of the Act. This requires consideration of the specific factors set out in s. 11.2(4) of the *CCAA*. That said, these factors need not be mechanically applied or individually reviewed by the supervising judge. Indeed, not all of them will be significant in every case, nor are they exhaustive. Further guidance may be drawn from other areas in which third party litigation funding agreements have been approved.

[98] The foregoing is consistent with the practice that is already occurring in lower courts. Most notably, in *Crystallex*, the Ontario Court of Appeal approved a third party litigation funding agreement in circumstances substantially similar to the case at bar. *Crystallex* involved a mining company that had the right to develop a large gold deposit in Venezuela. Crystallex eventually became insolvent and (similar to Bluberi) was left with only a single significant asset: a US$3.4 billion arbitration claim against Venezuela. After entering *CCAA* protection, Crystallex sought the approval of a third party litigation funding agreement. The agreement contemplated that the lender would advance substantial funds to finance the arbitration in exchange for, among other things, a percentage of the net proceeds of any award or settlement. The supervising

judge approved the agreement as interim financing pursuant to s. 11.2. The Court of Appeal unanimously found no error in the supervising judge's exercise of discretion. It concluded that s. 11.2 "does not restrict the ability of the supervising judge, where appropriate, to approve the grant of a charge securing financing before a plan is approved that may continue after the company emerges from CCAA protection" (para. 68).

[99] A key argument raised by the creditors in *Crystallex* — and one that Callidus and the Creditors' Group have put before us now — was that the litigation funding agreement at issue was a plan of arrangement and not interim financing. This was significant because, if the agreement was in fact a plan, it would have had to be put to a creditors' vote pursuant to ss. 4 and 5 of the *CCAA* prior to receiving court approval. The court in *Crystallex* rejected this argument, as do we.

[100] There is no definition of plan of arrangement in the *CCAA*. In fact, the *CCAA* does not refer to plans at all — it only refers to an "arrangement" or "compromise" (see ss. 4 and 5). The authors of *Bankruptcy and Insolvency Law of Canada* offer the following general definition of these terms, relying on early English case law:

> A "compromise" presupposes some dispute about the rights compromised and a settling of that dispute on terms that are satisfactory to the debtor and the creditor. An agreement to accept less than 100¢ on the dollar would be a compromise where the debtor disputes the debt or lacks the means to pay it. "Arrangement" is a broader word than "compromise" and is not limited to something analogous to a compromise. It would include any scheme for reorganizing the affairs of the debtor: *Re Guardian*

> *Assur. Co.,* [1917] 1 Ch. 431, 61 Sol. Jo 232, [1917] H.B.R. 113 (C.A.); *Re Refund of Dues under Timber Regulations,* [1935] A.C. 185 (P.C.).
>
> (Houlden, Morawetz and Sarra, at N§33)

[101] The apparent breadth of these terms notwithstanding, they do have some limits. More recent jurisprudence suggests that they require, at minimum, some compromise of creditors' rights. For example, in C*rystallex* the litigation funding agreement at issue (known as the Tenor DIP facility) was held not to be a plan of arrangement because it did not "compromise the terms of [the creditors'] indebtedness or take away . . . their legal rights" (para. 93). The Court of Appeal adopted the following reasoning from the lower court's decision, with which we substantially agree:

> A "plan of arrangement" or a "compromise" is not defined in the CCAA. It is, however, to be an arrangement or compromise between a debtor and its creditors. The Tenor DIP facility is not on its face such an arrangement or compromise between Crystallex and its creditors. Importantly the rights of the noteholders are not taken away from them by the Tenor DIP facility. The noteholders are unsecured creditors. Their rights are to sue to judgment and enforce the judgment. If not paid, they have a right to apply for a bankruptcy order under the BIA. Under the CCAA, they have the right to vote on a plan of arrangement or compromise. None of these rights are taken away by the Tenor DIP.
>
> (*Re Crystallex International Corporation*, 2012 ONSC 2125, 91 C.B.R. (5th) 169, at para. 50)

[102] Setting out an exhaustive definition of plan of arrangement or compromise is unnecessary to resolve these appeals. For our purposes, it is sufficient to conclude that plans of arrangement require at least some compromise of creditors' rights. It

follows that a third party litigation funding agreement aimed at extending financing to a debtor company to realize on the value of a litigation asset does not necessarily constitute a plan of arrangement. We would leave it to supervising judges to determine whether, in the particular circumstances of the case before them, a particular third party litigation funding agreement contains terms that effectively convert it into a plan of arrangement. So long as the agreement does not contain such terms, it may be approved as interim financing pursuant to s. 11.2 of the *CCAA*.

[103] We add that there may be circumstances in which a third party litigation funding agreement may contain or incorporate a plan of arrangement (e.g., if it contemplates a plan for distribution of litigation proceeds among creditors). Alternatively, a supervising judge may determine that, despite an agreement itself not being a plan of arrangement, it should be packaged with a plan and submitted to a creditors' vote. That said, we repeat that third party litigation funding agreements are not necessarily, or even generally, plans of arrangement.

[104] None of the foregoing is seriously contested before us. The parties essentially agree that third party litigation funding agreements *can* be approved as interim financing. The dispute between them focusses on whether the supervising judge erred in exercising his discretion to approve the LFA in the absence of a vote of the creditors, either because it was a plan of arrangement or because it should have been accompanied by a plan of arrangement. We turn to these issues now.

(3) The Supervising Judge Did Not Err in Approving the LFA

[105] In our view, there is no basis upon which to interfere with the supervising judge's exercise of his discretion to approve the LFA as interim financing. The supervising judge considered the LFA to be fair and reasonable, drawing guidance from the principles relevant to approving similar agreements in the class action context (para. 74, citing *Bayens*, at para. 41; *Hayes*, at para. 4). In particular, he canvassed the terms upon which Bentham and Bluberi's lawyers would be paid in the event the litigation was successful, the risks they were taking by investing in the litigation, and the extent of Bentham's control over the litigation going forward (paras. 79 and 81). The supervising judge also considered the unique objectives of *CCAA* proceedings in distinguishing the LFA from ostensibly similar agreements that had not received approval in the class action context (paras. 81-82, distinguishing *Houle*). His consideration of those objectives is also apparent from his reliance on *Crystallex*, which, as we have explained, involved the approval of interim financing in circumstances substantially similar to the case at bar (see paras. 67 and 71). We see no error in principle or unreasonableness to this approach.

[106] While the supervising judge did not canvass each of the factors set out in s. 11.2(4) of the *CCAA* individually before reaching his conclusion, this was not itself an error. A review of the supervising judge's reasons as a whole, combined with a recognition of his manifest experience with Bluberi's *CCAA* proceedings, leads us to conclude that the factors listed in s. 11.2(4) concern matters that could not have escaped

his attention and due consideration. It bears repeating that, at the time of his decision, the supervising judge had been seized of these proceedings for well over two years and had the benefit of the Monitor's assistance. With respect to each of the s. 11.2(4) factors, we note that:

- the judge's supervisory role would have made him aware of the potential length of Bluberi's *CCAA* proceedings and the extent of creditor support for Bluberi's management (s. 11.2(4)(a) and (c)), though we observe that these factors appear to be less significant than the others in the context of this particular case (see para. 96);

- the LFA itself explains "how the company's business and financial affairs are to be managed during the proceedings" (s. 11.2(4)(b));

- the supervising judge was of the view that the LFA would enhance the prospect of a viable plan, as he accepted (1) that Bluberi intended to submit a plan and (2) Bluberi's submission that approval of the LFA would assist it in finalizing a plan "with a view towards achieving maximum realization" of its assets (at para. 68, citing 9354-9186 Québec inc. and 9354-9178 Québec inc.'s application, at para. 99; s. 11.2(4)(d));

- the supervising judge was apprised of the "nature and value" of Bluberi's property, which was clearly limited to the Retained Claims (s. 11.2(4)(e));

- the supervising judge implicitly concluded that the creditors would not be materially prejudiced by the Litigation Financing Charge, as he stated that "[c]onsidering the results of the vote [on the First Plan], and given the particular circumstances of this matter, the only potential recovery lies with the lawsuit that the Debtors will launch" (at para. 91 (emphasis added); s. 11.2(4)(f)); and

- the supervising judge was also well aware of the Monitor's reports, and drew from the most recent report at various points in his reasons (see, e.g., paras. 64-65 and fn. 1; s. 11.2(4)(g)). It is worth noting that the Monitor supported approving the LFA as interim financing.

[107] In our view, it is apparent that the supervising judge was focussed on the fairness at stake to all parties, the specific objectives of the *CCAA*, and the particular circumstances of this case when he approved the LFA as interim financing. We cannot say that he erred in the exercise of his discretion. Although we are unsure whether the LFA was as favourable to Bluberi's creditors as it might have been — to some extent, it does prioritize Bentham's recovery over theirs — we nonetheless defer to the supervising judge's exercise of discretion.

[108] To the extent the Court of Appeal held otherwise, we respectfully do not agree. Generally speaking, our view is that the Court of Appeal again failed to afford the supervising judge the necessary deference. More specifically, we wish to comment

on three of the purported errors in the supervising judge's decision that the Court of Appeal identified.

[109] First, it follows from our conclusion that LFAs can constitute interim financing that the Court of Appeal was incorrect to hold that approving the LFA as interim financing "transcended the nature of such financing" (para. 78).

[110] Second, in our view, the Court of Appeal was wrong to conclude that the LFA was a plan of arrangement, and that *Crystallex* was distinguishable on its facts. The Court of Appeal held that the LFA and associated super-priority Litigation Financing Charge formed a plan because they subordinated the rights of Bluberi's creditors to those of Bentham.

[111] We agree with the supervising judge that the LFA is not a plan of arrangement because it does not propose any compromise of the creditors' rights. To borrow from the Court of Appeal in *Crystallex*, Bluberi's litigation claim is akin to a "pot of gold" (para. 4). Plans of arrangement determine how to distribute that pot. They do not generally determine what a debtor company should do to fill it. The fact that the creditors may walk away with more or less money at the end of the day does not change the nature or existence of their rights to access the pot once it is filled, nor can it be said to "compromise" those rights. When the "pot of gold" is secure — that is, in the event of any litigation or settlement — the net funds will be distributed to the creditors. Here, if the Retained Claims generate funds in excess of Bluberi's total liabilities, the creditors will be paid in full; if there is a shortfall, a plan of arrangement or compromise

will determine how the funds are distributed. Bluberi has committed to proposing such a plan (see supervising judge's reasons, at para. 68, distinguishing *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.*, 2008 BCCA 327, 296 D.L.R. (4th) 577).

[112] This is the very same conclusion that was reached in *Crystallex* in similar circumstances:

> The facts of this case are unusual: there is a single "pot of gold" asset which, if realized, will provide significantly more than required to repay the creditors. The supervising judge was in the best position to balance the interests of all stakeholders. I am of the view that the supervising judge's exercise of discretion in approving the Tenor DIP Loan was reasonable and appropriate, despite having the effect of constraining the negotiating position of the creditors.
>
> . . .
>
> . . . While the approval of the Tenor DIP Loan affected the Noteholders' leverage in negotiating a plan, and has made the negotiation of a plan more complex, it did not compromise the terms of their indebtedness or take away any of their legal rights. It is accordingly not an arrangement, and a creditor vote was not required. [paras. 82 and 93]

[113] We disagree with the Court of Appeal that *Crystallex* should be distinguished on the basis that it involved a single option for creditor recovery (i.e., the arbitration) while this case involves two (i.e., litigation of the Retained Claims and Callidus's New Plan). Given the supervising judge's conclusion that Callidus could not vote on the New Plan, that plan was not a viable alternative to the LFA. This left the LFA and litigation of the Retained Claims as the "only potential recovery" for Bluberi's creditors (supervising judge's reasons, at para. 91). Perhaps more significantly, even if there were multiple options for creditor recovery in either *Crystallex* or this case, the

mere presence of those options would not necessarily have changed the character of the third party litigation funding agreements at issue or converted them into plans of arrangement. The question for the supervising judge in each case is whether the agreement before them ought to be approved as interim financing. While other options for creditor recovery may be relevant to that discretionary decision, they are not determinative.

[114] We add that the Litigation Financing Charge does not convert the LFA into a plan of arrangement by "subordinat[ing]" creditors' rights (C.A. reasons, at para. 90). We accept that this charge would have the effect of placing secured creditors like Callidus behind in priority to Bentham. However, this result is expressly provided for in s. 11.2 of the *CCAA*. This "subordination" does not convert statutorily authorized interim financing into a plan of arrangement. Accepting this interpretation would effectively extinguish the supervising judge's authority to approve these charges without a creditors' vote pursuant to s. 11.2(2).

[115] Third, we are of the view that the Court of Appeal was wrong to decide that the supervising judge should have submitted the LFA together with a plan to the creditors for their approval (para. 89). As we have indicated, whether to insist that a debtor package their third party litigation funding agreement with a plan is a discretionary decision for the supervising judge to make.

[116] Finally, at the appellants' insistence, we point out that the Court of Appeal's suggestion that the LFA is somehow "akin to an equity investment" was

unhelpful and potentially confusing (para. 90). That said, this characterization was clearly *obiter dictum*. To the extent that the Court of Appeal relied on it as support for the conclusion that the LFA was a plan of arrangement, we have already explained why we believe the Court of Appeal was mistaken on this point.

VI. Conclusion

[117] For these reasons, at the conclusion of the hearing we allowed these appeals and reinstated the supervising judge's order. Costs were awarded to the appellants in this Court and the Court of Appeal.

Appeals allowed with costs in the Court and in the Court of Appeal.

Solicitors for the appellants/interveners 9354-9186 Québec inc. and 9354-9178 Québec inc.: Davies Ward Phillips & Vineberg, Montréal.

Solicitors for the appellants/interveners IMF Bentham Limited (now known as Omni Bridgeway Limited) and Bentham IMF Capital Limited (now known as Omni Bridgeway Capital (Canada) Limited): Woods, Montréal.

Solicitors for the respondent Callidus Capital Corporation: Gowling WLG (Canada), Montréal.

Solicitors for the respondents International Game Technology, Deloitte LLP, Luc Carignan, François Vigneault, Philippe Millette, Francis Proulx and François Pelletier: McCarthy Tétrault, Montréal.

Solicitors for the intervener Ernst & Young Inc.: Stikeman Elliott, Montréal.

Solicitors for the interveners the Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals: Norton Rose Fulbright Canada, Montréal.

Tab 2

Business Development Bank of Canada v. Pine Tree Resorts Inc. et al. [Indexed as: Business Development Bank of Canada v. Pine Tree Resorts Inc.]

Ontario Reports

Court of Appeal for Ontario,

Blair J.A. (in Chambers)

April 29, 2013

115 O.R. (3d) 617 | 2013 ONCA 282

Case Summary

Bankruptcy and insolvency — Practice and procedure — Appeals — Second mortgagee appealing order granting first mortgagee's application for appointment of receiver over mortgagor's assets — Second mortgagee wishing to exercise its rights under s. 22 of Mortgages Act — Leave to appeal required as appeal did not fall within s. 193(a) or s. 193(c) of Bankruptcy and Insolvency Act ("BIA") — Test for leave to appeal under s. 193(e) of BIA being whether proposed appeal raises issue of general importance to practice in bankruptcy/ insolvency matters or to administration of justice generally, is prima facie meritorious and would not unduly hinder progress of bankruptcy/insolvency proceedings — Proposed appeal not satisfying those criteria — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 193 — Mortgages Act, R.S.O. 1990, c. M.40, s. 22.

BDC held security for the money owed to it by Pine Tree by way of a first mortgage and general security agreements. Romspen was the second mortgagee. Both mortgages were in default. Romspen wished to exercise its rights as a subsequent mortgagee under s. 22 of the *Mortgages Act* to put BDC's mortgage in good standing and take over the sale of the property. It proposed to pay all arrears of principal and interest, together with BDC's costs, expenses and outstanding realty taxes, but did not propose to repay HST arrears, which constituted a default under the BDC security documents. BDC applied successfully for the appointment of a receiver over the Pine Tree's assets. Pine Tree and Romspen sought to appeal that order. Romspen intended to argue that it was entitled to exercise its [page618] rights under s. 22 of the *Mortgages Act* as the arrears of HST did not jeopardize BDC's security because they were a subsequent encumbrance, and therefore it was not necessary for them to comply with that covenant in order to be able to take advantage of a subsequent mortgagee's rights under s. 22.

Held, leave to appeal should be denied.

Leave to appeal under s. 193(*e*) of the *Bankruptcy and Insolvency Act* was required. The appeal did not involve "future rights" within the meaning of s. 193(*a*). Section 193(*c*) did not apply as an order appointing a receiver did not bring into play the value of the property. In determining whether to grant leave to appeal under s. 193(*e*), the court will look to whether the proposed appeal (a) raises an issue that is of general importance to the practice in bankruptcy/insolvency or to the administration of justice as a whole; (b) is *prima facie* meritorious; and (c) would unduly

hinder the progress of the bankruptcy/ insolvency proceedings. In this case, the application judge's considerations were entitled to great deference and, in any event, were purely factual and case-specific and did not give rise to any matters of general importance to the practice in bankruptcy/insolvency matters or to the administration of justice as a whole. Moreover, Romspen's s. 22 argument was not *prima facie* meritorious. Finally, all parties agreed that the property in question had to be sold, and there was a need for the sale to proceed expeditiously. Interfering with the timeliness of that process could potentially impact on the success of the sale. Leave to appeal should not be granted.

Baker (Re) (1995), 22 O.R. (3d) 376, [1995] O.J. No. 580, 83 O.A.C. 351, 31 C.B.R. (3d) 184, 53 A.C.W.S. (3d) 933 (C.A., in Chambers); *Fiber Connections Inc. v. SVCM Capital Ltd*., [2005] O.J. No. 1845, 198 O.A.C. 27, 10 C.B.R. (5th) 201, 139 A.C.W.S. (3d) 10 (C.A., in Chambers); *GMAC Commercial Credit Corp. of Canada v. TCT Logistics Inc*., [2003] O.J. No. 5761 (C.A., in Chambers); *Power Consolidated (China) Pulp Inc. v. British Columbia Resources Investment Corp*., [1988] B.C.J. No. 1403, 19 C.P.C. (3d) 396 (C.A.); *R.J. Nicol Construction Ltd. (Trustee of) v. Nicol*, [1995] O.J. No. 48, 77 O.A.C. 395, 30 C.B.R. (3d) 90, 52 A.C.W.S. (3d) 957 (C.A., in Chambers), **consd**

Other cases referred to

Alternative Fuel Systems Inc. v. Edo (Canada) Ltd. (Trustee of), [1997] A.J. No. 869, 206 A.R. 295, 48 C.B.R. (3d) 171, 73 A.C.W.S. (3d) 727 (C.A., in Chambers); *Blue Range Resources Corp. (Re)*, [1999] A.J. No. 975, 1999 ABCA 255, 244 A.R. 103, 12 C.B.R. (4th) 186; *Century Services Inc. v. Brooklin Concrete Products Inc*. (March 11, 2005), Court File No. M32275, Catzman J.A. (Ont. C.A., in Chambers); *Country Style Food Services (Re)*, [2002] O.J. No. 1377, 158 O.A.C. 30, 112 A.C.W.S. (3d) 1009 (C.A., in Chambers); *Ditchburn Boats & Aircraft (1936) Ltd. (Re)* (1938), 19 C.B.R. 240 (Ont. C.A.); *Dominion Foundry Co. (Re)*, [1965] M.J. No. 49, 52 D.L.R. (2d) 79 (C.A.); *Leard (Re)*, [1994] O.J. No. 719, 114 D.L.R. (4th) 135, 71 O.A.C. 56, 25 C.B.R. (3d) 210, 47 A.C.W.S. (3d) 242 (C.A., in Chambers); *Ravelston Corp. (Re)*, [2005] O.J. No. 5351, 24 C.B.R. (5th) 256 (C.A.); *Theodore Daniels Ltd. v. Income Trust Co*. (1982), 37 O.R. (2d) 316, [1982] O.J. No. 3315, 135 D.L.R. (3d) 76, 25 R.P.R. 97 (C.A.)

Statutes referred to

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 193 [as am.], (*a*), (*c*), (*e*)

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 [as am.]

Mortgages Act, R.S.O. 1990, c. M.40, s. 22, (1) [page619]

APPEAL from an order appointing a receiver.

Milton A. Davis, for appellants Pine Tree Resorts Inc. and 1212360 Ontario Limited.

David Preger, for appellant Romspen Investment Corporation.

Harvey Chaiton, for respondent Business Development Bank of Canada.

Endorsement of **BLAIR J.A.** (in Chambers): —

Overview

[1] On April 2, 2013, Justice Mesbur granted the application of Business Development Bank of Canada ("BDC") for the appointment of a receiver over the assets of the respondents, Pine Tree Resorts Inc. and 1212360 Ontario Limited (together, "Pine Tree"). Pine Tree owns and operates the Delawana Inn in Honey Harbour, Ontario.

[2] Pine Tree and the second mortgagee, Romspen Investment Corporation ("Romspen"), seek to appeal from Mesbur J.'s order. At the heart of this motion is whether the order should be stayed pending the appeal if there is an appeal. Collateral issues include whether the appeal is as of right under s. 193 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"). If the answer to that question is yes, should the automatic stay be lifted? If leave to appeal is required, should it be granted and, if so, should the order be stayed pending the disposition of the appeal?

[3] For the reasons that follow, I conclude that the appeal is not as of right, that leave to appeal is required and that in the circumstances here leave ought not to be granted. It is therefore unnecessary to deal with the specific question of whether a stay should be ordered pending appeal.

Background and Facts

[4] BDC is owed approximately $2.6 million by Pine Tree and holds first security for that indebtedness by way of a mortgage on the Delawana Inn lands and, additionally, by way of general security agreements covering both land and chattels. Romspen is the second mortgagee. Its mortgage, too, is in default. Romspen is owed approximately $4.3 million.

[5] The inn has been in financial difficulties for several years and finally, after a number of negotiated extensions and forbearances, BDC demanded payment under both the mortgage and the general security agreements. [page620]

[6] Under its security documents, BDC is contractually entitled to the appointment of a receiver. Instead of appointing a private receiver, however, BDC chose to apply for a court-appointed receiver. Romspen chose to initiate power of sale proceedings but, at the time the order was made, was not in a position to proceed with the sale because three days remained under the period prescribed in the notice of power of sale for redemption.

[7] Pine Tree and Romspen opposed BDC's application. That said, all parties agree the property must be sold immediately. Pine Tree does not have the financial ability to keep the inn operating. In essence, the dispute is over which secured creditor will have control over the sale of the property and which plan for sale will be implemented.

[8] Pine Tree supports Romspen's plan because it involves re-opening the inn for the upcoming summer season and attempting to sell the property on a going-concern basis. BDC

rejects this option as unrealistic because it views the inn's operations as being an irretrievably losing proposition.

[9] Romspen argued before the application judge -- and argues here as well -- that it was entitled to exercise its rights as a subsequent mortgagee under s. 22 of the *Mortgages Act*, R.S.O. 1990, c. M.40 to put BDC's mortgage in good standing and take over the sale of the property. It proposes to put the mortgage in good standing by paying all arrears of principal and interest, together with all of BDC's costs, expenses and outstanding realty taxes. However, it does not propose to repay approximately $250,000 in HST arrears. Those arrears constitute a default under the BDC security documents.

[10] In seeking to appeal the order, Romspen and Pine Tree assert a number of grounds relating to the exercise of the application judge's discretion in granting the receivership order, but the centrepiece of their legal argument on appeal concerns the exercise of a subsequent mortgagee's rights under s. 22 of the *Mortgages Act*. They submit that the arrears of HST do not jeopardize BDC's security in any way because they are a subsequent encumbrance, and therefore it is not necessary for them to comply with that covenant in order to be able to take advantage of a subsequent mortgagee's rights under s. 22. Whether that view is correct is the question of law they wish to have determined on appeal.

[11] On behalf of BDC, Mr. Chaiton submits that there is nothing in s. 22 that permits a subsequent mortgagee to exercise its s. 22 rights unless it brings the prior mortgage into good standing, which involves both paying the amount due under the [page621] mortgage and -- where there are unperformed covenants -- performing those covenants as well.

Is Leave to Appeal Necessary?

[12] In my view, there is no automatic right to appeal from an order appointing a receiver: see *Century Services Inc. v. Brooklin Concrete Products Inc.* (March 11, 2005), Court File No. M32275, Catzman J.A. (Ont. C.A., in Chambers); *Alternative Fuel Systems Inc. v. Edo (Canada) Ltd. (Trustee of)*, [1997] A.J. No. 869, 206 A.R. 295 (C.A., in Chambers).

[13] The portions of s. 193 of the *BIA* relied upon by Romspen and Pine Tree are the following:

> 193. Unless otherwise expressly provided, an appeal lies to the Court of Appeal from any order or decision of a judge of the court in the following cases:
> (*a*) if the point at issue involves future rights;
>
> . . . . .
>
> *(c)* if the property involved in the appeal exceeds in value ten thousand dollars;
>
> . . . . .
>
> *(e)* in any other case by leave of a judge of the Court of Appeal.

[14] Neither (*a*) nor (*c*) applies in these circumstances, in my view. I will address whether leave to appeal should be granted later in these reasons.

[15] "Future rights" are future legal rights, not procedural rights or commercial advantages or disadvantages that may accrue from the order challenged on appeal. They do not include rights that presently exist but that may be exercised in the future: see *Ravelston Corp. (Re)*, [2005] O.J. No. 5351, 24 C.B.R. (5th) 256 (C.A.), at para. 17. See, also, *Ditchburn Boats & Aircraft (1936) Ltd. (Re)* (1938), 19 C.B.R. 240 (Ont. C.A.); *Dominion Foundry Co. (Re)*, [1965] M.J. No. 49, 52 D.L.R. (2d) 79 (C.A.); and *Fiber Connections Inc. v. SVCM Capital Ltd.*, [2005] O.J. No. 1845, 10 C.B.R. (5th) 201 (C.A., in Chambers).

[16] Here, Romspen's legal rights are its right to exercise its power of sale remedy and its right to put the first mortgage in good standing under s. 22 of the *Mortgages Act*. The first crystallized on the default under the Romspen mortgage, the second on the default under the BDC mortgage. Both rights were therefore triggered before the order of Mesbur J. They were at best rights presently existing but exercisable in the future.

[17] Nor do I accept the argument that the property in the appeal exceeds in value $10,000 for purposes of s. 193(*c*). As [page622] noted by the Manitoba Court of Appeal in *Dominion Foundry Co.*, at para. 7, to allow an appeal as of right in these circumstances would require doing so in almost every case because very few bankruptcy cases would go to appeal where the value of the bankrupt's property did not exceed that amount. More importantly, though, an order appointing a receiver does not bring into play the value of the property; it simply appoints an officer of the court to preserve and monetize those assets, subject to court approval.

[18] In my view, leave to appeal is required in the circumstances of this case.

Should Leave to Appeal Be Granted?

The test

[19] In *Fiber Connections Inc.*, Armstrong J.A. (in Chambers) reviewed extensively the jurisprudence surrounding the test to be applied for granting leave to appeal under s. 193(*e*). As he noted, at para. 15, there is some confusion as to what that test is. Two articulations of the test have emerged, and each has its support in the case law.

[20] One formulation is that set out by McLachlin J.A. (as she then was) in *Power Consolidated (China) Pulp Inc. v. British Columbia Resources Investment Corp.*, [1988] B.C.J. No. 1403, 19 C.P.C. (3d) 396 (C.A.). It asks the following questions:

(i) Is the point appealed of significance to the practice as a whole?

(ii) Is the point raised of significance in the action itself?

(iii) Is the appeal *prima facie* meritorious?

(iv) Will the appeal unduly hinder the progress of the action?

[21] These are the criteria generally applied when considering whether to grant leave to appeal from orders made in restructuring proceedings under the *Companies' Creditors*

Arrangement Act, R.S.C. 1985, c. C-36 ("*CCAA*"), although their application has not been confined to those types of cases.

[22] A second approach to the test was adopted by Goodman J.A. in *R.J. Nicol Construction Ltd. (Trustee of) v. Nicol*, [1995] O.J. No. 48, 77 O.A.C. 395 (C.A., in Chambers), at para. 6. Through this lens, the court is to determine whether the decision from which leave to appeal is sought (a) appears to be contrary to law; (b) amounts to an abuse of judicial power; or [page623] (c) involves an obvious error, causing prejudice for which there is no remedy.

[23] Ontario decisions have traditionally leaned toward the *R.J. Nicol* factors when determining whether to grant leave to appeal under s. 193(*e*) of the *BIA*: see, in addition to *R.J. Nicol*, for example, *Leard (Re)*, [1994] O.J. No. 719, 114 D.L.R. (4th) 135 (C.A., in Chambers); and *Century Services Inc.*

[24] This view has evolved in recent years, however, and three decisions in particular have added nuances to the *R.J. Nicol* approach by considering such factors as whether there is an arguable case for appeal and whether the issues sought to be raised are significant to the bankruptcy practice in general and ought to be addressed by this court: see *Fiber Connections Inc.*, at paras. 16-20; *GMAC Commercial Credit Corp. of Canada v. TCT Logistics Inc.*, [2003] O.J. No. 5761 (C.A., in Chambers); and *Baker (Re)*, (1995), 22 O.R. (3d) 376, [1995] O.J. No. 580 (C.A., in Chambers). These factors echo the criteria set out in *Power Consolidated.*

[25] In *Baker (Re)*, Osborne J.A. acknowledged the two alternative approaches to determining whether leave to appeal should be granted. He concluded, at p. 381 O.R., that the *R.J. Nicol* criteria were "generally relevant" but observed that all factors need not be given equal weight in every case. For that particular case, he emphasized the factor that the issue sought to be appealed was "a matter of considerable general importance in bankruptcy practice". In *TCT Logistics*, at para. 9, Feldman J.A. listed all of the *R.J. Nicol* and the *Power Consolidated* criteria -- without apparently distinguishing between them -- as matters to be taken into account. She granted leave holding that the issues in that case were significant to the commercial practice regulating bankruptcy and receivership and ought to be considered by this court.

[26] Finally, in *Fiber Connections Inc.*, Armstrong J.A. reviewed all of the foregoing authorities and, at para. 20, granted leave to appeal because he was satisfied in that case that there were arguable grounds of appeal (although it was not necessary for him to determine whether the appeal would succeed) and because the issues raised were significant to bankruptcy practice and ought to be considered by this court.

[27] I take from this brief review of the jurisprudence that, while judges of this court have tended to favour the *R.J. Nicol* test in the past, there has been a movement towards a more expansive and flexible approach more recently -- one that incorporates the *Power Consolidated* notions of overall importance to [page624] the practice area in question or the administration of justice as well as some consideration of the merits.

[28] That being the case, it is perhaps time to attempt to clarify the "confusion" that arises from the co-existence of the two streams of criteria in the jurisprudence. I would adopt the following approach.

[29] Beginning with the overriding proposition that the exercise of granting leave to appeal under s. 193(*e*) is discretionary and must be exercised in a flexible and contextual way, the

following are the prevailing considerations in my view. The court will look to whether the proposed appeal

(a) raises an issue that is of general importance to the practice in bankruptcy/insolvency matters or to the administration of justice as a whole, and is one that this court should therefore consider and address;

(b) is *prima facie* meritorious, and

(c) would unduly hinder the progress of the bankruptcy/ insolvency proceedings.

[30] It is apparent these considerations bear close resemblance to the *Power Consolidated* factors. One is missing: the question whether the point raised is of significance to the action itself. I would not rule out the application of that consideration altogether. It may be, for example, that in some circumstances the parties will need to have an issue determined on appeal as a step toward dealing with other aspects of the bankruptcy/ insolvency proceeding. However, it seems to me that this particular consideration is likely to be of lesser assistance in the leave to appeal context because most proposed appeals to this court raise issues that are important to the action itself, or at least to one of the parties in the action, and if that consideration were to prevail there would be an appeal in almost every case.

[31] I have not referred specifically to the three *R.J. Nicol* criteria in the factors mentioned above. That is because those factors are caught by the "*prima facie* meritorious" criterion in one way or another. A proposed appeal in which the judgment or order under attack (a) appears to be contrary to law, (b) amounts to an abuse of judicial power or (c) involves an obvious error causing prejudice for which there is no remedy will be a proposed appeal that is *prima facie* meritorious. I recognize that the *Power Consolidated* "*prima facie* meritorious" criterion is different than the "arguable point" notion referred to by Osborne J.A. in *Baker* and by Armstrong J.A. in *Fiber Connections*. In my [page625] view, however, the somewhat higher standard of a *prima facie* meritorious case on appeal is more in keeping with the incorporation of the *R.J. Nicol* factors into the test.

[32] As I have explained above, however, the jurisprudence has evolved to a point where the test for leave to appeal is not simply merit-based. It requires a consideration of all of the factors outlined above.

[33] The *Power Consolidated* criteria are the criteria applied by this court in determining whether leave to appeal should be granted in restructuring cases under the *CCAA*: see *Country Style Food Services (Re)*, [2002] O.J. No. 1377, 158 O.A.C. 30 (C.A., in Chambers), Feldman J.A., at para. 15; and *Blue Range Resources Corp. (Re)*, [1999] A.J. No. 975, 244 A.R. 103 (C.A.). The criteria I propose are quite similar. There is something to be said for having similar tests for leave to appeal in both *CCAA* and *BIA* insolvency proceedings. Proposed appeals in each area often arise from discretionary decisions made by judges attuned to the particular dynamics of the proceeding. Those decisions are entitled to considerable deference. In addition, both types of appeal often involve circumstances where delays inherent in appellate review can have an adverse effect on those proceedings.

Application of the test in the circumstances

[34] I am not prepared to grant leave to appeal on the basis of the foregoing criteria in the circumstances of this case.

[35] First, Romspen and Pine Tree raise a number of grounds relating to the exercise of the application judge's discretion. These include her consideration and treatment of: the relative expenses involved in BDC's and Romspen's plans for the sale of the property; the impact of shutting down the inn on employees and others and upon the potential sale prospects of the property; and her concern for "the usual unsecured creditors". These discretionary considerations are all entitled to great deference and, in any event, are purely factual and case-specific, and do not give rise to any matters of general significance to the practice in bankruptcy/insolvency matters or to the administration of justice as a whole.

[36] I would not grant leave to appeal on those grounds.

[37] The legal issue raised by Romspen is this: did the application judge err by relying on a covenant default that could not prejudice BDC or erode its first-ranking security as the basis for her conclusion that Romspen had not complied with the requirements for the exercise of a subsequent mortgagee's rights under s. 22 of the *Mortgages Act*? The basis for that submission [page626] is the argument that the outstanding HST arrears -- although a default in the observance of a covenant under the BDC mortgage -- could not in any circumstances constitute a claim that would have priority over BDC's security, and therefore Romspen, as a subsequent mortgagee, is not required to cure the default by performing that covenant in order to be able to exercise its s. 22 rights.

[38] I have serious reservations about the likelihood of success of this submission on appeal.

[39] Romspen relies upon the jurisprudence of this court establishing that a mortgagor -- and therefore, a subsequent mortgagee -- is entitled as of right, upon tendering the arrears or performing the covenant in default, to be relieved of the consequence of default: see *Theodore Daniels Ltd. v. Income Trust Co.* (1982), 37 O.R. (2d) 316, [1982] O.J. No. 3315 (C.A.). The problem is that Romspen has not offered to put the BDC mortgage in good standing, but has only offered to do so partially. It proposes to leave unperformed a $250,000 covenant -- payment of the outstanding HST arrears.

[40] For Romspen to succeed on appeal would require a very creative interpretation of s. 22 of the *Mortgages Act*,[1] and one that would potentially create an undesirable element of uncertainty in the field of mortgage enforcement, because no one would know which covenants could be left unperformed and which could not, without litigating the issue in each case. [page627]

[41] I am not persuaded that the s. 22 point crosses the *prima facie* meritorious threshold. In any event, given my serious reservations about the merits, that factor together with the need for a timely sale process leads me to conclude that leave to appeal ought not to be granted.

[42] Interfering with the timeliness of that process could potentially impact on the success of the sale. All parties agree the property must be sold. They only differ over who will conduct the sale and how it will be done. The application judge considered the alternative plans at length, and her decision to accept the BDC plan was not dependent on her rejection of Romspen's s. 22 argument.

[43] There is some need for the sale to proceed expeditiously. The experienced application judge chose between BDC's and Romspen's two proposals and favoured that of BDC. Any further delay resulting from an appeal could well impact the potential sale, since the inn is a seasonal business that only operates in the warm months of the year and those warm months are fast approaching.

[44] For the foregoing reasons, I decline to grant leave to appeal.

Disposition

[45] There is no appeal as of right from the receivership order granted by Mesbur J. under s. 193 of the *BIA*. Leave to appeal is required, but Romspen and Pine Tree have not met the test for leave to be granted in these circumstances. The motions of Romspen and Pine Tree are therefore dismissed. It follows that the receivership order is not stayed and that BDC's motion, to the extent it is necessary to deal with it, is successful.

[46] No order as to costs is required, since I am advised that BDC is entitled to add the costs of this proceeding to its debt under the mortgage.

Application dismissed.

Notes

---

1 Section 22(1) provides:

> 22(1) Despite any agreement to the contrary, *where default has occurred* in making any payment of principal or interest due under a mortgage or *in the observance of any covenant in a mortgage* and under the terms of the mortgage, by reason of such default, the whole principal and interest secured thereby has become due and payable,
>
> (*a*) at any time before sale under the mortgage: or
>
> *(b)* before the commencement of an action for the enforcement of the rights of the mortgagee or of any person claiming through or under the mortgagee,
>
> *the mortgagor may perform such covenant* or pay the amount due under the mortgage, exclusive of the money not payable by reason merely of lapse of time, and pay any expenses necessarily incurred by the mortgagee, and thereupon the mortgagor is relieved from the consequences of such default.
>
> (Emphasis added)

It is not disputed that a subsequent mortgagee is a "mortgagor" for purposes of this provision.

End of Document

Tab 3

Ontario Court (General Division)

Citation: Covia Canada Partnership Corp. v. PWA Corp.
Court File: 92-CQ-29998
Date: 1993-07-10

Farley J.

Counsel:
Stephen T. Goudge, Q.C., *Peter C. Wardle* and *Richard P. Stephenson*, for plaintiffs.
Robert S. Russell, Roland K. Laing, Q.C., *Barry L. Glaspell* and *Benjamin T. Glustein*, for defendants, PWA Corporation and Canadian Airlines International Ltd.
John H. Francis, Q.C., and *Geoff R. Hall*, for defendants, AMR Corporation and American Airlines Inc.
H. Lorne Morphy, Q.C., and *Kent E. Thomson*, for Rhys Eyton and Kevin Jenkins.

[1] FARLEY J.:—I heard three interlinked motions these past two days related to the "Airwars" matter. In Stage 1, Callaghan C.J.O.C. determined that PWA Corporation failed in its suit seeking an order dissolving the Gemini Group Limited Partnership (decision released April 2, 1993) [see *PWA Corp. v. Gemini Group Automated Distribution Systems Inc.* (1993), 101 D.L.R. (4th) 15, 39 A.C.W.S. (3d) 702]. The Chief Justice stated at pp. 2-3 [pp. 18-19 D.L.R.]:

> It is one of four related actions, the others being the Gemini Group Automated Distribution Systems Inc. v. PWA Corporation, Canadian Airlines International Ltd., AMR Corporation and American Airlines Inc. ("*Gemini PWA et al.*"); Covia Canada Partnership and Covia Canada Corp. v. PWA Corporation, Canadian Airlines International Ltd., AMR Corporation and American Airlines Inc. ("*Covia v. PWA et al.*"); and the Gemini Group Limited Partnership v. Canadian Airlines International Ltd. ("*Gemini v. Canadian*"). By agreement of counsel, the trial of this action constitutes the first stage in the hearing of the various actions. The trial of *Gemini v. PWA et al.* and *Covia v. PWA et al.* will constitute the second stage. Counsel have agreed that all of the evidence from the first stage will apply to the second; for that reason, counsel appearing on behalf of AMR Corporation and American Airlines Inc. have been permitted to participate in the examination of witnesses in this trial, but have not taken part in the closing arguments. The fourth action, *Gemini v. Canadian*, will be tried at a later date.

The subject-matter of these motions is the action of *Covia v. PWA et al.*

Definitions and corporate chart

[2] For ease of reference, I attach a corporate chart showing the relationship of the various business entities. In addition, I set out a cast of characters (and their interrelationships), with definitions.

— Gemini Group Limited Partnership — "LPship", an Ontario limited partnership;

— limited partnership — "lpship";

— limited partner — "lp";

— Gemini Group Automated Distribution Systems Inc. — "Gemini GP"— a federally incorporated company which is the general partner of the LPship, holding a 1% interest therein;

— general partner — "gp";

— shareholders of Gemini GP — Covia Canada Corp., 166771 Canada Inc. and PWA Corporation as to one-third of the shares each;

— Covia Canada Corp. — "Covia Shareholder", an Ontario corporation, owned by Covia Partnership (U.S.), which in turn is 50% owned by United Airlines; it is a shareholder of Gemini GP;

— 166771 Canada Inc. — a federally incorporated company owned by Air Canada and a shareholder of Gemini GP;

— PWA Corporation — "PWA", an Alberta corporation which owns Canadian Airlines International Ltd., is a lp in the LPship and a shareholder of Gemini GP;

— Canadian Airlines International Ltd. — "CAIL";

— limited partners of LPship — Covia Canada Partnership Corp., Air Canada and PWA, each having a 33% interest in the LPship (Gemini GP having the remaining 1% interest);

— Covia Canada Partnership Corp. — "Covia Partner", an Ontario corporation owned by Covia Partnership (U.S.); it is a lp in the LPship;

— Air Canada — a federally incorporated company which is a lp in the LPship;

— Rhys Eyton — "Eyton", Chairman of PWA;

— Kevin Jenkins — "Jenkins", President of CAIL and a director of PWA;

— Brent Aitken — "Aitken", senior vice-president, human resources and administration of PWA (now retired), a nominee director of PWA on the Gemini GP board;

— Terrence DeMeza — "DeMeza", director, corporate affairs of PWA (now retired), a nominee director of PWA on the Gemini GP board;

— Terrence Francis — "Francis", director of marketing, CAIL, a nominee director of PWA on the Gemini GP board;

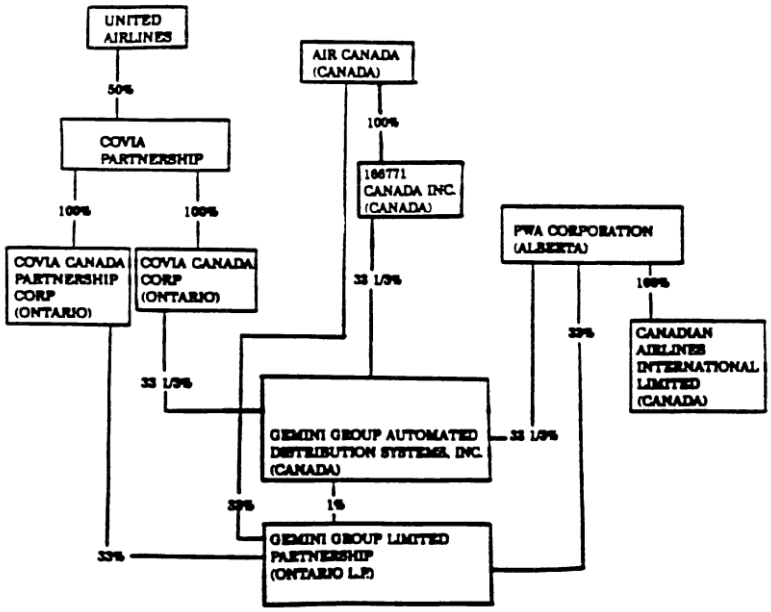
— William Palm — "Palm", senior vice-president, information services, CAIL, (now retired), a nominee director of PWA on the Gemini GP board;

— AMR Corp. — "AMR", the parent of American Airlines Inc.;

— American Airlines Inc. — "AA";

— AMR and AA are sometimes collectively referred to as "American".

Corporate Chart



Note 1: AMR (AA's parent) has entered a conditional agreement with PWA for an equity investment in the latter provided that PWA is able to free itself from its arrangement with the LPship.

Note 2: Eyton, Jenkins, Aitken, DeMeza, Francis and Palm were during the material time senior officers of PWA, with the latter three being nominee directors for PWA of Gemini GP the gp of the LPship.

Covia shareholder situation and nature of the motions generally

[3] The first motion was by PWA and CAIL for summary judgment, dismissing all, or part, of the claim of Covia Partner and Covia Shareholder on the basis that:

(i) the action commenced was derivative in nature; and

(ii) there was no genuine issue for trial, either in law or in fact, with respect to the claims advanced.

At the hearing it was acknowledged by its counsel that Covia Shareholder's claim was derivative as Gemini GP, a corporation, is interposed between it and the alleged wrongdoers. To the extent that this claim is not subsumed in Gemini GP's claim in *Gemini Group Automated Distribution Systems Inc. v. PWA Corp.*, it does not appear that Covia Shareholder has made any demand on Gemini GP to pursue such: see s. 246 of the *Business Corporations Act*, R.S.O. 1990, c. B.16. Therefore, there is to be summary judgment dismissing Covia Shareholders' action. An identical motion to (i) above was brought by American with the same result. As to (ii), both PWA/CAIL and American, *inter alia*, submitted that the rule in *Foss v. Harbottle* (1843), 2 Hare 461, 67 E.R. 189, should apply even though the subject-matter involved a lp (Covia Partner) being involved in a lpship (LPship) rather than a shareholder being involved in a corporation. The third motion was by Covia Partner and Covia Shareholder to amend their statement of claim. These amendments involved:

> (i) the addition of Eyton, Jenkins, Aitken, DeMeza, Francis and Palm, as party defendants with the assertion against them of claims based on breach of fiduciary duty and conspiracy; and
>
> (ii) the addition of claims against PWA for its vicarious responsibility concerning the alleged breaches of fiduciary duty and conspiracy by the six individuals.

Of course, given that Covia Shareholder's claim has been struck, this results in this motion being brought by Covia Partner alone.

Amendment of the claim by Covia Partner including adding new parties

[4] The six individuals assert that they will be caused both procedural and substantive prejudice by being added as party defendants at this stage of the proceedings. This question is governed by rule 5.04 (2) of the Rules of Civil Procedure while the question of the amendment of the pleadings vis-à-vis already named parties (*i.e.*, PWA) is governed by rule 26.01.

> 5.04 (2) At any stage of a proceeding the court may by order add, delete or substitute a party or correct the name of a party incorrectly named, on such terms as are just, unless prejudice would result that could not be compensated for by costs or an adjournment.
>
> • • • • •
>
> 26.01 On motion at any stage of an action the court shall grant leave to amend a pleading on such terms as are just, unless prejudice would result that could not be compensated for by costs or an adjournment.

[5] I would note the following.

> (a) There was an unusual and unfortunate disagreement among counsel as to what would constitute the evidence of Stage 2 of the Airwars litigation. There appear to have been ambiguous words used in opening submissions to Callaghan C.J.O.C. at trial. Since all parties to the litigation were not represented at these hearings, I would not think it

appropriate for me to make any ruling at this stage. I am confident that all the parties will be able to work this out in the next several weeks after some reflection on the procedures discussed with me at the mechanical pre-trial.

(b) The Airwars litigation has been addressed by all parties and their counsel in a most commendable fashion. There has been a very high degree of co-operation in proceeding to what has been a *common* objective of all parties — a very speedy resolution of the subject disputes.

(c) With this consensus that this litigation should not proceed in the ordinary fashion, but rather be dealt with on as timely a basis as possible, the parties entered into some relatively novel approaches — *e.g.*, witness statements (in lieu of direct examination) being exchanged in advance, compendia and a "critical flow chart" to assist in scheduling production, discovery and motions. Thus, litigation which commenced in the commercial list at the end of November, 1992, was able to be resolved as to Stage 1 by a four-week trial which commenced February 26, 1993, with judgment being given by Callaghan C.J.O.C. on April 2, 1993. Counsel were generally of the opinion that, even if this litigation had proceeded at a normal expeditious pace with a first priority call using normal methods, it would have taken place over some three to four months sometime in 1994.

(d) No explanation was given by Covia Partner as to why it was only now proposing to add the six individuals. I note that this is a third amendment to Covia Partner's statement of claim so the answer cannot be that it wished to save up its amendments rather than bothering everyone with dribbling them out. The general nature of their involvement was well-known prior to the Stage 1 trial and related amendments were made to its statement of defence in that matter.

(e) No explanation was given by Covia Partner as to why it wished to add the six individuals to this action under which it is claiming $1.2 billion.

(f) In his reasons, Callaghan C.J.O.C. made certain findings not only as to PWA and CAIL but also as to these individuals; findings which it would be fair to observe were quite critical.

(g) These individuals were not represented by counsel at Stage 1 nor did they have the opportunity to adduce evidence, subject other witnesses adverse in interest to cross-examination or make submissions. They were not party to the agreement amongst the corporate protagonists as to how the Airwars litigation should be conducted. Neither have they had the opportunity to argue the appeal from Callaghan C.J.O.C.'s decision which was heard by the Court of Appeal last week [see 103 D.L.R. (4th) 609, 41 A.C.W.S. (3d) 1204].

(h) It is conceivable that these individuals would wish to add third parties and make cross-claims as well as have discovery. Given the disastrous personal consequences of an award of only a fraction of that claimed, I would assume that they would have to aggressively conduct their defence to the extent they could afford.

(i) Covia Partnership's counsel candidly acknowledges that:

> 34. The Plaintiffs simply assert that as in an ordinary partnership, each of the partners owed fiduciary duties to the others, and that those obligations extended to PWA's nominees on the Board. Accordingly, the Plaintiffs allege a direct relationship between the PWA nominees and Covia [Partnership] and a direct cause of action which can be asserted against them.
>
> 35. While perhaps novel, it is submitted that it cannot be said that this claim bears no chance of success.

(j) It has been speculated by me that Stage 2 relating to damages could be resolved in approximately one week of trial if it were not otherwise settled. I received no adverse challenge to that observation but rather an endorsement — Mr. Lenczner hypothesized that it could be done in three days.

(k) The trial schedule for Stage 2 suggested by all parties is that pre-trials begin in September and the trial be held this October or November. I would understand that this is in recognition of the AMR deadline of December 31, 1993, as it understandably would want to see what the lay of the land is before committing a quarter billion dollars, assuming PWA found some legal way of freeing itself from the LPship arrangements.

(l) Gemini, Air Canada and Covia Partner delivered bills of cost amounting to approximately $1.8 million, of which, more than half were legal fees on a party-and-party scale. The cost of such litigation is an indication of how detailed, complex and hard (but cleanly) fought it is.

[6] It seems to me that the use of the word "may" in rule 5.04 (2) (versus "shall" in rule 26.01) imports that the court has discretion over and above merely looking at whether any prejudice could be overcome by costs or an adjournment: see *Motruk v. Jeannot* (1987), 16 C.P.C. (2d) 160, 3 A.C.W.S. (3d) 135 (H.C.J.). As well, it seems that the only way that prejudice elimination is to be addressed is through costs or adjournment; albeit, it seems to me that the imposition of terms may pre-condition the element of prejudice.

[7] In *Seaway Trust Co. v. Markle* (1988), 25 C.P.C. (2d) 64, 8 A.C.W.S. (3d) 257 (Ont. Master); affirmed 40 C.P.C. (2d) 4 (H.C.J.), Master Sandler said, at pp. 91-2, in adopting the contra argument:

> The argument contra is, that the reason a discretion remains (as reflected by the use of the word "may") when adding new parties to an existing action, is to ensure procedural fairness in such things as the state of the action, with the Court considering such factors as whether the trial is imminent or not, or whether the examinations for discovery of all parties have already been held (for example, see *Fusco v. Yofi Creations* (1987), 60 O.R. (2d) 287 (Ont. Master)), and also whether it would be a proper joinder of the new cause of action, and also whether there is an improper purpose for adding any defendant such as to only obtain discovery of the added party, and whether the proposed added party is a necessary or proper party, and other special problems in relation to class actions,

representation orders, trade unions, assignees, insurers, trustees, infants, persons under a disability, amicus curiae, accrual of the cause of action, and limitation periods. These are the procedural considerations that come quickly to mind and there may well be others.

[8] In the earlier case, *Fusco v. Yofi Creations Ltd.* (1987), 60 O.R. (2d) 287, 5 A.C.W.S. (3d) 331 (Master), referred to in *Seaway*, Master Sandler also observed at p. 288, as to a request to bring four new defendants into an action:

> They will be brought into an action that is well advanced and under time-limits that were imposed because of delays in the prosecution of this case, howsoever caused.
>
> It is unfair to these proposed defendants to add them when this action is under the time constraints that it is.

[9] *Bank of Montreal v. Bay Bus Terminal (North Bay) Ltd.* (1964), 45 D.L.R. (2d) 705, [1964] 2 O.R. 425 (C.A.), dealt with a situation in which a plaintiff financial institution obtained judgment against a carrier for the value of currency destroyed in a fire arising from the carrier's negligence. The trial judge had rejected the defence that the plaintiff could recover the value of bills destroyed from the Bank of Canada but he did not determine the bank's liability as it was not a party to the action. The Court of Appeal was faced with an after-the-appeal-was-argued request to add the bank as a defendant to the action, which request was granted. I pause to note that these were highly unusual circumstances. However, in dealing with the question of previously made findings at trial, the court said at p. 708:

> Since there must be a trial as between the original parties and the added defendant, the nature and extent of the order to be made by this Court in disposition of the appeal and motion yet remain to be considered. Essentially the facts which the respondent must prove as against the added defendant are the same facts which were in issue at the trial between the original parties. The trial Judge before whom the further trial proceeds should not be embarrassed by findings already made upon the same subject-matter but binding upon some of the litigants only. Such embarrassment could have been obviated if all of the present parties had been represented at the first trial. For these reasons we are convinced that the only proper course to pursue is to set aside the judgment of the learned trial Judge and direct a new trial on all issues between all parties and we so order. Respondent may amend its statement of claim and appellants their statement of defence as they may be advised; the statement of defence of the added defendant will be delivered within 10 days of the date of service upon it of the amended statement of claim. The parties will be entitled in the usual way to discovery and production.

[10] The Nova Scotia Court of Appeal, in overturning a trial court's decision to add an individual as a defendant after all the evidence had been called, said in *Chapel Island Band Council v. Grand Anse Contracting Ltd.* (1990), 23 A.C.W.S. (3d) 558, [1990] N.S.J. No. 245 (C.A.):

> The motion to add Mr. MacKenzie was made at the end of the proceedings in this action when the evidence called by the parties had all been adduced. The trial judge granted the

motion. Mr. MacKenzie has appealed from that decision.

> It was contended that the proceedings are too far advanced and that Mr. MacKenzie could not make full answer and defence particularly as he did not have an opportunity to participate in the proceedings and to cross-examine the witnesses. We agree with that submission. In our view it would not be appropriate to add a party at this stage of the proceedings.

[11] While it is true that some of the individuals participated in the proceedings, that was only in the sense that they were discovered or were witnesses. They did not even have the advantage of participating at the trial in another capacity. However, in that regard the New Brunswick Court of Appeal cautioned against such merger of personality in overturning a trial court's decision following the end of a trial to permit a person who had been sued in her capacity as executrix of an estate to be added as a defendant in her personal capacity. The court said at p. 133 of *Mann v. Englehart* (1986), 76 N.B.R. (2d) 121:

> I have concluded that, except in the clearest of circumstances, a party ought not be deprived of the usual procedural rights available to all litigants as set out in the Rules of Court. All the more so where the trial has been completed, a new cause of action is being entertained and the person may wish the advice of counsel independent from the advice of counsel who represents the party in a totally different capacity in her role as executrix.

[12] Let me now return to the subject litigation. This is immense, complicated and detailed litigation which has been fought by the five corporate entities under special procedures which they have all had a hand in formulating. It would be difficult, if not impossible, to see how anyone could be brought up to speed in order to continue this litigation in the agreed time-frame — *i.e.*, trial by this November with a speedy decision thereafter. Whilst there may be some present disagreement as to the evidence to the adduced at Stage 2, it is fair to observe that if the door has not shut already, one would be foolish to leave one's fingers in the door frame. A fresh start is not a practical option, but without it I think it is fair to observe that the six individuals and the trial judge would have the greatest degree of discomfort with each other given the trial judge's findings in Stage 1, a stage in which these individuals did not participate as parties and were unrepresented. If added, they would have to be afforded all the protection and procedure available normally to defendants unless they otherwise participated in the "condensed" arrangement previously agreed to by the five corporate entities. I do not find it unreasonable when they say that they would be totally unprepared to go for trial this fall. This is not a motion to strike as discussed in *Hunt v. Carey Canada Inc.* (1990), 74 D.L.R. (4th) 321, [1990] 2 S.C.R. 959, 4 C.C.L.T. (2d) 1, where the Supreme Court of Canada observed at p. 334 that:

> The fact that the case the plaintiff wishes to present may involve complex issues of fact and law or may raise a novel legal proposition should not prevent a plaintiff from proceeding with his action.

Rather, one would hope that novel causes would not be advanced "at (or beyond) the last moment" against defendants that the plaintiff was trying to shoehorn into the litigation. Litigants should not have the unfair advantage of "waiting and seeing" how litigation turns out before

amending (or I would think adding parties): see *Germscheid v. Valois* (1989), 34 C.P.C. (2d) 267, 68 O.R. (2d) 670, 15 A.C.W.S. (3d) 77 (H.C.J.). It seems to me that for all of the above factors it would be quite inappropriate for me to exercise my discretion in favour of Covia Partnership and against the six individuals. I cannot conceive of any reasonable basis to impose terms such as would minimize the prejudice to a stage at which it could be overcome by an order on costs or an adjournment. The procedural and substantive unfairness to the six individuals cannot be addressed. I pause to note that if anything were attempted, it would likely create significant prejudice to some or all of the existing litigants in the Airwars arena.

[13] Over and above this though, I must note that I would think it appropriate for Covia Partnership to have indicated why it was so late in asking that the individuals be added in light of their very advanced stage of knowledge of their involvement and the nature thereof prior to the Stage 1 trial. Beyond that I would observe that I would be sceptical of Covia Partnership's motives in adding these individuals. This is a corporate fight, part of the litigation which will have a material impact on whether CAIL will continue as an independent national carrier. I cannot conceive that Covia Partnership would view the individuals as having deep pockets for this scale of litigation. What then is left of tactical or strategic advantage — the other parties suggested that it was to apply undue pressure on these individuals so as to obtain leverage in the litigation (or in pursuit of a settlement). Covia Partnership merely advised that it did not consider that it had any obligation to advise or respond as to timing or purpose. However, I would think that a plaintiff moving to add new defendants would have some obligation to justify such addition, at least in circumstances similar to these.

[14] I would therefore dismiss Covia Partnership's motion to add the six individuals as party defendants. It seems to me, since the amendment to the pleadings adding vicarious liability on PWA is based upon a finding of liability against the individuals or some of them, that this element of the pleading should not be allowed against PWA. In any event, the amendments and adding would cause prejudice to PWA and CAIL since: (i) the timing of hearing Stage 2 is critical to their attempt to survive; (ii) the "wait and see" attitude of Covia Partner should not be rewarded; and (iii) (with lesser import) if the conspiracy allegation had been upfront it may well have resulted in PWA changing its tactics and presenting its case differently. Such prejudice could not be overcome now. While I do not find it necessary to review at this moment the other grounds on which the individuals and PWA found the proposed amendments to the pleadings objectionable, I note that there are certain common threads with the balance of PWA's and CAIL's motion.

[15] In any event, if the Covia Shareholder and Covia Partner action is dismissed on the basis of the claims being derivative (as I in fact do determine below), there is no claim to amend or to which to add parties.

American's motion

[16] Let me now turn to American's motion. I note in passing that Covia Partner's proposed (and now disallowed) amendments do not appear to have any affect vis-à-vis American. Turning then to the existing statement of claim of Covia Partner, there is reference to three agreements:

(a) a Hosting Agreement to which neither Covia Partner nor Covia Shareholder is a party;

(b) the 1989 Limited Partnership Agreement to which Covia Partner is a party; and

(c) the Unanimous Shareholder Agreement to which Covia Shareholder is a party.

However, it is not alleged that any of these agreements has been breached. There is no allegation that American owes any fiduciary duty to Covia Partner. The allegations against American appear to be:

> 20. At all material times, AMR and American Airlines, with the consent of Canadian Airlines, imposed two conditions, which would require PWA to cause Canadian Airlines to:
>
> (a) obtain its release from its binding contractual obligations to Gemini under the Hosting Agreement; and
>
> (b) enter into a long term hosting contract with American Airlines' Sabre division.
>
> 21. The actions of the defendants to seek to induce a breach of the Hosting Agreement to release Canadian Airlines from its obligations to Gemini (as outlined in more detail below) are unlawful and are a breach of the fiduciary duties owned by PWA and the PWA Directors to the plaintiff.
>
> 22. The plaintiffs state that such wrongful conduct by the defendants was and is designed and calculated to injure and cause damage to the plaintiffs' economic interests in tortious disregard of the plaintiffs' legal rights.
>
> • • • • •
>
> 28. The plaintiffs state that the defendants have caused, induced, or encouraged wrongful interference with the plaintiffs' economic interests by the acts alleged and others to the detriment interference with contracts of the plaintiffs and as a result of such conduct, the plaintiffs have suffered and will continue to suffer substantial losses.

The further paragraphs do not plead particular facts but simply motives and the effect of the conduct being the subject of complaint. There is an allegation that the conduct is "wrongful", but there is no explanation of or basis for this characterization. There is no allegation that PWA has breached the Limited Partnership Agreement to which it is a party; it is from that relationship which PWA must extricate itself in a legal way so as to complete its deal with American.

[17] Covia Partner does allege that American engaged in conduct "to seek to induce a breach of the Hosting Agreement" between the LPship and CAIL. However, there has been no breach of such hosting agreement, nor has Covia Partner alleged there has been. American's position is that there is no cause of action for inducing breach of contract unless there is a

resulting breach of contract. However, I do not see the cases relied on (*Posluns v. Toronto Stock Exchange* (1964), 46 D.L.R. (2d) 210, [1964], 2 O.R. 547 (H.C.J.); *Ontario Store Fixtures Inc. v. Mmmuffins Inc.* (1989), 70 O.R. (2d) 42, 17 A.C.W.S. (3d) 1006 (H.C.J.)) as going that far: see p. 44 where MacFarland J. said in paraphrasing Gale J. (at p. 262 of *Posluns*):

> The issue in this motion is whether the plaintiff has properly pleaded facts which set out all of the elements of the tort of intentional interference with contractual relations. The elements of this tort include the following: (1) an enforceable contract; (2) knowledge of the plaintiff's contract; (3) an intentional act on the part of the defendant to cause a breach of that contract; (4) wrongful interference on the part of the defendant, and (5) resulting damage.

It seems to me that a defendant could act in accordance with parts 3 and 4 without actually causing a breach of the contract. Damages as *per* part 5 may be incurred by extra costs incurred by the plaintiff.

[18] However, Covia Partner's pleading states that American imposed a condition on PWA to require CAIL to "obtain its release from its binding contractual obligations to Gemini under the Hosting Agreement". Furthermore, at the Stage 1 trial, counsel for Covia Partnership (as well as the LPship and Air Canada) had the opportunity to cross-examine PWA witnesses on three exhibits which were admitted as evidence:

> (a) Exhibit 238 — a letter dated December 12, 1991 from American's attorney Tobin Clark to Brent Aitken of Canadian Airlines, setting out American's desire that Canadian Airlines be hosted by SABRE and stating American would only be in a position to proceed with the proposed transaction if Canadian Airlines were contractually free and legally able to consummate this type of transaction;
>
> (b) Exhibit 352 — a letter dated April 13, 1992 from Don Carty of American to Kevin Jenkins of Canadian Airlines requesting confirmation that Canadian Airlines would not breach the Hosting Agreement or any other existing contract with Gemini, that Canadian Airlines would not breach any such contract in anticipation of closing such a transaction, and that American, by entering into the proposed transaction with Canadian Airlines, would not be interfering with any business relationship between Canadian Airlines and Gemini;
>
> (c) Exhibit 431 — a letter dated June 22, 1992 from Kevin Jenkins to Don Carty stating that Canadian Airlines had consistently represented to American throughout all negotiations and discussions that entering into and completing the proposed transaction would not result in a breach of the Hosting Agreement, that Canadian was bound by covenants of confidentiality with respect to the business and affairs of Gemini Limited Partnership, and that neither PWA nor Canadian Airlines had any intention of proceeding on any basis other than fully complying with their respective legal obligations relating to Gemini.

See transcripts of proceedings (a) March 8, 1993, cross-examination of DeMeza at pp. 1038-9 and 1096-7, and (b) March 11, 1993, cross-examination of Jenkins. I note as well the reasons

for judgment of Callaghan C.J.O.C. at pp. 69-72 [p. 55ff. D.L.R.] and particularly at p. 69 [p. 55 D.L.R.] where he states:

> I am satisfied on the evidence that in the course of the negotiations at the end of November, 1991, PWA was asserting to American that PWA would successfully negotiate its way out of Gemini.

There was no further indication in his reasons where I could detect that American was told to the contrary or in which it could be construed that American was advocating explicitly or implicitly that CAIL breach its contract.

[19] If CAIL is released from the Hosting Agreement, it will owe no contractual duty to the LPship (except to the "replacement contract" degree of fulfilling whatever terms might be exacted for such release; even in these circumstances if CAIL were to breach the new terms technically it would be a breach of the "withdrawal agreement" and not the Hosting Agreement unless there were a clawback term included in the withdrawal agreement whereby breach of it would be deemed a breach of the Hosting Agreement). "Release" is defined as:

> ... the relinquishment, concession, or giving up of a right, claim or privilege, by the person on whom it exists or to whom it accrues, to the person against whom it might have been demanded or enforced.

(Black's Law Dictionary, 5th ed. (St. Paul, Minnesota: West Publishing Co., 1979).)

> I ... 4. To give up, resign, relinquish, surrender (esp. a right or claim in favour of another person) ...
>
> II To set out or make free; to liberate, deliver of (now rare) or *from* pain, bondage, obligation, etc.

(The Shorter Oxford English Dictionary On Historical Principles, 3rd ed. (Oxford: Clarendon Press, revised 1967).) I do not see in the circumstances how the word "release" as used in the statement of claim could be interpreted as other than in the sense indicated above. A lawful termination of contract by definition cannot result in a breach; similarly, a third party suggesting, urging or requiring that one party to a contract exit the contract (and its attendant obligations and rights) in a legal way cannot be said to be inducing a *breach* of that contract: see *Posluns, supra.* I note that Covia Partner's statement of claim does not claim inducing breach of contract (see para. 1D) but rather that is a claim for damages against all the defendants, including American, "in the amount of $300,000,000.00 for wrongful interference with Covia [Partner]'s economic interests" as well as a further $300 million for punitive and exemplary damages. It would appear that para. 21 of the statement of claim is superfluous and unsupported on the face of the pleadings vis-à-vis American. In my view, it should be struck as against American.

Summary judgment motion by PWA and CAIL

[20] Turning to the motion by PWA and CAIL for summary judgment, is there a genuine issue necessitating trial in respect of the claims advanced by Covia Partner? Secondly, should the action by Covia Partner be dismissed as offending the principle against having a multiplicity of proceedings (see rule 21.01 (3) (*c*) and s. 138 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43) vis-à-vis *Gemini v. PWA et al.*?

> 21.01 (3) A defendant may move before a judge to have an action stayed or dismissed on the ground that,
>
> • • • • •
>
> (*c*) another proceeding is pending in Ontario or another jurisdiction between the same parties in respect of the same subject matter ...
>
> • • • • •
>
> 138. As far as possible, multiplicity of legal proceedings shall be avoided.

[21] The test for summary judgment pursuant to rule 20 is the good hard look test (but subject to the proviso there is no problem with credibility as to material elements): see *Irving Ungerman Ltd. v. Galanis* (1991), 83 D.L.R. (4th) 734, 1 C.P.C. (3d) 248, 4 O.R. (3d) 545 (C.A.). In such cases, the parties "should be spared the agony and expense of a long and expensive trial after some indeterminate wait": see my comments in *Avery v. Value Investment Corp.* released May 25, 1990 (Ont. H.C.J.) [summarized 21 A.C.W.S. (3d) 488]; affirmed February 20, 1991 (C.A.) [summarized 25 A.C.W.S. (3d) 827]. I note in particular the comments of Henry J. in *Pizza Pizza Ltd. v. Gillespie* (1990), 33 C.P.R. (3d) 515 at p. 529, 45 C.P.C. (2d) 168, 75 O.R. (2d) 225 (Ont. Ct. (Gen. Div.)):

> — There is no arbitrary or fixed criterion that the motions judge must apply. It is a case-by-case decision to be made on the law and on the facts that he is able to find on the evidence submitted to him in support of the claim or defence, whether the plaintiff has laid a proper foundation in its affidavit and other evidence to sustain the claims made.
>
> — It is not sufficient for the-responding party to say that more and better evidence will (or may) be available at trial. The occasion is now. The respondent must set out specific facts and coherent evidence organized to show that there is a genuine issue for trial.

[22] The question to be decided here is whether there is overlap (now that Covia Shareholder's claim has been dismissed in light of its derivative nature) between Covia Partner's statement of claim and that of Gemini GP and the LPship in *Gemini v. PWA et al.* In that action, Gemini GP in its capacity of a partner (a gp holding a 1% interest) in the LPship is claiming against PWA in para. 1 for $500 million for breaches of PWA's fiduciary duties to it, another $500 million for unlawful interference with its economic interests, a third $500 million for malicious prosecution of a civil action and abuse of process of the court, and a final $500 million for punitive and exemplary damages. In contrast, Covia Partner is claiming a mere $300

million in its capacity as a partner (a lp holding a 33% interest) in the LPship for breaches of PWA's fiduciary duties to it, another $300 million for wrongful interference with its economic interests, a third $300 million for conspiracy and a final $300 million for punitive and exemplary damages. One may pause to note that if one assumes the two plaintiffs have similar attributes then Gemini GP values the harm done to its 1% at $500 million (thus a 100% interest would have the equivalence of $50 billion or a 33% interest $16½ billion). This might be contrasted with Covia Partner's relatively (at least to Gemini GP) modest claim as to its 33% of $300 million.

[23] In *Gemini v. PWA et al.*, the plaintiffs (that is, both Gemini GP and the LPship) claim against all the defendants except PWA (that is, CAIL and American) for $500 million for unlawful interference with their economic interests and a second $500 million for punitive and exemplary damages. Thus, no claim is made by the LPship against PWA for breach of fiduciary duty, although I note that paras. 19 and 24 mention such a breach. Then there is para. 27:

> 27. PWA's breach of its fiduciary duties, as aforesaid, has caused [LPship] substantial damages and incalculable loss of its market position in the Canadian CRS market, for which PWA is liable to compensate the [Gemini GP].

There appears to be similar confusion in para. 29 (a) concerning malicious prosecution for which there is no claim by the LPship. Further paras. 33, 34 and 35 involve complaints by both Gemini GP and the LPship about harm done to the LPship (but not to Gemini GP)

[24] At the discovery of Paul Blackney, a representative of both Covia Shareholder and Covia Partner, the following exchange took place:

> Q. Inasmuch as they are fractional interest holders in those two Gemini entities, does Covia [Shareholder or Partner] say that it has independent damage to which it's been exposed or damage which it has suffered independent of its interest in the two Gemini entities?
>
> MR. WARDLE: Not as far as I'm aware.
>
> • • • • •
>
> Q. I just want to be clear on this, Mr. Wardle, that Covia [Shareholder or Partner] makes no claim for damages, other than in relation to its fractional position as an interest holder in the Gemini General Partner and the Gemini Limited Partnership?
>
> MR. WARDLE: That's correct.

It would appear that Covia Partner only wishes single recovery which would appear to be in accord with the philosophy of *Ratych v. Bloomer* (1990), 69 D.L.R. (4th) 25, [1990] 1 S.C.R. 940, 30 C.C.E.L. 161.

[25] Aside from this apparent messiness which may well be tidied up with yet further

amendments — and one would hope with a 100% successful co-ordination effort — the devilish question to be answered is what is the appropriate way of dealing with an internecine fight involving a lpship, its gp and its lps. Additionally, there is the question of whether the rule in *Foss v. Harbottle* applies with the lpship being viewed as the equivalent in a corporate fight as would a corporation — and with the gp equating to the board of directors and the lps to the shareholders. Let us turn to the rules:

> 8.01 (1) A proceeding by or against two or more persons as partners may be commenced using the firm name of the partnership
>
> (2) Subrule (1) extends to a proceeding between partnerships having one or more partners in common.

Watson and McGowan, *Ontario Civil Practice* (Toronto: Carswell, 1993), comment at p. 225 as follows:

> Recent amendments. Rule 8.01 (2) was amended by O.Reg. Oct./92, in force October 1, 1992. Prior to its amendment, this rule read literally appeared to authorize a partnership to sue in the firm name of the partnership where the proceeding was between the partnership and one or more of its partners. However it was held in *Unical Properties v. 784688 Ontario Ltd.* (1990), 75 O.R. (2d) 284, 45 C.P.C. (2d) 288, 73 D.L.R. (4th) 761 (Gen.Div.) that, notwithstanding the wording of Rule 8.01 (2), it was not possible for a partnership to sue in its own name where it was suing a partner of the partnership. The amendment now conforms the rule itself to the holding in the *Unical Properties* case.

[26] While I hesitate to do so, I am not certain that the amendment to the rules solves the problem in all cases and it seems to me that it does not in the present instance. *Unical Properties v. 784688 Ontario Ltd.* (1990), 73 D.L.R. (4th) 761, 45 C.P.C. (2d) 288, 75 O.R. (2d) 284, specifically involved the *usual* relief claimed in a partnership squabble — an order dissolving the partnership and an accounting. Steele J. in that case said at pp. 763-4:

> In my opinion, a partnership has no life of its own apart from its partners. While a partnership may sue third parties in its own name at the direction of one partner, this does not apply to one partner suing the other partner because the defending partner would in effect be both plaintiff and defendant. I agree with the statement in Holmstead and Watson, *Ontario Civil Procedure*, vol. 2, at pp. 8-10-1, as follows:
>
> > "At common law, no action could be brought by a partnership against one partner or by a partner against the firm, because no person could be both plaintiff and defendant in the same action. For the same reason, one partnership could not sue another partnership if the partnerships had one or more partners in common: Williston & Rolls, *The Law of Civil Procedure*, 223.
> >
> > "The Rule abrogates this narrow and technical common law rule. Rule 8.01 (2) states that the basic provision (rule 8.01 (1), permitting proceedings by or against partners to be brought in a firm name) extends to (a) proceedings between a partnership and one

> or more of its partners and (b) proceedings between partnerships having one or more partners in common. However, while (b) does not cause any difficulty, the case law indicates that (a) has such narrow application that this part of the rule is almost misleading.
>
> "While there appear to be no cases on the subject, the commentators accept (b) to be an accurate proposition, and applying this rule creates no practical problems, *i.e.*, if partnership X sues partnership Y on a contract, there is no difficulty in having the litigation conducted in the firm names, and the fact that Z is a common partner in both partnerships causes no real practical difficulty: see *Lindley on Partnership* (15 ed., 1984), 437.
>
> "However, proposition (a), that a partner may sue the partnership in the firm name and *vice versa*, runs into real practical difficulties, because the action is one between the partners *inter se* and typically the relief sought will be an accounting and/or dissolution. Since this is something in which of the partners are directly and personally interested, the courts have understandably taken the view that in such cases an action may not be brought by or against the firm, but that all the partners must be made partners [*sic* parties]: *Meyer and Co. v. Faber (No. 2)*, [1923] 2 Ch. 421 (C.A.); *Lee v. Nam Yuen Fong Syndicate*, [1933] O.W.N. 424 (H.C.); *Sandham v. Sandham Bros.*, [1933] O.R. 590 (H.C.); *Public Trustee v. Elder*, [1926] Ch. 776 (C.A.); *Lindley on Partnership* (15th ed.), 585, *et seq. Lindley discusses the matter at some length and concludes that a rule such as 8.01 (2) can apply to actions between partners not involving any partnership account or any interference with persons against whom no relief is sought, but such cases will be extremely rare.*"

(Emphasis added in these present reasons.) Steele J. went on to say at p. 765:

> While s. 65 (2) (rep. & sub. 1989, c. 55, s. 2; am. 1989, c. 67, s. 1) of the *Courts of Justice Act, 1984*, S.O. 1984, c. 11, permits the Civil Rules Committee to make rules even though they alter the substantive law, such rules must relate to the enumerated items. In my opinion, any change in the substantive law must be to such portions of the common law that relate to issues such as evidence, practice or procedure. Section 65 (2) does not give the rules committee the right to alter common law relating to partnerships.

[27] *Lindley & Banks on Partnership*, 16th ed (London: Sweet & Maxwell, 1990) examined the difference between corporations and (ordinary) partnerships at p. 18:

> A corporation is an artificial person created by special authority (by the law of England, by the Crown, or by Parliament) and endowed with capacity to acquire rights and incur obligations, in order to further or achieve the objects for which it was created. Certainly a corporation is composed of a number of individuals, but the rights and obligations of those individuals are not the same as those of the corporation; nor are there rights and obligations of the corporation exercisable by or enforceable against those individuals, either jointly or separately, but only collectively, as an artificial entity. As the civilian lawyers neatly expressed it: *Si quid universitati debetur singulis non debetur, nec quod debet univeristas singuli debent.* (If anything is owed to an entire body, it is not owed to

the individual members, nor do the individual members owe what is owed by the entire body.)

With partnerships, the reverse proposition holds good: the firm is not an entity distinct from the individuals composing it; nor do the partners collectively have the ability to acquire rights or incur obligations. The rights and liabilities of a partnership are the rights and liabilities of the partners and are enforceable by and against them individually: *Si quid societati debetur singulis debetur et quod debet societas singuli debent.* (If anything is owed to the partnership, it is owed to the individual members and the individual members owe what is owed by the partnership). A limited exception to the latter principle is, however, to be found in the statutory provision governing income tax assessments against a firm.

[28] In *Re Lehndorff General Partners Ltd.* (1992), 17 C.B.R. (3d) 24, 37 A.C.W.S. (3d) 847, [1993] O.J. No. 14 (Ont. Ct. (Gen. Div.)), I discussed the nature of a limited partnership in the context of stay proceedings under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, the *Courts of Justice Act* and the inherent powers of a superior court of general jurisdiction. At pp. 38-40, I observed:

Thus it appears to me that the inherent power of this court to grant stays can be used to supplement s. 11 of the CCAA when it is just and reasonable to do so. Is it appropriate to do so in the circumstances? Clearly there is jurisdiction under s. 11 of the CCAA to grant a stay in respect of any of the applicants which are all companies which fit the criteria of the CCAA. However the stay requested also involved the limited partnerships to some degree either (i) with respect to the applicants acting on behalf of the Limited Partnerships or (ii) the stays being effective vis-à-vis any proceedings taken by any party against the property assets and undertaking of the Limited Partnerships in respect of which they hold a direct interest (collectively the "Property") as set out in the terms of the stay provisions of the order paragraphs 4 through 18 inclusive attached as an appendix to these reasons. [Appendix omitted.] I believe that an analysis of the operations of a limited partnership in this context would be beneficial to an understanding of how there is a close inter-relationship to the applicants involved in this CCAA proceedings and how the Limited Partnerships and their Property are an integral part of the operations previously conducted and the proposed restructuring.

A limited partnership is a creation of statute, consisting of one or more general partners and one or more limited partners. The limited partnership is an investment vehicle for passive investment by limited partners. It in essence combines the flow through concept of tax depreciation or credits available to "ordinary" partners under general partnership law with limited liability available to shareholders under corporate law. See Ontario LPA sections 2 (2) and 3 (1) and Lyle R. Hepburn, *Limited Partnerships*, (Toronto: DeBoo, 1991), at p. 1-2 and p. 1-12. I would note here that the limited partnership provisions of the Alberta PA are roughly equivalent to those found in the Ontario LPA with the interesting side aspect that the Alberta legislation in s. 75 does allow for judgment against a limited partner to be charged against the limited partner's interest in the limited partnership. A general partner has all the rights and powers and is subject to all the restrictions and liabilities of a partner in a partnership. In particular a general partner is

fully liable to each creditor of the business of the limited partnership. The general partner has sole control over the property and business of the limited partnership: see Ontario LPA ss. 8 and 13. Limited partners have no liability to the creditors of the limited partnership's business; the limited partners' financial exposure is limited to their contribution. The limited partners do not have any "independent" ownership rights in the property of the limited partnership. The entitlement of the limited partners is limited to their contribution plus any profits thereon, after satisfaction of claims of the creditors. See Ontario LPA sections 9, 11, 12 (1), 13, 15 (2) and 24. The process of debtor and creditor relationships associated with the limited partnership's business are between the general partner and the creditors of the business. In the event of the creditors collecting on debt and enforcing security, the creditors can only look to the assets of the limited partnership together with the assets of the general partner including the general partner's interest in the limited partnership. This relationship is recognized under the *Bankruptcy Act* (now the BIA) sections 85 and 142.

A general partner is responsible to defend proceedings against the limited partnership in the firm name, so in procedural law and in practical effect, a proceeding against a limited partnership is a proceeding against the general partner. See Ontario *Rules of Civil Procedure*, O. Reg. 560/84, Rules 8.01 and 8.02.

It appears that the preponderance of case law supports the contention that a partnership including a limited partnership is not a separate legal entity. See *Lindley on Partnership*, 15th ed. (London: Sweet & Maxwell, 1984), at pp. 33-35; *Seven Mile Dam Contractors v. R.* (1979), 13 B.C.L.R. 137 (S.C.), affirmed (1980), 25 B.C.L.R. 183 (C.A.) and "Extra-Provincial Liability of the Limited Partner", Brad E. Milne, (1985) 23 Alta. L. Rev. 345, at pp. 350-351. Milne in that article made the following observations:

> "The preponderance of case law therefore supports the contention that a limited partnership is not a separate legal entity. It appears, nevertheless, that the distinction made in *Re Thorne* between partnerships and trade unions could not be applied to limited partnerships which, like trade unions, must rely on statute for their validity. The mere fact that limited partnerships owe their existence to the statutory provision is probably not sufficient to endow the limited partnership with the attribute of legal personality as suggested in *Ruzicks* unless it appeared that the Legislature clearly intended that the limited partnership should have a separate legal existence. A review of the various provincial statutes does not reveal any procedural advantages, rights or powers that are fundamentally different from those advantages enjoyed by ordinary partnerships. The legislation does not contain any provision resembling section 15 of the *Canada Business Corporation Act* [S.C. 1974-75, c. 33, as am.] which expressly states that a corporation has the capacity, both in and outside of Canada, of a natural person. It is therefore difficult to imagine that the Legislature intended to create a new category of legal entity."

It appears to me that the operations of a limited partnership in the ordinary course are that the limited partners take a completely passive role (they must or they will otherwise lose their limited liability protection which would have been their sole reason for choosing

a limited partnership vehicle as opposed to an "ordinary" partnership vehicle). For a lively discussion of the question of "control" in a limited partnership as contrasted with shareholders in a corporation, see R. Flannigan, "The Control Test of Investor Liability in Limited Partnerships" (1983) 21 Alta L. Rev. 303; E. Apps, "Limited Partnerships and the 'Control' Prohibition: Assessing the Liability of Limited Partners" (1991), 70 Can. Bar Rev. 611; R. Flannigan, "Limited Partner Liability: A Response" (1992) 11 Can. Bar Rev. 552. The limited partners leave the running of the business to the general partner and in that respect the care, custody and the maintenance of the property, assets and undertaking of the limited partnership in which the limited partners and the general partner hold an interest. The ownership of this limited partnership property, assets and undertaking is an undivided interest which cannot be segregated for the purpose of legal process. It seems to me that there must be afforded a protection of the whole since the applicants' individual interest therein cannot be segregated without in effect dissolving the partnership arrangement. The limited partners have two courses of action to take if they are dissatisfied with the general partner or the operation of the limited partnership as carried on by the general partner — the limited partners can vote to (a) remove the general partner and replace it with another or (b) dissolve the limited partnership. However Flannigan strongly argues that an unfettered right to remove the general partner would attach general liability for the limited partners (and especially as to the question of continued enjoyment of favourable tax deductions) so that it is prudent to provide this as a conditional right: *Control Test* (1992), supra, at pp. 524-525. Since the applicants are being afforded the protection of a stay of proceedings in respect to allowing them time to advance a reorganization plan and complete it if the plan finds favour, there should be a stay of proceedings (vis-à-vis any action which the limited partners may wish to take as to replacement or dissolution) through the period of allowing the limited partners to vote on the reorganization plan itself.

It seems to me that using the inherent jurisdiction of this court to supplement the statutory stay provisions of s. 11 of the CCAA would be appropriate in the circumstances; it would be just and reasonable to do so.

Allow me to further observe that lpships are governed by and subject to the *Limited Partnerships Act*, R.S.O. 1990, c. L.16. Pursuant to s. 46 of the *Partnerships Act*, R.S.O. 1990, c. P.5:

> 46. This Act is to be read and construed as subject to the *Limited Partnerships Act* and the *Business Names Act.*

Thus a lpship is a special type of partnership.

[29] Estey J. in *Molchan v. Omega Oil & Gas Ltd.* (1988), 47 D.L.R. (4th) 481 at p. 493, [1988] 1 S.C.R. 348, [1988] 3 W.W.R. 1, observed:

> For these purposes I assume the highest status of the general partner under the limited partnership, namely, that of a trustee holding the properties of the partnership on behalf of all other partners.

See also Conrad J.'s discussion of limited partnerships at pp. 94-100 of *Marigold Holdings Ltd. v. Norem Construction Ltd.* (1988), 31 C.L.R. 51, [1988] 5 W.W.R. 710, 89 A.R. 81 (Q.B.).

[30] What have Gemini GP and PWA, AC and Covia Partner as gp and lps respectively in the LPship (a lpship) agreed to concerning their respective rights and obligation? Article 2.5 (g) of the First Restated and Amended Limited Partnership Agreement dated June 30, 1989, provides that:

> 2.5 The General Partner [Gemini GP] represents and warrants to and covenants with each Limited Partner [PWA, Air Canada and Covia Partner] that the General Partner:
>
> • • • • •
>
> (g) will, in the conduct of the business and affairs of the Partnership [LPship], act in the best interests of the Partnership and, *in particular, will diligently enforce the rights of the Partnership pursuant to the terms and provisions of any instrument or document on behalf of and in the name of the Partnership from time to time as may be reasonably determined by the General Partner to be in the best interests of the Partnership.*

(Emphasis added.)

[31] Callaghan C.J.O.C. determined that this provision provided Gemini GP with the authority and responsibility to pursue legal action in the name of the LPship and in particular to enforce the provisions of the Hosting Agreement (see p. 83 of his reasons) [p. 63 D.L.R.]. I also note that there does not seem to be anything that would preclude the subject limited partnership agreement as well from being included in "the terms and provisions of any instrument or document". Southin J.A. in *337965 B.C. Ltd. v. Tackama Forest Products Ltd.* (1992), 91 D.L.R. (4th) 129, 67 B.C.L.R. (2d) 1, 34 A.C.W.S. (3d) 512 (C.A.), was of the view at p. 151 that in a case dealing with a conflict between a gp and the lps that "in the end the rights of these parties fall to be determined essentially on the limited partnership agreement to which they adhered ...".

[32] Granger J. in *872928 Ontario Ltd. v. Gallery Pictures Inc.* (1990), 75 O.R. (2d) 273, 23 A.C.W.S. (3d) 217 (Ont. Ct. (Gen. Div.)), was dealing with rule 8.01 (2) before it was amended last year: see discussion of Watson & McGowan, *supra.* That rule then was:

> 8.01 (1) A proceeding by or against two or more persons as partners may be commenced using the firm name of the partnership.
>
> (2) *Subrule (1) extends to a proceeding between a partnership and one or more of its partners and to a proceeding between partnerships having one or more partners in Canada.*

(The emphasized portion has now been amended to read: " (2) Subrule (1) extends to a proceeding between partnerships having one or more partners in common".) Granger J. reviewed limited partners and their nature at p. 275:

In their article "An Introduction to Limited Partnerships" (1981), 39 *Advocate* 381, William F. Ehrcke and Rosemarie Wertschek described a limited partnership at pp. 381-82:

> "A limited partnership is a partnership consisting of one or more general partners and one or more limited partners. The general partners manage and control the business of the partnership and are personally liable without limitation for partnership liabilities. The limited partners contribute capital and share in the profits, but take no part in the control or management of the business. The liability of a limited partner for partnership obligations is limited to the amount of his contribution plus his agreed contribution as stated in the certificate of limited partnership.
>
> "Relations between the partners themselves are governed by the terms of the partnership agreement, which may contain any provisions which are not inconsistent with the Act and public policy. It is the certificate, as filed with the Registrar of Companies, which limits the liability of the limited partners and defines the position of the limited partners and of the general partners vis-à-vis third parties. If there is a discrepancy between the partnership agreement and the certificate, creditors are entitled to rely on the certificate."

The form and structure of a limited partnership, and the rights and responsibilities of the limited partners *vis-à-vis* the general partners are governed in Ontario by the *Limited Partnerships Act*, R.S.O. 1980, c. 241. As a limited partnership is a partnership the procedural rules [Rules of Civil Procedure, O. Reg. 560/84, rules 8.01, 8.05, 8.06] governing partnerships apply ...

Granger J. then went on to set out, *inter alia*, rule. 8.01 as it then was. He then examined various authorities at pp. 276-7:

In *133/135 Kingeast Inc. v. Wood Wilkings Ltd.* (1983), 43 O.R. (2d) 698, 39 C.P.C. 49 (Master), Master Sandler, in dealing with former Rule 102 [Rules of Practice, R.R.O. 1980, Reg. 540] which was similar to rule 8.01, stated at p. 702 O.R.:

> "In my view, Rule 102 applies equally to limited partnerships as to ordinary partnerships and both can sue or be sued in the name of the firm. It seems clear that a limited partnership being registered as such, could only sue or be sued in the firm name and could not adopt the alternative open to ordinary partnerships of suing or being sued in the name of all the partners."

In L. Hepburn, *Limited Partnerships* (Toronto: De Boo, 1989) the author states at p. 2-46:

> "The Acts of Ontario and Prince Edward Island do not contain any provisions similar to those above. However, it is likely that any action commenced by or against the limited partnership would be in the partnership name."

In England the right of a limited partnership to sue and to be sued was discussed in *Supreme Court Practice 1970* (London: Sweet & Maxwell), at vol. 1, p. 1160:

> "81/1/19 (1) Suing or being sued. — The expressions 'firm', 'firm name' and 'business' mean the same in the case of limited partnerships as in the case of ordinary partnerships defined by section 4 (1) and section 45 of the Partnership Act, 1890 (Limited Partnerships Act, 1907, s. 3). They therefore come within this Rule as to suing and being sued in the name of the firm. It would seem that a limited partnership, being registered as such, could only sue or be sued in the firm name, and could not adopt the alternative open to ordinary partnerships of suing in the names of the partners, with the description 'trading as _____'; nor could it be so sued. It hardly seems that limited partners could be properly imported into an action by or against the firm, though after judgment they might be made liable to execution: see r. 5 (n) 'Limited Partners, Execution against', infra."

In my opinion an Ontario limited partnership can sue and be sued in its own name. In order to maintain the integrity of the limited partnership the legal proceedings must be controlled and directed by the general partner. In *133/135 Kingeast v. Wood Wilkings Ltd., supra*, Master Sandler held that service of an originating process on a limited partner was not valid and service had to be effected on the general partner.

Although the general partner controls the affairs of the limited partnership, the general partner cannot institute proceedings in its own name or on behalf of the limited partnership. Neither the *Limited Partnerships Act* nor the *Partnerships Act*, R.S.O. 1980, c. 370, authorizes the general partner to institute proceedings in its own name. The plaintiff must be the party wronged.

[33] Who is the party wronged in a lpship situation? Granger J. went on to review *Re Lee and Block Estates Ltd.*, [1984] 3 W.W.R. 118, 50 B.C.L.R. 289 (S.C.). At pp. 120-1, in starting off his judgment in that, case McEachern C.J.S.C. observed:

> This case is concerned with limited partnerships, which are fairly common in commerce but relatively unknown in court. In fact, although counsel referred to several American authorities, I am informed there are no Canadian cases dealing with limited partnerships.

He then went on to deal with a fight between the original lps and a new lp. He held that the original lps did not have standing to sue the new lp for capital which should have been furnished to the lpship. McEachern C.J.S.C. stated at p. 140 (a passage relied on by Granger J. at p. 277 of *Gallery*):

> Counsel for Block relies upon the first rule in *Foss v. Harbottle* (1843), 2 Hare 461, 67 E.R. 189, which is well described by Jenkins L.J. in *Edwards v. Halliwell*, [1950] 2 All E.R. 1064 at 1066 (C.A.), as follows:
>
> > "The rule in *Foss v. Harbottle*, as I understand it, comes to no more than this. First, the proper plaintiff in an action in respect of a wrong alleged to be done to a company or association of persons is *prima facie* the company *or the association of persons itself.*"
>
> *The above establishes that the rule in Foss v. Harbottle* applies in a proper case not just

> to corporations but also to associations of persons such as trade unions, and there are many American authorities which hold that the principle also applies to partnerships: *Bell Sound Studios Inc. v. Enneagram Productions Co.* (1962), 234 N.Y.S. (2d) 12, 36 Misc. (2d) 879; *Blattberg v. Weiss* (1969), 306 N.Y.S. (2d) 88, 61 Misc. (2d) 564 (S.C.); *Klein v. Weiss* (1978), 395 A. (2d) 126, 284 Md. 36; and *Kramer v. McDonald's System Inc.* (1979), 396 N.E. (2d) 504, 33 Ill. Dec. 115, 77 Ill. (2d) 323, rehearing denied 30th November 1979 (S.C.).
>
> Notwithstanding what McKay J. said about common law derivative rights in corporate matters in *Shield Dev. Co. v. Snyder*, [1976] 3 W.W.R. 44 (B.C.S.C.), the absence from the Partnership Act of any provisions similar to s. 225 [am. 1980, c. 50, s. 21] of the Company Act, R.S.B.C. 1979, c. 59, leaves the common law rule stated in *Foss v. Harbottle, supra*, applicable in proper circumstances in partnership matters.

(Emphasis added.) McEachern C.J.S.C. went on to expand at p. 141 as follows:

> I think [counsel for Block] is right on the question of standing. The class "A" partners, in my view, cannot enforce Block's covenant to contribute capital to fund operating losses to the partnership. Thus the class "A" partners cannot succeed upon a claim which presupposes the flow of sufficient capital into the partnership to keep the interim mortgage in good standing and sufficient refinancing to produce a surplus of $600,000. These are threshold requirements for either of the scenarios mentioned above.
>
> [Counsel for the plaintiff Lee] replies by advancing two exceptions to this rule.
>
> First, he says this rule may be disregarded wherever the interests of justice require it be disregarded. It appears to me that this exception, if it is an exception of general application, can only apply if the action is a derivative or a representative action. In cases about corporations, leave to bring a derivative action must be obtained before action (although it has been granted nunc pro tunc). In the case of associations or partnerships, the action, at the very least, would have to be a representative action in which all parties would be represented. Remedies cannot be given in the absence of essential parties.
>
> Secondly, it was argued that the rule only applies where standing is questioned before trial, and that the rule does not apply after there has been a full trial on the merits. That was the result in *Prudential Assur. Co. v. Newman Indust. Ltd.*, (1982) Ch. 204, [1982] 1 All E.R. 354 (C.A.), but again, that was a representative action, and all parties were before the court. In fact, the company in that case objected to the action going forward, but after a long trial the court refused to apply the rule against the plaintiff which, as a minority shareholder, had successfully established a right to relief on behalf of the company which the company was then able to pursue. I think the failure to bring or convert this action into a derivative or representative action precludes me from applying these exceptions.

[34] Granger J. concluded at p. 278 of *Gallery* that:

> McEachern C.J.S.C. held that the limited partners did not have standing to institute proceedings for capital which should have been furnished to the limited partnership by the defendants. The proper plaintiff was the limited partnership which claimed to have been wrong[ed].

[35] I am of the view that particulary given the contractual arrangements of s. 2.5 (g) of the subject limited partnership agreement that the parties thereto implicitly recognized that their limited partnership should be governed by the rule in *Foss v. Harbottle.* I pause to note that corporate law in England in 1843 was evolving; I am. of general understanding (but stand to be corrected) that corporations in those days were to some greater degree than now akin to partnerships, at least to limited partnerships.

[36] It would therefore appear to me that Covia Partner's claim should be viewed as derivative and in fact subsumed in the LPship claim in the *Gemini v. PWA et al.* action subject to whatever amendment of that claim may be necessary. In essence there should be a practical consolidation of these two actions. I do not see the aspect of a partnership (in this case a lpship, the LPship) suing a partner (lp, in this case PWA) an insurmountable hurdle. This anomaly is easily cured by in effect ignoring the presence (for the purpose of recovery) of PWA. I do not see any reason why the procedures set out for derivative actions involving corporations should not be followed.

[37] On that basis, I would dismiss Covia Partner's action against PWA, CAIL and American without prejudice to any necessary and efficient amendment of the LPship's claims in *Gemini v. PWA et al.*

Balance of motion regarding breach of fiduciary obligation and interference with economic interests

[38] Given my views that not only should the Covia Shareholder but also the Covia Partner claims be struck on the basis of derivativeness, I do not think it appropriate to deal with what PWA, CAIL and American say are the other deficiencies of these claims as to other aspects such as breach of fiduciary obligation and interference with economic interests, since in my view these determinations would have an effect on the enlarged *Gemini v. PWA et al.* action and a resultant effect not only on Covia Partner but also Air Canada as lps in the LPship. I do not think it fair or appropriate to deal with them in the absence of Gemini GP representing the LPship (and Air Canada). Otherwise I am of the view that I would create the same practical problem as was faced in *Bank of Montreal, supra.* It may be that the parties will wish to continue this debate at a later date this summer.

Costs

[39] As to costs, I would award the six individuals their costs on a solicitor-and-client scale. I would not expect there to be any difficulty in resolving these costs. As to PWA, CAIL and American, they should have their costs of the action including these motions on a party-and-party basis, subject however to a deletion as to whatever may be reasonably salvaged with no additional cost in the *Gemini v. PWA et al.* (expected) expanded action.

[40] Judgment accordingly.

File No. C16276

COURT OF APPEAL FOR ONTARIO

RE: **COVIA CANADA PARTNERSHIP CORP. and COVIA CANADA CORP. (Plaintiffs (Appellants) v. PWA CORPORATION, CANADIAN AIRLINES INTERNATIONAL LTD., AMR CORPORATION and AMERICAN AIRLINES INC. (Defendants (Respondents))**

BEFORE: **GOODMAN, CARTHY AND OSBORNE JJ.A.**

COUNSEL: ***PETER C. WARDLE AND RICHARD P. STEPHENSON***
FOR COVIA CANADA PARTNERSHIP CORP.

R.S. RUSSELL
FOR PWA CORPORATION

BENJAMIN GLUSTEIN
FOR CANADIAN AIRLINES INTERNATIONAL LTD.

GEOFF HALL
FOR AMR CORPORATION

JOHN H. FRANCIS
AMERICAN AIRLINES INC.

HEARD: **NOVEMBER 1 AND 2, 1993**

E N D O R S E M E N T

BY THE COURT

In this appeal by Covia Canada Partnership Corporation from the judgment of Farley J. dated July 10, 1993, whereby the action instituted by Covia Canada Partnership Corp. and Covia Canada Corporation was dismissed for want of status of the plaintiffs to assert derivative claims, we are in agreement with the reasons and conclusion of Farley J., and therefore dismiss the appeal with costs.

Tab 4

CITATION: Essar Steel Algoma Inc. (Re), 2016 ONSC 1802
COURT FILE NO.: 15-CV-0011169-00CL
DATE: 20160314

SUPERIOR COURT OF JUSTICE – ONTARIO
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 ESSAR STEEL ALGOMA INC., ESSAR TECH ALGOMA INC., ALGOMA HOLDINGS B.V., ESSAR STEEL ALGOMA (ALBERTA) ULC, CANNELTON IRON ORE COMPANY, AND ESSAR STEEL ALGOMA INC. USA

BEFORE: Newbould J.

COUNSEL: *Ashley Taylor and Kathryn Esaw*, for the Applicants

Lou Brzezinski and Alexandra Teodorescu, for the USW Local 2251

Massimo (Max) Starnino, for USW and its Local 2724

Naomi Greckol-Herlich, for the Essar Algoma retirees

Clifton P. Prophet and Nicholas Kluge, for the Monitor

Bradley Whiffen, for the Ad Hoc Committee of Essar Algoma Noteholders

Andrea Lockhart, for Deutsche Bank

Evan Cobb, for the board of directors of Essar Algoma

HEARD: March 11, 2016

ENDORSEMENT

[1] Essar Algoma applies for the approval of a grievance claims procedure to govern grievances made against Essar Algoma under two collective agreements between Essar Algoma and Local 2251 and Local 2724. Local 2724 is satisfied with the proposed procedure. Local 2251 is not.

[2] On January 14, 2016, an order was made approving a general claims process to solicit and determine claims that exist against the applicants and their directors and officers. During the negotiations leading to this order, counsel to the USW and the Locals requested an independent claims procedure order designed specifically to deal with grievances. The applicants agreed to such an approach on the understanding that the parties would work together to develop a grievance claims procedure order on consent.

[3] As of the commencement of these *CCAA* proceedings, approximately 2,768 grievances had been filed and remained unresolved. Many of the grievances go back many years. Since the date of the Initial Order and through to February 26, 2016, approximately 374 additional grievances have been filed.

[4] Article 13 of the collective agreement governing Local 2251 establishes a three-step process for the resolution of grievances, and provides in the third step for the final and binding settlement of grievances by arbitration. Most of the pre-filing grievances have gone through the first two steps and what remains is arbitration under the third step. Under ss. 49(1) of the *Labour Relations Act*, a party to a collective agreement may request the Minister of Labour to refer a grievance to a single arbitrator to be appointed by the Minister. Up to February 24, 2016, 68 pre-filing grievances and 148 post-filing grievances were referred to the Minister by Local 2251. Arbitrator Bloch was named by the Minister for all of these grievances. By virtue of the stay contained in the Initial Order, he has adjourned all of the grievances pending the end of the *CCAA* proceedings.

Grievance claims procedure

[5] The grievance claims procedure streamlines the process by which grievance claims are resolved by placing the vast majority of outstanding grievances on an expedited resolution track which will see all of those claims determined by August 31, 2016. A limited number of grievance claims which are not placed on the expedited track will continue to be heard through the process provided for in the collective agreements and a limited number of grievance claims will continue to be stayed and held in abeyance pending the conclusion of the *CCAA* proceedings.

[6] Under the grievance claims procedure, a chief arbitrator will be appointed, who will oversee the implementation of the grievance claims procedure, including assigning grievance claims to the grievance arbitrators and overseeing the scheduling of mediation and, if necessary, arbitration of the claims. The Honourable John Murray is named in the procedure as the chief arbitrator. It is intended that all of the grievance arbitrators will be experienced labour arbitrators.

[7] The vast majority of the grievance claims will proceed by way of the expedited process. The procedure contemplates that the Local 2251 and Local 2724 will prepare a list of grievances, to which the applicants shall respond. The chief arbitrator will assign those grievance claims to a grievance arbitrator. Any grievance claim which is not included on the list of grievances shall be deemed to be withdrawn with prejudice by the applicable Local and shall be barred and extinguished.

[8] Once a grievance arbitrator has carriage of a grievance claim, he or she will work with the applicants, the USW, the applicable Local and the Monitor to try to come to a consensual resolution of the claim. Where such resolution attempts are not successful, the grievance arbitrator shall proceed to hear, adjudicate and determine the grievance claim. The result of the arbitration will be final and binding on the parties.

[9] There is no question that the grievance claims procedure will assist the applicants in their restructuring attempts. The applicants are in the midst of a sale and investment solicitation process, the outcome of which will determine whether the applicants survive as a going concern.

Time is of the essence. The DIP financing matures on August 31, 2016, but may be extended to September 30, 2016. The applicants also need to start building up inventory levels in advance of the winter freeze. In order to have the financing necessary to do this and continue operating, the applicants must implement a restructuring plan or close a sale transaction before the end of September, 2016. In order to effect this, some certainty regarding the potential impact of the unresolved grievances would greatly assist matters. A third party considering an offer to purchase would obviously want to understand the impact of the grievances on the business.

[10] The Monitor participated in the negotiation process and is of the view that the grievance claims procedure is a fair and reasonable method of dealing with grievances, will bring certainty to labour relation claims against the applicants and in turn will aid the applicants in their operations and be of benefit to potential bidders under the SISP. The Monitor believes that approval of the grievance claims procedure is important to the applicants' restructuring efforts.

Position of Local 2251

[11] The position of Local 2251 is a legal one. Mr. Brzezinski said that his client has no concerns regarding Mr. Murray being appointed. That is understandable. Mr. Murray before his appointment to the bench was a very senior and able labour lawyer and arbitrator and since his retirement from the bench has continued to be heavily involved in labour matters in Ontario. Mr. Brzezinski said that his clients want to take a legal position to ensure that their rights under the collective agreement are maintained and that their rights under the *CCAA* are made clear.

[12] Under step three of the collective agreement, which provides for arbitration if the grievance cannot be settled, three arbitrators are named who shall be selected on a rotation basis. In case an arbitrator cannot hear the matter in 60 days, the parties may by mutual agreement extend the 60 day period or agree to another arbitrator not on the list. The language of the collective agreement in the third step contemplates a speedy resolution of grievances, but this has not been achieved.

[13] What has happened in this *CCAA* process is that the applicants have tried to have Local 2251 agree to a grievance claims procedure which essentially would result in the same thing as would happen under the collective agreement. However Local 2251 has refused to agree to it.

[14] One may wonder why Local 2251 would not readily agree to such a procedure. One would think it would be in the interests of a grievor to have his or her claim dealt with as quickly as possible. It would also seem to be in the interests of the grievors to have a procedure to resolve the grievances and thus assist in a positive outcome for the business on which their livelihoods depend.

[15] I will deal with the legal issues raised by Local 2251.

Effect of the stay in the Initial Order

[16] The main argument advanced by Local 2251 is that grievances are not stayed by the Initial Order and that providing for a grievance procedure other than under the collective agreement amounts to an amendment to the collective agreement which is not permitted under section 33 of the *CCAA*. Mr. Brzezinski took the position in argument that the stay under the Initial Order did not constitute an amendment to the collective agreement but that the imposition of the grievance claims procedure would be an impermissible amendment to the grievance procedures contained in the collective agreement.

[17] Section 33 of the *CCAA* provides in part as follows:

> 33.(1) If proceedings under this Act have been commenced in respect of a debtor company, any collective agreement that the company has entered into as the employer remains in force, and may not be altered except as provided in this section or under the laws of the jurisdiction governing collective bargaining between the company and the bargaining agent.
>
> ...
>
> (8) For greater certainty, any collective agreement that the company and the bargaining agent have not agreed to revise remains in force, and the court shall not alter its terms.

[18] In my view, a stay of a grievance procedure under a collective agreement can be ordered under the *CCAA*. Further, the imposition of a claims procedure under the *CCAA* that includes grievance claims is not an amendment to the collective agreement. The claims procedure in the collective agreement has been stayed and a claims procedure process under the *CCAA*, not under the collective agreement, has replaced it during the pendency of the *CCAA* proceeding.

[19] In *Canwest Global Communications Corp. (Re)* (2011), 75 C.B.R. (5th) 156 the claims procedure order in a *CCAA* process was broad enough to cover grievances under the applicable collective agreement and claims for a number of grievances were made and resolved. A few claims were not resolved and the union moved to lift the stay of proceedings to permit the grievances to be dealt with under the applicable collective agreement. Pepall J. (as she then was) dismissed the motion and in doing so stated that there appeared to be no real issue that the grievances are caught by the stay of proceedings. Regarding the utility of the claims process covering grievances, Pepall J. said that generally speaking grievances should be adjudicated in the *CCAA* claims process. She stated:

> **33** The claims process is summary in nature for a reason. It reduces delay, streamlines the process, and reduces expense and in so doing promotes the objectives of *CCAA*. Indeed, if grievances were to customarily proceed to arbitration, potential exists to significantly undermine the *CCAA* proceedings. Arbitration of all claims arising from collective agreements would place the already stretched resources of insolvent *CCAA* debtors under significant additional strain and could divert resources away from the restructuring. It is my view that generally speaking, grievances should be adjudicated along with other claims pursuant to the provisions of a claims procedure order within the context of the *CCAA* proceedings.

[20] Regarding section 33 of the *CCAA*, Justice Pepall said that a *CCAA* claims process for grievances was not precluded by section 33. She stated:

> **38** Justice Mongeon of the Québec Superior Court had occasion to address the effect of section 33 of the *CCAA* in *White Birch Paper Holding Company*. He stated that the fact that a collective agreement remains in force under a *CCAA* proceeding does not have the effect of "excluding the entire collective labour relations process from the application of the *CCAA*." He went on to write that:

> It would be tantamount to paralyzing the employer with respect to reducing its costs by any means at all, and to providing the union with a veto with regard to the restructuring process.
>
> ...
>
> **40** I agree with the Monitor's position that if Parliament had intended to carve grievances out of the claims process, it would have done so expressly. To do so, however, would have undermined the purpose of the *CCAA* and in particular, the claims process which is designed to streamline the resolution of the multitude of claims against an insolvent debtor in the most time sensitive and cost efficient manner. It is hard to imagine that it was Parliament's intention that grievances under collective agreements be excluded from the reach of the stay provisions of section 11 of the *CCAA* or the ancillary claims process. In my view, such a result would seriously undermine the objectives of the *Act*.

[21] A stay of grievance claims under a collective agreement has often been imposed under the *CCAA*. Justice Mongeon did so with respect to claims of retirees in *White Birch*, as did Justice Morawetz with respect to claims of former employees in *Nortel Networks Corp., Re* (2009), 55 C.B.R. (5th) 68. Further, providing for all grievances under collective agreements to be dealt with in a *CCAA* claims process was ordered in *Air Canada* by Justice Farley in 2004 (albeit prior to the enactment of section 33 of the *CCAA* in 2009). In *AbitibiBowater Inc., Re* 2010 CarswellQue 2338 Justice Gascon (as he then was) ordered claims of former employees to be dealt with in a *CCAA* claims procedure. In all of these cases the collective agreements contained grievance procedures.

[22] Local 2251 also takes the position that staying grievances from being determined by arbitration under a collective agreement violates the freedom of association right under section 2(d) of the *Charter of Rights and Freedoms*. It relies on passages from *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4, which dealt with legislation in Saskatchewan that limited the right of public servants to strike. The Court in that case held that the right to strike is an essential part of a meaningful collective bargaining process and that the test whether the legislative interference with the right to strike in a particular case contravenes section 2(d) of the *Charter* is whether it amounts to a substantial interference with collective bargaining. As the

right to strike for designated public servants under the Saskatchewan legislation was prohibited, it was held that the prohibition was a substantial interference with collective bargaining.

[23] For several reasons I do not think this *Charter* argument can succeed.

[24] Sections 11 and 11.02 of the *CCAA* provide for a stay of any proceeding against the debtor company. What Local 2251 seeks to do is to challenge the constitutionality applicability of those sections in the face of sections 48 and 49 of the *Labour Relations Act*. However it has not given the required notice of a constitutional question to the Attorney General of Canada under section 109 of the *Courts of Justice Act*. Therefore, even if the union were right in its argument, there would be no power in the court to rule the applicability of those sections of the *CCAA* invalid or to grant a remedy.

[25] In any event, in considering the principles discussed in *Saskatchewan,* I do not think those principles render constitutionally invalid a stay of a grievance process in a collective agreement in favour of a grievance process under the *CCAA*. It must be remembered that there is a claims process in place in this *CCAA* proceeding, as there are in all *CCAA* proceedings, and that the claims process proposed in this case provides for the arbitration of grievances by experienced labour arbitrators. This process clearly would meet the requirements of an arbitration process contained in section 48 of the *Labour Relations Act*.

[26] Prior to *Saskatchewan*, the Supreme Court in *Health Services & Support-Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27 established that s. 2(d) prevents the state from substantially interfering with the ability of workers, acting collectively through their union, to exert meaningful influence over their working conditions through a process of collective bargaining. In *Mounted Police Association of Ontario v. Canada (Attorney General)*, [2015] 1 S.C.R. 3 it was stated that whatever the nature of the restriction, the ultimate question to be determined is whether the measures disrupt the balance between employees and employer that s. 2(d) seeks to achieve, so as to substantially interfere with meaningful collective bargaining. The issue in *Saskatchewan* therefore was whether removing the right to strike was an

interference that could be said to be a substantial interference with meaningful collective bargaining. It was held that striking, the "powerhouse" of collective bargaining, promotes equality in the bargaining process (para. 55) and was essential to the ability of employees to bargain "on a more equal footing" (para. 56).

[27] The flaw in the argument of the union is that it is the negotiating process and not the results of that process that are constitutionally protected. That was made clear in *Health Services*. In that case, Chief Justice McLachlin and Justice Lebel stated:

> **19** At issue in the present appeal is whether the guarantee of freedom of association in s. 2(d) of the *Charter* protects collective bargaining rights. We conclude that s. 2(d) of the *Charter* protects the capacity of members of labour unions to engage, in association, in collective bargaining on fundamental workplace issues. This protection does not cover all aspects of "collective bargaining", as that term is understood in the statutory labour relations regimes that are in place across the country. Nor does it ensure a particular outcome in a labour dispute, or guarantee access to any particular statutory regime. What is protected is simply the right of employees to associate in a process of collective action to achieve workplace goals. If the government substantially interferes with that right, it violates s. 2(d) of the *Charter*: *Dunmore*. We note that the present case does not concern the right to strike, which was considered in earlier litigation on the scope of the guarantee of freedom of association.
>
> ...
>
> **29** ... However, "collective bargaining" as a procedure has always been distinguishable from its final outcomes (e.g., the results of the bargaining process, which may be reflected in a collective agreement). Professor Bora Laskin (as he then was) aptly described collective bargaining over 60 years ago as follows:
>
> > Collective bargaining is the procedure through which the views of the workers are made known, expressed through representatives chosen by them, not through representatives selected or nominated or approved by employers. More than that, it is a procedure through which terms and conditions of employment may be settled by negotiations between an employer and his employees on the basis of a comparative equality of bargaining strength.
> >
> > ("Collective Bargaining in Canada: In Peace and in War" (1941), 2:3 Food for Thought 8, at p. 8)

[28] The fruits of the bargaining in this case are the particular terms of the grievance procedure. I do not see them as being constitutionally protected under section 2(d) of the *Charter*. In *Canwest* Justice Pepall came to the same conclusion.

[29] Moreover, the issue in this case is whether the grievance arbitration provisions in the collective agreement can be stayed, and whether such a stay amounts to a substantial interference with collective bargaining. I do not think it can be said in this case that the effect of the stay is substantial. The right to a grievance procedure is a given. It is mandated in section 48 of the *Labour Relations Act*. I think it fair to say that the need to bargain for terms of a grievance procedure is a far cry from being the "powerhouse" of collective bargaining such as the right to strike that promotes equality in the bargaining process. The terms of a grievance procedure to be negotiated surely do not have any substantial influence on the bargaining power of the employees. The grievance provisions that are negotiated reflect the bargaining power of both sides to the negotiations.

[30] Local 2251 also takes the position that a stay imposed under the *CCAA* is not absolute but is subject to certain limits and exceptions provided for in the *CCAA*, one of which is that services provided after the date of the Initial Order are to be paid for the purpose of ensuring the continued supply of services during the restructuring effort. Section 11.01 provides that no order made under section 11 or 11.02 has the effect of prohibiting a person from requiring immediate payment for services provided after the order is made or requiring the further advance of money or credit. It is contended that members of Local 2251 continue to provide active services to Essar Algoma and they are entitled to be compensated for their post-filing services in accordance with the package of compensation and benefits provided under their collective agreement. No doubt they are entitled to such compensation but I do not see a grievance procedure as somehow being a form of compensation under section 11.01 of the *CCAA*. Section 11.01 as an exception to the stay powers in sections 11 and 11.02 is to be narrowly construed (see *Nortel Networks Corp., Re* 2009 ONCA 833 at para. 17), and it is not possible to construe it as preventing a claims procedure order being imposed.

[31] Finally, Local 2251 contends that the exclusive jurisdiction over grievance arbitration is given to arbitrators under sections 48 and 49 of the *Labour Relations Act* and that this exclusive jurisdiction applies to insolvency cases under the *CCAA*. Reliance is placed on statements in cases such as *Weber v. Ontario Hydro*, 1995 SCC 108 which have held that it is for labour arbitrators and not the courts to determine grievances under collective agreements.

[32] I do not accept this contention of Local 2251. The cases relied on by it did not deal with any issue between a federal and provincial statute. What the union has raised is an issue that requires a consideration of the constitutional doctrine of paramountcy.

[33] Section 48 mandates a grievance arbitration procedure in collective agreements and provides that a decision is binding on the parties. Section 49 permits a request to the Minister to appoint an arbitrator whose decision will be binding on the parties. Sections 11 and 11.02 of the *CCAA* provide for an order to be made staying proceedings against the debtor company. These provisions permit the staying of grievance claims under a collective agreement. The two statutes are thus in conflict as one cannot comply with the one without violating the other. Thus under the doctrine of paramountcy, the *CCAA* provisions must prevail over sections 48 and 49 of the *Labour Relations Act*. See *407 ETR Concession Co. v. Canada (Superintendent of Bankruptcy)* 2015 SCC 52; 30 C.B.R. (6th) 207 at paras. 24 and 25.

[34] Moreover, even if there is not a direct conflict in the federal and provincial statutes in question, the doctrine of paramountcy will apply where complying with the provincial law will have the effect of frustrating the purpose of the federal law and therefore the intent of Parliament. See *Alberta (Attorney General) v. Moloney*, [2015] 3 S.C.R. 327; 29 C.B.R. (6th) 173 at para. 25; *Nortel Networks Corp., Re* (2009), 59 C.B.R. (5th) 23 at paras 39-39.

[35] In my view, apart from there being a direct conflict between the two statutes in so far as a stay being permitted under the *CCAA*, it would be very detrimental to the attempt at a successful restructuring in this case if the stay of the approximately 3000 grievance claims and a process for their speedy resolution were not granted. The view of the Monitor is compelling in this regard

that that approval of the grievance claims procedure is important to the applicants' restructuring efforts. Thus in my view the doctrine of paramountcy on this ground leads to the paramountcy of sections 11 and 11.02 of the *CCAA* over sections 48 and 49 of the *CCAA*.

Conclusion

[36] The motion by the applicants for the approval of the grievance claims procedure is allowed.

Newbould J.

Date: March 14, 2016

COURT OF APPEAL FOR ONTARIO

CITATION: Essar Steel Algoma Inc. (Re), 2016 ONCA 274
DATE: 20160415
DOCKET: M46326 (M46297)

Gillese J.A. (In Chambers)

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 ESSAR STEEL ALGOMA INC., ESSAR TECH ALGOMA INC., ESSAR STEEL ALGOMA (ALBERTA) ULC, CANNELTON IRON ORE COMPANY AND ESSAR STEEL ALGOMA INC. USA

Applicants

Lou Brzezinski and Alexandra Teodorescu, for the moving party United Steelworkers Union Local 2251

Ashley John Taylor and Lee Nicholson, for the Applicants

David Rosenblat, for Deutsche Bank, the DIP Lenders and the Term Lenders

Clifton P. Prophet, for the Monitor, Ernst & Young Inc.

Massimo Starnino and Debra McKenna, for the United Steelworkers Union Local 2724

Heard: April 13, 2016

Gillese J.A.:

[1] This is a motion brought by Local 2251 of the United Steelworkers Union for the stay of an order made in a CCAA proceeding.

[2] Local 2251 is the exclusive bargaining agent for the hourly employees of Essar Steel Algoma Inc. ("Algoma") in Sault Ste. Marie. It moves to stay the order of Newbould J. (the "CCAA judge") dated March 14, 2016 (the "Order"), pending the disposition of its motion for leave to appeal that Order. The Order establishes a summary process with condensed timelines for the resolution of grievance related claims.

[3] In Local 2251's amended Notice of Motion for Leave to Appeal, dated March 29, 2016, it contends that leave should be granted because its proposed appeal raises points of significance to the practice, including whether the suspension of grievances under the CCAA constitutes an alteration of the collective agreement, contrary to s. 33 of the CCAA.

[4] For the reasons that follow, the motion for a stay is dismissed.

BACKGROUND IN BRIEF

The CCAA Proceeding

[5] Algoma and certain related companies (the "Applicants") came under the protection of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended ("CCAA") by court order made in November of 2015 (the "Initial Order").

[6] The Applicants are currently in the middle of a sale and investment solicitation process ("SISP") which was approved by an order dated February 10, 2016. The SISP is expected to be completed by August 31, 2016, which coincides with the expiry of the Applicants' debtor-in-possession financing ("DIP financing").

[7] The majority of the Applicants' employees are represented by Locals 2251 and 2724 of the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Services Workers International Union ("USW").

[8] Local 2251 is the exclusive bargaining agent for all hourly employees of Algoma in Sault Ste. Marie. It represents approximately 2235 members.

[9] The relationship between Algoma and Local 2251 is governed by a collective agreement, dated August 1, 2013 (the "Collective Agreement"). Article 13 of the Collective Agreement establishes a three-step process for the resolution of grievances and provides for the final and binding settlement of grievances by arbitration in the third step. Most of the pre-filing grievances have gone through the first two steps and what remains is arbitration under the third step.

[10] Currently, there are approximately 3,000 unresolved grievances of employees represented by Local 2251. The grievances date back as far as 2005.

[11] Local 2724 is the exclusive bargaining agent for all of Algoma's salaried employees.

[12] By order dated January 14, 2016, a general claims process was approved to determine claims against the Applicants and their directors and officers (the "Claims Procedure Order"). However, the USW and the Locals requested that an independent claims procedure be designed specifically to deal with grievances. The Applicants agreed to such an approach on the understanding that the parties would work together to develop a grievance claims procedure.

[13] Algoma, the USW and Local 2724 negotiated such a procedure. Local 2251 did not participate because it viewed such a procedure as an amendment or alteration of the collective agreement, contrary to s. 33 of the CCAA.

The Order

[14] The motion to obtain court approval of the grievance claims procedure was heard on March 11, 2016. The motion was granted and the Order made on March 14, 2016.

[15] The Order provides for a streamlined grievance claim procedure. The goal is to have such claims determined by August 31, 2016, which coincides with the conclusion of the SISP and expiry of DIP financing.

[16] The Order requires Local 2251 to prepare a list of grievances by April 11, 2016, to which the Applicants must respond by May 2, 2016. The list is to include

the identity of the employee, a 250-word summary of the grievance, and the relief or remedy sought. All claims not included on the list are deemed withdrawn with prejudice, and are forever barred and extinguished.

[17] The Order appointed the Honourable John Murray, as Chief Arbitrator, to oversee the implementation of the procedure. Chief Arbitrator Murray has the power to assign grievance claims to qualified labour arbitrators to assist the parties in resolving the claims. Once a grievance arbitrator has carriage of a grievance claim, he or she must attempt to come up with a consensual resolution but, if unsuccessful, the arbitrator will hear, adjudicate and determine the grievance claim. Except for a limited number of identified grievances, the result will be final but have no precedential binding effect.

Steps Taken since the Order Issued

[18] Acting pursuant to the Order, Chief Arbitrator Murray named Michael Mitchell as Deputy Chief Arbitrator. The two men have already travelled to Sault Ste. Marie for both joint and separate meetings with representatives of Algoma, Local 2251 and Local 2724.

[19] At the direction of Chief Arbitrator Murray, after the meetings, Algoma delivered to Local 2251 a summary of its information on the number of grievances associated with each article in the collective agreement.

[20] Based on the spreadsheet of grievances provided by Algoma, Chief Arbitrator Murray noted that many grievances appear to raise common issues, the resolution of which could clear the path to speedy resolution of the underlying grievances.

[21] The parties subsequently met with the Deputy Chief Arbitrator to discuss progress in identifying those common grievances that could potentially be resolved together. After one day with the Deputy Chief Arbitrator, Local 2251 requested an adjournment of the meeting. There is some dispute about what next occurred. On one version, Local 2251 agreed to the continuation of the meeting without it being present. On the other version, Deputy Chief Arbitrator refused to adjourn the meeting, Local 2251 walked out of the meeting and refused to re-attend. There is no question, however, that the meeting continued without Local 2251's participation.

[22] In a report delivered to the parties on April 4, 2016, Deputy Chief Arbitrator Mitchell reiterated that the Chief Arbitrator and Deputy Chief Arbitrator have directed a modified approach to the grievance claims procedure that is less onerous than that which is provided for in the Order. Among other things, the modified approach does not require Local 2251 to provide a 250-word summary of each grievance in the list that it is to prepare.

[23] A number of executive members of Local 2251 are working full-time to complete the list but, consequently, are unable to perform other day-to-day tasks critical to the operation of the union.

[24] Algoma has agreed to allow Local 2251 to pull four workers from the shop floor to assist in drafting the list.

[25] As of April 6, 2016, 36 of 48 grievances filed by Local 2724 and its members have been consensually resolved under the grievance claims procedure provided for in the Order. It is expected that the remaining grievances will be resolved well before August 31, 2016.

The Notice of Motion for Leave to Appeal

[26] On March 29, 2016, Local 2251 served its notice of motion for leave to appeal the Order. An amended notice was filed on April 1, 2016.

THE TEST FOR GRANTING A STAY

[27] To obtain a stay, it is trite law that the moving party must demonstrate that:

1. there is a serious question to be determined on the appeal, should leave be granted;
2. it will suffer irreparable harm if the stay is not granted; and
3. the balance of convenience favours granting the stay.

See *RJR MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311.

[28] In applying this test, the overall focus must be on whether a stay is "in the interests of justice": *Circuit World Corp. v. Lesperance* (1997), 33 O.R. (3d) 674 (C.A.), at p. 677.

1. Serious Question

[29] The threshold to satisfy the first limb of the test is generally low, in that the court is required to make a preliminary assessment of the merits to determine that the appeal is neither frivolous nor vexatious: *RJR MacDonald,* at pp. 337-338.

[30] However, where – as in the present case – leave to appeal is required, the moving party must demonstrate that there is at least a "reasonable prospect" that leave will be granted: *Vandenberg v. Desjardine*, 2016 ONSC 1968, at para. 14.

[31] Moreover, leave to appeal is to be granted only sparingly in CCAA proceedings and only where there are serious and arguable grounds: *Return on Innovation Capital Ltd. v. Gandi Innovations Limited*, 2012 ONCA 10, 90 C.B.R. (5th) 141, at para. 6. At para. 6 of *Innovation Capital*, this court states that in determining whether the grounds of the proposed appeal are sufficient and arguable, it considers whether:

1. the point on the proposed appeal is of significance to the practice;
2. the point is of significance to the action;
3. the appeal is *prima facie* meritorious or frivolous; and

4. the appeal would unduly hinder the progress of the action.

[32] This stringent test for granting leave to appeal in CCAA proceedings is a result of the real time dynamic of CCAA matters and Parliament's clear intention to restrict appeal rights, having due regard to the nature and object of CCAA proceedings: *Newfoundland and Labrador v. AbitibiBowater Inc.*, 2010 QCCA 965, 68 C.B.R. (5th) 57, at para. 26, aff'd 2012 SCC 67.

[33] In my view, Local 2251 has not met its burden on this first part of the *RJR MacDonald* test. It appears unlikely that leave will be granted. The grounds set out in the amended Notice of Motion raise well-settled points of law. The federal paramountcy of CCAA proceedings has been the subject-matter of much appellate jurisprudence, including that of the Supreme Court of Canada. And, it is well-settled that grievances are caught by the stay made in CCAA proceedings, and that the CCAA judge has the power to establish a procedure for resolving matters which parties had previously agreed to have resolved by arbitration, including arbitrations pursuant to the terms of a collective agreement: *Canwest Global Communications Corp.*, 2011 ONSC 2215, 75 C.B.R. (5th) 156, at paras. 28-29.

[34] Furthermore, it appears clear that an appeal would unduly hinder progress in this CCAA proceeding. On the findings of the CCAA judge, there is "no question" that the grievance claims procedure will assist the Applicants in their

restructuring attempts, that “some certainty” regarding the potential impact of the unresolved grievances “would greatly assist matters”, and that a third party considering an offer to purchase would “obviously” want to understand the impact of the grievances on the business (para. 9). A stay at this point would delay the resolution of the grievances. So, too, would granting leave to appeal.

2. Irreparable Harm

[35] Local 2251 submits that it will suffer irreparable harm unless a stay is granted, primarily because:

a. it does not have the human resources or capability to process and summarise the outstanding grievances by the deadline, with the result that the unprocessed grievances will be barred and extinguished;
b. the grievances cannot be addressed properly under the procedures provided for in the Order, given the compressed time period in which the grievances will be determined;
c. it cannot carry out its duty of fair representation because of the constraints imposed by the Order; and
d. it cannot fully or properly be involved in the SISP process because the Order requires that Local 2251 put its full efforts into the grievance process.

[36] Much of Local 2251's assertion of irreparable harm rests on the workload created by the Order, its tight timelines and Local 2251's resulting inability to fulfill its other obligations, including involvement in the SISP process.

[37] I find it difficult to accept this assertion because it appears that there were (and are) avenues available to Local 2251 to ameliorate the workload and strict deadlines which Local 2251 has failed to pursue. I offer three examples of this.

[38] First, before making the Order, the CCAA judge pressed Local 2251 to identify its concerns with the procedure. While Local 2251 mentioned a concern about the deadlines imposed under the grievance list procedure, it does not appear that this matter was pursued in any detail before the CCAA judge nor has Local 2251 moved before that judge to amend or vary the Order to extend the deadlines.

[39] Second, it appears that the Applicants have been working in good faith to assist Local 2251 in preparing the list by the deadline. It has released four Local 2251 members from their duties at Algoma to work full time on the grievance claims procedure. It has provided Local 2251 with a summary detailing the number of grievances associated with each article in the collective agreement. It has provided Local 2251 with a list of outstanding grievances and the description of each grievance that was provided by Local 2251 when the grievance was filed. And, it offered to consent to the deadline being extended to April 20, 2016.

[40] Third, the Chief Arbitrator and Deputy Chief Arbitrator appear to be very cognizant of the difficult challenges the Order poses for Local 2251 and are willing to assist in the resolution of those challenges. Earlier in these reasons I give examples of assistance that the Chief Arbitrator and the Deputy Chief Arbitrator have already provided.

[41] However, it appears that Local 2251 has not fully explored that route of assistance. A recent example of this can be seen in Exhibit "C" to the affidavit of Alexandra Teodorescu sworn April 12, 2016. Exhibit "C is an email sent by Chief Arbitrator Murray in which he says that he will treat an agreement by the parties to extend the April 11 deadline to April 15 (made in the context of an earlier adjournment of this motion), as a "joint request by the parties". Chief Arbitrator Murray goes on to ask that, in future, such matters as extensions be the subject of a discussion with him in advance. He gives concrete reasons for this request, noting that the parties need to work diligently together and in good faith to achieve the important goals of the grievance claims procedure.

[42] From this and the assistance already provided by the Chief Arbitrator, there is a demonstrated willingness on his part to work collaboratively to resolve the inevitable strains and workload problems that arise in a situation such as this.

[43] I find it also difficult to accept the submission that irreparable harm will ensue if individual grievances are forever barred as a result of the grievance failing to be on the list.

[44] In this regard, I note two things. First, the alleged harm appears speculative. Local 2251 has lists. Algoma has lists. Steps have been taken to publish the list, which employees are urged to review to ensure that their grievances are listed. Second, if leave to appeal is granted and the appeal is allowed, anything that was done pursuant to the terms of the Order, including the possible barring of grievances, will be overturned.

[45] Thus, I find it difficult to accept that irreparable harm will flow if the stay is not granted. Having said that, I wish to be clear. I fully accept that the Order has placed an onerous task on Local 2251, including the executive members who are working extremely hard to meet the deadlines. There is no question that the workload and resulting stress and strain is real and creates problems for the full and proper discharge of all of the union obligations. That said, I do not see such problems as amounting to irreparable harm, within the legal meaning of those words.

4. Balance of Convenience

[46] In considering the third part of the test, the court must determine which of the two parties will suffer the greater harm from granting or refusing the stay: *RJR MacDonald*, at p. 342.

[47] Local 2251 says that there is no evidence that the continued existence of the grievances has had, or will have, any impact on the SISP or that any bidder or person involved in the sales process has indicated that the grievances of Local 2251 have impeded or affected any potential bid. In the face of the irreparable harm it says that it will suffer if the stay is not granted, its position is that the balance of convenience weighs in favour of granting the stay.

[48] The Applicants submit that the CCAA judge was in the best position to consider and balance the interests of the various stakeholders with respect to the Order and his determination should not be disturbed.

[49] I accept the Applicants' submission on this matter.

[50] The CCAA judge found that the Order would assist the Applicants in their restructuring attempts and that, in order to achieve a going concern solution, some certainty regarding the potential impact of the unresolved grievances would greatly assist (para. 9). He further found that it would be very detrimental to the attempted restructuring if the stay of the grievance claims and a process for their speedy resolution were not ordered (para. 35).

[51] Based on the findings of the CCAA judge, I am of the view that granting the stay motion would lead to greater harm to the Applicants and other stakeholders in the CCAA proceeding, including Local 2251, as the stay would delay the determination of the grievance claims. The balance of convenience weighs heavily in favour of the Applicants.

CONCLUSION

[52] In my view, granting a stay is not in the interests of justice. There can be little doubt that resolution of the outstanding grievances is important to the Applicants' restructuring efforts. As the CCAA judge found, the Applicants must implement a plan of arrangement or a sale by August 31, 2016 (or September 30, 2016, at the very latest). He also found that the Order would greatly assist in bringing certainty to the claims against the Applicants that may impact a restructuring transaction. Granting a stay pending leave to appeal, in these circumstances, will virtually ensure that the outstanding grievance claims will not be fully addressed by August 31, 2016.

DISPOSITION

[53] Accordingly, the motion is dismissed.

Released: April 15, 2016 ("E.E.G.")

"E.E. Gillese J.A."

Tab 5

Court File No. CV-15-000011169-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE MR.	)	MONDAY, THE 26TH
	)	
JUSTICE NEWBOULD	)	DAY OF SEPTEMBER, 2016

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 ESSAR STEEL ALGOMA INC., ESSAR TECH ALGOMA INC., ALGOMA HOLDINGS B.V., ESSAR STEEL ALGOMA (ALBERTA) ULC, CANNELTON IRON ORE COMPANY AND ESSAR STEEL ALGOMA INC. USA

Applicants

ORDER

THIS MOTION, made by the DIP Lenders (defined below) for an order authorizing, directing and empowering Ernst & Young Inc. in its capacity as Monitor pursuant to the Amended and Restated Initial Order of the Honourable Mr. Justice Morawetz dated November 9, 2015 (the "**Amended and Restated Initial Order**") and not in its personal capacity (the "**Monitor**") to commence certain proceedings and make certain investigations, was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the affidavit of John McKenna sworn August 9, 2016, the Thirteenth Report of the Monitor dated June 20, 2016 (the "**Thirteenth Report**"), the Sixteenth Report of the Monitor dated September 9, 2016 (the "**Sixteenth Report**"), the affidavit of Anshumali Dwivedi, sworn September 19, 2016 and on hearing the submissions of counsel for the Applicants, the Monitor, Port of Algoma Inc. and

those other parties present, no one appearing for any other person on the service list, although duly served as appears from the affidavit of service, filed:

1. **THIS COURT ORDERS** that the Monitor is authorized, empowered and directed to commence and continue proceedings (the "**Related Party Proceedings**") under the provisions of section 241 of the *Canada Business Corporations Act* ("CBCA") in relation to the transactions and matters described in the Thirteenth Report and the Sixteenth Report (the "**Related Party Transactions**"), including without limitation the transactions involving the conveyance of Algoma's port facility assets (the "**Port Transaction**") to Port of Algoma Inc.

2. **THIS COURT ORDERS** that all issues regarding the merits of the Related Party Proceedings may be raised in the course of those proceedings, including but not limited to: (i) the sufficiency of the pleadings; (ii) whether the plaintiff or applicant is a proper complainant pursuant to section 238 of the CBCA; (iii) whether the proper parties are named in the Related Party Proceedings; and (iv) whether the Related Party Proceedings meet the elements of section 241 of the CBCA. The granting of this Order permitting the Monitor to commence the Related Party Proceedings does not constitute a determination of any such issue.

3. **THIS COURT ORDERS** that the Monitor is directed to bring any and all Related Party Proceedings on the Commercial List by a date not later than October 21, 2016.

4. **THIS COURT ORDERS** that the stays of proceedings provided for under the Amended and Restated Initial Order, as they apply to the Applicants, Port of Algoma Inc. and Essar Power Corporation Limited, are hereby lifted to allow the Monitor to commence and continue the Related Party Proceedings and any defendants or

respondents named in the Related Party Proceedings to respond to the Related Party Proceedings, provided however, that the stay of proceedings shall be lifted with respect to no other claim.

5. **THIS COURT ORDERS** that in addition to the powers provided to the Monitor pursuant to the Amended and Restated Initial Order and the obligations imposed upon those with information and records pertaining to the Applicants, all persons having notice of this Order shall cooperate fully with the Monitor in relation to its investigation of the Related Party Transactions, and provided further that such persons shall incur no liability merely by reason of the cooperation referred to in this paragraph. All procedural and discovery related issues shall be determined by the case management judge of the Related Party Proceedings.

6. **THIS COURT ORDERS** that in relation to all matters connected with the Related Party Proceedings, the Monitor shall have all of the rights, powers and protections provided for pursuant to the Amended and Restated Initial Order.

7. **THIS COURT ORDERS** that the Monitor shall continue to have the benefit of the protections provided for under paragraph 41 of the Amended and Restated Initial Order in the exercise of its powers under this Order, including, without limitation, the commencement and continuation of the Related Party Proceedings.

8. **THIS COURT ORDERS** that the foregoing does not preclude the Court from awarding legal costs associated with the Related Party Proceedings in favour of a party to the Related Party Proceedings and in the event that such costs are awarded against the Monitor, the Monitor shall, have a claim for indemnity against the Property to satisfy any such costs award ("**Monitor's Cost Indemnity Claim**") and such indemnity claim shall be secured by the Administrative Charge created in accordance with the Amended and Restated Initial Order, as amended by this Order.

9. **THIS COURT ORDERS** that the Amended and Restated Initial Order shall be amended as necessary so as to provide that the maximum aggregate amount of the Administrative Charge (as defined therein) is equal the sum of $5 million plus the amount of the Monitor's Cost Indemnity Claim.

GENERAL

10. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States or any other jurisdiction to give effect to this Order and to assist the Applicants, the Monitor and their respective agents in carrying out the terms of this Order, including the U.S. Bankruptcy Court. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Applicants and the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order or to assist the Applicants and the Monitor and their respective agents in carrying out the terms of this Order.

ENTERED AT / INSCRIT À TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO:

SEP 2 6 2016

PER / PAR:

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 ESSAR STEEL ALGOMA INC., ET AL

Court File No. CV15-000011169-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding commenced at Toronto

ORDER

OSLER, HOSKIN & HARCOURT LLP
P.O. Box 50, 1 First Canadian Place
Toronto, ON M5X 1B8

JOHN MACDONALD
Tel: 416-862-5962
LSUC No. 25884R

MARC WASSERMAN
Tel: 416-862-4908
Fax: 416-862-6666

Lawyers for Deutsche Bank AG in its various capacities, the DIP Lenders and Term Lenders
Lawyers for the Applicants

Tab 6

1991 S.H. No. 78982

IN THE SUPREME COURT OF NOVA SCOTIA

TRIAL DIVISION

IN THE MATTER OF:
The Companies' Creditors Arrangement Act R.S.C. 1985, c.C-36

- and -

IN THE MATTER OF:
The application of Fairview Industries Limited, ELL. Holdings Limited, Shelburne Marine Limited, VGM Capital Corporation, 683297 Ontario Inc., and CanEast Capital Limited, body corporates with head offices in the City of Halifax, County of Halifax, Nova Scotia.

HEARD: Before the Honourable Chief Justice Constance R. Glube, Trial Division, in Chambers at Halifax, Nova Scotia on November 14th, 1991

DATE November 18, 1991

COUNSEL: Dara Gordon and Rodney F. Burgar - for the applicants Fairview Industries Limited et al

John D. Stringer and B. Miller - for the Royal Bank of Canada and the Bank of Nova Scotia

Peter MacKeigan - for Royal Trust

Gerald R. P. Moir - for RoyNat Inc.

David Farrar - for the Nova Scotia Business Capital Corporation and Small Business Development Corporation

J. Gale appearing for R.G.MacKeigan Q.C. solicitor on record - for Central Capital Corporation

D. MacAdam Q.C. and K. MacDonald Art Clerk - for Nesbitt Thompson Deacon Inc.

Carl Holm Q.C. - for the monitor Coopers & Lybrand Limited

Bruce Clarke - for Seacoast Diesel and Gas Limited Steven Zatzman - for Sketchley Air Conditioning

Johanne Tournier - for the Municipality of the District of Shelburne

G. Giles - for Sonco Property Development L. Doll - for Gary Foley and TTL Supply Ltd.

1991 S.H. No. 78982

IN THE SUPREME COURT OF NOVA SCOTIA

TRIAL DIVISION

IN THE MATTER OF:

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

- and -

IN THE MATTER OF:

The application of Fairview Industries Limited, F.I.L. Holdings Limited, Shelburne Marine Limited, VGM Capital Corporation, 683297 Ontario Inc., and CanEast Capital Limited, body corporates with head offices in the City of Halifax, County of Halifax, Nova Scotia.

GLUBE, C.J.T.D.:

The Interlocutory Notice for this application which was heard on November 14th, 1991, seeks an Order dealing with the following matters:

> "1. Determining the appropriate classes of creditors and the members of such classes for purposes of voting on the plan of arrangement or compromise proposed by each of the applicants pursuant to Sections 4, 5 and 6 of the Companies' Creditors Arrangement Act (CCAA);
>
> 2. Fixing the amount of the creditors' claims for the purposes of voting on the plan of arrangement or compromise pursuant to the CCAA;
>
> 3. Approving the form of proxy to be issued' to the creditors;
>
> 4. Approving the issuance of an Information Circular;
>
> 5. Amending the method of service stipulated for in the Order of this Honourable Court dated September 16, 1991; and
>
> 6. Concerning such other procedural aspects as the Court consider advisable in order to carry out the plan of arrangement or compromise pursuant to the CCAA;"

The general facts were set out in the unreported decision of Glube CJ.T.D. dated November 6, 1991. That decision was filed after the application was made for this hearing. As a result, those parts of this application referring to "a plan", now relate to "plans".

For the purposes of this application, the six corporations are referred to as "the applicants" unless specific reference is made to a particular company.

The affidavit of Rodney F. Burgar dated October 31st, 1991 sets out that the applicants gave notice of this application to all the creditors. Although the applicants asked the court to deal with a number of issues and others were raised by various creditors, a number of matters were resolved by the parties before the Chambers hearing commenced.

The following were dealt with during the Chambers application.

1. Removal of the Monitor.

At the commencement of the application, and in light of the Noveinber 6th decision, counsel for the monitor, Coopers & Lybrand Limited, applied to be relieved as monitor. This request was granted.

2. Applicants Changes to Proposed Classes.

The court was advised of a number of changes in both categories and dollar amounts in the classes proposed by the applicants as shown on the exhibits attached to the affidavit of Ross Drake sworn October 31st 1991.

3. Request for a change in category by Seacoast Diesel & Gas Limited (Seacoast) and Sketchley Air Conditioning & Refrigeration (Sketchley).

Seacoast and Sketchley claim that they should be placed in a separate sub-class of the secured creditors of Fairview Industries Limited (Fairview). Both Seacoast and Sketchley claim as subcontractors against a specific contract performed by Fairview. It was argued that these two companies had a claim similar to a mechanics lien or a form of secured or "trust" claim. Sketchley did not present any affidavit evidence.

William LeBlanc, President of Seacoast, filed an affidavit dated November 12th, 1991, which outlines that Seacoast had a subcontract with Fairview to do certain refit work on a vessel. The affidavit puts forward that before Fairview could be paid for that refit job, all the subcontractors on the job had to be paid. Mr. LeBlanc swore that he relied upon an undertaking by a representative of the Department of Supply and Services Canada that Seacoast would be paid before Fairview. He also obtained a letter from the President of Fairview in which Fairview undertook to pay Seacoast pursuant to Fairview's contract with Supply and Services

Canada.

Fairview submitted a number of arguments including the fact that there were more companies than Seacoast and Sketchley similarly situated and that the other companies had not objected to their classification as unsecured creditors.

Based upon the information presented, I held that I was not prepared to change the classification of the two companies, however, this did not preclude them from making another application to the court on this issue.

4. The Small Business Development Corporation (SBDC) applied to be moved from the unsecured class of Shelburne Marine Limited (Shelburne) to the preferred creditors class.

Counsel was asked to make written submissions, however, on November 15th, 1991, the court received a letter from counsel for SBDC advising that this application was not being pursued.

5. Central Capital Corporation (Central Capital) requested certain changes to its position in the classes of VGM Capital Corporation (VGM) and 683297 Ontario Inc. (683297).

Counsel for the applicants submitted that if the original figures and categorization were allowed to remain that this would result in double counting. The proposal put forward is for the purposes of voting which means that Central Capital's overall dollar entitlement has not been altered.

The request for change by Central Capital was refused and the new figures and locations within the classes as presented at the beginning of this hearing as they related to Central Capital were approved.

6. Changes to the draft order sought by RoyNat Inc. (RoyNat).

Most of the changes requested by RoyNat were agreed to in advance and a new proposed order was submitted incorporating the agreed changes. There is one remaining requested change in paragraph 9 which the parties will discuss. If no agreement is reached, then the parties may place their respective positions before the court.

7. Should the secured creditors of Fairview and Shelburne be subdivided and vote in sub-classes ?

A number of the secured creditors of Fairview requested changes to their class which would result in three sub-classes, each voting as a class. These changes are opposed by the applicants. If the changes were granted, the three sub-classes would consist of the following:

(1) Bank of Nova Scotia (ENS)
(2) RoyNat
Royal Trust
(3) Nesbitt Thomson Deacon Inc. (Nesbitt Thomson)
CAFCO Leasing Inc.
Chrysler Credit.

A number of the secured creditors of Shelburne requested changes to theft class which would result in three sub-classes, each voting as a class. These changes are opposed by the applicants. If the changes were granted, the three sub-classes would consist of the following:

(1) Royal Bank of Canada (RBC)
(2) Nova Scotia Business Capital Corporation
Bank of Nova Scotia
(3) Central Capital

It must be stated clearly at the outset that each case must be decided upon its own facts. Initially, I decided I would not write a decision to avoid having future cases rely upon it in any way. I concluded, however, that the parties were entitled to have my opinions on the various proposals.

I suggest that all counsel are reading too much into the two decisions Norcen Energy Resources Limited et al v. Oakwood Petroleums Limited (1988), 72 C.B.R.(N.S.) 20 and Elan Corporation v. Comiskey (1990) 1 O.R. (3d) 289. In my opinion the two cases do not set up two "lines" of cases reaching different conclusions. I suggest that each was decided on their particular facts. The court should be wary about setting up rigid guidelines which "must" be followed. The CCAA is intended to be a fairly summary procedure and should not be stretched out over months and years with protracted litigation. Quite definitely, each case must be decided on its own unique set of circumstances.

Both Norcen and Elan quote from Sovereign Life Assurance Co. v. Dodd [1892] 2 Q.B. 573, [1891-4] All E.R. Rep. 246, 41 W.R. 4 (C.A.) as a starting point. In Elan, at p. 300, Finlayson J.A. states:

> " The classic statement on classes of creditors is that of Lord Esher M.R. in Sovereign Life ....at pp. 579-80 Q.B.
>
> > 'The Act (Joint Stock Companies Arrangement Act, 1870) says that the persons to be summoned to the meeting (all of whom, be it said in passing, are creditors) are persons who can be divided into different classes - classes which the Act of Parliament recognises, though it does not define them. This, therefore, must be done: they must be divided into

> different classes. What is the reason for such a course? It is because the creditors composing the different classes have different interests; and, therefore, 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.' "

Forsythe J. at p. 24 in Norcen, refers to part of the same quote and he refers to the "commonality of interests test" described in Sovereign Life.

Again, both cases also refer to another English authority, namely, 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(C.A.).

In Elan at p.301, Finlayson J.A. quotes Lord Justice Bowen at p.243:

> "...Now, I have no doubt at all that it would be improper for the Court to allow an arrangement to be forced on any class of creditors, if the arrangement cannot reasonably be supposed by sensible business people to be for the benefit of that class as such, otherwise the sanction of the Court would be a sanction to what would be a scheme of confiscation. The object of this section is not confiscation. Its object is to enable compromises to be made which are for the common benefit of the creditors as creditors, or for the common benefit of some class of creditors as such.'"

At p. 25 of Norcen, Forsythe J. in discussing the "bona fide lack of oppression test" refers to the Alabama case at p. 239 where Lindley L.J. stated:

> "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..' "

Forsythe J. goes on to remind the reader of the purpose of the CCAA, that is, that it is designed to continue rather than liquidate companies. I believe this is something which judges should always keep in mind.

In the article by Stanley E. Edwards, Reorganizations Under The Companies' Creditors Arrangement Act (1947), 25 Can. Bar Rev. 587 Mr. Edwards states at p. 602:

> "Creditors should be classified according to their contract rights, - that is according to their respective interests in the company. Sections 3 and 4 of the C.C.A.A. provide for a compromise or arrangement with

> the creditors 'or any class of them', and for the direction of a meeting of 'such creditors or class of creditors'. Hon. C.H. Cahan's remarks made in the House of Commons while he was sponsoring the passage of the bill, (House of Commons Debates, Canada, 1932-33, Vol, V,4723) make clear how each class of creditors is to be constituted. In discussing section 4 he said: 'Each class of creditors who have the same interest may decide by a three-fourths majority with respect to any proposed compromise and, if approved by the court, such compromise becomes effective'. In suggesting a change of wording in section 5 he made the following statement: 'The suggestion is that it should be made clear that each class of creditors having the same interest shall decide among themselves as to the terms of the compromise and I think this proposed amendment makes the matter very much clearer'. This history indicates that the intention of the statute was to require classification of the creditors according to their interest in the company."

I do not take that to mean that each creditor can allege a certain interest and thereby require that it be placed in a certain or separate classification, but rather that those with like interests, for example, mechanics lien holders, will be placed in the same class and be obliged to vote in that class (See: Re NsC Diesel Power Inc. (1990), 79 C.B.R. (N.S.) 1 (N.S.T.D.)).

At p. 28 of Norcen, Forsyth J. after referring to written submissions made to him states:

> " 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."

In Norcen, although the class was composed of a group of institutional lenders each with a first charge as security, the argument against one class of secured creditors was that the two Banks had separate security on different assets.

The court rejected that argument and found a commonality of interest.

In Elan, the Bank of Nova Scotia had a first registered charge on the accounts receivable and inventory of Elan and Nova and a second registered charge on the land, buildings and equipment. It had been placed in the same class as RoyNat who held a second registered charge on the accounts receivable and a first registered charge on the land, buildings and equipment. The Bank and RoyNat had entered into a priority agreement to define with certainty the priority each held over the assets of Elan and Nova. Along with others, the Bank and RoyNat were ordered by the Chambers Judge to be in the same class.

The Appeal Court held that if the Chambers Judge had decided that a meeting should be held and at that same time determined the classes of creditors, he would have known that any meeting would have failed. The Court found no "community of interest". They also found that RoyNat would dominate any class it was in and would always have a veto. Thus, it was found that there were different legal interests as well as different commercial interests.

I have no difficulty in rationalizing the decisions in Norcen and Elan. In my opinion, whether the security is on "quick" assets or "fixed" assets the companies listed under Fairview secured creditors and Shelburne secured creditors except for Central Capital all have a first charge. There does not have to be a commonality of interest of the debts involved provided the legal interests are the same. In addition, it does not automatically follow that those who have different commercial interests, that is, those who hold security on "quick" assets, are necessarily in conflict with those who hold security on hard or fixed assets. Just saying there is a conflict is insufficient to warrant putting them into separate classes.

In the present case, all the secured creditors of Fairview and all the secured creditors of Shelburne except Central Capital have a first charge of some sort even though the security of each differs. They have a common legal interest. Excluding Central Capital, I find that there is a commonality or community of interest of the secured creditors of Fairview and the secured creditors of Shelburne. Based on this position, I find that the Fairview secured creditors shall continue as one group.

As stated in Elan at p. 301 where Finlayson J.A. quotes from the case Re Wellington Building Corp. Ltd. [1934] O.R/ 653, 16 C.B.R. 48, [1934] 4 D.L.R. 626 (H.C.J. at p. 660 O.R.:

> " 'It is clear that Parliament intended to give the three-fourths majority of any class power to bind that class, but I do not think the Statute should be construed so as to permit holders of subsequent mortgages power to vote and thereby destroy the priority rights and security of a first mortgagee.' "

This position makes eminent common sense. I find that the Shelburne

secured creditors shall have two sub-classes as follows:

(1) Nova Scotia Business Capital Corporation
Royal Bank
Bank of Nova Scotia
(2) Central Capital Corporation

8. The Municipality of the District of Shelburne (the Municipality) applied to move into a separate sub-class as a preferred creditor of Shelburne.

The Municipality seeks to have its own sub-class of preferred creditor for its outstanding claim for property taxes and sewer rates from Shelburne. The Municipality is included with other statutory lien claimants in the Shelburne preferred creditor class.

As submitted by counsel for the applicants, to be set up in one class, the interests need only be similar. The court must wherever possible avoid a multiplicity of classes or sub-classes that could end up defeating the object of the Act.

I conclude that the Municipality should remain in the class of Shelburne preferred creditors. There is sufficient commonality for them to vote as a group. It was pointed out that the same proposal will not necessarily be made to all creditors in a class. No doubt this may be appropriate in a class of preferred creditors where their rights are established by legislation, however, I find that it is not necessary at this time to place each of them in a separate sub-class.

In its written submission, the Municipality raised the issue of whether or not it was bound by the initial September 16th order. This was not argued in court but if counsel for the Municipality wishes to pursue this point, further submissions are required, preferably, if possible, in writing. I will wait to hear from counsel from the Municipality on this issue before setting any time frames for submissions.

9. General Remarks.

In my opinion it is extremely important that individuals or companies within each class be treated fairly and equally. With the possible exception of particular legislation requiring particular treatment for some if not all of the preferred creditors, I have concerns when it is suggested that the plans may address different individuals within a class differently. If this does occur, two things come to mind.

First, everyone within a class must know of the different treatment so that each vote occurs with full knowledge of the plan overall and for the particular class. It is extremely important to ensure that when companies or individuals vote, they do so with full awareness of what their vote will mean.

Second, even if the plan is accepted by the various classes of creditors, it

must still come to the court for approval. The court is clearly entitled to reject the plan and if necessary the court can and will deal with any alleged unfairness or inequity at that time. At the application to approve the plan, the court will determine whether the appropriate majority approved the plan at a meeting held in accordance with the Act and the court's orders and whether the plan is fair and reasonable.

On reviewing the revised draft Order presented on November 14, it appears that there may be a word or words missing from paragraph 4. Since not all of the creditors are companies perhaps "... separately by individual company..." should read "...separately by individuals or by individual companies...". If this is not the intended meaning then counsel for the applicants should circulate a revised draft of the paragraph.

In paragraph 8 there was a change by adding a second type of proxy which I suggest results in a change to the wording from "...be and it is hereby approved..." to "...be and are hereby approved...".

Counsel for the applicants will submit an amended order with all of the changes included. All other matters not dealt with but which are contained in the revised draft order presented to the court on November 14 are approved.

Constance R. Glube

Halifax, Nova Scotia
November 18, 1991.

1991 S.H. 78982

IN THE SUPREME COURT OF NOVA SCOTIA
TRIAL DIVISION

IN THE MATTER OF:

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

- and -

IN THE MATTER OF:

The Application of Fairview Industries Limited, F.I.L. Holdings Limited, Shelburne Marine Limited, VGM Capital Corporation, 683297 Ontario Inc. and CanEast Capital Limited, body corporates with head offices in the city of Halifax, County of Halifax, Nova Scotia

DECISION OF
GLUBE, C.J.T.D.

Tab 7

Citation: Nalcor Energy v. Grant Thornton 2015 NBQB 020
Date: 20150121

IN THE COURT OF QUEEN'S BENCH OF NEW BRUNSWICK

TRIAL DIVISION

JUDICIAL DISTRICT OF FREDERICTON

F/M/47/2014

BETWEEN:

NALCOR ENERGY,

Plaintiff

- and –

GRANT THORNTON POIRIER LIMITED

Defendant

Date of Hearing:	December 3, 2014
Date of Decision:	January 21, 2015
Before:	Justice Terrence J. Morrison
At:	Fredericton, New Brunswick
Appearances:	Stephen Kingston, Benjamin Durnford and Shivani Chopra, for Nalcor Energy;
	John E. Bujold, for Grant Thornton Poirier Limited;
	Robert M. Creamer, Q.C. and Frank McBrearty, for Great Western Forestry Ltd.;
	Craig J. Hill, for Western Surety Company;
	Hugh J. Cameron, for TCE Capital Corporation

D E C I S I O N

Morrison, J.

I. INTRODUCTION

[1] Great Western Forestry Ltd. ("GWF") filed a notice of intention to make a proposal to creditors (the "Proposal") pursuant to the *Bankruptcy and Insolvency Act*, R.S.C. 1985, Chapter B-3 (the "*BIA*"). Matthew Munro of Grant Thornton Poirier Limited ("Grant Thornton") was named the proposal administrator/trustee (the "Proposal Trustee"). Nalcor Energy ("Nalcor") submitted a proof of claim to the Proposal Trustee. At a meeting of creditors held on July 11, 2014, Mr. Munro, acting in the capacity as chair of the meeting, rejected Nalcor's proof of claim for purposes of voting on the Proposal pursuant to section 108(1) of the *BIA*. The chair rejected Nalcor's Proof of Claim on the basis that it was contingent and unliquidated.

[2] This is an application by Nalcor for an order reversing the chair's ruling rejecting Nalcor's Proof of Claim for purposes of voting on the Proposal. This is an appeal pursuant to section 108 of the *BIA*.

II. FACTS

[3] The following summary of the facts is a compilation of the facts outlined in the various briefs submitted by the parties. I have borrowed extensively from the briefs and I have largely reproduced them verbatim. The essential facts are not in dispute. Where there are factual controversies I have specifically identified them.

[4] Nalcor is the proponent of an undertaking known as the Muskrat Falls Project, a project being developed to exploit the hydroelectric potential of Muskrat Falls on the Churchill River in the Labrador portion of the Province of Newfoundland and Labrador at a reported capital cost of $7.4 billion. On March 11, 2013, Nalcor and GWF, which engages in the business of harvesting and clearing timber, entered into a contract which provides that GWF will supply the personnel, equipment and services necessary to clear a right-of-way from the site of the Muskrat Falls Project to the site of existing hydroelectric generation facilities located at Churchill Falls, Labrador (the "Contract"). The projected value of the Contract is $33,283,323.00.

[5] On November 15, 2013, Nalcor issued a Notice of Termination to GWF under the Contract. Among other things, the Notice of Termination cited GWF's failure to meet the Contract schedule as the basis for termination. That same day, Nalcor entered into a letter agreement with a different company to complete GWF's work under the Contract.

[6] On February 10, 2014 GWF filed a Notice of Intention to Make a Proposal pursuant to subsection 50.4(1) of the *BIA*. The respondent was retained to act as the Proposal Trustee.

[7] On February 11, 2014 GWF filed a Statement of Claim in the Supreme Court of Newfoundland and Labrador Trial Division (General) claiming against Nalcor, amongst other damages to be later valued, special damages in excess of eleven million dollars ($11,000,000.00) and a mechanics lien in excess of nine million dollars ($9,000,000.00) (the "Litigation"). On March 2, 2014 a copy of the Statement of Claim was served on Nalcor.

[8] On May 27, 2014 Nalcor presented a Proof of Claim to the Proposal Trustee listing an unsecured claim in the amount of $20,100,000.00. which was superseded by a Re-stated Proof of Claim filed on July 8, 2014 (the "Proof of Claim") setting out a claim in the amount of $18,672,151.64.

[9] On June 3, 2014, Nalcor filed a Defence in the Litigation.

[10] On June 6, 2014 GWF submitted its Proposal indicating that unsecured creditors were to be paid out of the "Net proceeds of Settlement or Final Judgment" in the Litigation.

[11] On June 13, 2014 the Proposal Trustee recommended acceptance of the Proposal.

[12] On June 30, 2014 the Proposal Trustee also advised Nalcor that in order to assess its claim further it would be required to provide more substantive evidence to support the claim.

[13] On July 7, 2014 Nalcor submitted to the Proposal Trustee various documents including Change Orders, Payment Certificates, the Contract, an Executive Summary and a copy of its Defence filed in the Litigation in support of its claim of $18,672,151.64.

[14] On July 8, 2014 the Proposal Trustee received Nalcor's Re-stated Proof of Claim and the applicant's Proxy/Voting Letter indicating it would be voting against the acceptance of the Proposal.

[15] On July 10, 2014 there was a telephone conversation between Nalcor's legal counsel and the Chair. Nalcor's legal counsel asserts that in that conversation he was advised by the Chair that he intended to proceed under section 108(3) of the *BIA*. The substance of the conversation was confirmed in an email from Nalcor's counsel to the Chair on the same date (Record, pages 32 and 483). There was no response to the email. In his affidavit, the Chair denies there was any understanding or assurances made that he would proceed

under section 108(3) only that he was considering certain sections of the *BIA* (Record, page 511).

[16] On July 11, 2014, the first meeting of GWF's creditors (the "Creditors' Meeting") was held in Fredericton. Matthew Munro of Grant Thornton served as the Chair of the meeting. At the meeting, the Chair rejected Nalcor's Proof of Claim for the purpose of voting at the meeting pursuant to section 108(1) of the *BIA*.

[17] The Chair provided oral reasons for his decision to disallow Nalcor's Proof of Claim, as evidenced in the minutes of the meeting. Later that day, the Chair also provided Nalcor with written reasons for his decision. In his reasons, the Chair explained that the Proof of Claim was disallowed because:

> i. The claim is contingent upon the outcome of an action as to whether the Termination of the Contract between Nalcor Energy and Great Western Forestry Ltd. was proper and legal for which no final decision has been rendered by a Court of Law, and
>
> ii. The amount of the claim has not been adjudicated in a Court of Law and is therefore unliquidated.

[18] It is common ground that had Nalcor been permitted to vote at the Creditors' Meeting the Proposal would have been defeated and GWF automatically placed into bankruptcy.

III. PRELIMINARY ISSUE

[19] At the outset of the hearing counsel sought a determination whether this application would proceed by way of trial *de novo* or on the existing record. Nalcor argued that the matter should proceed as a rehearing (trial *de novo*). Grant Thornton argued that appeals under section 108 of the *BIA* should be based on the record.

[20] There are conflicting lines of authority on this issue. In *Alberta Permit Pro Inc. (Re)* 2011 ABQB 141 the Court concluded that appeals pursuant to section 108 of the *BIA* should proceed by way of "appeal de novo" rather than an "appeal on the record". In *Trans Global Communications Group Inc. (Re)* [2009] A.J. No. 352 the Court acknowledged and reviewed the two lines of authority on the issue and concluded that, except in circumstances where restricting the hearing to the record would result in injustice, appeals of this nature should not be heard *de novo*.

[21] In this case, I could see no compelling reason to open the matter up to issues which were not before the Chair at the time of his rejection of Nalcor's Proof of Claim and which did not form part of his reasons for rejection. Accordingly, I ruled that the hearing would proceed as an appeal on the record.

IV. STANDARD OF REVIEW

[22] All of the parties, except Grant Thornton, agree that the applicable standard of review is that of correctness. In *Re Galaxy Sports Inc.* 2004 BCCA 284 the Court concluded that a Chair's decision rejecting a proof of claim under section 108 attracts a correctness standard on appeal:

> On a consideration of all the "contextual" factors mandated by the "pragmatic and functional" approach, I see no reason to disagree with the long-standing principle enunciated in Re McCoubrey, supra, which requires the application of a "correctness" standard where compliance with a "mandatory" provision (which I would equate to a question of law or statutory compliance) is involved, and the application of a "reasonableness" standard where the determination of a factual matter or an exercise of true discretion is called for. In the former category, I would place the chair's decision under s. 108 rejecting a proof of claim for voting purposes and the trustee's decision disallowing a proof of claim under ss. 124 and 135(2). In the latter category, I would place the trustee's role in valuing contingent and unliquidated claims under s. 135(1.1). This general approach conforms with the objective, which I see as implicit in the BIA, of enabling debtors to have their proposals voted upon expeditiously and permitting creditors to have their rights and claims determined in a business-like manner, while at the same time providing a meaningful appeal to a court of law on questions that clearly affect legal rights, engage the relative expertise of judges, and set precedents for other cases.

[23] The standard of review in this matter is that of correctness.

V. ANALYSIS AND DECISION

[24] At the outset I will deal with the factual controversy identified in paragraph 15 above. It is difficult to make findings with respect to controverted facts based solely on affidavits.

However, the Chair's affidavit evidence seems to me to be more plausible. In my view, it is likely that Nalcor's counsel misunderstood his conversation with the Chair. In any event, nothing turns on it. Nalcor did not alter its conduct in reliance on the conversation and therefore suffered no prejudice. Furthermore, the conversation had no bearing or influence on the outcome of the Creditors' Meeting.

[25] It is common ground that the Proposal Trustee did not determine whether Nalcor's claim is a provable claim pursuant to section 135(1.1) of the *BIA*. Nalcor argues that if the Proposal Trustee believed that its claim was of a contingent and/or unliquidated nature he should have valued the claim pursuant to section 135(1.1). Failing that, the Chair was obligated to proceed under section 108(3) and mark the Nalcor Proof of Claim as "objected to" and allow Nalcor to vote on the Proposal. Nalcor further argues that, even if the Chair had the discretion to proceed under section 108(1), his ruling that Nalcor's claim is contingent and/or unliquidated is wrong and must be overturned for failing to meet the correctness standard.

A. Was the Chair obligated to proceed under section 108(3)?

[26] Section 108 of the *BIA* provides as follows:

> 108.(1) **Chair may admit or reject proof** – The chair of any meeting of creditors has power to admit or reject a proof of claim for the purpose of voting but his decision is subject to appeal to the court.

> (2) **Accept as proof** – Notwithstanding anything in this Act, the chair may, for the purpose of voting, accept any letter or printed matter transmitted by any form or mode of telecommunication as proof of the claim of a creditor.
>
> (3) **In case of doubt** – Where the chair is in doubt as to whether a proof of claim should be admitted or rejected, he shall mark the proof as objected to and allow the creditor to vote subject to the vote being declared invalid in the event of the objection being sustained.

[27] Nalcor urges me to follow the approach advocated by Veit, J. in *Alberta Permit Pro,* supra. In that case the chair of a meeting of creditors denied a claimant, Wood Buffalo, the right to vote on a proposal because its proxy and claim were deficient and also because the Chair ruled the claim to be contingent and unliquidated. Wood Buffalo argued that its vote be marked as "objected" but be allowed under section 108(3) of the *BIA*. The Chair refused to proceed under section 108(3). The Court concluded that the Chair should have marked the claim "objected" and allowed Wood Buffalo to vote. Veit, J. stated at paragraph 64:

> However, where claims are relatively complicated, it stands to reason that the Trustee would come to the conclusion that it does not have the time, or the means, to assess the claim and that it should resort to the provisions of s. 108(3). It appears to me that a potentially useful guide to a Trustee is the case law which has developed around the issue of summary judgments: a Trustee is, in effect, called upon to make a summary judgment in respect of the claims advanced. In circumstances where it is not possible to make a summary judgment, the Trustee should take advantage of the statutory mechanism offered, mark a claim "objected", but allow the putative creditor to vote. In the circumstances here, it is difficult to credit that the Trustee would have had sufficient information to categorically state that Wood Buffalo's claim was denied; Wood Buffalo should have been allowed to vote, and the vote should have been marked "objected".

[28] In my view, the plain reading of section 108 provides the Chair with several options as to how to proceed with proofs of claim at a meeting of creditors. One of those options is section 108(1). As counsel for TCE Capital Corporation succinctly stated in argument:

> I did not have time to make this complicated. I submit that the Chair was able to use section 108(1) and therefore the only issue is whether he was correct.

I agree.

[29] In any event, there is persuasive authority that the Chair's use of section 108(1) over the "mark and park" provisions of section 108(3) is the appropriate course of action in the circumstances of this case. Counsel for the respondent referred me to two decisions, the circumstances and issues of which are similar to the present case: *Re Port Chevrolet Oldsmobile Ltd.,* 2002 BCSC 1874 (affirmed 2004 BCCA 37) and *Re 2713250 Canada Inc.,* 2011 QCCS 6119.

[30] In *Port Chevrolet* the Canada Customs and Revenue Agency ("CCRA") submitted a claim for $15,864,279.83 based on an assessment against the debtor which was under appeal. The debtor had negotiated a proposal with its other creditors which was approved by the Trustee. At the creditors' meeting the Trustee disallowed CCRA's claim on the ground that it was contingent being based on an unresolved assessment currently under appeal and disallowed CCRA's vote on the proposal. CCRA appealed. In upholding the Trustee's decision Neilson, J. stated at paragraph 41:

> 41 I find the circumstances here quite different. The debtor is not yet bankrupt. It was a profitable business with over 50 employees before the assessment and is now diligently pursuing a proposal under the *Bankruptcy and Insolvency Act*, which is the only course left open to it to avoid a bankruptcy and continue to operate, in the face of an assessment that it claims is invalid. Neither the debtor nor the trustee are seeking to avoid the appeal procedures outlined in the *Excise Tax Act*. Instead, the debtor is vigorously pursuing them. The problem is that those procedures could not be completed before the first creditors' meeting. Port has evidently convinced the trustee that there is merit to its objection. Even CCRA's representative, Mr. O'Connell, has conceded to the trustee that one possible outcome of Port's challenge may be a nil value to CCRA's claim.

[31] And at paragraphs 45 and 46:

> 45 In the circumstances I have described, I am satisfied that the trustee had the power to classify CCRA's claim as contingent. As Port's counsel points out, to hold otherwise could permit CCRA to issue a substantial but erroneous assessment against an innocent and profitable debtor and put it into bankruptcy and out of business before the validity of the assessment can be determined under the appropriate process provided by the *Excise Tax Act*. That cannot be the intent of either the *Excise Tax Act* or the *Bankruptcy and Insolvency Act*.
>
> 46 There is no evidence of prejudice to CCRA in permitting Port to continue to operate pending resolution of the appeal process under the *Excise Tax Act*, which I am told may take up to a year. CCRA, during that period, is entitled to receive the lion's share of the profits set aside for unsecured creditors under the proposal. On the other hand, there is substantial prejudice to Port, its employees and its other creditors if it is prematurely forced into bankruptcy on the strength of an assessment that may be successfully challenged.

[32] The case of *2713250 Canada* is another involving an unresolved tax dispute. In that case Revenue Quebec issued two Notices of Assessment against the debtor totaling $30,652,071.00 which the debtor contested. Under the applicable law the tax assessments were presumed valid and the amounts claimed were immediately payable. As a result, the debtor became insolvent and filed a notice of intention to file a proposal under the *BIA*. The trustee concluded that Revenue Quebec's claim was contingent. At the first meeting of creditors the Chair declared the Revenue Quebec claim as being inadmissible

for the purposes of voting pursuant to section 108(1) of the *BIA*. The evidence was clear that Revenue Quebec would have voted against the proposal if permitted resulting in the automatic bankruptcy of the debtor. On the issue of the applicability of section 108(1) of the *BIA* Gascon, J. (now of the Supreme Court of Canada) stated at paragraphs 50 and 51:

> 50 Similarly, this is not a case where the chair doubted that the proof of claim should be admitted or rejected under section 108(3) BIA. As the Trustee expressed at the hearing, in its opinion, **it is clear that RQ's proof of claim is inadmissible for the purposes of voting due to its contingent and unliquidated character and the impossibility of assessing it in the circumstances which prevailed at the time of the meeting.**
>
> 51 In other words, the Trustee has neither accepted, nor rejected RQ's proof of claim. It has simply not recognized it for the purposes of voting at the meeting. The relevant meeting minutes and the Trustee's testimony at hearing are unequivocal. (emphasis added)

[33] And at paragraph 75:

> 75 In making the decision contested by RQ, **the Trustee exercised a power conferred by section 108(1) *BIA*,** in its role as chair of the meeting of creditors. This being said, **the Court should only intervene in the presence of an error of law or a palpable and overriding error of fact.** (emphasis added)

[34] And at paragraphs 79 and 80:

> 79 These parameters set out, we note that **section 108(1) *BIA* allows the chair to declare a claim as being inadmissible for the purposes of voting. The wording of the section explicitly states this.**
>
> 80 In this case, the Trustee, in its capacity as chair of the meeting of creditors, **has correctly exercised this power.** It gave reasons for its decision. Its report on the proposal and the minutes of the meetings held October 4, 2010 and February 17, 2011 makes proof of this. (emphasis added)

[35] A compelling argument for applying the approach used in *2713250 Canada* and *Port Chevrolet* is found at paragraphs 41 and 42 of the Pre-Hearing Brief filed on behalf of Western Surety Company:

> 41. There are several similarities between the case at bar and the two cases summarized above. In all three scenarios:
>
> i. the debtor is not yet bankrupt;
>
> ii. the proposal has the overwhelming support of almost all creditors;
>
> iii. the claim in question has been challenged (in good faith) in a court of law;
>
> iv. the debtor is actively pursuing the court challenge and the proposal;
>
> v. the contested claim is larger than the claim of any other creditor;
>
> vi. the contested claim is impossible to evaluate at the time of the first meeting of creditors;
>
> vii. the creditor in question was the only creditor (or one of the only creditors) who intended to vote against the proposal;
>
> viii. allowing the creditor in question to vote would have triggered an automatic bankruptcy; and
>
> ix. the creditor in question was the only creditor who stood to benefit from the failure of the proposal.
>
> 42. Because the similarities are so stark, the Chair's decision to disallow Nalcor's claim for the purpose of voting pursuant to s. 108(1) should be upheld, as it was in *Port Chevrolet* and *Re 2713250 Canada Inc.*

[36] The cases of *2713250 Canada* and *Port Chevrolet* on the one hand, and *Alberta Permit Pro* on the other, reveal a stark contrast in approaches. I am not bound by any of these decisions. However, and with the greatest respect, I find the reasoning in *2713250 Canada* more compelling than that in *Alberta Permit Pro*. Furthermore, the

persuasiveness of the *2713250 Canada* decision is enhanced due to the striking factual similarities to the present case. Adopting the reasoning in that case, I conclude that it was appropriate for the Chair to proceed under section 108(1) of the *BIA*.

B. Did the Chair err in rejecting Nalcor's Proof of Claim on the basis of it being contingent and/or unliquidated?

[37] At the meeting of creditors the Chair rejected Nalcor's Proof of Claim for the purposes of voting at the meeting for the following reasons:

> i. The claim is contingent upon the outcome of an action as to whether the Termination of the Contract between Nalcor Energy and Great Western Forestry Ltd. was proper and legal for which no final decision has been rendered by a Court of Law, and
>
> ii. The amount of the claim has not been adjudicated in a Court of Law and is therefore unliquidated.

[38] The question becomes whether the Chair was correct in his characterization of Nalcor's claim as contingent and/or unliquidated.

(i) Contingent

[39] In Houlden, Morawetz & Sarra, 2014 *Annotated Bankruptcy and Insolvency Act* (Toronto: Carswell, 2014) at G-37(2) a contingent claim is described as follows:

> A contingent claim is a claim that may or may not ever ripen into a debt, according as some future event does or does not happen: *Gardner v. Newton* (1916), 29 D.L.R. 276, 10 W.W.R. 51, 26 Man. R. 251 (K.B.).

[40] In *Vanderpol v. The Queen* (2002), 31 C.B.R. (4th) 118 at paragraph 10 it states:

> …In *Wawang Forest Products Ltd. v. The Queen*, the Court observed:
>
> The generally accepted test for determining whether a liability is contingent comes from *Winter and Others (Executors of Sir Arthur Munro Sutherland (deceased)) v. Inland Revenue Commissioners*, [1963] A.C. 235 (H.L.), in which Lord Guest said this (at page 262):
>
> I should define a contingency as an event which may or may not occur and a contingent liability as a liability which depends for its existence upon an event which may or may not happen.
>
> …
>
> Returning to the *Winter* test, the correct question to ask, in determining whether a legal obligation is contingent at a particular point in time, is whether the legal obligation has come into existence at that time, or whether no obligation will come into existence until the occurrence of an event that may not occur.
>
> The fact is that the assessment created a legal obligation which was in existence at the point of time the proof of claim was filed.

[41] Earlier cases indicate that there must be an element of probability of liability otherwise the claim will be considered contingent. However, Nalcor's counsel referred to several authorities that suggest the claimant need not establish that success is probable (*Re Air Canada* (2004) 2 C.B.R. (5th) 23; *Oil Lift Technology Inc. v. Deloitte & Touche Inc.* [2012] A.J. No. 548). The mere fact that the claim is founded on pending litigation is not, in itself, determinative of the issue (*Re Wiebe* 1995, 30 C.B.R. (3rd) 109; *Oil Lift Technology Inc. v. Deloitte & Touche Inc.*, supra). However, the authorities are

consistent and clear that the claimant must establish that the claim is not "too speculative or remote".

[42] Nalcor's counsel relies on *Newfoundland and Labrador v. AbitibiBowater Inc.* 2012 S.C.C. 67 where the Court stated at paragraph 26:

> These provisions highlight three requirements that are relevant to the case at bar. First, there must be a debt, a liability or an obligation to a *creditor*. Second, the debt, liability or obligation must be incurred *before the debtor becomes bankrupt.* Third, it must be possible to attach a *monetary value* to the debt, liability or obligation. I will examine each of these requirements in turn.

[43] In *AbitibiBowater* the issue before the Court was whether an environmental protection order issued by the Province would ripen into a monetary claim. Under the applicable legislation, if the Province undertook remediation it was entitled to recover the costs of the same from the person against whom the protection order was issued. The Court concluded that the first two elements referenced above were satisfied thus the issue became whether the possibility of a monetary claim arising from the protection order was "too remote or speculative". If there was sufficient certainty of a monetary claim then it could be included in the insolvency process. The motions judge adjudicating the claim pursuant to the *Companies' Creditors Arrangement Act* ("*CCAA*") concluded that it was "most likely" that the Province would perform the remediation work and thus have a monetary claim to recover the remediation costs. In affirming the judge's decision the Supreme Court of Canada stated that the analysis must be grounded on the specific facts

of each case. The Court then went on to take exception to the threshold of "likelihood" applied by the motions judge. At paragraph 61 Deschamps, J. (for the majority) stated:

> Thus, I prefer to take the approach generally taken for all contingent claims. In my view, the *CCAA* court is entitled to take all relevant facts into consideration in making the relevant determination. Under the approach, **the contingency to be assessed in a case such as this is whether it is sufficiently certain** that the regulatory body will perform remediation work and be in a position to assert a monetary claim. (emphasis added)

[44] In my view, the "sufficiently certain" threshold applied in *AbitibiBowater* is really a restatement of the test applied in the preponderance of authorities: Is the claim too speculative or remote?

[45] Returning to the three elements set out in *AbitibiBowater*, Nalcor argues that it meets all three elements insofar as:

1. There is a debt, liability or obligation;

2. That the obligation predated the proposal; and

3. It is possible to assign a monetary value to the obligation.

Nalcor argues that all three elements are satisfied. I disagree.

[46] Insofar as Nalcor's Proof of Claim depends on its success in the Litigation and the Litigation is based on the Contract, I am prepared to accept, for the purposes of argument,

that Nalcor's claim predates the Proposal. The remaining two elements (whether there is an existing debt, liability or obligation and whether that obligation is capable of being assigned a value) go to the heart of whether Nalcor's claim is contingent and/or unliquidated. The very issue in the Litigation is whether GWF defaulted under the Contract. Can it be said that Nalcor's success on this issue at trial is not "too speculative or remote" or, put another way, is its success in the Litigation "sufficiently certain"? In my view, the answer to this question is no.

[47] Nalcor maintains that the obligation or debt owing by GWF to Nalcor crystalized upon GWF's default. Nalcor refers to Article 24.6 of the Contract which provides that all costs incurred by Nalcor arising out of "lawful exercise" of its remedies shall constitute a "debt" by GWF to Nalcor. However, whether Nalcor is entitled to the "lawful exercise" of any of its remedies is dependent upon whether GWF breached the terms of the Contract. GWF's debt is not crystalized by the issuance of the notice of default by Nalcor but by a final determination of whether GWF defaulted under the Contract. That is the very issue at the heart of the Litigation. The pleadings reveal a substantial dispute involving a complex commercial contract with hotly contested facts. GWF's obligation to Nalcor will only "crystalize" if GWF fails in the Litigation. If, on the other hand, GWF is successful then it will recover a substantial claim against Nalcor which will be used to fund the Proposal. Put simply, Nalcor's claim is completely contingent upon the outcome of the Litigation. Given the complexity of the legal proceedings, assessing Nalcor's chances of success in the Litigation would be a highly speculative exercise.

[48] In *Port Chevrolet* the court concluded that the speculative nature of a claim of a tax assessor under appeal rendered the claim contingent. There was a similar result in *2713250 Canada* even where the tax assessment was presumed valid and payable immediately. In my view, Nalcor's claim is not sufficiently certain and is too remote and speculative to be considered as anything but contingent. The Chair was correct in rejecting it on the basis that it was contingent.

(ii) Unliquidated

[49] In 2014 *Annotated Bankruptcy and Insolvency Act*, supra, at G-37(4) at page 630 it states:

> A liquidated claim is in the nature of a debt, *i.e.*, a specific sum of money due and payable under or by virtue of a contract. Its amount must either be already ascertained or capable of being ascertained as a mere matter of arithmetic. If the ascertainment of a sum of money, even though it be specified or named as a definite figure, requires investigation beyond mere arithmetical calculation, then the claim is an unliquidated claim: *Re A Debtor* (No. 64 of 1992), [1994] 1 W.L.R. 264 (H.C.).

[50] The essential elements of a liquidated claim are:

(a) a specific sum ascertained or ascertainable by mere arithmetic;

(b) payable under a contract.

[51] Nalcor relies upon Article 24 of the Contract. That Article sets out a methodology for calculating the damages for completion of the work in the event that Nalcor elects to do so upon breach by GWF. After issuing its notice of default, Nalcor advised GWF that it was proceeding under Article 24.4(b) and completing the work (Record, page 401). Nalcor's Re-stated Proof of Claim incorporates various schedules, one of which summarizes Nalcor's damages resulting from GWF's alleged default (Table 3, Record, page 406). Nalcor says that the aforesaid damages claimed are computed using the agreed formula set out in Article 24.6 and, as such, were ascertained as a mere matter of arithmetic and thus constitute a liquidated claim. I disagree.

[52] While the lion's share of Nalcor's claim is for completion costs, the validity of the claim as well as the assessment of damages is completely dependent on the outcome of the Litigation. For the same reason, I conclude that it cannot be said that Nalcor's claim is for a sum due and payable under a contract. That too will depend upon the outcome of the Litigation. In my view, Nalcor's claim is unliquidated.

[53] While it is not essential to my decision, I believe it is important that this matter be viewed in context. Nalcor's primary concern is that it be entitled to vote at the meeting of creditors. In the circumstances of this case, Nalcor can never share in the distribution. The Proposal depends on GWF succeeding in the Litigation for that is the only source for funding the Proposal. If GWF loses there are no funds for distribution. If GWF succeeds then Nalcor has no claim. In either case, Nalcor will not participate in the distribution.

Further, Nalcor has made it clear that if it is permitted to vote it will defeat the Proposal resulting in the automatic bankruptcy of GWF. The practical effect of this will be the discontinuance of the Litigation against Nalcor. While theoretically any creditor can continue the litigation, I believe it is improbable that any other creditor will assume the significant cost and risk of pursuing the litigation against Nalcor. In these circumstances the comments of Neilson, J. at para. 45 of *Port Chevrolet* resonate (see para. 31 above).

[54] Counsel for GWF argues that Nalcor is using the *BIA* for an improper purpose. Both Grant Thornton and TCE Capital Corporation argue that Nalcor's Proof of Claim does not satisfy the statutory requirements of subsection 124(4) of the *BIA*. Given my conclusion with respect to the Chair's determination that Nalcor's claim is contingent and unliquidated, it is not necessary for me to address these arguments.

VI. CONCLUSION

[55] Nalcor's application is dismissed and the Chair's decision to disallow Nalcor's claim for purposes of voting pursuant to section 108(1) of the *BIA* is affirmed.

[56] The respondent has been successful and is entitled to costs. Lengthy affidavits with extensive supporting documentation were filed in this matter and the parties submitted

comprehensive legal briefs. A full day was required for argument. In all the circumstances Nalcor shall pay costs to the respondent in the sum of $5,000.00.

Terrence J. Morrison,
J.C.Q.B.

Tab 8

Ontario Supreme Court
Canadian Triton International Ltd., Re
Date: 1997-10-22

In The Matter of the Bankruptcy of Canadian Triton International Ltd.

Ontario Court of Justice, General Division (In Bankruptcy) Farley J.

Heard: October 15 and 17, 1997

Judgment: October 22, 1997

Docket: 31-205425T

Steven G. Golick, for Price Waterhouse Limited, Interim Receiver and Trustee in Bankruptcy.

Keith M. Landy, for the Bankrupt, Canadian Triton International Limited.

J. Carfagnini, for Babak Movahedi.

Justin R. Fogarty, for Tradean Ltd., Alan Tyson and Mastin's Manitoulin Limited and GAC International Consultants Inc. and member of the Creditors Committee.

Steven Graff, for Duferco International Trading, Ltd.

Patrick Shea, for Doyle Salewski Lemieux Inc., the Trustee named in the Proposal of Canadian Triton International Ltd.

Chris Reid, for Nantong, S.A.

Stephen Turk, for Crown Resources Corporation, S.A. and Dr. Ati Olfati.

J.A. Fabello and R. Matheson, for Services Dowell Schlumberger, S.A.

***Farley J.*:**

Endorsement

[1] Price Waterhouse Limited ("PWL") in its capacity as interim receiver ("Interim Receiver") of Canadian Triton International Ltd. ("Triton") and in its capacity as Trustee in Bankruptcy of Triton ("Trustee") moved i. for advice and directions with respect to the outcome of four resolutions tabled and voted on at a meeting of creditors held on October 8, 1997 and in particular, as to the entitlement of creditors to vote at such meeting, and ii. for an order approving of the activities of the Interim Receiver as disclosed in the fourth and fifth reports of

the Interim Receiver. The hearing proceeded as scheduled on October 15, 1997 but was held over to October 17, 1997 to allow Doyle Salewski Lemieux Inc. ("Doyle") the trustee named in the proposal of Triton (which proposal was defeated on October 8, 1997 resulting in the bankruptcy) to provide possibly missing documentation and for others to provide any further material in regular fashion. Unfortunately there seems to have developed a practice in this case of interested persons forwarding and advancing material irregularly and at the last minute. Regular material would be by way of affidavits with exhibits or reports of court officers, not correspondence. An example of inappropriate timing would be that at the start of the hearing on the morning of October 15th I received a number of affidavits; before breaking for lunch I observed that I was wondering if I would receive additional material - which I did that afternoon (it having been prepared over the lunch hour). This affidavit of Robert Stein representing Duferco International Trading Ltd. ("Duferco") was said to have two exhibits attached - they were not. As well, the material handed up to me included a cross motion of Alan Tyson ("Tyson"), Tradean Limited ("Tradean"), GAC International Consultants Inc. ("GAC") and Mastin's Manitoulin Limited ("Mastin's"), (collectively "Fogarty Clients") to adjourn the motion of PWL above "to allow sufficient time for [the Fogarty Clients] to file responding material, iii. directing that cross examinations be conducted on the affidavit of Bernard Frankel filed in support of the proof of claim of Crown Resources Corporation, S.A., (iv) pursuant to section 116(5) of the *Bankruptcy and Insolvency Act,* removing Ata Olfati and Bernard Frankel as inspectors and substituting two inspectors in their place pending resolution of all claims; (v) directing a date for the validity of the proofs of claim before this Court…". Notwithstanding that this hearing was adjourned to October 17, 1997 with an invitation to any one to file any other relevant material, the Fogarty Clients did not submit any further material nor were they represented at the resumption. In today's world of communication capability it is not sufficient to baldly assert that more time is required without giving any justification. In his letter to Mr. Golick of October 17, 1997, Mr. Fogarty indicated that he did not have any submissions to make with respect to the form of proof of claim of Tradean, GAC and Tyson. In support of the cross motion by the Fogarty Clients an affidavit of A.J. Reynolds Mastin, barrister & solicitor and manager of Mastin's sworn October 14, 1997 was advanced. Paragraph 4 of that affidavit related to a telephone hearing before me (I being in Quebec City and essentially all representatives of the interested parties being in the boardroom of counsel for PWL in Toronto and other by conference phone). At the start of that hearing some counsel interrupted others on a repeated basis as well as referring to irregular material. I therefore advised that I

would allow them 10 minutes to sort out their order of speaking and that I only wished deal with regular material. Mr. Mastin indicates within paragraph 4 that: “the Court did not allow my Counsel or any other Counsel to make reference to the Resolution which was very important to the Creditors, namely that the Penguin Offer should be delayed until a Proposal was voted on.” That resolution was not mentioned in any material regular or irregular; it was not mentioned in any way nor the fact that it had not been commented upon by the Interim Receiver. Under the circumstances I do not see that any one was inappropriately prevented from raising anything material to my attention.

[2] Some counsel advised on October 15, 1997 that they had not had enough time to obtain instructions as to the aspect of the approval of the Interim Receiver’s activities as reflected in the fourth and fifth report. I advised that they should obtain these instructions by October 17, 1997. No one appeared then to object but Mr. Golick advised of Mr. Fogarty’s letter: an order will go approving of these activities. Mr. Fogarty’s letter of October 17, 1997 to Mr. Golick indicates that his clients “do not take issue with respect to the activities described therein with the exception to their position not being taken as an approval of the action and fees incurred by the Trustee with respect to Ata Olfati”.

[3] I think it helpful to observe that the balance of the PWL motion deals with the question of who is entitled to vote at the October 8, 1997 meeting and that because of the size of the asserted claims it was only necessary to deal with the voting capacity of Crown Resources Corporation SA (“Crown”), Duferco, Nantong, S.A. (“Nantong”) and Tradean. As Mr. Fogarty observed in his October 17th letter to Mr. Golick: “Ultimately I agree that the matter will rise and fall on how the claim of Nantong, S.A. and Crown Resources Corporation are characterized and those submissions have already been well canvassed before the court.” I would also observe that the question here is only with respect to entitlement to vote (on October 8, 1997) and not to entitlement to any distribution of the estate of Triton.

[4] I was directed to certain sections of the *Bankruptcy and Insolvency Act* R.S.C. 1985, c. B-3, as amended (“BIA”), namely ss. 105(1), 108(1), (3), 109(1), 121(2), 124(1), (2), (3), (4), 125 and Form 61 They are set out for ease of reference as well as s. 51(1), Form 38, s. 109(2) and s. 121(1):

> s. 51(1) The trustee shall call a meeting of the creditors, to be held within twenty-one after the filing of the proposal with the official receiver under subsection 62(1), by

sending in the prescribed manner to every known creditor and to the official receiver, at least ten days before the meeting.

(a) notice of the date, time and place of the meeting;

(b) a condensed statement of the assets and liabilities;

(c) a list of the creditors with claims amounting to two hundred and fifty dollars or more and the amounts of their claims as known or shown by the debtor's books:

(d) a copy of the proposal;

(e) the prescribed forms, in blank, of

(i) proof of claim,

(ii) in the case of a secured creditor to whom the proposal was made, proof of secured claim, and

(iii) proxy,

if not already sent; and

(f) a voting letter as prescribed.

s. 105(1) The official receiver or his nominee shall be the chairman at the first meeting of creditors and shall decide any questions or disputes arising at the meeting and from any such decision any creditor may appeal to the court.

s. 108(1) The chairman of any meeting of creditors has power to admit or reject a proof of claim for the purpose of voting but his decision is subject to appeal to the court.

(3) Where the chairman is in doubt as to whether a proof of claim should be admitted or rejected, he shall mark the proof as objected to and allow the creditor to vote subject to the vote being declared invalid in the event of the objection being sustained.

s. 109(1) A person is not entitled to vote as a creditor at any meeting of creditors unless he has duly proved a claim provable in bankruptcy and the proof of claim has been duly lodged with the trustee before the time appointed for the meeting.

(2) A creditor may vote either in person or by proxy.

s. 121(1) All debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt or to which the bankrupt may become subject before the bankrupt's discharge by reason of any obligation incurred before the day on which the bankrupt becomes bankrupt shall be deemed to be claims provable in proceedings under this Act.

(2) The court shall, on the application of the trustee, determine whether any contingent claim or any unliquidated claim is a provable claim, and, if a provable claim, it shall value the claim, and the claim shall after that valuation be deemed a proved claim to the amount of its valuation.

s. 124(1) Every creditor shall prove his claim, and a creditor who does not prove his claim is not entitled to share in any distribution that may be made.

(2) A claim shall be proved by delivering to the trustee a proof of claim in the prescribed form.

(3) The proof of claim may be made by the creditor himself or by a person authorized by him on behalf of the creditor, and, if made by a person so authorized, it shall state his authority and means of knowledge.

(4) The proof of claim shall contain or refer to a statement of account showing the particulars of the claim and any counterclaim that the bankrupt may have to the knowledge of the creditor and shall specify the vouchers of other evidence, if any, by which it can be substantiated.

s. 125 Where a creditor or other person in any proceedings under this Act files with the trustee a proof of claim containing any wilfully false statement or wilful misrepresentation, the court may, in addition to any other penalty provided in this Act, disallow the claim in whole or in part as the court in its discretion may see fit.

Form 38 dealing with voting letters (ss. 51(1)(f) and 66.15(3)(c)) contains the following provision and instruction.

…to record my (*or* our) vote_____(for *or* against) the acceptance of the proposal (*or* consumer proposal) made on the___day of___…

NOTE a person is not entitled to vote unless the proof of claim has been lodged with the Trustee before the time appointed for the meeting. In the case of the corporation the voting letter should be accompanied by an appropriate resolution.

Form 61 dealing with proof of claim (ss. 50.1(1), 51(1)(e), 66.14(b), 81.2(1), 102(2), 124(2) and 128(1)) contains the following:

3. That the said debtor was at the date of the bankruptcy (*or* the proposal *or* the receivership), namely the___day of_____and still is indebted to the above named creditor (referred to in this form as "the creditor") in the sum of $_____as shown by the statement of account (*or* affidavit) attached hereto and marked "Schedule A", after deducting any counter claims to which the

debtor is entitled. (The attached Statement of Account or affidavit must specify the vouchers or other evidence in support of the claim.).

The original proposal of Triton was that dated September 10, 1997; it was further amended, most recently by amendment dated October 3, 1997. Doyle at the October 8, 1997 meeting indicated that there would be further amendments. At that time there was a motion put to the meeting that it be adjourned three weeks to enable Triton to file a further amended proposal and provide the letter of credit contemplated by the proposal.

[5] It would seem to me to be reasonably obvious that the determination as to who is allowed to vote at a particular meeting has to be decided on the basis of what information (i.e., the appropriate material) was available to the Chair of the meeting (in this case the Official Receiver) at the time the vote was conducted. See *Andrew Motherwell of Canada Ltd., Re* (1923), 4 C.B.R. 265 (Ont. S.C.) at p. 268: "Again I do not see how I can allow any new

material to go in at this stage. We must deal with the proxies as of the date the votes were cast under them." In other words, it would be inappropriate to go back after the meeting and attempt to cooper up any observed deficiency with the material filed for the purpose of voting. That is not to be confused with material *then available* to the Chair. If it were otherwise, then there could be a (never ending) string of attempts at bolstering the material so that it was objectively satisfactory and that the estate would continue to be in a state of uncertainty as to any vote taken. Any appeal from the Chair's decision should be in accord with the appeal provision and be on a single appeal basis. That is not to imply that the material could not be coopered up for any *future* vote or for the purpose of entitlement to any future distribution. The time for lodging the proxy according to Holden and Morawetz, "The 1997 Annotated *Bankruptcy and Insolvency Act"* (1996; Toronto, Carswell Co.) ("H & M") at p. 335 "must, however, be filed with the Chair before the taking of the vote, not afterwards: *Britannia Canning Co., Re* (1938), 19 C.B.R. 250 (Ont. S.C.)."

[6] As well, it would appear that a creditor can vote on a proposal by way of voting in person or by proxy (s. 109(2)) but also by way of voting letter (s. 50(1)(f) and Form 38). However, it is obvious from the voting letter form that it is an instruction for the trustee of the proposal to vote for or against the (specific) proposal of the debtor which is dated a specific day. It is not an instruction to vote on some other proposal. The Duferco voting letter instructed the trustee of the proposal, Doyle, to vote in favour of the Triton proposal dated September 10, 1997 and not on any amended proposal which was before the creditors on October 8, 1997. Query in any event whether Duferco provided a corporate resolution as required by Form 38. I would observe in passing that it may well be that the trustee instructed by a voting letter could use that authority to vote in favour of an adjournment of the meeting called for the purpose of considering that specific proposal so that that specific proposal could be voted on at a later date (but not that another or materially amended proposal be voted on at a later date). I note that Duferco also executed a proxy in favour of Robert P. Stein ("Stein") (which proxy is also dated September 18, 1997 as was the voting letter). In my view it would appear that Stein could vote on any matter at the meeting (or any adjournment) provided that he not vote against the proposal dated September 10, 1997 contrary to the express wishes of his principal as set out in the voting letter. However, it is also clearly obvious to me that a proxy must be present at the meeting in order to vote. Stein was not present at the October 8, 1997

meeting. No one else held the proxy from Duferco at that meeting. I am of the view that Duferco could not vote at the October 8, 1997 meeting.

[7] Nantong filed a proof of claim dated September 19, 1997 for $19,777,650 US "as shown by the statement of account (or affidavit) attached hereto and marked "Schedule A"." There was no Schedule A attached, at least anything which was marked Schedule A. However the fax transmittal page carried the following message reproduced in its entirety: "Also attached is the Judgment and Statement of Claim." The judgment was that of Paisley J. dated July 26, 1996 giving summary judgment to Nantong against Triton and its principal Vladimir Katic for the Canadian equivalent of the $19,777,650 US together with cost of $15,000. The Statement of Claim was the one in relation to this judgment. Curiously enough there was no indication in the material transmitted to the trustee of the proposal, Doyle, that the Court of Appeal had set aside Paisley J.'s judgment. The Court of Appeal's decision is reported as *Nantong S.A. v. Katic* (February 26, 1997), Doc. CA C25404 (Ont. C.A.). The total endorsement was as follows:

> We are of the view that there are genuine issues for trial especially with respect to misrepresentation. The appeal is allowed, the order of Paisley J. set aside and the case remitted for trial. Costs of the motion for summary judgment and the appeal will be in the cause.

Ms Conway's October 14, 1997 affidavit handed up to me on October 15th indicates:

> 2. In response to the request of Doyle Salewski Lemieux Inc. as the Trustee in the Proposal of Canadian Triton International Ltd., I filed on behalf of Nantong S.A. a Proof of Claim. I attached thereto the Judgment which Nantong S.A. had obtained on a summary judgment motion before Justice Paisley and the Statement of Claim. The purpose of filing the Statement of Claim was to set out that our claim is based on Promissory Notes and the purpose of filing the Judgment was to quantify our claim which is succinctly done in the Judgment.

It may be puzzling why this seemingly roundabout method of dealing with the proof of claim was chosen, but I give that the benefit of the doubt. Ms Conway goes on to indicate at paragraph 4 of her affidavit that she attended the first meeting of creditors in the proposal on September 24, 1997 at which time she asked if there were any problems with Nantong's proof of claim on entering "an adjoining room where the Official Receiver, Mr. Doyle on behalf of the Trustee and Mr. Golick and Mr. Shea as solicitors for respectively the Interim Receiver and the Trustee were going over the Proofs of Claim. I asked if there was any problem with Nantong S.A.'s Proof of Claim. I advised that I had in my possession and indeed in my hands

the Promissory Notes which formed the basis of the claim. Mr. Shea indicated that there was no problem with the claim. I asked about the quantification of the claim, since Canadian Triton International Ltd. in its Proposal had indicated that Nantong S.A.'s claim was $6.5 million, which is (roughly) the amount owing under only one of the Promissory Notes. I was advised that there was no problem with the amount Nantong S.A. was claiming." No one has disputed this portion, although Doyle, the trustee under the proposal in its report of October 14, 1997 states:

> 12. At a meeting of creditors held on September 24, 1997 Crown requested that it be permitted to review and copy all of the proofs of claim submitted to the Trustee [Doyle]. The Trustee complied with this request. No other creditors asked to review the proofs of claim. *The Interim Receiver did not ask to review the proofs of claim.* (emphasis added)

Ms Conway went on at paragraph 7 to state:

> 7. It did not occur to me to file the Court of Appeal's Order because I was not relying on the Judgment except to quantify the claim. The fact that the Court of Appeal ordered the matter to be tried, was, I believe, well known to all the parties to the Bankruptcy proceeding. I frankly did not advert to the fact that Mr. Shea, being newly appointed, would not know the history.

Nor of course would the Official Receiver who was chair of the meeting. I am however satisfied that there was no intent to deceive but only inadvertence.

[8] Nantong was represented by proxy at the September 24, 1997 meeting by Pascal Mahvi. He was not available for the October 8, 1997 meeting. Ms Conway indicates that she filed a proxy appointing her for that meeting. Doyle has now provided Mr. Golick with a proxy naming Ms Conway which proxy is dated October 6, 1997. Doyle does not indicate when it received this proxy (i.e. before, during or after the October 8 meeting). However even assuming that it was received in time (and that should be verified by Doyle and Ms Conway) we still have to deal with the question of whether Nantong was entitled to vote at the meeting.

[9] Sections 121(2) and s. 109(1) of the BIA come into play with respect to the voting contingent claims or the claims for unliquidated damages. As set out in H & M at p. 333:

> …By section 109(1) a person is only entitled to vote at a meeting of creditors if he or she has a provable claim. By s. 121(2), a contingent claim or a claim for unliquidated damages is only a provable claim for the amount at which it has been valued by the court.
>
> A creditor with a claim for unliquidated damages has no right to vote until his or her claim has been valued pursuant to s. 121(2): *Re Andrew Motherwell of Canada Ltd.*

(1923), 4 C.B.R. 483, [1924] 4 D.L.R. 1308, 54 O.L.R. 614 (Ont. C.A.); *Re Arthur Fuel Co.* (1926), 8 C.B.R. 46, [1927] 1 D.L.R. 646, [1927] 1 W.W.R. 158 (Man. K.B.).

Given the uncertain nature of the Nantong claim at this stage and the Court of Appeal's concerns about whether or not there has been misrepresentation, it would not seem to me that Nantong can substantiate that on the basis of the material it has presented, it has other than a claim for unliquidated damages which must be valued - either by compromise by the trustee or by the summary valuation procedure by a judge so valuing the claim pursuant to section 121(2). In a sense as well it has a contingent claim - i.e. its claim has been disputed by Triton and this must be ruled on. I would note as well the views of Noble J. in *Claude Resources Inc. (Trustee of) v. Dutton* (1993), 22 C.B.R. (3d) 56 (Sask. Q.B.) at p. 65. As Fisher J. in *Motherwell supra* stated at p. 267:

> In dealing with Taylor and Bornique's claim of $21,417.28 for damages (objected to at the meeting) arising by a failure of the debtor company to take delivery of a large quantity of goods which they had agreed to purchase, the trustee admits in his affidavit that it is a claim for unliquidated damages - that it has not been contested by him nor has it been valued by the Court. Section 44, subsection (3) of the Bankruptcy Act [1 C.B.R. 51] provides that the court shall value at the time and in the summary manner prescribed by the general rules all contingent claims and all claims for unliquidated damages, and *after* but not *before* such valuation every such claim shall for all the purposes of this Act be deemed a proved debt to the amount of its valuation. It is not a proved debt until valued by the Court. Rule 119 [1 C.B.R. 212] sets out the procedure to be followed in such cases. Section 20 - a trustee has power to make a compromise [1 C.B.R. 29] and the trustee did nothing under this section. Sub-section (9) of section 42 reads as follows:-
>
> > A person shall not be entitled to vote as a creditor at the first or any other meeting of creditors unless he has duly proved a debt provable in bankruptcy or under an authorized assignment to be due to him from the debtor, and the proof of claim has been duly lodged
> >
> > with the trustee before the time appointed for the meeting. [1 C.B.R. 48.]
>
> I must therefore hold that, as this claim has not been valued pursuant to the statute, it is not a proved claim until it is valued; it is only upon a proved claim that a vote can be taken; and that the 24 votes be disallowed.

H & M at pp. 346-7 state:

> When a contingent or unliquidated claim is filed with the trustee he shall, unless he compromises the claim, apply to the court to determine whether the claim is a provable claim, and, if so, to value the claim: R. 94(1). The court will then determine whether the claim is provable or not, and if the claim is provable will value it. Thereupon the claim is deemed a proved claim to the amount if its valuation: s. 121(2).
>
> The trustee must, prior to the hearing of the application under R. 94(1), file in a court a copy of the claim and an affidavit sworn by himself, the bankrupt or some other person

having knowledge of the claim setting out in detail the available information relating thereto: R. 94(2). In determining the matter the court may receive evidence upon affidavit: R. 94(3).

A trustee is not entitled to disallow a claim under s. 135 because it is a contingent or unliquidated claim. The trustee must apply to the court under s. 121(2) to have it determined whether the claim is a provable one following the procedure set out in R. 94: *Re Light's Travel Service ltd.* (1985), 56 C.B.R. (N.S.) 175 (B.C.S.C.).

Both claims for unliquidated damages arising by reason of contract and claims for unliquidated damages sounding in tort are claims provable in bankruptcy under s. 121. Such claims should be filed in the usual way under s. 124 whereupon the trustee should proceed in the manner provided in s. 121: *Re Letovsky and Mutual Motor Freight Ltd.* (1958), 37 C.B.R. 83 (Man. S.C.). See *Re Angelstad* (1991), 4 C.B.R. (3d) 235 (Sask. Q.B.).

The contingent liability of a guarantor who has not been called upon to pay or who has not in fact paid, is a debt provable in bankruptcy of the debtor: *Re Film House Ltd.* (1971), 15 C.B.R. (N.S.) 232 (Ont. S.C.).

To be a provable claim under s. 121(2), a claim must not be too remote and speculative. To establish that a contingent claim or unliquidated claim is a provable claim, a creditor must prove more than he has been sued, and that he has an indemnity agreement from the bankrupt: there has to be an element of probability of liability arising from the court proceedings. If there are too many "ifs" about the action and the applicability of the indemnity agreement before a provable claim comes into being, the claim is not a provable claim under s. 121(2): *Claude Resources Inc. (Trustee of) v. Dutton* (1993), 22 C.B.R. (3d) 56, (*sub nom. Claude Resources Inc. (Bankruptcy), Re)* 115 Sask. R. 35 (Q.B.).

Nantong not having proved its claim, it should not be allowed to vote until it does and such votes and entitlement to distribution are as to prospective matters and not retroactive to October 8, 1997.

[10] What of the aspect of not having marked the attachments as "Schedule A" (i.e. the attachments to the proof of claim). There are various judicial

views on this but nothing recent. See *London Bridge Works Ltd., Re* (1926), 8 C.B.R. 73 (Ont. S.C.) where Fisher J. at pp. 78-9 stated:

(3) Cowan Hardware Company is not entitled to a vote for the reason that the declaration of proof is defective. The declaration states that the insolvent company is indebted to the creditor "in the sum of $68.70 as shown by the account hereto annexed and marked A." I find there is no account annexed and marked A to this declaration, but only an invoice pinned to it, and the only particulars given are "account rendered $68.70." The account is not signed by the commissioner, and it should have been. It is necessary that particulars of an account should appear either in the declaration or in the account attached, so that a chairman may be in a position to exercise some scrutiny on

a claim filed. See *In Re McCoubrey; In Re Stratton and Greenshields Ltd.* (1924), 5 C.B.R. 248, [1924] 3 W.W.R. 587.

The rule that a creditor must file a claim within a certain time is only directory, but when a creditor prepares a declaration of proof The Bankruptcy Act is mandatory and must be strictly complied with, and if the Act is not complied with the proof of claim cannot be admitted by the chairman. A chairman is entitled to exercise his own discretion as to what proofs of claim he should admit or reject for the purpose of voting, and it is only when he entertains an honest doubt whether the proof of a creditor should be admitted or rejected that he is called upon to mark the proof objected to and allow the creditor to vote. It is only in cases where the Act has not been strictly complied with that the Court will interfere on an appeal from the chairman's decision.

See also *D.W. McIntosh Ltd., Re* (1939), 20 C.B.R. 267 (Ont. Bktcy.) at pp. 272-3 and pp. 280-1 where Urquhart J. observed:

Lastly the account must be marked "A". This requirement caused a considerable amount of argument in this case and I was referred to the case of *In Re London Bridge Works Ltd.* (1926), 8 C.B.R. 73, at p. 78, 3 Can. Abr. 652 or Abr. Bkcy. Cas. 504, where Fisher J. says:

> Cowan Hardware Company is not entitled to a vote for the reason that the declaration of proof is defective. The declaration states that the insolvent company is indebted to the creditor 'in the sum of $68.70 as shown by the account hereto annexed and marked A'. I find there is no account annexed and marked A to this declaration, but only an invoice pinned to it, and the only particulars given are 'account rendered $68.70'. The account is not signed by the commissioner, and it should have been.

It was argued before me that I am bound to find, following this decision, that unless the account marked "A" is signed or initialled by the commissioner the creditor cannot vote. I cannot agree with that argument. The form provides that the account must be marked "A"; that is all, and I think that the words of Fisher J. at page 78, "The account is not signed by the commissioner and it should have been" are mere obiter. He found in that case that there was no account marked "A" but only an invoice pinned to the declaration and with insufficient particulars. That is the gist of his decision and his subsequent words above last quoted

must be regarded as mere obiter. I have taken the matter up with him and he agrees that this is so.

If the account is a proper one and is annexed to the declaration in the sense I have above described and with particulars itemized, as I have detailed, and is marked "A", that is a full compliance, in my opinion, with the requirements of the section and rule. I have always considered it to be the best practice to have the commissioner either sign or initial the account for identification but I do not think the wording of the statute requires same.

Fisher J. in the above case goes on to say:

> It is necessary that particulars of an account should appear either in the declaration or in the account attached, so that a chairman may be in a position to exercise some scrutiny on a claim filed.

> The provisions of sec. 105(4) [14 C.B.R. 14] in regard to proof are not merely directory but are mandatory. It is enacted that the proof "shall contain or refer to a statement of account": *In Re McCoubrey,* supra, at p. 255. There must be reasonable compliance with this section otherwise the proofs must be disregarded for voting purposes. I think however in determining what is a reasonable compliance with the section and form, what are obviously clerical errors must be ignored.
>
> (pp. 272-3)
>
> (15) The last claim is that of the solicitor for the company, Mr. Rosenberg himself. It carries two votes and was admitted by the chairman. The only objection taken to the proof was that the statutory declaration did not disclose the name of the creditor.
>
> In regard to the objection taken, the declaration is made by Anne Schwarts who declares that she is the bookkeeper of the undermentioned creditor and has knowledge of the circumstances. There is no creditor undermentioned in the declaration itself. The declaration then goes on in the security clause to say the said creditor has no security. However, the account marked "A" is headed as follows: "D.W. McIntosh, Limited, in account with Henry S. Rosenberg". As the account marked "A" is by the form and the section made part of clause two, I think it can be read as if the account marked "A" follows in the space left for particulars after clause 2 and before the security clause 3, and therefore reading the two documents together in this manner the undermentioned creditor is Henry S. Rosenberg.
>
> No objection was taken at the meeting as to the form of the account marked "A" annexed to Mr. Rosenberg's declaration. I am of opinion that if it is necessary to have recourse to the account for the purpose of making good the declaration, any defects in the account should be open to the inspection of the Court although objection to such defects was not made at the meeting. In other words a defective declaration should not be allowed to be made good by a defective account.
>
> This account was itemized to a certain extent but there are no dates given for the various services set out, but there is a general date, December 2, 1938, at the head of the account. This is approximately the date of the commencement of the bankruptcy proceedings above referred to. No one can tell over what period the
>
> services in question were rendered and the account and therefore the whole proof of claim is defective.
>
> I would expect a greater degree of precision from members of the legal profession than I would from an ordinary commercial creditor. (pp. 280-1)

But for a more relaxed or lenient view see the observation of Tweedie J. *McCoubrey, Re,* [1924] 4 D.L.R. 1227 (Alta. S.C.) at pp. 1234-5:

> The fourth objection is that the statement submitted along with the declaration is not sufficiently identified to comply with the provisions of Form 47 so as to constitute a proper reference within the meaning of sec. 45(4) of the Act. This objection applies to proofs of fourteen creditors.
>
> The declarations all referred to accounts as being "annexed and marked 'A.'" Statements were in fact annexed to all the declarations, some of which had marked on them the letter "A" without any words to indicate that the letter referred to the declaration while the remainder were not marked at all.

> As already pointed out Form 47 indicates the method by which reference may be made, which must be deemed to be the manner in which the identification of statements is authorized by the Rules, and the statement of account is *prima facie* properly referred to in a declaration only when it is "annexed and marked 'A.'" Neither Form 47 nor the words in the form, however, are exclusive. Some of them or others may be used subject to certain penalties, as to costs, for their use (R. 3). What is meant by "refer" as used in s. 45(4)? The purpose of this section is to compel a claimant to furnish a statement as part of the evidence by which the person authorized to make a decision must be guided in arriving at his decision, and the reference to it is sufficient if it is referred to with such particularity that it may be identified and become incorporated with and form part of the proof. If the statement is a proper one and it is annexed to the declaration though not marked and from an examination of the statement in conjunction with the declaration to which it is attached or from other circumstances, the person who has to decide in regard to the admissibility of the proof may reasonably conclude that the statement is the one referred to, he is justified, in the exercise of his discretion, in receiving it and his decision should not be interfered with. I am satisfied from an examination of the documents that the statements in question were annexed and were the ones referred to and the objection cannot be sustained.

H & M at p. 329 observed:

> **(2) Formalities**
>
> If there is not a reasonable compliance with the statutory requirements of the Act for proofs of claim, a creditor will not be permitted to vote. In determining what is reasonable compliance, clerical errors should be ignored and reasonable allowance ought to be made for the fact that the Bankruptcy and Insolvency Act is a businessman's statute and contemplates that businessmen will file their own proofs of claim: *Re D.W. McIntosh Ltd.* (1939), 20 C.B.R. 267 (Ont. S.C.).
>
> When the proof of claim is from a workman or a layman, the chair should be more lenient in determining if the proof of claim complies with the Act, but if the claim emanates from a trader, the proof of claim should be held to a more
>
> rigid compliance with the requirements of the Act: *Re Corduory's Unlimited Inc.; Grobstein and Lawrence v. Canadian Corduroys Ltd.* (1962), 4 C.B.R. (N.S.) 250 (Que. S.C.); but see *Re G. Totton Publishers Ltd.* (1975), 20 C.B.R. (N.S.) 140 (Ont. Reg.).

I would be of the view that under these circumstances (given the annexure, the limited number of claims with the result that the trustee would not be over burdened with "defective" proofs) it is reasonable to conclude that the failure to mark the attachment as Schedule A is not fatal to a proof of claim if otherwise valid. It would seem to me that this formalism is designed to assist a trustee who may otherwise be inundated with either a vast number of proofs from various claimants and/or a jumble of attachments. I do not see that the trustee in these circumstances could not have readily reached the conclusion that the attachments here were what were otherwise intended to be Schedule A, there was nothing to conflict with that conclusion and it does not appear that the trustee has complained that it could not complete

its task notwithstanding the absence of the marking as Schedule A on the attachments. I am however of the view that Tweedie J. at pp. 1235-6 of *McCoubrey, Re, supra,* has some helpful observations as to what should go into the statement of account:

> There is nothing in any of these five statements to indicate who is the debtor or who is the creditor or as to why the payments were made. A person examining them without the assistance of extrinsic evidence could only conclude that the payments were being made by the claimants on account of their indebtedness to the authorized assignor while in fact the reverse was the case. The claimants were each buying suits of clothes on the instalment plan and when an amount agreed upon was paid in, the person making such payments would be entitled to a suit. The statement of account should clearly indicate who is debtor and who is creditor and give such particulars, with dates, as are necessary to disclose the origin or nature of the liability, such as, "goods sold and delivered," "money lent," "services rendered," or, if there be particular circumstances which do not come within what are generally known as the common counts, the particular circumstances giving rise to the claim as well as all payments in cash or otherwise for which the debtor is entitled to credit. It is not necessary that the statement should contain in detail an itemized account of the goods sold and delivered, but it is sufficient if it shows goods sold on a certain date as is the practice in statements of commercial houses in connection with their monthly statements. If the claim is for money lent, the particulars of the loan should be given; if for services rendered, the extent thereof and the period within which they were rendered; if on a bill of exchange, sufficient particulars to identify the instrument, or in special cases sufficient particulars to acquaint the person whose duty it is to pass upon the proof with the nature of the particular transaction.

With respect to GAC, Tradean and Tyson, Doyle has confirmed that Mr. Mastin provided a proof of proxy minutes before the meeting to the Doyle offices and this was relayed to the meeting immediately thereafter. It would

appear that these proxies were in regular form. With respect to Tradean and Tyson it was indicated that the documentation may have been split in the sense that PWL received separately from Doyle a proof of claim and proxy and then apart from that a schedule. However it appears from Tyson's transmittal cover sheet of September 18, 1997 that he sent Doyle the material together. The Tradean proxy in favour of Mr. Mastin is subsequently dated (October 7, 1997) from that it gave in favour of Mr. Fogarty (September 22, 1997) and I would be of the view that the subsequent proxy is the operative one. Thus it would appear that Tradean, GAC and Tyson could vote on October 8, 1997.

[11] Let us now turn to the question of Crown's ability to vote. Crown's proof of claim was objected to by Doyle, as trustee under the proposal. Crown's claim is based upon a contract between it and Triton which provides that Crown is to be paid a fee equal to 10% of the total contract value of Triton's participation in certain Iranian projects. This matter is the subject of

arbitration in Switzerland which is apparently somewhat in practical suspension as it does not appear that either side has been pushing to have it finally determined. Doyle's objection to Crown's position would appear to me to be somewhat round about - e.g. asking for documentation that Crown is a valid and subsisting corporation under the laws of Liberia which is authorized to do business in Iran. However, for the same reasons as I reviewed in rejecting Nantong's right to vote because its claim had not been valued, it would seem to me that Crown's claim is similarly affected. That is, it cannot vote until its claim has been established as a valued claim pursuant to s. 109(1) and s. 121(2). Triton in the arbitration proceedings has stated (paragraph 8): "[Crown] did not fulfill its obligations towards [Triton] and performed no services either directly or indirectly which resulted in the award of the NIOC [National Iranian Oil Company] contract to [Triton]." Given the requirements of the BIA concerning establishment and valuation of a provable claim before a claimant is allowed to vote as a creditor, I do not see that the handing up of a November 26, 1993 letter from the Head of Drilling Operations of the National Iranian Oil Company (NIOC) is helpful for the purposes of the October 8, 1997 vote even though it does indicate that it "is to acknowledge successful completion of the NIOC - CTI [Triton] 53 wells turnkey drilling contract… completing the project with about 20M USD [$20 million US] less than project budget (258M USD) which was financed by Canadian Triton International."

[12] It also seemed somewhat curious that Doyle (now appreciating that Nantong did not have a final judgment since Paisley's judgment was set aside by the Court of Appeal) did not directly address whether Nantong fell into the same difficulty as did Crown although I do note that Doyle in paragraph 23 of its October 14, 1997 report did ask for "the advice and direction of the Court respecting the hearing of Crown's appeal from the disallowance of its claim and the timing for the adjudication of any other disputed claims."

[13] It would seem to me that these claimants with contingent or unliquidated claims should proceed according to the provisions of section 121(2) to establish and value their claims if they wish to participate in any future voting or distribution.

[14] Based on the foregoing it would appear to me that the motion to adjourn was defeated, that the amended proposal was appropriately voted on and defeated and that there resulted therefore a bankruptcy of Triton. As well there was the substitution of PWL as trustee in bankruptcy vote and vote electing inspectors which should be counted in accordance with my

observations above. The Schlumberger claim together with the other undisputed claims against the adjournment are sufficient to defeat that motion even allowing for the positive vote of Tradean etc. This follows through the other votes.

[15] I would also note that it appears that the Official Receiver allowed a vote by Duferco in favour of the adjournment - but based on a misunderstanding that Duferco was properly represented at the meeting. Since in my view it was not so properly represented, its vote on the adjournment is not valid. As Chair, the Official Receiver was quite correct in agreeing with Gordon Marantz, counsel for the Interim Receiver at pp. 50-1 of the transcript of the October 8, 1997 meeting when it was noted that Duferco had no vote on the proposal question that this would change the adjournment vote as well.

> The Chairperson: Ladies and gentlemen, the vote hasn't changed, except for the abstaining vote.
>
> Right, could you do some calculations for me, please.
>
> Mr. Olfati: Is there a proxy for Duferco?
>
> Mr. Doyle: We are trying to locate it right now.
>
> Mr. Graff: I am the representative, but I understood that Robert Stein was the proxy.
>
> Mr. Marantz: Well, that changes the vote on the motion to adjourn as well.
>
> The Chairperson: Yes, it will, yes, it will.
>
> Mr. Marantz: It doesn't change the result, but it changes the numbers.
>
> Mr. Carfagnini: The percentage goes a lot higher.
>
> Mr. Williams: I apologize—
>
> Mr. Carfagnini: So, general proxy in favour of the Trustee?
>
> Mr. Brent Williams: No, still with Mr. Stein, who was present last week.
>
> The Chairperson: What was the total, Brian?
>
> Mr. Doyle: Seven million for Duferco.
>
> Mr. Marantz: Nothing appears to turn on it.
>
> Mr. Turk: No, but could we have the revised percentage anyway?
>
> The Chairperson: This is the percentage, taking out Duferco and also with Nantong abstaining, okay—there you go.
>
> Mr. Brent Williams: The "no" votes, 74.51% and the "yes" votes, 25.45%.
>
> The Chairperson: Has everybody got those numbers?
>
> The resolution fails.
>
> We now have a deemed bankruptcy of the company.

It is clear that the Official Receiver was relying on what she appropriately thought was correct information being given to her which information was in fact incorrect. She was quite right in noting that there should therefore be a revision to the vote calculations on the adjournment, based upon the correct information. To say that such an error when caught (and no one having acted to their detriment) cannot be corrected is abhorrent to the principles and philosophy of the bankruptcy and insolvency legislation.

[16] Voting at meetings of creditors must be in accordance with the provisions of BIA. I think it salutary to remember the concluding words of Gomery J in *Toia v. Cie de Cautionnement Alta* (1989), 77 C.B.R. (N.S.) 264 (Que. S.C.) at p. 270:

> Distinguishing between the rules governing procedure at meetings of creditors which must be strictly enforced and those which are merely directory is not always easy. In *Re McCoubrey; Re Stratton,* 5 C.B.R. 248, [1924] 3 W.W.R. 587, [1924] 4 D.L.R. 1227 (Alta.), it was decided that in the latter case, if the chairman of the meeting has exercised his discretion reasonably, his decision should not be interfered with. However, mandatory rules must be complied with.
>
> In the court's opinion, the rule breached by the Official Receiver in this case was mandatory. *The only way in which a creditor is able to participate in the administration of the estate of a bankrupt is by voting at meetings of creditors. If the votes of other creditors are improperly allowed or calculated, the will of the majority may not prevail.*
>
> (emphasis added)

It should be obvious that creditors who wish to vote should ensure that they successfully pass over the hurdles imposed by BIA - specifically here that they have any contingent or unliquidated claims established and valued as per section 121(2) or that they are properly represented at any vote. Minor imperfections which do not go to the heart of the claim or authority to vote when viewed objectively should not go to preventing the true will of the (validated) majority from prevailing.

[17] The Fogarty Clients also moved for an order giving the relief of "(iv) Pursuant to section 116(5) of the *Bankruptcy and Insolvency Act,* removing Ata Olfati and Bernard Frankel as inspectors and substituting two inspectors in their place pending resolutions of all claims." In the grounds for such removal it was stated that "(v) Two of the three inspectors appointed have a conflict of interest in so far as their claims are being challenged. No person is eligible to be appointed or to act as an inspector who is a party to any contested action or proceeding by or against the estate of the bankrupt."

[18] Bernard Frankel is a representative of Crown. While he personally is not a party to Crown's contested proceeding, I note that *Maheu v. Rodrigue* (1984), 51 C.B.R. (N.S.) 132 (Que. S.C.) indicated that the prohibition in s. 116(2) applies to a representative of the corporation as much as to an individual. It would therefore appear to me at this stage that Mr. Frankel's position is questionable. The Fogarty Clients, through Mr. Mastin's affidavit also suggest that Dr. Olfati was involved with Crown (and by implication continues to be so involved) as a result of his having signed a document on behalf of Crown some years previously. It would appear to me that this question should be explored further to determine if there is any presently existing conflict. I would generally note that if a matter came up before the inspectors and one of them was directly affected by being a creditor or the representative of a creditor whose claim was being contested or affected in some way different from the general body of creditors, then it would be appropriate for that inspector to remove himself from debate and vote on that item. I note as well that BIA does not lay down any particular qualifications for inspectors and does not require that an inspector be a representative of a creditor: see *F & W Stereo Pacific Ltd., Re* (1975), 22 C.B.R. (N.S.) 84 (B.C. S.C.). I note that Mr. Frankel does not appear to have been served with the motion to have him removed. Thus, it would be inappropriate at this time to make any binding decisions concerning Mr. Frankel or Dr. Olfati. Rather it would be appropriate to have this heard on a regular basis.

[19] While on that topic, it would be helpful to the Court, the system of justice and the administration of and principles of BIA, if all interested parties adhered to the maximum extent possible in the circumstances to the established procedures for serving motions preparing motion material and attempting to have matters dealt with in Court. The Court will always try to deal in a timely fashion with true emergencies, however these emergencies should not be self created ones or situations where the parties have refrained from taking timely action at an earlier time. One is struck by the frequency and amount of last minute or after the fact filings and irregular material.

[20] Further along those lines, Triton (or its principal Vladimir Katic) continues to submit material concerning what appears to be additional information concerning a desired reorganization of Triton. The latest in this is an affidavit of Samuel Marr, a partner in the legal firm retained by Triton who attaches a letter dated October 13, 1997 from PT Tertimas Comexindo to "Doyle Salewski Lemiuex Inc. [in trust] 5617 Yonge Street, Toronto, Ontario, Canada M2M 3S9" (it may be that Doyle which is located in Ottawa has this as a Toronto

address). Mr. Marr describes PT Tertimas Comexindo as “an Indonesian investor” without further explanation. The letter indicates that:

> Further to a meeting of 13 October 1997, between Mr. Vladimir Katic and a responsible party representing the Republic of Kalmykia Oil Company, this is to inform you that a Letter of Credit, in the amount of USD $3,000,000 (three million United States dollars) for the mobilization of six (6) drilling rigs, currently based in the Islamic Republic of Iran, shall be opened by 1 November 1997.
>
> The drawdown conditions on the Letter of Credit are as follows:
>
> 1. Approval of the proposal by the creditors and by Judge Farley.
>
> 2. Execution of the formal drilling contract between above Oil Company and the contractor, being Canadian Triton International Ltd. (C.T.I.).
>
> …

Attached was a draft of a letter of credit with an issue date of October 13, 1997 with the following indications:

> …
>
> issuing bank:
>
> [to be determined]
>
> …
>
> Dated at Jakarta this 1st day of November 1997.

I would merely note that section 50(1) of BIA provides:

> 50(1) Subject to subsection 1.1, a proposal may be made by
>
> (a) an insolvent person;
>
> (b) a receiver, within the meaning of subsection 243(2), but only in relation to an insolvent person;
>
> (c) a liquidator of an insolvent person’s property;
>
> (d) a bankrupt; and
>
> (e) a trustee of the estate of a bankrupt.

It seems to me that the “and” in this section should be read disjunctively. Thus, if Triton as a bankrupt wishes to submit a proposal in the future it should do so in the regular way. I would assume that any such proposal would have included in it sufficient information to allow the creditors to make a reasoned decision.

[21] Finally, I would note that *National Bowling Centres Ltd. v. Brunswick of Canada Ltd. (No. 2)* (1967), 11 C.B.R. (N.S.) 219 (Que. Q.B.) is based upon the question of there being an

appeal brought by a claimant to determine whether it is a creditor authorized to vote at the meeting called to consider the proposal. As Rinfret J. stated for the Court at p. 223:

> En effet, il s'agit sur le présent appel de déterminer si Brunswick of Canada Ltd. est un créancier autorisé à voter sur la proposition et, dans l'affirmative, pour quel montant.
>
> Tant qu'on n'aura pas définitivement répondu à ces deux questions, la proposition ne saurait être considérée comme rejetée. Dans l'intervalle, l'appel a l'effet de suspendre la marche des procédures postérieures prévues par l'article 32B.

I would therefore suggest that all interested persons carefully note the provisions of BIA which may affect them and others as to whom they are in opposition. Then they may decide to take what they consider to be appropriate action in the circumstances. I would think it helpful for all concerned if they were to meet in the near future to discuss their various legal and business alternatives; in that regard I think it would be appropriate for PWL as trustee in bankruptcy to call such a meeting to be held by November 8, 1997. This meeting may assist by eliminating unnecessary turmoil and allow matters to be appropriately focused.

Order accordingly.

Tab 9

Court File No. CV-20-00642928-00CL

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 THE CLOVER ON YONGE INC. AND THE CLOVER ON YONGE LIMITED PARTNERSHIP

Applicants

TRANSCRIBED ENDORSEMENT

(UNOFFICIAL)

[1] This is a motion for an order sanctioning The Plan of Compromise and Arrangement dated November 6, 2020 ("**Plan**").

[2] The Plan was approved on December 15, 2020 by the requisite statutory majorities of affected creditors with voting claims in each of the Plan's two classes of creditors. 96.6% of the Depositor Creditor Class voted in favour of the Plan and 98.8% of the General Unsecured Creditor Class voted in favour of the Plan.

[3] There is one unresolved voting claim advanced by Maria Athanasoulis, which she values at $49 million ("**Maria's Claim**"). If this claim is accepted in the value asserted, the Plan would be defeated in the General Unsecured Creditor Class. All but $1 million of Maria's Claim is a claim for a share of profits in a number of projects, including the Clover on Yonge Project.

[4] I accept the Monitor's position that with respect to the component of Maria's Claim related to an alleged profit sharing agreement with respect to the Clover on Yonge Project. There was no prospect of any profit from that project because as of March 31, 2020, shortly after the receivership commenced, the Clover on Yonge project was forecast to generate a loss of $61 million. As a result, because I accept that the proper date to value Maria's Claim is when the Receiver was

appointed on March 27, 2020, there was no profit from the Clover od Yonge Project that could be shared with Maria.

[5] Mr. Dunn, on behalf of Maria, concedes there can be no profit from this project unless the pre-sale unit purchase contracts are disclaimed. I have already ordered that those contractors can only be disclaimed if the Plan is approved.

[6] As the Monitor points out in the Supplementary Report to its 14th Report, any forecast profit is entirely dependent on the restructuring of the revenues of the Clover on Yonge Project. I accept and adopt the Monitor's following Statement:

> "It does not assist Ms. Athanasoulis to argue she is entitled to share in profit derived from successful Plan that she would vote against and cause to fail if she had a claim."

[7] In my view to argue that the relevant date to calculate her profit-sharing claim is later than the receivership appointment date and that profit will be derived from the Clover on Yonge Project is far too remote and speculative and lacks an air of reality. I agree with the applicants' submission that, "There is no profit absent disclaimer, and no disclaimer absent the approval, sanction and implementation of the Plan. Accordingly, if the profit component of the alleged Athanasoulis claim is allowed for negative voting purposes, it must follow that the value attributed to it is a profit expectation of $ nil, and not a profit expectation of $48 million"

[8] The criterion I must use to determine if Maria's Claim, which is a contingent claim, is to be included in the insolvency process is whether the event that has not yet occurred is too remote and speculative. In my view, Maria's Claim cannot be shown to be neither too remote nor speculative unless the Plan is approved, sanctioned and implemented. This is the very event that Maria would defeat if her contingent profit-sharing claim for $48 million is allowed for voting purposes.

[9] I rely on Justice Morrison's decision in *Nalcor Energy v Grant Thornton*, 2015 NBQB 20 at para 35 where he affirmed the Proposal Trustee's decision to disallow a contingent creditor's claim for purpose of voting on a summary basis on facts that are strikingly similar to the facts in this case.

[10] Accordingly, I have concluded for the reasons outlined above, that Maria's Claim is too speculative and remote in the amount of $48 million to be allowed for voting purposes. I will therefore not have to consider whether Maria's Claim is an equity claim that should not be counted for voting purposes.

[11] With respect to the issue of whether the Plan should be sanctioned, I am satisfied that,

a. It has been approved by the requisite statutory majority of the applicant's non-equity creditors;

b. There has been strict compliance with all statutory requirements and adherence to previous orders of the Court;

c. Nothing has been done, or purported to be done that is not authorized by the CCAA; and

d. The Plan is fair and reasonable.

[12] In conclusion, for the reasons set out above, the Plan is sanctioned by the Court in its entirety and I declare that Maria's Claim cannot be valued at more than $1 million (the wrongful dismissal portion of the claim) for voting purposes with respect to the Plan.

[13] An Order shall go to this effect.

[14] I thank all counsel for their helpful submissions.

Hainey J.

January 8, 2021

Schedule “A”

Original Handwritten Endorsement

See attached.

CV-20-00642928

Re Clover on Yonge Inc

---

(1) This is a motion for an Order sanctioning the Plan of Compromise and Arrangement dated November 6, 2020. ("Plan")

(2) The Plan was approved on December 15, 2020 by the requisite Statutory Majorities of affected creditors with voting claims in each of the Plan's two classes of creditors. 96.6% of the Depositor Creditor class voted in favour of the

Plan and 98.8% of the General Unsecured Creditor Class voted in favour of the plan.

(3) There is one unresolved Voting claim advanced by Maria Athanasoulis, which she values at $49 Million ("Maria's claim"). If this claim is accepted in the value asserted, the Plan would be defeated in the General Unsecured Creditor class. All but $1 million of Maria's claim is a claim for a share of

projects in a number of projects, including the Clover on Yonge project.

(4) I accept the Monitor's position that with respect to the component of Maria's claim related to an alleged profit sharing agreement with respect to the Clover on Yonge project there was no prospect of any profit from that project because as of March 31, 2020, shortly after the receivership commenced, the Clover on Yonge project was forecast to generate a loss of $61 Million. As a

result because I accept that the proper date to value Maria's claim is when the receiver was appointed on March 27, 2020 There was no profit from the closed on Gorge Project that could be shared with Maria.

(5) Mr Dunn, on behalf of Maria, concedes there can be no profit from this project unless the pre-sale unit purchase contracts are disclaimed. I have already ordered that those contracts can only

be disclaimed if the Plan is approved.

(6) As the Monitor points out in the Supplementary Report & its 1972 Report any forecast profit is entirely dependent on the restructuring of the revenues of the Clover Gorge Project. I accept and adopt the Monitor's following Statement:

"It does not permit Ms. Athanasoulis to argue she is entitled to share in profit derived from a successful Plan That she would vote against and cause to fail

if she had a claim.))

(7) In my view I agree that the relevant date to calculate her profit-sharing claim is later than the secretaryship appointment date and that profit could be deemed from the Claude on Yonge Project is just too remote and speculative and lacks an air of reality. I agree with the Applicants' submission that "there is no profit absent disclaimer, and no disclaimer absent the approval, sanction and

implementation of the Plan. Accordingly, if the profit component of the alleged Athanasoulis claim is allowed for negative voting purposes, it must follow that the value attributed to it is a profit expectation of $ nil, and not a profit expectation of $48 Million."

(8) The criterion I must use to determine if Nadia's claim, which is a contingent claim, is to be included in the insolvency proceeding is whether the event that has

not yet accrued is too remote or speculative. In my view Maria's claim cannot be shown to be neither too remote nor speculative unless the plan is approved, sanctioned and implemented. This is the very event that Maria would defeat if her contingent profit-sharing claim of $48 Million is allowed for voting purposes.

(9) I rely on Justice Morrison's decision in Nelco Energy v. Grant Thornton, 2015 NBQB 20 at para 35 where he

Approved the proposal trustee's decision & disallow a contingent creditor's claim for purpose of voting on a summary basis on facts that are strikingly similar & the facts in this case.

(10) Accordingly, I have concluded, for the reasons outlined above, that Maria's claim is so speculative and remote in the amount of $48 Million & be allowed for voting purposes. I will therefore not have to consider whether Maria's claim is an equity claim that should not be counted for voting purposes.

(11) With respect to the issue of whether the Plan should be sanctioned, I am satisfied that,

(a) It has been approved by the requisite statutory majority of the Applicants' non-equity creditors;

(b) There has been strict compliance with all statutory requirements and adherence to previous orders of the Court;

(c) Nothing has been done, or purported to be done

(11) that is not authorized by the CCAA; and

(d) The Plan is fair and reasonable.

(12) In conclusion, for the reasons set out above, the Plan is sanctioned by the Court in its entirety and I declare that Nortel's claim cannot be valued at more than $1 Million (the wrongful dismissal portion of the claim) for voting purposes with respect to the Plan.

(12)

(13) An order shall go to this effect.

(14) I thank all counsel for their helpful submissions.

Harvey J.

January 8, 2021

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 THE CLOVER ON YONGE INC. AND THE CLOVER ON YONGE LIMITED PARTNERSHIP

Court File No. CV-20-00642928-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST
Proceedings commenced at Toronto

MOTION RECORD OF THE CLOVER CCAA APPLICANTS (Returnable November 12, 2020)

AIRD & BERLIS LLP
Barristers and Solicitors
1800 - 181 Bay St.
Toronto, ON M5J 2T9

Steven L. Graff (LSO # 31871V)
Tel: (416) 865-7726
Email: sgraff@airdberlis.com

Ian Aversa (LSO # 55449N)
Tel: (416) 865-3082
Email: iaversa@airdberlis.com

Jeremy Nemers (LSO # 66410Q)
Tel: (416) 865-7724
Email: jnemers@airdberlis.com

Jonathan Yantzi (LSO# 77533A)
Tel: (416) 865-4733
Email: jyantzi@airdberlis.com

Lawyers for the Clover CCAA Applicants

BENNETT JONES LLP
2500 Park Place, 666 Burrard St.
Vancouver, BC V6C 2X8

David Gruber (LSO# 43758V)
Tel: (604) 891-5150
Email: gruberd@bennettjones.com

Co-counsel for the Clover CCAA Applicants

Tab 10

Citation: In the Matter of the Proposal of Port Chevrolet Oldsmobile Ltd. 2002 BCSC 1874

Date: 20021113

Docket: 228939 VA02

Registry: Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

Oral Reasons for Judgment
The Honourable Madam Justice Neilson
As Pronounced in Chambers
November 13, 2002

IN THE MATTER OF THE BANKRUPTCY AND INSOLVENCY ACT

AND

IN THE MATTER OF THE PROPOSAL OF

PORT CHEVROLET OLDSMOBILE LTD.

Counsel for Minister of National Revenue	E. McDonald
Counsel for Port Chevrolet Oldsmobile Ltd.	J. Grieve
Counsel for Trustee, PricewaterhouseCoopers, Inc.	B. Ingram

INTRODUCTION

[1] **THE COURT:** This is an appeal by Canada Customs Revenue Agency ("CCRA") under ss. 108 and 135(4) of the ***Bankruptcy and Insolvency Act***, R.S.C. 1985, c. B-3, with respect to a trustee's decision to disallow CCRA's proof of claim for voting purposes at a first meeting of the creditors of Port

Chevrolet Oldsmobile Ltd. ("Port") on October 25, 2002, and with respect to the Chair's decision at that meeting to value CCRA's claim at zero for the purpose of the vote taken. CCRA seeks amendment of the results of the vote to reflect its vote against the proposal, and a resulting declaration that the proposal was defeated, or, alternatively, a declaration that the vote was invalid.

THE FACTS

[2] On July 9, 2002, following a lengthy investigation, CCRA issued an assessment to Port for $16,436,009.96, that it says Port owes under the ***Excise Tax Act***, R.S.C. 1985, c. E-15. The material indicates that the debt is based on allegations that Port has been party to fraud, in claiming input tax credits with respect to GST paid on purchases of non-existent vehicles. A substantial part of the amount in the assessment is penalties and other charges related to that activity.

[3] CCRA immediately took action to seize Port's assets.

[4] Port emphatically denies that it knowingly engaged in fraud or owes any money to CCRA. It says it was an innocent dupe of a third party, who was engaged in a scheme of selling non-existent vehicles. On July 10, 2002, in order to forestall CCRA's execution proceedings, Port filed a Notice of

Intention to Make a Proposal under the ***Bankruptcy and Insolvency Act***, in the hope of fashioning a means of retaining its assets and keeping its business operational while it pursued its remedies under the ***Excise Tax Act***. The proposal was faxed to CCRA on July 11, 2002.

[5] Port advised CCRA that it would be formally objecting to the assessment soon after receiving it. Port filed a detailed Notice of Objection to the assessment under the ***Excise Tax Act*** in mid-September, objecting to the entire assessment. Port says that if it is successful, not only will the debt be extinguished but CCRA will owe it money.

[6] In the meantime, Port negotiated with its creditors, including CCRA, in an effort to reach agreement on an acceptable proposal that would allow it to continue operations while it prosecuted its Notice of Objection. CCRA declined to have any input into the proposal. On October 8, 2002, Port sent the trustee's report and a copy of the final proposal to CCRA.

[7] In that report, the trustee recommends that Port's creditors accept the proposal. It indicates that Port was operating at a profit before the proposal was necessitated by the CCRA assessment, that Port has appealed the assessment, and that the proposal is based on an assumption that Port will

successfully deal with the impact of the assessment. It proposes payment in full for secured creditors and creditors owed $400 or less. The remaining unsecured creditors are to be paid *pro rata* from a pool of at least $250,000 created through the continuing operations of the business. Unsecured claims, apart from CCRA's, are $434,000, making CCRA by far the largest unsecured creditor. The trustee's report advises that if Port is placed in bankruptcy, there will be no funds available to pay any unsecured creditors, and over 50 employees will lose their jobs, whereas acceptance of the proposal ensures unsecured creditors will receive part or even all of the funds owed, depending on the outcome of Port's assessment appeal.

[8] The first meeting of creditors was scheduled for October 25, 2002. Prior to the meeting, CCRA was non-committal about whether it would accept the proposal.

[9] CCRA filed its proof of claim the day before the meeting. It claims an unsecured debt of $15,864,279.83 as of July 10, 2002. The proof of claim states that "nil" payments and credits have been received in the three-month period prior to that. It does not mention the assessment or the Notice of Objection, or explain the discrepancy of almost $600,000

between the amount claimed and the amount assessed on July 9, 2002.

[10] CCRA's representative, Mr. O'Connell, says that he had no idea that the claim would be disallowed for the purpose of the vote until he arrived for the meeting. Port's counsel told him that morning that he intended to ask that the claim be disallowed if CCRA intended to vote against the proposal.

[11] Mr. O'Connell then met with Mr. McMorran, the trustee, and asked to adjourn the meeting to seek legal advice. Mr. McMorran told him that he would have to ask the Chair for an adjournment prior to the vote. Mr. O'Connell says that Mr. McMorran was non-committal about the position the trustee would take on CCRA's proof of claim.

[12] Mr. McMorran says, however, he told Mr. O'Connell the proof of claim did not reference the Notice of Objection and confirmed with him that the matter was still proceeding through CCRA's appeal process. He says Mr. O'Connell acknowledged that one possible outcome of the appeal was a finding that the value of CCRA's proof of claim was nil. Mr. McMorran says he then told Mr. O'Connell that until Port's Notice of Objection was dealt with, he viewed CCRA's proof of claim to be a contingent claim and not proven, and that while

CCRA could remain at the meeting, its claim had no value for voting purposes.

[13] The meeting was conducted by a representative of the Office of the Superintendent of Bankruptcy. Mr. McMorran told the meeting that the trustee took the view that CCRA's claim was unproven as it was based on an unresolved appeal and Notice of Objection. As a result, he had disallowed it and valued it at nil. The Chair later confirmed this, stating that the trustee had determined it was a contingent claim as it was under active appeal. CCRA said it did not accept this decision and sought an adjournment, which was denied.

[14] The vote took place, with CCRA's intention to vote against the proposal noted but not counted. Ninety-eight percent of the other creditors present, in value and number, voted in favour of the proposal. The proposal preserves CCRA's right to share *pro rata* in the funds generated for unsecured creditors from the continuation of the business despite the fact it did not vote.

[15] On October 28, 2002, pursuant to a request from CCRA, the Chair provided written reasons for determining its claim was contingent and valuing it at nil for voting purposes. The second and third paragraphs of those reasons state:

> As the minutes of the meeting of creditors will reflect, the trustee, Mr. Gordon McMorran, advised me before the meeting that he had made a determination that the claim of CCRA was a contingent claim as there was an ongoing appeal of the assessment in respect of GST. As a result, pursuant to section 135, the trustee had accepted the claim but assigned it a nil value.
>
> Section 109(1) of the ***Bankruptcy and Insolvency Act*** provides that a person is only entitled to vote at a meeting of creditors if he or she has a provable claim. By section 121(2), a contingent claim or a claim for unliquidated damages is only a provable claim for the amount at which it has been valued by the trustee. As Chair of the meeting I accepted the decision of the trustee in respect of the value of the claim and so informed the meeting.

[16] Also on October 28, 2002, the trustee sent CCRA a formal Notice of Disallowance under s. 135(3) of the ***Bankruptcy and Insolvency Act***. This states that the proof of claim was disallowed as it was not supported by any evidence of the debt as required by s. 124(4) of the ***Bankruptcy and Insolvency Act***, and because the trustee was not persuaded that Port is indebted to CCRA based on the trustee's review of the Notice of Objection.

[17] Michael Wolfe, principal of Port, swears that throughout the CCRA investigation and the proceedings since the assessment, Port has consistently and strenuously denied any wrongdoing and any liability to CCRA under the ***Excise Tax Act***. He characterizes CCRA's conduct in attempting to immediately

shut down the business on the basis of unproven allegations of fraud as "reprehensible" and a "vendetta", and says that if Port is successful in challenging the assessment, CCRA will owe it money. He says that if CCRA is allowed to place Port in bankruptcy before the validity of the assessment is determined, the result will be loss and injustice to other creditors and employees, as well as to Port itself. While Port has cooperated with CCRA and kept it informed of the process of the proposal, he says neither he nor Port's counsel ever led CCRA to believe its claim would be accepted without challenge at the creditors' meeting if CCRA did not support the proposal.

ANALYSIS

[18] CCRA's appeal rests essentially on two grounds:

1. Were the trustee and the Chair in error in disallowing the claim for non-compliance with s. 124 of the ***Bankruptcy and Insolvency Act***?

2. Did the trustee and Chair err in categorizing CCRA's claim as contingent and of no value for the purpose of voting?

[19] I will deal first with the question of disallowance of the claim for non-compliance with s. 124. The relevant parts of ss. 124 and 135 of the ***Bankruptcy and Insolvency Act*** read:

> S. 124 (1) Every creditor shall prove his claim, and a creditor who does not prove his claim is not entitled to share in any distribution that may be made.
>
> (2) A claim shall be proved by delivering to the trustee a proof of claim in the prescribed form.
>
> (4) The proof of claim shall contain or refer to a statement of account showing the particulars of the claim and any counter-claim that the bankrupt may have to the knowledge of the creditor and shall specify the vouchers or other evidence, if any, by which it can be substantiated.
>
> S. 135(1) The trustee shall examine every proof of claim or proof of security and the grounds therefor and may require further evidence in support of the claim or security.
>
> (1.1) The trustee shall determine whether any contingent claim or unliquidated claim is a provable claim, and, if a provable claim, the trustee shall value it, and the claim is thereafter, subject to this section, deemed a proved claim to the amount of its valuation.
>
> (2) The trustee may disallow, in whole or in part,
>
> (a) any claim;
>
> (b) any right to a priority under the applicable order of priority set out in this Act; or
>
> (c) any security.
>
> (3) Where the trustee makes a determination under subsection (1.1) or, pursuant to subsection (2), disallows, in whole or in part, any claim, any right to a priority or any security, the trustee shall

> forthwith provide, in the prescribed manner, to the person whose claim was subject to a determination under subsection (1.1) or whose claim, right to a priority or security was disallowed under subsection (2), a notice in the prescribed form setting out the reasons for the determination or disallowance.
>
> (4) A determination under subsection (1.1) or a disallowance referred to in subsection (2) is final and conclusive unless, within a thirty day period after the service of the notice referred to in subsection (3) or such further time as the court may on application made within that period allow, the person to whom the notice was provided appeals from the trustee's decision to the court in accordance with the General Rules.

[20] Form 31 under the ***Act*** provides the prescribed form of proof of claim mentioned in s. 124(2).

[21] Paragraph 1 of the Notice of Disallowance issued by the trustee after the meeting states:

> Your Proof of Claim is unsupported by any evidence for an alleged debt of $15,864,279.83 owed by Port on account of Goods and Services Tax. Subsection 124(4) of the BIA requires a proof of claim to include not only a statement of account but also the evidence by which the statement of account can be substantiated.

[22] Section 124(4) and paragraph 3 of Form 31 clearly require specification of evidence by which the claim can be substantiated, as well as a statement of account that includes reference to any counterclaim to which the debtor is entitled. As well, paragraph 6 of Form 31 requires a list of payments

from, and credits to, the debtor within the three months immediately before the date of the initial bankruptcy event, which, here, is the notice of intention to make a proposal on July 10, 2002.

[23] The provisions dictating the form of a proof of claim are mandatory and to be strictly construed, and the proof of claim should be sufficient to enable the trustee to make an informed decision on its merits: ***Re G. Totton Publishers Ltd.*** (1975), 20 C.B.R. (N.S.) 140, (Ont. S.C.); ***Re Riddler*** (1991), 3 C.B.R. (3d) 273 (B.C.S.C.).

[24] CCRA's proof of claim follows the format of Form 31, and attaches a statement of account that shows a debt occurring between 1995 and 1998 of $15,864,279.83. It includes no reference to the assessment, or to any other basis for this account. There is nothing in the proof of claim that could be construed as evidence in support of the claim. It makes no mention of the Notice of Objection. Nor does it set out any explanation for the discrepancy of almost $600,000 between the debt described in the proof of claim and the assessment that was delivered on July 9, 2002. In paragraph 6, where it is required to state payments from, or credits to, the debtor in the three months preceding the date of bankruptcy event, the response is "nil".

[25] In my view, these defects provided a lawful basis for the trustee to exercise his discretion in favour of disallowing the claim pursuant to s. 135(2). There was nothing in the proof of claim on which he could make an informed decision as to its merits.

[26] CCRA argues that the trustee was well aware of the assessment and Notice of Objection, and it is disingenuous to reject their proof of claim on that basis. I disagree. The fact that this information was available to the trustee elsewhere does not alleviate CCRA's obligation to comply with the mandatory provisions of s. 124 of the ***Bankruptcy and Insolvency Act***.

[27] Nor does that argument explain the significant discrepancy between the amount set out in the proof of claim and the assessment. Counsel for CCRA asks me to infer that it arises from credits to Port since July 10, 2002, but there is nothing in the proof of claim or the evidence on this appeal to permit such an inference, and I am not prepared to do so.

[28] Counsel for CCRA also argues that if the proof of claim did not set out sufficient evidence, it was incumbent on the trustee to require further evidence under s. 135(1). That provision, however, is discretionary, and places no obligation on the trustee to do so. This is particularly so, in my view,

when the creditor chooses to deliver his proof of claim the day before the meeting. CCRA's decision to submit its claim at the last minute precluded any opportunity for discussion and amendment of its inadequacies prior to the meeting.

[29] CCRA seeks to explain the late delivery of its proof of claim by saying that no one had advised it there may be problems with its claim prior to the meeting. In fact, Mr. O'Connell relates discussions he had with Port's counsel in September 2002, in which he says he was told that a reference in correspondence to having CCRA's claim disallowed for voting purposes was explained away by saying the statement had been made only to satisfy General Motors' requirements for financing. The counsel involved denies this, through Mr. Wolfe.

[30] I recognize this raises an issue of credibility, but having considered these alleged statements by counsel in the overall context of the events surrounding the proposal, I find it difficult to believe they would have led CCRA to expect any leniency with respect to the formalities required to permit it to vote against the proposal. Port had consistently and strenuously denied the basis for CCRA's debt. Its proposal was necessitated by CCRA's action in executing against its assets. Port was fighting for its economic survival. CCRA,

as the largest potential unsecured creditor, carried effective veto power over the proposal, and would not advise Port if it was in favour of it prior to the meeting. In my view, CCRA would be naive to think it could deliver an inadequate proof of claim in these circumstances, the day before the meeting without it being challenged.

[31] I recognize that ***Re Totton***, *supra*, suggests there should be some latitude given to creditors in filling out proofs of claim, as many are completed by creditors without the benefit of legal assistance. I find those comments have limited application, however, to sophisticated and experienced creditors such as CCRA.

[32] Finally, CCRA says it is inconsistent for the trustee to have preserved their right to share in the funds set aside for unsecured creditors under the proposal, while rejecting their proof of claim. That may be a gift horse for CCRA, but it does not alter the fundamental defects in its proof of claim.

[33] In ***Re Rix*** (1984), 53 C.B.R. (N.S.) 67 (B.C.S.C.), Wallace J. at 74 observed that the ***Bankruptcy and Insolvency Act*** has placed responsibility and discretion to approve proofs of claim with trustees who are experienced professionals, and it is not desirable for the courts to interfere with how that discretion is exercised. I find the trustee here was within

proper exercise of his discretion in disallowing CCRA's proof of claim under s. 135(2), and I would dismiss the appeal on that ground.

[34] However, it is not clear from the evidence that the defects in the proof of claim alone formed the basis of the trustee's decision to disallow CCRA's claim at the time of the meeting. It appears that he initially disallowed it because it was contingent, as it was subject to the pending Notice of Objection and appeal. I therefore find it necessary to go on and consider the second ground on which CCRA bases its appeal: that the trustee and Chair erred in categorizing its debt as contingent.

[35] CCRA's argument is based on ss. 299(3), 299(4), 313(1) and 315(2) of the ***Excise Tax Act***, which read:

> S. 299(3) Assessment valid and binding - An assessment, subject to being vacated on an objection or appeal under this Part and subject to a reassessment, shall be deemed to be valid and binding.
>
> S. 299(4) Assessment deemed valid - An assessment shall, subject to being reassessed or vacated as a result of an objection or appeal under this Part, be deemed to be valid and binding, notwithstanding any error, defect or omission therein or in any proceeding under this Part relating thereto.
>
> S. 313(1) Debts to Her Majesty – All taxes, net taxes, interest, penalties, costs and other amounts payable under this Part are debts due to Her Majesty in right of Canada and are recoverable as such in

> the Federal Court or any other court of competent jurisdiction or in any other manner provided under this Part.
>
> S. 315(2) Payment of Remainder – Where the Minister mails a notice of assessment to a person, any amount assessed then remaining unpaid is payable forthwith by the person to the Receiver General.

[36] CCRA says these provisions clearly create a valid and binding debt due from the moment of assessment, regardless of the pending objection and the appeal process. It says this argument is strengthened by the fact that the ***Excise Tax Act*** places no restrictions on execution proceedings if an assessment is under objection or appeal. Thus, nothing in the ***Bankruptcy and Insolvency Act*** can permit the trustee to disallow a debt based on an assessment under the ***Excise Tax Act***.

[37] CCRA says that if the trustee does question the validity of such a debt, he must do so under the procedures provided by the ***Excise Tax Act***. In support of this argument CCRA cites ***Re Norris*** (1989), 75 C.B.R. (N.S.) (Ont. C.A.). There, the CCRA had issued a notice of assessment against a company for failure to remit taxes and U.I. premiums. The director of the company was liable for the same debt under the ***Income Tax Act*** and made an assignment into bankruptcy. CCRA filed a proof of claim in the same amount as the assessment. The trustee

disallowed the claim. The Ontario Court of Appeal ruled against the trustee, and set the disallowance aside. It considered s. 152(8) of the ***Income Tax Act***, which is substantially equivalent to ss. 299(3) and 299(4) of the ***Excise Tax Act***, and held that it required a trustee who wished to question the assessment against a bankrupt to seek his remedy within the ***Income Tax Act***, stating at 99:

> To hold that the trustee in bankruptcy can disallow an assessment made pursuant to the ***Income Tax Act*** would be tantamount to clothing the trustee with the powers of the Tax Court. No interpretation of the ***Bankruptcy Act*** can support such a conclusion.

[38] CCRA also points to ***Re Bateman*** (1998), 10 C.B.R. (4th) 197 (N.S.S.C.), where a similar result obtained with respect to a bankrupt who sought to challenge an assessment under the ***Excise Tax Act***, in the course of an application to annul his assignment into bankruptcy.

[39] CCRA argues that the same result must follow here. The assessment creates a binding and valid debt until it is set aside under the procedures outlined in the ***Excise Tax Act***. The trustee here thus had no power to categorize its claim as contingent, and value its claim at nil for voting purposes under the ***Bankruptcy and Insolvency Act***.

[40] However, I find a significant distinction between those cases and the situation before me. Those authorities deal with a trustee managing a bankrupt estate, in which the assets were vested in the trustee. There had evidently been no challenge to the assessment by the debtor prior to bankruptcy. Nor had the trustee filed a notice of objection.

[41] I find the circumstances here quite different. The debtor is not yet bankrupt. It was a profitable business with over 50 employees before the assessment and is now diligently pursuing a proposal under the ***Bankruptcy and Insolvency Act,*** which is the only course left open to it to avoid a bankruptcy and continue to operate, in the face of an assessment that it claims is invalid. Neither the debtor nor the trustee are seeking to avoid the appeal procedures outlined in the ***Excise Tax Act***. Instead, the debtor is vigorously pursuing them. The problem is that those procedures could not be completed before the first creditors' meeting. Port has evidently convinced the trustee that there is merit to its objection. Even CCRA's representative, Mr. O'Connell, has conceded to the trustee that one possible outcome of Port's challenge may be a nil value to CCRA's claim.

[42] In ***Re Norris***, the court relied on the judgment in ***Re Carnat Construction Company Limited*** (1958), 37 C.B.R. 47 (Ont.

S.C.). That judgment, in my view, supports a role for both the ***Excise Tax Act*** and the ***Bankruptcy and Insolvency Act*** in circumstances such as those before me. At 48, Smily J. stated:

> I am of the opinion that where an assessment under ***The Income Tax Act*** has been made against a debtor, and that assessment is questioned by a trustee in bankruptcy, that the trustee should follow the provisions of ***The Income Tax Act***. I think the provisions of ***The Income Tax Act*** are binding on the estate of the bankrupt debtor and I do not think that they are in conflict with the provisions of ***The Bankruptcy Act***. In my opinion there is no question that ***The Bankruptcy Act*** provisions must be complied with, by the filing of proof of claim by the Crown with respect to income tax, and that this assessment may be disallowed by the trustee, and that in such event the Crown is called upon to proceed under the provisions of ***The Bankruptcy Act*** and appeal from that disallowance. But in so far as determining the amount of the tax, I think that should be done in accordance with the provisions of ***The Income Tax Act***. The trustee may properly inquire into the matter to determine whether the assessment is properly made in order that he may decide whether or not there should be proceedings taken against that assessment which would, as I say, be complying with the terms of ***The Income Tax Act*** and thus provide for the procedure, such as filing objections, and so forth, and also disallow the claim. However, when that disallowance comes before the court, if it does, then I think the proper procedure is that the amount of the income tax be determined under the provisions of ***The Income Tax Act*** rather than by the court in bankruptcy deciding the matter on the merits.
>
> [emphasis added]

[43] My interpretation of that passage, applied to the circumstances of this case, is that the debtor or trustee are

bound to follow the appeal process under the ***Excise Tax Act*** to ascertain the final amount of any debt owed to CCRA. However, if CCRA wishes to participate in concurrent proceedings under the ***Bankruptcy and Insolvency Act***, then it is bound to comply with the ***Bankruptcy and Insolvency Act*** process with respect to proving its claim, and that compliance includes recognition of the trustee's powers to determine a claim is contingent and value it accordingly. I do not read ***Re Norris*** as precluding a trustee from exercising his discretion under s. 135(1.1).

[44] I find support for that view in s. 4.1 of the ***Bankruptcy and Insolvency Act***, which evidently was not brought to the attention of the court in ***Re Norris***, and which specifically states that the ***Bankruptcy and Insolvency Act*** binds Her Majesty in the Right of Canada. As counsel for the trustee pointed out, there is no provision in s. 299 of the ***Excise Tax Act*** which expressly subordinates the ***Bankruptcy and Insolvency Act*** to it such as is found in s. 224(1.2) of the ***Income Tax Act,*** for example:

> Notwithstanding any other provision of this Act, the Bankruptcy and Insolvency Act, any other enactment of Canada, any enactment of a province or any law...where the Minister has knowledge or suspects that a particular person is, or will become within one year, liable to make a payment
>
> (a) to another person (in this subsection referred to as the "tax debtor") who is liable to pay an

> amount assessed under subsection 227(10.1) or a similar provision...
>
> the Minister may in writing require the particular person to pay forthwith, where the moneys are immediately payable...
>
> [emphasis added]

[45] In the circumstances I have described, I am satisfied that the trustee had the power to classify CCRA's claim as contingent. As Port's counsel points out, to hold otherwise could permit CCRA to issue a substantial but erroneous assessment against an innocent and profitable debtor and put it into bankruptcy and out of business before the validity of the assessment can be determined under the appropriate process provided by the ***Excise Tax Act***. That cannot be the intent of either the ***Excise Tax Act*** or the ***Bankruptcy and Insolvency Act***.

[46] There is no evidence of prejudice to CCRA in permitting Port to continue to operate pending resolution of the appeal process under the ***Excise Tax Act,*** which I am told may take up to a year. CCRA, during that period, is entitled to receive the lion's share of the profits set aside for unsecured creditors under the proposal. On the other hand, there is substantial prejudice to Port, its employees and its other

creditors if it is prematurely forced into bankruptcy on the strength of an assessment that may be successfully challenged.

[47] I, accordingly, find that the trustee did not err in categorizing CCRA's claim as contingent. The result of the appeal with respect to the Chair's actions is the same as she simply acted on the trustee's decision. The record of the meeting shows the Chair did not act under s. 108(3) of the ***Bankruptcy and Insolvency Act***, and I find there is, therefore, no need to consider CCRA's application to have the vote declared invalid.

[48] The appeal is dismissed.

“K.E. Neilson, J.”
The Honourable Madam Justice K.E. Neilson

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: ***Port Chevrolet Oldsmobile Ltd. (Re),*** 2004 BCCA 37

Date: 20040126
Docket: CA030337; CA030338

In the Matter of the *Bankruptcy and Insolvency Act*

and

In the Matter of the Proposal of Port Chevrolet Oldsmobile Ltd.

Before: The Honourable Madam Justice Ryan
The Honourable Madam Justice Newbury
The Honourable Madam Justice Levine

D.G. Nygard	Counsel for the Appellant Minister of National Revenue
J.F. Grieve	Counsel for the Respondent Port Chevrolet Oldsmobile Ltd.
B.J. Ingram	Counsel for the Respondent PricewaterhouseCoopers as Trustee
Place and Date of Hearing:	Vancouver, British Columbia November 24, 2003
Place and Date of Judgment:	Vancouver, British Columbia January 26, 2004

Written Reasons by:
The Honourable Madam Justice Newbury

Concurring Reasons by:
The Honourable Madam Justice Levine

Concurred in by:
The Honourable Madam Justice Ryan

Reasons for Judgment of the Honourable Madam Justice Newbury:

[1] The respondent Port Chevrolet Oldsmobile Ltd. ("Port") has carried on business as an automobile dealership in the lower mainland of British Columbia for some years. On July 9, 2002, the appellant Canada Customs and Revenue Agency ("CCRA") issued a Notice of Assessment to Port under the ***Excise Tax Act***, R.S.C. 1985, c. E-15, for the sum of $16,436,009.96 in respect of a 43-month period ending in October 1998. According to the Notice, the assessment represented "adjustments to input tax credits" of $8,651,572.86, a penalty of $3,201,994.73, interest of $2,419,549.16 and "other penalty" of $2,162,893.21.

[2] Port denied liability for the amount assessed and began preparing a Notice of Objection to Assessment in the form required by the ***Excise Tax Act***. The Objection stated in part:

> 2. The Taxpayer was fraudulently induced by Sameer Mapara to purchase vehicles that it believed existed (the "Vehicles") from one or more companies associated with Sameer Mapara ("Mapara's Companies").
>
> 3. The Vehicles were purchased during the reporting periods from April 1, 1995 to October 31, 1998 (the "Reporting Periods").
>
> 4. The Taxpayer paid goods and services tax ("GST") to Mapara's Companies on the purchase of the Vehicles and claimed input tax credits ("ITCs") in respect of that tax.

> 5. The Taxpayer was then fraudulently induced by Mapara to resell the Vehicles to Mapara's Companies for export.
>
> 6. The Taxpayer did not collect GST on the subsequent resale of Vehicles to Mapara's Companies as it understood that the Vehicles were being purchased for export.
>
> . . .
>
> 11. The Taxpayer was defrauded by Mapara and Mapara's Companies into believing that the Vehicles existed and were owned [by] Mapara's Companies and were being acquired by Mapara's Companies for export.

Port also took the position that many of the amounts assessed were statute-barred, that it was entitled to certain rebates against the tax assessed, and that CCRA had incorrectly calculated various tax credits to which it was entitled. Further, Port contended that it had exercised due diligence in determining its net taxes and had not knowingly or under circumstances amounting to gross negligence, consented to or acquiesced in the making of a false statement or omission in a return, and was therefore not liable to pay penalties under s. 285 of the ***Excise Tax Act***. The Notice of Objection was delivered to CCRA on or about September 12, 2002.

[3] There was no evidence that CCRA invoked the procedure available under s. 316 of the ***Excise Tax Act*** and certified an amount payable by Port. (Where a certificate is registered in

the Federal Court, it is said to have the same effect as if it were a judgment for a debt in the amount certified.) However, execution proceedings of some kind were evidently instituted by CCRA against Port, leading General Motors of Canada, Port's inventory supplier and financier, to express concern about the company's viability. Sensing that it could be out of business unless it took action, Port decided to make a proposal to its creditors under the ***Bankruptcy and Insolvency Act***, R.S.C. 1985, c. B-3 as amended (the "***BIA***"). Port issued notice of its intention to do so on July 10, 2002, which had the effect of staying all proceedings against it pursuant to s. 69 of the ***BIA***. Port's solicitors also began correspondence with its banker, with General Motors, and with CCRA in hopes of arriving at some arrangement whereby Port could remain in business and pursue its objection to the assessment.

[4] The final form of Port's proposal to creditors (filed on October 4, 2002) was unusual, but reflected the fact that but for the CCRA assessment, Port was not experiencing any particular financial difficulty. The proposal contemplated that the company would create a "pool" of not less than $250,000 by depositing with the Trustee 50 percent of profits earned during the ensuing five years. From this pool the Trustee would pay the claims of CCRA for any outstanding

source deductions under the ***Income Tax Act***, R.S.C. 1985, c. 1 (5th Supp.), unsecured creditors with claims of $400 or less in full, and other unsecured creditors pro rata according to the amounts of their claims. Preferred creditors were to be paid in full in accordance with s. 136(1) of the ***BIA*** in priority to unsecured creditors, and secured creditors were to be paid in accordance with already existing arrangements, or as might be "arranged between the Company and each of those parties outside of the terms of this Proposal." The proposal also contemplated that if CCRA's assessment under the ***Excise Tax Act*** was eliminated or reduced "in accordance with the applicable process of appeal", CCRA would repay to the Trustee "any amount to which CCRA would not be entitled if its Proof of Claim either did not reflect the Assessment or reflected it in the reduced amount, as applicable, and the Trustee may adjust any subsequent dividends to CCRA accordingly." The proposal was silent about what would happen if Port's objection to the assessment was not ultimately successful.

[5] The meeting of creditors to vote on the proposal was scheduled for October 25, 2002. With the notice of meeting, creditors received the Trustee's preliminary report on Port's affairs. It was prepared on the assumptions that (i) Port could either meet its obligations to the business creditors or

negotiate compromises with them, (ii) it could "successfully deal with the impact" of the CCRA assessment, and (iii) it would be able to continue operating under the General Motors dealer's agreement. Based on these assumptions, and on its review of Port's assets, the Trustee reported that a forced liquidation in bankruptcy would not provide sufficient funds to make any payment on account of the claims of preferred or unsecured creditors. The Trustee therefore recommended that the creditors accept the proposal which, if the underlying assumptions were correct, would result in the payment in full of all preferred creditors, the continued employment of Port's 55 employees and, depending on its success in appealing the CCRA assessment, full or partial recovery to unsecured creditors.

[6] Also accompanying the notice of meeting and the Trustee's report was a letter to creditors dated October 3, 2002 from Port's president, Mr. Michael Wolfe. He stated in part:

> Most of you know how we ended up in this situation. Canada Custom[s] and Revenue Agency ("CCRA") has assessed Port for an amount of some $16,000,000 in connection with GST related to [sic] transactions which took place several years ago. Port obviously does not have the money to make that kind of payment and we do not think that we are liable to pay it in the first place. We are appealing that CCRA assessment, but until that appeal is resolved, CCRA's claim is there.

> When CCRA issued its $16,000,000 assessment, they also took steps against some of Port's assets, namely accounts receivable. Had we done nothing, Port's cash flow would have been eliminated and we would have had to shut down.

[7] In the weeks leading up to the creditors' meeting, solicitors for Port and CCRA discussed the proposal in correspondence, but CCRA declined to indicate ahead of time how it would vote at the meeting. The day before the meeting, CCRA forwarded to the Trustee a proof of claim in "Form 31" (prescribed by the Superintendent under the ***BIA***) in the amount of $15,864,279.83. The material portions of the Form 31 stated:

> 3. That the debtor was, at the date of the proposal namely July 10, 2002, and still is, indebted to the creditor in the sum of $15,864,279.83 as specified in the statement of account attached and marked Schedule "A", after deducting any counterclaims to which the debtor is entitled.
>
> 4. (X) UNSECURED CLAIM of $15,864,279.83.
>
> That in respect of this debt, I do not hold any assets of the debtor as security and
>
> (X) Regarding the amount of $15,864,279.83, I do not claim a right to priority.
>
> 5. That, to the best of my knowledge, the above-named creditor is not related to the debtor within the meaning of section 4 of the Bankruptcy and Insolvency Act.
>
> 6. That the following are the payments that I have received from, and the credits that I have allowed to the debtor within the three months immediately

> before the date of the initial bankruptcy event within the meaning of Section 2 of the Bankruptcy and Insolvency Act.
>
> NIL

Attached as Schedule "A" to the Form 31 was a statement of account consisting of columns of dates and a net tax amount, interest, penalty and a "period total" for each date. The total of "period totals" shown on Schedule "A" was $15,874,279.83.

[8] The creditors' meeting was duly held on October 25. According to the minutes of the meeting, the Trustee advised those present that CCRA's claim was "not proven due to an unresolved appeal and Notice of Objection filed by the Company. Therefore, its claim had been disallowed and valued at nil for purposes of the meeting and . . . CCRA had been informed of this just prior to the meeting." After some discussion of the proposal and an adjournment, the chair of the meeting stated that for purposes of voting on the proposal, CCRA's claim would be valued at nil. The chair declined a request by CCRA for a further adjournment to seek the opinion of legal counsel. The proposal was approved by creditors representing 99 percent of the total claims in value and 98 percent of the creditors by number, excluding CCRA in both cases.

[9] The Trustee's formal Notice of Disallowance was forwarded in due course to CCRA. It stated the following reasons for the disallowance:

> 1. Your Proof of Claim is unsupported by any evidence for an alleged debt of $15,864,279.83 owed by Port on account of Goods and Services Tax. Subsection 124(4) of the BIA requires a proof of claim to include not only a statement of account but also the evidence by which the statement of account can be substantiated.
>
> 2. Based on a review by the Trustee of the Notice of Objection filed with CCRA on behalf of Port and dated September 12, 2002, the Trustee is not persuaded that Port is in fact indebted to CCRA and the Trustee would require but is not aware of any adjudication in favour of CCRA resolving the claim it is asserting against Port.
>
> 3. In particular, based on the contents of the Notice of Objection, it appears that Port paid a significant amount of money to a third party in connection with what Port believed to be the purchase of vehicles owned by the third party and claimed an equivalent figure as an Input Tax Credit, thereby reducing the amount payable by Port to CCRA on account of collected Goods and Services Tax. Port alleges that it was fraudulently induced by a Sameer Mapara to purchase vehicles from him and his associated companies.
>
> 4. In its Notice of Objection Port raises several grounds of objection. First, Port claims that all assessment of reporting periods beginning April 30, 1996 and ending May 31, 1998 are statute-barred under subsection 298(1) of the Excise Tax Act. The total period covered by the CCRA assessment extends from April 30, 1996 to October 31, 1998. Second, Port claims that Input Tax Credits were claimed by it in respect of amounts paid as or on account of tax in circumstances where none was actually payable,

> and that Port is therefore entitled to have CCRA apply rebates for such payments against the net tax assessed against Port. Third, Port objects to the substantial penalties claimed by CCRA. Finally, Port takes issue with the calculations of the amount of Input Tax Credits claimed by Port. The CCRA Proof of Claim does not address any of these issues raised by Port.
>
> 5. Such other reasons as the Trustee may subsequently determine are applicable.

[10] By the time CCRA received this notice, it had already applied to the Supreme Court of British Columbia to appeal the disallowance pursuant to s. 135(4) of the ***BIA***. The Court's order dismissing that appeal is the first of the two orders now being appealed to this court.

The First Chambers Judgment

[11] Madam Justice Neilson dealt in Chambers below with the first appeal. She noted in her Reasons (see [2002] B.C.J. No. 3206) that the appeal raised two basic questions, the first of which I regard as one of statutory compliance and the second as more substantive:

> 1. Were the trustee and the Chair in error in disallowing the claim for non-compliance with s. 124 of the ***Bankruptcy and Insolvency Act***?
>
> 2. Did the trustee and Chair err in categorizing CCRA's claim as contingent and of no value for the purpose of voting? [para. 18]

On the first question, she started with the proposition that the provisions of the ***BIA*** dictating the form of proofs of claim are "mandatory and to be strictly construed", and that a proof of claim must be sufficient to enable a trustee to make an informed decision on its merits. In this regard, she cited ***Re G. Totton Publishers Ltd.*** (1975) 20 C.B.R. (N.S.) 140 (Ont. S.C.) and ***Re Riddler*** (1991) 3 C.B.R. (3d) 273 (B.C.S.C.). She then described the proof of claim filed by CCRA as follows:

> CCRA's proof of claim follows the format of Form 31, and attaches a statement of account that shows a debt occurring between 1995 and 1998 of $15,864,279.83. It includes no reference to the assessment, or to any other basis for this account. There is nothing in the proof of claim that could be construed as evidence in support of the claim. It makes no mention of the Notice of Objection. Nor does it set out any explanation for the discrepancy of almost $600,000 between the debt described in the proof of claim and the assessment that was delivered on July 9, 2002. In paragraph 6, where it is required to state payments from, or credits to, the debtor in the three months preceding the date of bankruptcy event, the response is "nil".
>
> In my view, these defects provided a lawful basis for the trustee to exercise his discretion in favour of disallowing the claim pursuant to s. 135(2). There was nothing in the proof of claim on which he could make an informed decision as to its merits. [paras. 24-5]

[12] Further, Neilson J. noted, CCRA had provided no explanation for the discrepancy between the amount claimed in the Notice of Assessment and that in the proof of claim. She

found nothing in the proof of claim itself or in the evidence on the appeal to permit her to infer that it arose from credits made to Port since July 10, 2002. CCRA's other arguments — that the Trustee should have required further evidence under s. 135(1), that CCRA had been led to expect that formalities would not be strictly observed, and that the Trustee should generally have extended greater "latitude" to the CCRA — were also rejected. The Chambers judge reasoned:

> I find it difficult to believe they would have led CCRA to expect any leniency with respect to the formalities required to permit it to vote against the proposal. Port had consistently and strenuously denied the basis for CCRA's debt. Its proposal was necessitated by CCRA's action in executing against its assets. Port was fighting for its economic survival. CCRA, as the largest potential unsecured creditor, carried effective veto power over the proposal, and would not advise Port if it was in favour of it prior to the meeting. In my view, CCRA would be naive to think it could deliver an inadequate proof of claim in these circumstances, the day before the meeting without it being challenged.
>
> I recognize that ***Re Totton***, *supra*, suggests there should be some latitude given to creditors in filling out proofs of claim, as many are completed by creditors without the benefit of legal assistance. I find those comments have limited application, however, to sophisticated and experienced creditors such as CCRA. [paras. 30-1]

Considering also that trustees are experienced professionals who have a discretion to exercise, the Chambers judge concluded that the Trustee in this case was within its

discretion in disallowing CCRA's Proof of Claim under s. 135(2). She stated she would dismiss the appeal on that ground alone.

[13] Neilson J. went on, however, to examine CCRA's submission that the Trustee and the chair of the meeting had erred in categorizing CCRA's debt as contingent and of no value. On this issue, CCRA relied heavily on ss. 299(3), 299(4), 313(1) and 315(2) of the ***Excise Tax Act***, which provide:

> 299(3) **Assessment valid and binding** - An assessment, subject to being vacated on an objection or appeal under this Part and subject to a reassessment, shall be deemed to be valid and binding.
>
> . . .
>
> 299(4) **Assessment deemed valid** - An assessment shall, subject to being reassessed or vacated as a result of an objection or appeal under this Part, be deemed to be valid and binding, notwithstanding any error, defect or omission therein or in any proceeding under this Part relating thereto.
>
> * * *
>
> 313(1) **Debts to Her Majesty** – All taxes, net taxes, interest, penalties, costs and other amounts payable under this Part are debts due to Her Majesty in right of Canada and are recoverable as such in the Federal Court or any other court of competent jurisdiction or in any other manner provided under this Part.
>
> * * *
>
> 315(2) **Payment of Remainder** – Where the Minister mails a notice of assessment to a person, any amount assessed then remaining unpaid is payable forthwith

> by the person to the Receiver General. [Emphasis added.]

[14] As well, CCRA cited the decision of the Ontario Court of Appeal in ***Re Norris*** (1989) 75 C.B.R. (N.S.) 97, in which a trustee in bankruptcy had disallowed a proof of claim filed by the Crown against an individual, Mr. Norris, on the basis of a notice of assessment issued against a corporation pursuant to s. 227(10) of the ***Income Tax Act***. Mr. Norris was a director of the corporation and if the Crown's claim against the corporation was valid, would be jointly and severally liable for the assessed amount. He made an assignment in bankruptcy. The Crown issued a notice of assessment in the same amount against him personally. The trustee was not satisfied with the claim filed by the Crown and asked for more information. The Crown supplied the notice of assessment directed to Mr. Norris, but the trustee was still not satisfied and asked for Revenue Canada's working papers. Neither these papers nor any further details were supplied, leading the trustee to disallow Revenue Canada's entire claim.

[15] The Ontario Court of Appeal ruled that although it had been "within the power" of the trustee to "call for evidence to support the proof of claim", the trustee's request had been "fully answered by the notice of assessment". After citing

s. 152(8) of the ***Income Tax Act*** (the terms of which are similar to those of s. 299(4) of the ***Excise Tax Act*** quoted above), the Court stated:

> A taxpayer who objects to an assessment may file a notice of objection pursuant to s. 165(1) of the Income Tax Act and if necessary proceed to exercise rights of appeal to the Tax Court and to the Federal Court. When the trustee in bankruptcy wishes to question the validity of an assessment against a bankrupt he, like anyone else, must seek his remedy within the Income Tax Act: see *Re Carnat Const. Co.* and *Re Selkirk* (1972), 17 C.B.R. (N.S.) 302 (Ont. S.C.).
>
> To hold that the trustee in bankruptcy can disallow an assessment made pursuant to the Income Tax Act would be tantamount to clothing the trustee with the powers of the Tax Court. No interpretation of the Bankruptcy Act can support such a conclusion.
>
> In the result, the appeal is allowed and the disallowance is set aside and the trustee in bankruptcy is directed to allow the claim filed by the Crown. Such allowance of the claim is, however, without prejudice to the right of the trustee in bankruptcy to proceed with any right he may have under the Income Tax Act. [at 99]

[16] However, the Chambers judge in the case at bar found ***Re Norris*** (and ***Re Bateman*** (1998) 10 C.B.R. (4th) 197 (N.S.S.C.)) to be distinguishable from this case. In her analysis:

> Those authorities deal with a trustee managing a bankrupt estate, in which the assets were vested in the trustee. There had evidently been no challenge to the assessment by the debtor prior to bankruptcy. Nor had the trustee filed a notice of objection.
>
> I find the circumstances here quite different. The debtor is not yet bankrupt. It was a profitable

> business with over 50 employees before the assessment and is now diligently pursuing a proposal under the *Bankruptcy and Insolvency Act,* which is the only course left open to it to avoid a bankruptcy and continue to operate, in the face of an assessment that it claims is invalid. Neither the debtor nor the trustee are seeking to avoid the appeal procedures outlined in the *Excise Tax Act*. Instead, the debtor is vigorously pursuing them. The problem is that those procedures could not be completed before the first creditors' meeting. Port has evidently convinced the trustee that there is merit to its objection. Even CCRA's representative, Mr. O'Connell, has conceded to the trustee that one possible outcome of Port's challenge may be a nil value to CCRA's claim. [paras. 40-1]

She also noted that the Court in ***Re Norris*** had relied on ***Re Carnat Construction Co. Ltd.*** (1958) 37 C.B.R. 47 (Ont. S.C.), where Smily J. had stated that although any challenge to an income tax assessment made by a trustee in bankruptcy must be pursued through the appeal process in the ***Income Tax Act***, there was also

> . . . no question that *The Bankruptcy Act* provisions must be complied with, by the filing of proof of claim by the Crown with respect to income tax, and that this assessment may be disallowed by the Trustee, and that in such event the Crown is called upon to proceed under the provisions of *The Bankruptcy Act* and appeal from that disallowance. [at 48; emphasis added.]

[17] Relying on this passage, Neilson J. accepted that the debtor or trustee is bound to follow the appeal process in the applicable taxing statute to ascertain the final amount of any

debt owed to CCRA. On the other hand, if CCRA wished to "participate in concurrent proceedings under the ***Bankruptcy and Insolvency Act***", it was bound to comply with that statute with respect to the proof of its claim and, she added, "that compliance includes recognition of the trustee's powers to determine a claim is contingent and value it accordingly." (para. 43.) She found additional support for this conclusion in s. 4.1 of the ***BIA*** – a provision not referred to in ***Re Norris*** – which states that the ***BIA*** binds Her Majesty in Right of Canada, and in the fact that whereas the ***Income Tax Act*** expressly subordinates the ***BIA*** to its terms, the ***Excise Tax Act*** does not do so.

[18] The Chambers judge also saw substantial practical reasons for permitting Port to continue operating pending resolution of the excise tax appeal. That appeal might take a year – during which the CCRA was to be entitled to receive "the lion's share" of profits set aside for the unsecured creditors under the proposal. On the other hand, substantial prejudice would accrue to Port, its employees and its other creditors if it were prematurely forced into bankruptcy on the strength of an assessment that might be successfully challenged. In the result, she found that the Trustee had not erred in

categorizing CCRA's claim as contingent and of no value. She dismissed the appeal on this ground as well.

The Second Chambers Judgment

[19] The second order under appeal in this court was made five days later, on November 18, 2002, by Mr. Justice Groberman. After hearing counsel for Port, the Trustee and the Minister of National Revenue, he approved Port's proposal pursuant to s. 59 of the ***BIA,*** but postponed the coming into effect of his order until noon on November 21 in order to allow CCRA to seek leave to appeal the rejection of its claim, to appeal his order, and to seek a further stay. However, CCRA did not seek a further stay prior to November 21, so that Groberman J.'s order became effective as of that date.

[20] On November 22, CCRA filed notices of appeal in this court in respect of the two orders.

On Appeal

[21] In this court, much of CCRA's argument was taken up with the second branch of Neilson J.'s Reasons for Judgment — the conclusion that it lay within the discretion of the Trustee to rule that CCRA's claim was a contingent one and to assign it a nil value. The basis of CCRA's submission was again that because s. 299(4) of the ***Excise Tax Act*** provides that subject

to being vacated on an objection or appeal, a notice of assessment shall be deemed to be "valid and binding", it was not open to the Trustee to rule that CCRA's claim was anything other than valid and provable in the amount stated. In response, the Trustee and Port contend that, to quote from Port's factum, the fact that the Crown has "conferred upon its collectors the right to assess an amount outstanding subject to objection or appeal cannot turn something which is clearly contingent into something which is not contingent." Counsel notes that even CCRA's representative at the creditors' meeting acknowledged that ultimately, CCRA's claim might amount to nothing.

[22] The issue thus framed is a difficult one of principle. With all due respect to the Court in ***Re Norris***, it is not answered by a general statement to the effect that the process for challenging an assessment under the ***Excise Tax Act*** is the process prescribed by that statute. That principle is not in question here: unlike the corporate taxpayer or its director in ***Norris***, Port is proceeding under the ***Excise Tax Act*** with its objection to the assessment. The whole purpose of the proposal was apparently to secure time in which to carry out that process. In the meantime, the statutory validity of the assessment unless and until Port succeeds in having it set

aside, does not necessarily mean that in fact, CCRA's claim may not be highly questionable or of doubtful "value". (I express no opinion on whether that is so in this case.) The real question is the nature of the determination made by a trustee in examining and assessing proofs of claim under the ***BIA***. Does the trustee make a determination of fact concerning the validity of (all) the claims filed against the debtor, or is it bound to rule as a matter of law that an assessment under the ***Excise Tax Act***, no matter how questionable it might be in fact, is valid and fully binding on the debtor for purposes of the ***BIA***? CCRA contends that the answer is simple: s. 299 of the ***Excise Tax Act*** prevails notwithstanding the particular facts or equities surrounding the claim, and the trustee is obliged to accord it 'full faith and credit', even though the assessment may later be set aside. The other view, however, is that the ***BIA*** and ***Excise Tax Act*** may be reconciled by distinguishing the commercial judgements made in the "real" world by a trustee under the ***BIA***, from the artificial "deeming" provisions of the ***Excise Tax Act*** which may be invoked by CCRA without regard for the objection and appeal process provided in the same statute.

[23] Unfortunately, no appellate authority was brought to our attention considering this question, or considering how the

two statutes relate to each other in this regard. In the absence of direct authority, I prefer to decide this case on a more technical basis — the Chambers judge's conclusion on the first branch of her reasons that CCRA's proof of claim did not comply with s. 124 of the ***BIA***. For convenience, I set out s-ss. (1) and (4) thereof below:

> 124. (1) **Creditors shall prove claims** — Every creditor shall prove his claim, and a creditor who does not prove his claim is not entitled to share in any distribution that may be made.
>
> . . .
>
> (4) **Shall refer to account** — The proof of claim shall contain or refer to a statement of account showing the particulars of the claim and any counter-claim that the bankrupt may have to the knowledge of the creditor and shall specify the vouchers or other evidence, if any, by which it can be substantiated. [Emphasis added.]

[24] I did not understand CCRA to argue, and I do not read ***Re Norris*** to suggest, that when advancing a claim (whether for taxes due or otherwise) under the ***BIA***, CCRA need not comply with the applicable provisions regarding proofs of claim. (Indeed, I note that s. 124 was not mentioned by the Court in ***Re*** Norris.) The ground of appeal stated by CCRA in its factum was whether CCRA's proof of claim had in fact been defective "such as to justify total disallowance of the claim." (With respect to the latter phrase, I am not aware of any authority for the proposition that a defective claim could result in

only a partial disallowance of the claim.) This ground is inextricably tied to CCRA's argument that the Chambers judge failed to consider all the evidence before her — including evidence not before the Trustee — in deciding whether CCRA's proof of claim had met the requirements of s. 124.

[25] All counsel seemed to be in agreement with CCRA's contention that its appeal of the Trustee's decision was a "trial *de novo*" such that CCRA could file further evidence in order to establish a provable claim in the court below. The only authority cited on this point was ***Re Eskasoni Fisheries Ltd.*** (2000) 16 C.B.R. (4th) 173, a decision of a registrar of the Nova Scotia Supreme Court. The Registrar stated:

> Where a creditor appeals to the court from the decision of a trustee to disallow a claim that appeal will proceed by way of trial *de novo*. While I have found no specific case or commentary that makes this point clear, it is clear from a review of the cases generally that a Judge or Registrar hearing an appeal from a trustee's decision is not required simply to proceed upon the information before the trustee. In other words, on such appeals the court is entitled to accept and consider all evidence relevant to the claim. [para. 17]

I note that the ability of the court to accept "new" evidence can operate in favour of either party: in ***Eskasoni***, a trustee was permitted to advance a separate and distinct basis for

disallowing a claim on the appeal in addition to the basis previously advanced at the meeting.

[26] Since counsel did not challenge ***Eskasoni***, I frame the question before us to be whether, on the basis of the material before the Trustee, "as amplified" by the further evidence filed in the court below, the proof of claim filed by CCRA complied with s. 124. Specifically, did the document "contain or refer to a statement of account showing the particulars" thereof, and did it specify the "vouchers or other evidence, if any, by which it could be substantiated"?

[27] I agree with Neilson J. that the answer to these questions is "no". As I have already described, CCRA's proof of claim consisted of a covering letter, a Form 31 and a Schedule "A" listing a series of assessments, penalties and interest charges. I note that consistent with s. 124(4), the form prescribed for proofs of claim (presumably also prescribed by the Superintendent) is accompanied by an instruction that "The attached statement of account or affidavit must specify the vouchers or other evidence in support of the claim." CCRA's proof of claim simply stated at paragraph 3 that Port was indebted to CCRA as of July 10, 2002 in the amount of $15,864,279.83 "as specified in the statement of account attached and marked Schedule 'A', after deducting

any counterclaims to which the debtor is entitled." No reference was made to allegations regarding Port's sale of non-existent vehicles to a fraudulent party or parties, nor to any evidence by which the claim could be substantiated.

[28] As noted earlier, CCRA's Form 31 also stated that CCRA had not received any amount from the debtor within the three months preceding the proposal. If this was correct, then even if the Notice of Assessment had been attached to the proof of claim, a discrepancy between the amount claimed ($15,864,279.83) and the amount stated in the Notice of Assessment ($16,436,009.96) would have been apparent. On the other hand, there was affidavit evidence before the Chambers judge to the effect that Port had made payments in the usual course to CCRA within three months of making the proposal. If this was correct, the Form 31 may have been inaccurate. In either event, the Notice of Assessment would not have "fully answered" the question which no doubt arose in the Trustee's mind as to which amount was correct – unlike the situation in ***Re Norris***, *supra*.

[29] In its factum, CCRA suggests that these defects would have been cured had Neilson J. not "failed to consider the Assessment, the Statement of Audit Adjustments, the Notice of Objection, the Proof of Claim with Schedule 'A' and the

affidavit material in evidence before her." With respect, there is little doubt that the Chambers judge considered the Proof of Claim and Schedule "A" before her. There was also in evidence before her (but not before the Trustee) an affidavit of Mr. O'Connell, an employee of CCRA, who attached as exhibit "A" a copy of the Assessment dated July 9, 2002 and Port's Notice of Objection in turn dated September 12, 2002. The Notice of Objection had attached to it a "Statement of Facts and Reasons for Objection of Port Chevrolet Oldsmobile Ltd.", which had obviously been prepared by or on behalf of Port. This document set out in general terms the allegation that Port had been defrauded by Mr. Mapara and his companies into believing that various vehicles existed and were being acquired by his companies for export. It also advanced the other defences noted earlier in these Reasons. Clearly, the Chambers judge considered this document, since she referred at several places in her Reasons to Port's objection to the assessment. In any event, the Notice of Objection and the Statement of Facts and Reasons serve to cast doubt on CCRA's assessment — they do not support it.

[30] The Statement of Audit Adjustments referred to in CCRA's factum was filed as an exhibit to the affidavit of Mr. Peerson, a member of the law firm acting for Port. This

document, prepared by CCRA, is a list of "tax changes" for each month covered by the assessment, stating in each case an amount and that "ITCs on export vehicles disallowed as they pertained to the purchases of non-existent vehicles or vehicles that were not owned by the alleged vendors. Bills of lading (all fraudulent) were used to substantiate about 50% of these alleged exports." Again, CCRA did not provide copies of the bills of lading "or other evidence, if any" by which the claim could be substantiated. The Statement of Audit Adjustments is a series of conclusory accounts which could provide the Trustee with no assistance in carrying out his duty of determining the validity of the claim.

[31] In these circumstances, I see no error in the Chambers judge's conclusions that the documents filed by CCRA in proof of its claim, as augmented by the documents described above, did not comply with s. 124(4) of the ***BIA***. I would therefore dismiss the appeal from Neilson J.'s order on that basis. I would also dismiss the appeal from the order of Groberman J., which essentially followed upon Neilson J.'s order.

[32] In view of my conclusion, it is unnecessary for me to deal with a fourth issue raised by the Trustee in its factum, namely whether, if CCRA had been successful on this appeal, the creditors' vote would be vacated or whether CCRA would

simply have become entitled to share in any distribution under the existing proposal. I leave that interesting question, as well as that raised on the second branch of Neilson J.'s Reasons, for another day.

"The Honourable Madam Justice Newbury"

Reasons for Judgment of the Honourable Madam Justice Levine:

[33] I have had the privilege of reading in draft form the reasons for judgment of my colleague, Madam Justice Newbury. I agree that the appeals should be dismissed on the ground that CCRA's proof of claim failed to comply with the requirements of s. 124 of the ***BIA***. I also agree that the questions of whether a Trustee in Bankruptcy may determine that an assessment under the ***Excise Tax Act*** is "contingent" and how a successful appeal by CCRA would impact on the voting process for the proposal should be left for another day.

[34] In my opinion, CCRA's failures to reconcile the amount claimed in its proof of claim with the amount claimed in its Notice of Assessment and to accurately record payments made by Port in the three months before the proposal were fatal to its claim. The additional evidence provided to Neilson J. did not remedy these defaults. For this reason, the Trustee was justified in rejecting CCRA's proof of claim.

[35] While the factual circumstances in ***Re Norris*** differed in that the Trustee there was administering a bankrupt estate and no notice of objection had been filed, I agree with the decision of the Ontario Court of Appeal insofar as it determined that Revenue Canada was not required to produce its working papers to the Trustee to substantiate its proof of

claim. In this case, in my view, CCRA was not required to refer in its proof of claim to the allegations of fraud that formed the basis for the Assessment or to provide copies of the bills of lading referred to in the Assessment. Nor, in my opinion, was CCRA required to refer or append to its proof of claim the Notice of Objection that had been filed by Port.

[36] The question of whether the Trustee may determine, as a factual matter, that a claim by CCRA that complies in form with s. 124 of the ***BIA*** is of doubtful validity or value, remains open.

[37] I would dismiss the appeals.

"The Honourable Madam Justice Levine"

I Agree:

"The Honourable Madam Justice Ryan"

Tab 11

I.I.C. Ct. Filing 327096123047

Sem Canada Crude Company — Action Number 0801-008510
197. **— Notice of Motion — Canadian Creditor's Meetings Order, August 5, 2009**

Re Sem Canada Crude Company, SemCAMS ULC, Sem Canada EnergyCompany, A.E. Sharp Ltd., CEG Energy Options, Inc., 3191278 Nova Scotia Company, and 1380331 Alberta ULC, Action Number 0801-008510 (Alberta Court of Queen's Bench, Calgary, Alberta) — Bench Brief (Devon), February 26, 2009.

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 SemCanada Crude Company, SemCAMS ULC, SemCanada Energy Company, A.E. Sharp Ltd., CEG Energy Options, Inc. and 1380331 Alberta ULC

IN THE COURT OF QUEEN'S BENCH OF ALBERTA JUDICIAL DISTRICT OF CALGARY

Notice of Motion (Re: Canadian Creditors' Meetings Order)

TAKE NOTICE that an application will be made on behalf of SemCAMS ULC ("*SemCAMS*"), SemCanada Crude Company ("*SemCanada Crude*"), SemCanada Energy Company ("*SemCanada Energy*"), A.E. Sharp Ltd. ("*Sharp*") and CEG Energy Options Inc. ("*CEG*", together with SemCanada Energy and Sharp, the "*SemCanada Energy Companies*") (collectively, the "*SemCanada Group*") before the Honourable Justice B.E.C. Romaine in Chambers at the Calgary Courts Centre, 601-5th Street S.W., at the City of Calgary, in the Province of Alberta, on Wednesday, the 5th day of August, 2009, at 10 o'clock in the forenoon, or as soon thereafter as counsel may be heard, for the following relief:

1. A Canadian Creditors' Meetings Order substantially in the form attached as Schedule "A" hereto (the "*Canadian Creditors' Meetings Order*"):

(a) providing that there has been good and sufficient service and notice of this Application and the time for service of this Application and materials in support thereof be and is hereby abridged, if necessary, so that this Application is properly returnable on August 5, 2009 and any further service of this Application upon any interested party is hereby dispensed with;

(b) accepting the filing of a Plan of Arrangement and Reorganization concerning, affecting and involving SemCAMS, as such plan may be amended, varied or supplemented by SemCAMS from time to time in accordance with the terms thereof and the Canadian Creditors' Meetings Order (the "*CAMS Plan*");

(c) accepting the filing of a Plan of Arrangement and Reorganization concerning, affecting and involving SemCanada Crude, as such plan may be amended, varied or supplemented by SemCanada Crude from time to time in accordance with the terms thereof and the Canadian Creditors' Meetings Order (the "*Crude Plan*");

(d) accepting the filing of a Consolidated Plan of Distribution concerning, affecting and involving the SemCanada Energy Companies as such plan may be amended, varied or supplemented by the SemCanada Energy Companies from time to time in accordance with the terms thereof and the Canadian Creditors' Meetings Order (the "*Energy Distribution Plan*" and together with the CAMS Plan and the Crude Plan, the "*CCAA Plans*");

(e) authorizing SemCAMS, SemCanada Crude and the SemCanada Energy Companies to each establish one class of Affected Creditors in their respective CCAA Plans for the purposes of considering and voting on such CCAA Plans;

(f) authorizing SemCAMS, SemCanada Crude and the SemCanada Energy Companies to each call, hold and conduct a meeting of certain of their respective unsecured creditors (the "*CAMS Creditors' Meeting*", the "*Crude Creditors' Meeting*" and the "*Energy Creditors' Meeting*", respectively, and collectively, the "*Canadian Creditors' Meetings*")

to consider and vote on a resolution to approve the CAMS Plan, the Crude Plan and the Energy Distribution Plan, as the case may be;

(g) approving the procedures to be followed with respect to the calling and conduct of the Canadian Creditors' Meetings;

(h) amending the Record Date for Noteholders set out in the Order granted in the CCAA Proceedings on December 17, 2008; and

(i) providing such further and other relief as SemCAMS may seek and this Honourable Court deems just.

AND FURTHER TAKE NOTICE THAT the interpretation provisions set out in the Canadian Creditors' Meetings Order shall apply to this Notice of Motion. Unless otherwise defined herein or in the Canadian Creditors' Meetings Order, (a) capitalized terms used herein in reference to SemCAMS shall have the meanings ascribed to them in the CAMS Plan, (b) capitalized terms used herein in reference to SemCanada Crude shall have the meanings ascribed to them in the Crude Plan and (c) capitalized terms used herein in reference to the SemCanada Energy Companies shall have the meanings ascribed to them in the Energy Distribution Plan.

AND FURTHER TAKE NOTICE THAT the grounds of the application are as follows:

Background

1. On July 22, 2008 (the "*Application Date*"), SemCAMS and SemCanada Crude were granted protection from their creditors under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "*CCAA*");

2. On July 24, 2008, the SemCanada Energy Companies each filed Notices of Intention under Part III of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the "*BIA*"), which were consolidated with the CCAA proceedings of SemCAMS, SemCanada Crude and other affiliated companies on July 30, 2008 pursuant to the Amended and Restated Initial Order (the "*CCAA Proceedings*");

3. On the Application Date, and continuing thereafter, SemGroup L.P. ("*SemGroup*") and certain of its direct and indirect US subsidiaries and US affiliates (collectively, the "*US Debtors*") filed voluntary petitions seeking protection under chapter 11 of the US *Bankruptcy Code* (the "*US Bankruptcy Proceedings*") in the US Bankruptcy Court for the District of Delaware (the "*US Bankruptcy Court*");

SemCAMS

4. SemCAMS is a privately held unlimited liability company, duly incorporated under the Nova Scotia *Companies Act*, that carries on business in the Province of Alberta, where SemCAMS' headquarters and management are located;

5. SemCAMS' core business is the operation of gas processing plants in Alberta and it owns majority working interests in, three sour gas processing plants;

6. SemCAMS also owns a working interest in an Alberta plant that processes sweet gas, natural gas that does not contain significant amounts of hydrogen sulphide or carbon dioxide;

7. SemCAMS is the operator of, and owns varying working interests in, a network of more than 960 kilometres of natural gas gathering and transportation pipelines which are used to gather and transport natural gas to the plants;

8. SemCAMS employs approximately 330 individuals and 150 contract personnel;

SemCanada Crude

9. SemCanada Crude is a privately held unlimited liability company, duly incorporated under the Nova Scotia *Companies Act*, that carries on business in the Province of Alberta, where SemCanada Crude's headquarters and management are located, and Ontario, Saskatchewan, British Columbia, Manitoba and the northern United States;

10. SemCanada Crude's business consists mainly of crude oil marketing and blending operations, in connection with which it employs approximately 20 individuals;

11. SemCanada Crude's crude oil marketing business includes purchasing, gathering and blending crude oil in Alberta, British Columbia, Saskatchewan and Manitoba, and it also has an active cross-border business in North Dakota;

The SemCanada Energy Companies

12. SemCanada Energy is a privately held unlimited liability company duly incorporated under the Nova Scotia *Companies Act*;

13. SemCanada Energy has ceased all operations but, prior to the commencement of the CCAA Proceedings, carried on business in the Province of Ontario, where its headquarters and management were located, as well as Alberta, British Columbia, Manitoba, Quebec and Saskatchewan;

14. SemCanada Energy's business consisted mainly of providing marketing and consulting services with regard to natural gas products and services;

15. A key element of SemCanada Energy's business was the availability of adequate credit facilities and hedges, upon which its suppliers and customers relied for financial security when entering into natural gas trades;

16. Sharp and CEG are wholly owned subsidiaries of SemCanada Energy, both of which have also ceased all operations and sold substantially all of their assets;

17. Sharp is an Alberta corporation and CEG is a Saskatchewan corporation;

18. During its operation, Sharp was a professional agency for mid- to large-sized energy users, providing services that ranged from acquiring natural gas supply and assisting with price protection programs to providing market intelligence and energy portfolio optimization;

19. During its operation, CEG provided aggressively priced natural gas supply to commercial, institutional and industrial gas users in Western Canada;

The Indebtedness

20. The SemCanada Group is insolvent due to the substantial obligations that they share with their respective affiliates to the Secured Lenders pursuant to the Amended and Restated Credit Agreement dated as of October 18, 2005, among SemCrude, L.P. and SemCAMS Midstream Company, as borrowers, SemGroup and SemOperating G.P., L.L.C., as guarantors, Bank of America, N.A. ("*B of A*") as the administrative agent and L/C issuer, and the other lenders party thereto, as lenders (the "*Credit Agreement*");

21. The SemCanada Group guaranteed full repayment to B of A of SemGroup's indebtedness under the Credit Agreement pursuant to a guarantee dated March 16, 2005 (the "*Guaranty*"), which is secured by general security over all of its present and after-acquired personal property;

22. As of the Application Date, the approximate amounts outstanding under the Credit Agreement totalled US $2.36 billion;

23. SemCAMS, SemCanada Crude and SemCanada Energy are party to an indenture dated as of November 18, 2005 (the "*Indenture*"), in place among SemGroup and SemGroup Finance Corp., as issuers, the guarantors listed thereon, including

SemCAMS, SemCanada Crude and SemCanada Energy, as guarantors and HSBC Bank USA as successor trustee (the "*Noteholder Trustee*");

24. The obligations under the Indenture are unsecured obligations of SemGroup and the principal amount outstanding pursuant to the Indenture as of the Application Date is approximately US $600 million;

The Restructuring and Distribution

25. The SemCanada Group is a member of a larger group of companies (the "*SemGroup Companies*") owned directly or indirectly by SemGroup;

26. Together, the SemGroup Companies and their affiliates provide gathering, transportation, storage, distribution, marketing and other midstream services primarily to independent producers and refiners of petroleum products;

27. SemCAMS and SemCanada Crude's businesses remain viable and profitable and, with the assistance of the Court-appointed monitor, Ernst & Young Inc. (the "*Monitor*"), their legal counsel and their financial advisor, they have made substantial progress on a coordinated cross-border restructuring in Canada and the United States (the "*Restructuring*") with the US Debtors (together with SemCAMS and SemCanada Crude, the "*Restructuring Debtors*");

28. The Restructuring proposes to include SemCAMS and SemCanada Crude in a reorganized family of SemGroup Companies (the "*Restructured SemGroup*");

29. The Restructured SemGroup is to continue to focus on providing midstream energy-related services to third-party customers and itself, and gathering, storage, transportation, and distribution services for energy commodities including crude oil, natural gas, NGL, and asphalt;

30. Conversely, the SemCanada Energy Companies have liquidated substantially all of their property, assets and undertaking, except for the collection of certain accounts receivable;

31. The US Debtors filed in the US Bankruptcy Proceedings the Second Amended Joint Plan of the Affiliated Debtors dated July 21, 2009 (the "*US Plan*" and together with the CCAA Plans, the "*Plans*", and each individually, a "*Plan*");

32. In support of the US Plan, the US Debtors filed in the US Bankruptcy Proceedings the Disclosure Statement for the US Plan dated July 21, 2009 (the "*US Disclosure Statement*"), which outlines the framework of the Restructuring;

33. To facilitate the orderly implementation of the Plans in Canada and the United States, a condition precedent for the implementation of each Plan is that the other Plans take effect the same day;

34. The US Bankruptcy Court granted an Order on July 21, 2009, similar in purpose and function to the proposed Canadian Creditors' Meetings Order, authorizing the US Debtors to send the US Plan and the US Disclosure Statement to the US Debtors' creditors (the "*US Creditors*") for their consideration;

35. The US Bankruptcy Court also set July 22, 2009 as the record date for voting purposes for the US Creditors, including the Noteholders.

36. The deadline for the US Creditors to vote by proxy on the US Plan is September 3, 2009;

37. If the requisite majorities of the US Creditors approve the US Plan and each of the CCAA Plans receive the requisite approval from the Affected Creditors, the US Debtors and the SemCanada Group propose a coordinated confirmation hearing in the US Bankruptcy Proceedings and the CCAA Proceedings to take place on September 16, 2009;

38. If the US Plan is approved by the US Bankruptcy Court and the CCAA Plans are sanctioned by this Honourable Court at such confirmation hearing, the Restructuring Debtors and the SemCanada Energy Companies anticipate implementing the Plans on October 1, 2009;

The Canadian Creditors' Meetings Order

39. The proposed Canadian Creditors' Meetings Order authorizes the SemCanada Group to file and to distribute the CCAA Plans to creditors and call the Canadian Creditors' Meetings to consider and vote on each of the CCAA Plans;

Canadian Plan of Arrangement and Reorganization

40. The proposed CCAA Plans seeks to provide a fair and reasonable compromise amongst the SemCanada Group's various stakeholders and was developed with the input of the SemCanada Group's legal counsel and financial advisors, the Monitor and its legal advisors, and B of A and its legal and financial advisors;

41. Under the proposed CCAA Plans, recoveries to the Secured Lenders in respect of their unsecured claims and to the Noteholder Creditors will be provided for under the US Plan and such parties shall be deemed to have waived their rights to, and shall not be entitled to, receive any distributions provided for under and pursuant to the CCAA Plans in respect of their unsecured claims;

42. In exchange for waiving their rights to receive distributions under the CCAA Plans, the Noteholder Creditors will receive larger distributions in the US Plan;

43. No portion of the total claim of the Secured Lenders will be treated as a secured claim and no distributions will be made to the Secured Lenders under and pursuant to the CAMS Plan;

44. Secured Lenders under the Crude Plan and the Energy Plan will receive distributions for a portion of their claim and will waive their rights to receive further distributions;

45. The proposed CCAA Plans provide that creditors with Unaffected Claims and Unaffected Plan Closing Claims will continue to be paid in the ordinary course of business or, on implementation of the CAMS Plan, have their claims either reserved for or paid in full;

46. The Unaffected Claims Holders will not be entitled to vote on the CAMS Plan;

47. Under the proposed CCAA Plans, Secured Creditors are those Creditors whose Claims are secured by a validly attached and existing security interest on the assets, property and undertaking of the respective member of the SemCanada Group, which was duly and properly perfected at the Filing Date and has priority over the Secured Lenders' Security, up to the realizable value of such property, and will be paid in full in respect of such Claims;

48. Under the proposed CAMS Plan and Crude Plan, the Ordinary Creditors with unsecured claims will receive cash distributions on a *pro rata* basis out of the Ordinary Creditors' Pool, which pool will be CAD $4,850,000 for SemCAMS and CAD $11,000,000 for SemCanada Crude, in both cases subject to a ceiling of 4% of Ordinary Creditors' Proven Claims;

49. Under the proposed Energy Plan, the Ordinary Creditors with unsecured claims will receive cash distributions on a *pro rata* basis out of the Ordinary Creditors' Pool, which pool will be $2,000,000 plus a share of net collections from accounts receivable up to an additional CAD $1,000,000;

50. The CAMS Plan and Crude Plan will provide distributions to their respective Ordinary Creditors with unsecured claims which is expected to be at least equivalent to the value of the distributions provided to their comparable group of unsecured US Creditors in the US Plan;

Notice to Affected Creditors

51. To allow the Affected Creditors with a Voting Claim to consider and to vote on the CCAA Plans, the SemCanada Group proposes to call, hold and conduct the Canadian Creditors' Meetings on September 10, 2009;

52. The SemCanada Group proposes that the Monitor publish a notice of the Canadian Creditors' Meetings (the "*Notice to Creditors*") on or before August 12, 2009, for a period of two (2) Court Days in each of the *Globe and Mail* (National Edition), the *Edmonton Journal* and the *Calgary Herald*;

53. To distribute the necessary materials to the Affected Creditors with a Voting Claim and to allow such Affected Creditors to consider the CCAA Plans, the SemCanada Group proposes that the Monitor send by regular pre-paid mail the applicable Meeting Materials:

(a) to each Ordinary Creditor of the SemCanada Group that has a Proven Claim or a Disputed Claim on or before August 10, 2009; and

(b) to any Person claiming to be an Ordinary Creditor of the SemCanada Group within three (3) Court Days of receipt of a request from such Person to the address provided by such Person to the Monitor;

54. The SemCanada Group proposes that on or before August 10, 2009, the Monitor shall send by courier service a copy of the applicable Meeting Materials for Secured Lenders to B of A, for itself and on behalf of the Secured Lenders, to the Toronto address of B of A's Canadian counsel, Stikeman Elliott LLP, or such other address subsequently provided to the Monitor by B of A;

55. It is proposed that the Meeting Materials shall not be sent to the Companies' Noteholder Creditors;

56. The Secured Lenders and the Noteholder Creditors are to receive notice of the Canadian Creditors' Meetings, the CCAA Plans and the CCAA Sanction Motions in the US Disclosure Statement, as amended, which notice shall be deemed to be sufficient notice to the Secured Lenders and the Noteholder Creditors with respect to the CCAA Plans, the Canadian Creditors' Meetings and the CCAA Sanction Motions;

57. The SemCanada Group also proposes that electronic copies of the applicable Notice to Ordinary Creditors, the Meeting Materials and the Meeting Materials for Secured Lenders, including any amendments and variations thereto, be posted on the Website until the Court Day following the Plan Implementation Date;

Noteholder Identification Process and Record Date

58. The Noteholder identification process adopted in the US Bankruptcy Proceedings identifies which of the Noteholder Creditors are entitled to vote on the US Plan (the "*Noteholder Identification Process*") and the US Bankruptcy Court set the record date for Noteholder Creditors and the other US Creditors voting on the US Plan to be July 22, 2009 (the "*Record Date*");

59. The proposed Canadian Creditors' Meetings Order adopts the Noteholder Identification Process and the Record Date with respect to determining the number and value of votes the Noteholder Creditors are entitled to with respect to the resolutions to approve the CCAA Plans;

60. If this Honourable Court adopts the Noteholder Identification Process and Record Date as set out in the Canadian Creditors' Meetings Order, the Order granted in the CCAA Proceedings on December 17, 2008 will need to be amended accordingly;

Delivery of the Proxies

61. The SemCanada Group proposes that any Ordinary Creditors' Proxy in respect of the Canadian Creditors' Meetings (or any adjournment thereof) shall be provided to the Monitor on or before 5:00 p.m. on the Court Day immediately prior to the day on which the Canadian Creditors' Meetings (or any adjournment thereof) is to be held, provided that any Ordinary Creditors' Proxy may also be deposited with the Chair at the Canadian Creditors' Meetings (or any adjournment thereof) prior to the commencement of the Canadian Creditors' Meetings;

Conduct at the Canadian Creditors' Meetings

62. Pursuant to the proposed Canadian Creditors' Meetings Order and the CCAA Plans, for the purpose of voting to approve the CCAA Plans (a) there shall be one class of Affected Creditors in the CCAA Plans, comprised of the Secured Lenders, the Noteholder Creditors and the Ordinary Creditors, and (b) the value of the Voting Claims of each of SemCanada Group's Creditors shall be as established in accordance with the provisions of the Canadian Creditors' Meetings Order, the Claims Process Order, the applicable CCAA Plan and any further order of this Honourable Court;

63. The proposed quorum required at each of the Canadian Creditors' Meetings is one (1) Ordinary Creditor present in person or by proxy;

Voting Procedure

64. The SemCanada Group proposes that the only Persons entitled to vote at the Canadian Creditors' Meeting, in person or by proxy, on a resolution to approve the respective CCAA Plans are:

(a) Ordinary Creditors with Proven Claims; and

(b) Ordinary Creditors with Disputed Claims on the date that is five (5) Court Days prior to the date of the Canadian Creditors' Meetings, without prejudice to the rights of the applicable Company to dispute such Disputed Claim for distribution purposes under the applicable CCAA Plan;

65. Creditors with Unaffected Claims or Unaffected Plan Closing Claims, the Secured Lenders, the Noteholder Creditors, the other Applicants and the US Debtors shall not be entitled to vote at the Canadian Creditors' Meetings;

66. The votes of the Noteholder Creditors and the Secured Lenders entitled to vote for or against the US Plan shall be deemed to be votes of the Noteholder Creditors and the Secured Lenders, as the case may be, in respect of the CCAA Plans;

67. It is proposed that each of the Affected Creditors entitled to vote on the applicable CCAA Plan is entitled to one vote;

68. The weight provided to an Ordinary Creditors' Voting Claim is equal to the value of such Ordinary Creditors' Proven Claims;

69. The weight provided to an Ordinary Creditors' Disputed Claim for voting purposes will either be the amount set out in any applicable Notice of Revision or Disallowance or the full amount of such Disputed Claim, as more particularly described in and set out in the Canadian Creditors' Meetings Order;

70. The deemed votes of Noteholder Creditors and the Secured Lenders of the SemCanada Group entitled to vote on the US Plan shall have a Voting Claim equal to the value of such creditors' proven claims against the US Debtors that are recognized for the purpose of the US Plan, after such Voting Claims are converted to Canadian Dollars in accordance with the CCAA Plans;

71. Pursuant to the proposed Canadian Creditors' Meetings Order, the SemCanada Group and the Monitor shall be entitled to rely on the information provided by the US Debtors to determine:

(a) the number of votes the Noteholder Creditors are entitled to in respect of the US Plan that are deemed to be votes in favour of or against the resolutions to approve the CCAA Plans and the value attributed to each such vote; and

(b) the number of votes the Secured Lenders are entitled to in respect of the US Plan that are deemed to be votes in favour of or against the resolutions to approve the CCAA Plans and the value attributed to each such vote;

72. The results of the vote conducted at the proposed Canadian Creditors' Meetings and the results of the votes of the Secured Lenders and the Noteholder Creditors in the US Proceedings in respect of the US Plan are proposed to be binding on all of the SemCanada Group's Affected Creditors;

73. The proposed voting procedures for the Canadian Creditors' Meetings are fair and reasonable and afford the Affected Creditors eligible to vote at the Canadian Creditors' Meetings with an adequate opportunity to express their opinions on the proposed CCAA Plans;

Sanctioning of the CAMS Plan

74. The proposed Canadian Creditors' Meetings Order requires the Monitor to provide a report to this Honourable Court no later than two (2) Court Days after the Canadian Creditors' Meetings with respect to:

(a) the results of the votes of the Secured Lenders and the Noteholder Creditors in the US Bankruptcy Proceedings in respect of the US Plan;

(b) the results of the voting at the Canadian Creditors' Meetings on the resolutions to approve each of the CCAA Plans;

(c) whether the required majority of each of the Companies' respective Affected Creditors has approved each of the CCAA Plans; and

(d) the effect on the results of the voting had all of the Ordinary Creditors with Disputed Claims also voted the full amount of their Disputed Claims;

75. If each of the CCAA Plans receives the requisite approval of the Affected Creditors and the US Plan receives the requisite approval of the US Bankruptcy Court, the SemCanada Group expects to bring an application before this Honourable Court on September 16, 2009, or such other date as is set by this Honourable Court, seeking an order sanctioning the CCAA Plans pursuant to the CCAA;

76. As noted above, if the US Plan is approved and the CCAA Plans are sanctioned by this Honourable Court, the Restructuring Debtors and the SemCanada Energy Companies expect to implement the Plans on or about October 1, 2009;

Conclusion

77. The SemCanada Group has acted and will continue to act in good faith and with due diligence in pursuing their respective restructuring and liquidation efforts;

78. The Canadian Creditors' Meetings Order sets out a fair and efficient process for Affected Creditors to Consider and Vote on the CAMS Plan; and

79. Such further and other grounds as counsel may advise.

AND FURTHER TAKE NOTICE THAT SemCAMS will rely upon the following:

(i) the Affidavit of Darren Marine sworn on or about July 24, 2009;

(ii) the Affidavit of Brent Brown sworn on or about July 24, 2009;

(iii) the Affidavit of Terrence Ronan sworn on or about July 25, 2009;

(iv) the Reports of the Monitor;

(v) the pleadings in the within proceedings;

(vi) the CCAA;

(vii) the Alberta *Rules of Court*;

(viii) the inherent jurisdiction of this Honourable Court; and

(ix) such further and other materials as counsel for the Applicant may advise and this Honourable Court may permit.

DATED at the City of Calgary, in the Province of Alberta, this 24th day of July, 2009.

OSLER, HOSKIN & HARCOURT LLP

Per:

A. Robert Anderson, Q.C. / Doug Schweitzer

Solicitors for SemCAMS ULC

TO: The Clerk of the Court

AND TO: The Service List (attached hereto as Schedule "B")

Schedule "A"

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 SemCanada Crude Company, SemCAMS ULC, SemCanada Energy Company, A.E. Sharp Ltd., CEG Energy Options, Inc. and 1380331 Alberta ULC Applicants

IN THE COURT OF QUEEN'S BENCH OF ALBERTA JUDICIAL DISTRICT OF CALGARY

BEFORE THE HONOURABLE MADAM JUSTICE B.E.C. ROMAINE IN CHAMBERS	))))	AT THE LAW COURTS, IN THE CITY OF CALGARY, IN THE PROVINCE OF ALBERTA, ON WEDNESDAY, THE 5TH DAY OF AUGUST, 2009

Canadian Creditors' Meetings Order

UPON the application of SemCAMS ULC ("*SemCAMS*"), SemCanada Crude Company ("*SemCanada Crude*"), SemCanada Energy Company ("*SemCanada Energy*"), A.E. Sharp Ltd. ("*AES*") and CEG Energy Options, Inc. ("*CEG*" and together with SemCAMS, SemCanada Crude, SemCanada Energy and AES, the "*Companies*") for an order (a) accepting the filing of a Plan of Arrangement and Reorganization concerning, affecting and involving SemCAMS, as such plan may be amended, varied or supplemented by SemCAMS from time to time in accordance with the terms thereof and this Canadian Creditors' Meetings Order (the "*CAMS Plan*"); (b) accepting the filing of a Plan of Arrangement and Reorganization concerning, affecting and involving SemCanada Crude, as such plan may be amended, varied or supplemented by SemCanada Crude from time to time in accordance with the terms thereof and this Canadian Creditors' Meetings Order (the "*Crude Plan*"); (c) accepting the filing of a Consolidated Plan of Distribution concerning, affecting and involving SemCanada Energy, AES and CEG (collectively, the "*SemCanada Energy Companies*") as such plan may be amended, varied or supplemented by the SemCanada Energy Companies from time to time in accordance with the terms thereof and this Canadian Creditors' Meetings Order (the "*Energy Distribution Plan*" and together with the CAMS Plan and the Crude Plan, the "*CCAA Plans*"); (d) authorizing SemCAMS, SemCanada Crude and the SemCanada Energy Companies to each establish one class of Affected Creditors in their respective CCAA Plans for the purposes of considering and voting on such CCAA Plans; (e) authorizing SemCAMS, SemCanada Crude and the SemCanada Energy Companies to each call, hold and conduct a meeting of certain of their respective unsecured creditors (the "*CAMS Creditors' Meeting*", the "*Crude Creditors' Meeting*" and the "*Energy Creditors' Meeting*", respectively, and collectively, the "*Canadian Creditors' Meetings*") to consider and vote on a resolution to approve the CAMS Plan, the Crude Plan and the Energy Distribution Plan, as the case may be; and (f) approving the procedures to be followed with respect to the calling and conduct of the Canadian Creditors' Meetings; *AND UPON* having read (i) the Notice of Motion, filed; (ii) the affidavit of Darren Marine sworn July 24, 2009 in respect of SemCAMS, filed; (iii) the affidavit of Brent Brown sworn July 24, 2009

in respect of SemCanada Crude, filed; (iv) the affidavit of Terrence Ronan sworn July 24, 2009 in respect of the SemCanada Energy Companies, filed; (v) the • Report of the court-appointed monitor, Ernst & Young Inc. (the "*Monitor*") dated •, 2009 in respect of, *inter alia*, the CCAA Plans, filed (the "*Monitor's • Report*"); (vi) the US Disclosure Statement, including the US Plan appended thereto (as such capitalized terms are defined herein) and (vii) such further material in the pleadings and proceedings as was deemed necessary; *AND UPON* hearing counsel for the Companies, the Monitor and counsel present for other interested parties; *AND UPON* being satisfied that the Companies have acted and continue to act in good faith and with due diligence and that the circumstances exist that make this Canadian Creditors' Meetings Order appropriate; *IT IS HEREBY ORDERED AND DECLARED THAT*:

Service

1. There has been good and sufficient service and notice of this Application and the time for service of this Application and materials in support thereof be and is hereby abridged, if necessary, so that this Application is properly returnable today and any further service of this Application upon any interested party is hereby dispensed with.

Interpretation and Definitions

2. The interpretation provisions set out hereto in Schedule "A" shall apply to this Canadian Creditors' Meetings Order. Unless otherwise defined herein or in Schedule "A" attached hereto, (a) capitalized terms used herein in reference to SemCAMS shall have the meanings ascribed to them in the CAMS Plan, (b) capitalized terms used herein in reference to SemCanada Crude shall have the meanings ascribed to them in the Crude Plan and (c) capitalized terms used herein in reference to the SemCanada Energy Companies shall have the meanings ascribed to them in the Energy Distribution Plan.

The CCAA Plans

3. The CAMS Plan, the Crude Plan and the Energy Distribution Plan are each hereby accepted for filing, and the Companies are each hereby authorized to seek approval from their respective Affected Creditors of the CAMS Plan, the Crude Plan and the Energy Distribution Plan, as the case may be, in the manner set forth herein.

4. Subject to the prior consent of B of A, acting reasonably, each of the Companies may at any time and from time to time prior to their respective Canadian Creditors' Meetings amend, restate, modify and/or supplement their respective CCAA Plans provided that (i) any such amendment, restatement, modification or supplement is contained in a written instrument filed with this Honourable Court and (ii) notice is provided to all of the applicable Company's Affected Creditors in the manner required by this Honourable Court (if so required).

5. Subject to the prior consent of B of A, acting reasonably, each of the Companies may at any time and from time to time following their respective Canadian Creditors' Meetings amend, restate, modify and/or supplement their respective CCAA Plans provided that (i) any such amendment, restatement, modification or supplement is contained in a written instrument filed with this Honourable Court and (ii) such amendments, restatements, modifications and/or supplements are approved by this Honourable Court following notice to all of the applicable Company's Affected Creditors.

6. Any amendment, restatement, modification or supplement may be made by the Companies with the consent of the Monitor and B of A, acting reasonably, and pursuant to an order of this Honourable Court following the applicable Company's Plan Sanction Date, provided that it concerns a matter which, in the opinion of the applicable Company, acting reasonably, is of an administrative nature required to better give effect to the implementation of the applicable CCAA 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 applicable Company's Affected Creditors.

7. Any amended, restated, modified or supplementary plan or plans of arrangement and reorganization or distribution filed with this Honourable Court and, if required, approved by this Honourable Court with the prior consent of B of A, acting reasonably, shall, for all purposes, be and be deemed to be a part of and incorporated in the applicable CCAA Plan.

Forms of Documents

8. The Notice to Ordinary Creditors substantially in the form attached hereto as Schedule "B", the Instructions to Ordinary Creditors substantially in the form attached hereto as Schedule "C" and the Ordinary Creditors' Proxy substantially in the form attached hereto as Schedule "D" are each hereby approved, and each of the Companies are hereby authorized and directed to make such changes thereto as they consider necessary or desirable to conform the content thereof to the terms of their respective CCAA Plans or this Canadian Creditors' Meetings Order or to describe their respective CCAA Plans.

Record Date and Noteholder Identification Process

9. The Noteholder identification process adopted in the US Proceedings to identify which of the Companies' Noteholder Creditors are entitled to vote on the US Plan (the "*US Noteholder Identification Process*"), as described in the Monitor's • Report, is hereby approved and adopted as the Noteholder identification process that will be used by the Companies and the Monitor to determine the number and value of votes the Noteholder Creditors are entitled to with respect to the resolutions to approve the CCAA Plans.

10. The Voting Record Date for determining which of the Companies' Noteholder Creditors (a) are entitled to vote on the US Plan and (b) shall be deemed to vote on the resolutions to approve the CCAA Plans in accordance with paragraph 34 herein and the CCAA Plans is July 22, 2009. The record date set by this Honourable Court pursuant to the order of the Honourable Madam Justice B.E.C. Romaine dated December 17, 2009 shall be amended accordingly.

Notice to Affected Creditors

11. With respect to each Company, the Monitor shall send by regular pre-paid mail the applicable Meeting Materials:

(a) to each Ordinary Creditor of the applicable Company that has a Proven Claim or a Disputed Claim on or before August 10, 2009 to the address provided by each such Ordinary Creditor in its Proof of Claim or to such other address subsequently provided to the Monitor by any such Ordinary Creditor; and

(b) to any Person claiming to be an Ordinary Creditor of the applicable Company within three (3) Court Days of receipt of a request from such Person to the address provided by such Person to the Monitor.

12. With respect to each Company, on or before August 10, 2009, the Monitor shall send by courier service a copy of the applicable Meeting Materials for Secured Lenders to B of A, for itself and on behalf of the Secured Lenders, to the Toronto address of B of A's Canadian counsel, Stikeman Elliott LLP, or such other address subsequently provided to the Monitor by B of A.

13. With respect to each Company, commencing on or before August 12, 2009, the Monitor shall cause the Notice to Ordinary Creditors, substantially in the form attached hereto as Schedule "B", to be published on two (2) separate Court Days in each of the *Globe and Mail* (National Edition), the *Edmonton Journal* and the *Calgary Herald*.

14. With respect to each Company, electronic copies of the applicable Notice to Ordinary Creditors, the Meeting Materials and the Meeting Materials for Secured Lenders, including any amendments and variations thereto, shall be posted on the Website until the Court Day following the Plan Implementation Date.

15. With respect to each Company, the publication of the Notice to Ordinary Creditors; the notice in the US Disclosure Statement to the Secured Lenders and the Companies' Noteholder Creditors of the Canadian Creditors' Meetings, the CCAA Plans and the CCAA Sanction Motions; the mailing to Ordinary Creditors of the Meeting Materials in accordance with the requirements of this Canadian Creditors' Meetings Order and the mailing to Secured Lenders of the Meeting Materials for Secured Lenders in accordance with the requirements of this Canadian Creditors' Meetings Order shall constitute good and sufficient service, notice and delivery of this Canadian Creditors' Meetings Order and the other documents referred to in this Canadian Creditors' Meetings Order on all Persons, including the Secured Lenders and the Companies' Noteholder Creditors, who may be entitled

to receive notice of or be deemed to vote at or be present at or vote in person or by proxy at the Canadian Creditors' Meetings or any adjournment thereof and no other notice or service need be given or made and no other document or material need be served except as required and in accordance with this Canadian Creditors' Meetings Order. Service and notice shall be effective, in the case of mailing, on the third Court Day after the date of mailing, in the case of service by courier, on the day after the courier package was sent and, in the case of service by fax or email, on the day the fax or email was transmitted, unless such day is not a Court Day, or the fax or email transmission was made after 5:00 p.m., in which case, on the next Court Day.

16. The Meeting Materials shall not be sent to the Companies' Noteholder Creditors or to the Secured Lenders. The Secured Lenders and the Companies' Noteholder Creditors shall receive notice of the Canadian Creditors' Meetings, the CCAA Plans and the CCAA Sanction Motions in the US Disclosure Statement, which notice shall be deemed to be sufficient notice to the Secured Lenders and the Companies' Noteholder Creditors with respect to the CCAA Plans, the Canadian Creditors' Meetings and the CCAA Sanction Motions.

Delivery of Proxies to the Monitor

17. With respect to each Company, any Ordinary Creditors' Proxy in respect of the Canadian Creditors' Meetings (or any adjournment thereof) shall be provided to the Monitor on or before 5:00 p.m. on the Court Day immediately prior to the day on which the Canadian Creditors' Meetings (or any adjournment thereof) are to be held, provided that any Ordinary Creditors' Proxy may also be deposited with the Chair at the Canadian Creditors' Meetings (or any adjournment thereof) prior to the commencement of the applicable Canadian Creditors' Meeting.

18. Each of the Companies may in their respective discretion waive in writing the time limits imposed on their respective Ordinary Creditors as set out in this Canadian Creditors' Meetings Order and the Instructions to Ordinary Creditors for the deposit of proxies and all other procedural matters if the applicable Company deems it advisable to do so (without prejudice to the requirement that all of the applicable Company's other Ordinary Creditors must comply with this Canadian Creditors' Meetings Order and the other procedures set out in the applicable Instructions to Ordinary Creditors).

Conduct at the Canadian Creditors' Meetings

19. With respect to each of the Companies, for the purposes of voting to approve the CCAA Plans (a) there shall be one class of Affected Creditors established in the applicable CCAA Plan, the "Affected Creditors' Class", comprised of the Secured Lenders, the Noteholder Creditors and the Ordinary Creditors, and (b) the value of the Voting Claims of each of the Company's Creditors shall be as established in accordance with the provisions of this Canadian Creditors' Meetings Order, the Claims Process Order, the CCAA Plans and any further order of this Honourable Court.

20. Each of the Companies are hereby authorized to call, hold and conduct the Canadian Creditors' Meetings on the date and at the times and location set out hereto in Schedule "E" for the purpose of considering, and if deemed advisable by the Ordinary Creditors, voting in favour of, with or without variation, resolutions to approve the CCAA Plans.

21. The Canadian Creditors' Meetings shall each be called, held and conducted, and the CCAA Plans shall each be voted upon and, if approved by the applicable Company's Affected Creditors, ratified and given full force and effect, in accordance with the provisions of this Canadian Creditors' Meetings Order, the Claims Process, the CCAA Plans, the CCAA and any further order of this Honourable Court, notwithstanding the provisions of any agreement or other instrument to the contrary.

22. An officer of the Monitor, designated by the Monitor, shall preside as the chair (the "*Chair*") of each of the Canadian Creditors' Meetings and, subject to this Canadian Creditors' Meetings Order and any further order of this Honourable Court, shall decide all matters relating to the conduct at the Canadian Creditors' Meetings.

23. In each of the Canadian Creditors' Meetings, the Chair shall direct a vote with respect to a resolution to approve the applicable CCAA Plan and any amendments thereto as the applicable Company may consider appropriate.

24. In each of the Canadian Creditors' Meetings, the Chair is hereby authorized to accept and rely upon proxies substantially in the form attached hereto as Schedule "D", or such other form as is acceptable to the Chair.

25. The quorum required at each of the Canadian Creditors' Meetings shall be one (1) Ordinary Creditor present in person or by proxy.

26. The Monitor shall appoint scrutineers for the supervision and tabulation of the attendance at, quorum at and votes cast at each of the Canadian Creditors' Meetings. A person designated by the Monitor shall act as secretary at each of the Canadian Creditors' Meetings.

27. If (a) the requisite quorum is not present at a Canadian Creditors' Meeting, or (b) a Canadian Creditors' Meeting is postponed by the vote of the majority in number of the applicable Ordinary Creditors present in person or by proxy, then such Canadian Creditors' Meeting shall be adjourned by the Chair to a later date, time and place designated by the Chair.

28. The Chair shall be entitled to adjourn and further adjourn the Canadian Creditors' Meetings at the Canadian Creditors' Meetings or any adjourned Canadian Creditors' Meetings provided that any such adjournment or adjournments shall be for a period of not more than thirty (30) days in total and, in the event of any such adjournment, the applicable Company shall not be required to deliver any notice of adjournment of the applicable Canadian Creditors' Meeting or adjourned Canadian Creditors' Meeting other than announcing the adjournment at the Canadian Creditors' Meeting or posting notice at the originally designated time and location of the Canadian Creditors' Meeting or adjourned Canadian Creditors' Meeting.

29. With respect to each of the Companies, the only Persons entitled to attend the applicable Canadian Creditors' Meetings are the Monitor; those Persons, including the holders of proxies, entitled to vote at the applicable Canadian Creditors' Meetings, their legal counsel and advisors; the other Applicants; the directors, officers and legal counsel of the applicable Company and of the other Applicants; B of A and its legal counsel and financial advisors; the Noteholder Trustee and its legal counsel; legal counsel to the unsecured creditors' committee appointed in the US Proceedings; and any Persons appointed as scrutineers for the Canadian Creditors' Meetings. Any other person may be admitted to a Canadian Creditors' Meeting on invitation of the Chair.

Voting Procedure

30. Subject to paragraph 34 herein, at each of the Canadian Creditors' Meetings, the Chair shall direct a vote, by written ballot, on a resolution to approve the applicable CCAA Plan and any amendments thereto as the Monitor and the applicable Company may consider appropriate.

31. With respect to each Company, the only Persons entitled to vote at the Canadian Creditors' Meetings, in person or by proxy, are:

(a) Ordinary Creditors with Proven Claims; and

(b) Ordinary Creditors with Disputed Claims on the date that is five (5) Court Days prior to the date of the applicable Canadian Creditors' Meeting, subject to paragraph 35 herein and without prejudice to the rights of the applicable Company to dispute such Disputed Claim for distribution purposes under the applicable CCAA Plan.

32. With respect to each Company, if an Ordinary Creditor transfers or assigns the whole of its Claim prior to the applicable Canadian Creditors' Meeting and the transferee delivers to the applicable Company and the Monitor actual notice of the transfer or assignment, together with satisfactory evidence of such transfer or assignment, by no later than 5:00 p.m. on the day that is ten (10) Court Days prior to the date of the applicable Canadian Creditors' Meeting, such transferee shall be entitled to attend and vote such Ordinary Creditors' Claim at the applicable Canadian Creditors' Meeting, either in person or by proxy, if and to the extent such Claim may otherwise be voted at the applicable Canadian Creditors' Meeting and shall be bound by any and all notices previously given to the transferor or assignor in respect of such Claim. The Companies shall not recognize partial assignments or transfers of Claims.

33. Subject to paragraphs 34 and 35 herein, with respect to each Company, Creditors with Unaffected Claims or Unaffected Plan Closing Claims, the Secured Lenders, the Noteholder Creditors, the other Applicants and the US Debtors shall not be entitled to vote at the Canadian Creditors' Meetings.

34. With respect to each of the Companies and each of the Canadian Creditors' Meetings, the votes of the Noteholder Creditors and the Secured Lenders entitled to vote for or against the US Plan shall be deemed to be votes of the Noteholder Creditors and the Secured Lenders, as the case may be, in respect of the CCAA Plans.

35. With respect to each of the Companies and in accordance with the terms of the Companies' respective CCAA Plans, each of the applicable Company's Affected Creditors entitled to vote on the applicable CCAA Plan is entitled to one vote, which vote shall:

(a) for Ordinary Creditors with Proven Claims, have a Voting Claim equivalent to the value of such Ordinary Creditors' Proven Claim;

(b) for Ordinary Creditors with Disputed Claims and to whom the Monitor has delivered a Notice of Revision or Disallowance and which revision or disallowance remains in dispute or under appeal in accordance with the Claims Process Order, have a Voting Claim equivalent to the value of the revised Claim as accepted by the Monitor pursuant to the Notice of Revision or Disallowance for voting purposes provided that the applicable Company reserves the right to dispute such Ordinary Creditor's Disputed Claim for distribution purposes under the applicable CCAA Plan;

(c) for those Ordinary Creditors with Disputed Claims and to whom the Monitor has not yet delivered a Notice of Revision or Disallowance, have a Voting Claim equivalent to the value of the amount of such Ordinary Creditors' Proof of Claim for voting purposes, provided that the applicable Company reserves the right to dispute such Ordinary Creditor's Disputed Claim for distribution purposes under the applicable CCAA Plan;

(d) for all Noteholder Creditors and for the Secured Lenders of SemCAMS that are entitled to vote on the US Plan in accordance with the US Proceedings, have a Voting Claim equivalent to each such Noteholder Creditor's or Secured Lender's proportionate share of the value of the proven claims of such Noteholder Creditors and Secured Lenders against the US Debtors that are recognized for the purpose of the US Plan in accordance with the process to determine such Noteholder Creditors' and Secured Lenders' respective voting claims in the US Proceedings and under the US Plan after such voting claims have been converted to Canadian Dollars in accordance with the applicable CCAA Plan; and

(e) for the Secured Lenders of SemCanada Crude and the SemCanada Energy Companies that are entitled to vote on the US Plan in accordance with the US Proceedings, have a Voting Claim equivalent to each such Secured Lender's proportionate share of the value of the Lenders' Total Claim that has been proven against the US Debtors for the purpose of the US Plan in accordance with the process to determine such Secured Lenders' voting claims in the US Proceedings and under the US Plan after such voting claims have been converted to Canadian Dollars in accordance with the applicable CCAA Plans less (i) the proportionate share of $145,000,000 for each Secured Lender of SemCanada Crude and (ii) the proportionate share of $108,000,000 for each Secured Lender of the SemCanada Energy Companies.

36. The Companies and the Monitor shall be entitled to rely on the information provided by the US Debtors to determine the:

(a) the number of votes the Noteholder Creditors are entitled to in respect of the US Plan that are deemed to be votes in favour of or against the resolutions to approve the CCAA Plans pursuant to paragraph 34 herein and the value attributed to each such vote in accordance with paragraph 35 herein; and

(b) the number of votes the Secured Lenders are entitled to in respect of the US Plan that are deemed to be votes in favour of or against the resolutions to approve the CCAA Plans pursuant to paragraph 34 herein and the value attributed to each such vote in accordance with paragraph 35 herein.

37. With respect to each Company, Ordinary Creditors with Disputed Claims which have not been finally resolved in accordance with the Claims Process Order shall have their voting intentions with respect to such disputed amounts recorded by the Monitor and reported to this Honourable Court in accordance with paragraph 39 herein. If approval or non-approval of a CCAA Plan by the applicable Affected Creditors shall prove to be determined by the votes cast in respect of Disputed Claims, the applicable Company and the Monitor shall request this Honourable Court for directions and an appropriate deferral of the motion for the applicable Company's Plan Sanction Order and any other applicable dates.

38. The results of the vote conducted at the Canadian Creditors' Meetings and the results of the votes of the Secured Lenders and the Noteholder Creditors in the US Proceedings in respect of the US Plan shall be binding on all of the Companies' Affected Creditors, whether or not any such Affected Creditor is present in person or by proxy or voting at the applicable Canadian Creditors' Meeting or, in respect of the Secured Lenders and the Noteholder Creditors, are voting on the US Plan.

Court Sanctioning of Plan

39. In respect of each of the Companies, the Monitor shall provide a report to this Honourable Court no later than two (2) Court Days after the Canadian Creditors' Meetings (the "*Monitor's Report Regarding the Canadian Creditors' Meetings*") with respect to:

(a) the results of the votes of the Secured Lenders and the Noteholder Creditors in the US Proceedings in respect of the US Plan;

(b) the results of the voting at the Canadian Creditors' Meetings on the resolutions to approve the CCAA Plans;

(c) whether the required majority of each of the Companies' Affected Creditors (as set out in the CCAA Plans) has approved each of the CCAA Plans; and

(d) the effect on the results of the voting had all of the Ordinary Creditors with Disputed Claims also voted the full amount of their Disputed Claims.

40. An electronic copy of the Monitor's Report Regarding the Canadian Creditors' Meetings, including any amendments and variations thereto, and draft sanction orders in respect of each of the CCAA Plans shall be posted on the Website prior to the CCAA Sanction Motions (as defined herein).

41. If the CCAA Plans are approved by the required majority of the Companies' Affected Creditors (as set out in the CCAA Plans), the Companies may bring a motion to this Honourable Court on September 16, 2009, or such other date as is set by this Honourable Court upon motion by the Companies, seeking separate orders sanctioning each of the CCAA Plans pursuant to the CCAA (the "*CCAA Sanction Motions*").

42. Service of this Canadian Creditors' Meetings Order by the Monitor to the parties on the service list, service of this Canadian Creditors' Meetings Order in accordance with paragraphs 11 and 12 hereof, the notice to the Secured Lenders and the Companies' Noteholder Creditors of the Canadian Creditors' Meetings, the CCAA Plans and the CCAA Sanction Motions in the US Disclosure Statement, the publication of the Notice to Ordinary Creditors in accordance with paragraph 13 hereof, the mailing to Ordinary Creditors of the Meeting Materials in accordance with the requirements of this Canadian Creditors' Meetings Order and the mailing to Secured Lenders of the Meeting Materials for Secured Lenders in accordance with the requirements of this Canadian Creditors' Meetings Order shall constitute good and sufficient service of notice of the CCAA Sanction Motions on all Persons entitled to receive such service and no other form of notice or service need be made and no other materials need be served in respect of the CCAA Sanction Motions, except that the Company shall also serve the service list with any additional materials to be used in support of the CCAA Sanction Motions.

43. Any party who wishes to oppose any of the CCAA Sanction Motions shall serve on the service list a notice setting out the basis for such opposition and a copy of the materials to be used to oppose the applicable CCAA Sanction Motion at least two

(2) Court Days before the date set for the applicable CCAA Sanction Motion, or such shorter time as this Honourable Court, by order, may allow.

44. In the event the CCAA Sanction Motions are adjourned, only those Persons who have filed and served a Notice of Appearance shall be served with notice of the adjourned date.

45. Subject to any further order of this Honourable Court, in the event of any conflict, inconsistency, ambiguity or difference between the provisions of the CCAA Plans and this Canadian Creditors' Meetings Order, the terms, conditions and provisions of the CCAA Plans shall govern and be paramount, and any such provision in this Canadian Creditors' Meetings Order shall be deemed to be amended to the extent necessary to eliminate any such conflict, inconsistency, ambiguity or difference.

Assistance of Other Courts

46. This Honourable Court hereby requests the aid and recognition (including assistance pursuant to Section 17 of the CCAA, as applicable) of any court or any judicial, regulatory or administrative body in any province or territory of Canada and any judicial, regulatory or administrative tribunal or other court constituted pursuant to the Parliament of Canada or the legislature of any province or territory or any court or any judicial, regulatory or administrative body of the United States, including the United States Bankruptcy Court for the District of Delaware, and of any other nation or state to act in aid of and to be complementary to this Honourable Court in carrying out the terms of this Canadian Creditors' Meetings Order.

J.C.Q.B.A.

ENTERED THIS ..... day of ....., 2009.

CLERK OF THE COURT

Schedule "A" Interpretation and Definitions

Interpretation

1. All references as to time herein shall mean local time in Calgary, Alberta, Canada, and any reference to an event occurring on a Court Day shall mean prior to 5:00 p.m. on such Court Day unless otherwise indicated herein.

2. All references to the word "including" shall mean "including without limitation".

3. References to the singular herein include the plural, the plural include the singular, and any gender includes the other gender.

Definitions

1. For the purposes of this Canadian Creditors' Meetings Order, the following terms shall have the following meanings ascribed to them:

(a) *"B of A"* means Bank of America, N.A. in its capacity as administrative agent and letter of credit issuer pursuant to the Secured Lenders Credit Agreement;

(b) *"Court Day"* means a day other than Saturday, Sunday or a statutory holiday, on which Courts in Calgary, Alberta are generally open;

(c) *"CCAA Sanction Motions"* shall have the meaning ascribed thereto in paragraph 41;

(d) *"Chair"* shall have the meaning ascribed thereto in paragraph 22;

(e) *"Court"* means the Court of Queen's Bench of Alberta;

(f) *"Instructions to Ordinary Creditors"* means the instructions to the Companies' Ordinary Creditors substantially in the form attached hereto as Schedule "C", together with such changes as may be made to it;

(g) *"Meeting Materials"* means, in respect of each Company, copies of:

(i) the Notice to Ordinary Creditors;

(ii) the CAMS Plan, the Crude Plan or the Energy Distribution Plan, as the case may be;

(iii) the Canadian Creditors' Meetings Order;

(iv) a blank form of the Ordinary Creditors' Proxy; and

(v) the Instructions to Ordinary Creditors;

(h) *"Meeting Materials for Secured Lenders"* means, in respect of each Company, copies of:

(i) the Notice to Ordinary Creditors;

(ii) the CAMS Plan, the Crude Plan or the Energy Distribution Plan, as the case may be; and

(iii) the Canadian Creditors' Meetings Order;

(i) *"Monitor's Report Regarding the Canadian Creditors' Meetings"* shall have the meaning ascribed thereto in paragraph 39 herein;

(j) "*Notice to Ordinary Creditors*" means the notice to Ordinary Creditors for publication in accordance with paragraph 13, which shall be substantially in the form attached hereto as Schedule "B";

(k) "*Ordinary Creditors' Proxy*" means a proxy substantially in the form attached hereto as Schedule "D";

(l) *"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;

(m) *"Secured Lenders"* means any member of the syndicate of secured lenders under the Secured Lenders Credit Agreement or in their capacity as an individual claimant for any amount claimed to be secured by the Secured Lenders Credit Agreement, regardless of whether or not any such amount is ultimately secured under the Secured Lenders Credit Agreement;

(n) *"Secured Lenders Credit Agreement"* means, collectively, the Amended and Restated Credit Agreement dated October 18, 2005 among SemCrude, L.P., as the US borrower, B of A, as the administrative agent and letter of credit issuer, and the guarantors (including SemCAMS, SemCanada Crude, SemCanada Energy, AES and CEG) and the other lender parties listed therein, as amended, modified and supplemented from time to time, and any of the documents and instruments related thereto;

(o) *"US"* means the United States of America;

(p) *"US Debtors"* means SemGroup, L.P. and certain of its direct and indirect subsidiaries and affiliates that filed petitions seeking protection under Chapter 11 of Title 11 of the United States *Bankruptcy Code*;

(q) "*US Disclosure Statement*" means the Disclosure Statement for the Second Amended Joint Plan of Affiliated Debtors dated July 21, 2009 pursuant to Chapter 11 of the US *Bankruptcy Code*;

(r) *"US Noteholder Identification Process"* shall have the meaning ascribed thereto in paragraph 9;

(s) *"US Plan"* means the Second Amended Joint Plan of Affiliated Debtors dated July 21, 2009 pursuant to Chapter 11 of the US *Bankruptcy Code* in the US Proceedings (as the same may be amended, varied or supplemented from time to time);

(t) *"US Proceedings"* means the proceedings commenced by the US Debtors by filing voluntary petitions seeking protection under Chapter 11 of Title 11 of the United States *Bankruptcy Code*;

(u) "*Voting Record Date*" shall have the meaning ascribed thereto in paragraph 10; and

(v) *"Website"* means the website of the Monitor at www.ey.com.ca/SemCanada.

Schedule "B"

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 SemCanada Crude Company, SemCAMS ULC, SemCanada Energy Company, A.E. Sharp Ltd., CEG Energy Options, Inc. and 1380331 Alberta ULC

Notice to Ordinary Creditors of .....•.....

NOTICE IS HEREBY GIVEN that .....•..... (the "*Company*") has filed with the Alberta Court of Queen's Bench (the "*Court*") a plan of *[arrangement and reorganization / distribution]* dated July 24, 2009 (as amended from time to time, the "*Plan*") pursuant to the *Companies' Creditors Arrangement Act* (Canada), as amended (the "*CCAA*").

The Plan contemplates the compromise of rights and claims of certain creditors of the Company (as defined in the Plan, "*Affected Creditors*"). Affected Claims (as that term is defined in the Plan) of Affected Creditors constitute one (1) class as established in the Plan, the "*Affected Creditors Class*".

NOTICE IS ALSO HEREBY GIVEN that a Meeting of the Ordinary Creditors (as that term is defined in the Plan) (the "*Creditors' Meeting*") will be held at the time and place and on the date set forth below for the purpose of considering and, if thought advisable by the Ordinary Creditors, voting in favour of, with or without variation, a resolution to approve the Plan and to transact such other business as may properly come before such Creditors' Meeting or any adjournment thereof. The Creditors' Meeting is being held pursuant to the Order of the Court made on August 5, 2009 by the Honourable Madam Justice B.E.C. Romaine (the "*Canadian Creditors' Meetings Order*").

DATE	TIME (MST)	LOCATION
September 10, 2009	•	*[Osler, Hoskin & Harcourt LLP, 2500, 450 -1{st} Street SW, Calgary, AB T2P 5Hl]*

The quorum for the Creditors' Meeting has been set by the Canadian Creditors' Meetings Order as the presence, in person or by proxy, at the Creditors' Meeting of one (1) Ordinary Creditor.

To become effective, in respect of the Affected Creditors' Class, the Plan must be approved by a majority in number of Affected Creditors who represent at least two-thirds in value of the Voting Claims (as defined in the Plan) of (a) the Ordinary Creditors who actually vote on the resolution approving the Plan (in person or by proxy) at the Creditors' Meeting, and (b) the Secured Lenders and the Noteholder Creditors (each as defined in the Plan) who actually vote on the US Plan (as defined in the Plan) by proxy in accordance with the US Proceedings (as defined in the Plan). The Plan must also be sanctioned by a final order of the Court under the CCAA.

NOTICE IS ALSO HEREBY GIVEN that such order will be sought in a motion to be brought by the Company within ten (10) days of the Creditors' Meeting, which date shall be posted on the website of the court-appointed Monitor as set out below.

At that time the Company will also seek the other relief specified in the Plan. Subject to the satisfaction of the conditions to implementation of the Plan, all Affected Claims of Affected Creditors will then receive the treatment set out in the Plan unless otherwise ordered by the Court.

The value of each Affected Claim for voting purposes has or will be determined pursuant to the Canadian Creditors' Meetings Order, the Claims Process, the Plan, the CCAA and any further order of the Court. Secured Lenders and Noteholder Creditors will not vote (in person or by proxy) at the Creditors' Meeting.

Any Ordinary Creditor who is entitled to vote at the Creditors' Meeting but is unable to attend the Creditors' Meeting is requested to date, sign and return the enclosed form of proxy in the return envelope provided. In order to be used at the Creditors' Meeting, a proxy must be deposited with the Monitor, at the address below, at anytime prior to 5:00 p.m. on the last Business Day before the Creditors' Meeting, or with the Chair of the Creditors' Meeting prior to the commencement of the Creditors' Meeting or any adjournment thereof.

The Monitor's address for the purpose of filing forms of proxy and for obtaining any additional information or materials related to the Creditors' Meeting is:

Ernst & Young Inc.

Court-Appointed Monitor

1000, 440 - 2nd Avenue S.W.

Calgary AB T2P 5E9

Attention: Neil Narfason

Telephone: (403) 206-5067

Fax: (403) 206-5075

This notice is given by the Company pursuant to the Canadian Creditors' Meetings Order.

You can view copies of the documents relating to this process on the following website — www.ey.com.ca/SemCanada.

Capitalized terms not otherwise defined herein shall have the meanings ascribed thereto in the Plan.

DATED this • day of August, 2009.

Schedule "C" .....•..... (the "Company")

Instructions to Ordinary Creditors

August •, 2009

TO: ORDINARY CREDITORS OF THE COMPANY

Re: Meeting of the Ordinary Creditors of the Company to consider and vote on a resolution to approve the Company's Plan of [Arrangement and Reorganization / Distribution] pursuant to the Companies' Creditors Arrangement Act (Canada) (the "Plan")

We enclose in this package the following documents for your review and consideration:

1. Notice to Ordinary Creditors;

2. the Plan proposed by the Company;

3. the Monitor's Report regarding the Canadian Creditors' Meetings;

4. a copy of the Canadian Creditors' Meetings Order of the Alberta Court of Queen's Bench dated August 5, 2009; and

5. a blank form of Ordinary Creditors' Proxy, completion instructions and a return envelope.

Capitalized terms not otherwise defined herein shall have the meanings ascribed thereto in the Plan.

The purpose of these materials is to provide you with the documents required to facilitate the determination and settlement of your Affected Claims, and to enable you to consider the Plan and vote to accept or reject the Plan at the Meeting of Ordinary Creditors to be held at • *[a.m./p.m.]* (MST) on September 10, 2009 at the offices of *[Osler, Hoskin & Harcourt LLP, 2500, 450-1st Street SW,]* Calgary, Alberta (the "*Creditors' Meeting*").

Proxy

If an Ordinary Creditor wishes to vote at the Creditors' Meeting and is not an individual or is an individual who will not be attending the Creditors' Meeting in person, please complete the enclosed Ordinary Creditors' Proxy and provide it to the Monitor, using the enclosed envelope, or by sending it to the Monitor by facsimile transmission, at the fax number noted below, so that it is received by the Monitor no later than 5:00 p.m. (MST) on September 9, 2009. You are required to provide the Ordinary Creditors' Proxy to the Monitor by this deadline or to the Chair prior to the commencement of the Creditors' Meeting if you wish to appoint a proxy to cast your vote at the Creditors' Meeting. However, your failure to vote at the Creditors' Meeting will not affect any right you have to receive any distribution that may be made to Affected Creditors under the Plan.

Further Information

If you have any questions regarding the process or any of the enclosed forms, please contact Ernst & Young Inc. at the following address:

Ernst & Young Inc.

Court-Appointed Monitor

1000, 440 - 2nd Avenue S.W.

Calgary AB T2P 5E9

Attention: Neil Narfason

Telephone: (403) 206-5067

Fax: (403) 206-5075

You can view copies of documents relating to this process on the following website — www.ey.com.ca/SemCanada.

Schedule "D"

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 SemCanada Crude Company, SemCAMS ULC, SemCanada Energy Company, A.E. Sharp Ltd., CEG Energy Options, Inc. and 1380331 Alberta ULC Applicants

IN THE COURT OF QUEEN'S BENCH OF ALBERTA JUDICIAL DISTRICT OF CALGARY

Ordinary Creditors' Proxy

MEETING OF ORDINARY CREDITORS OF .....•..... to be held pursuant to an Order of the Alberta Court of Queen's Bench (the "*Court*") in connection with .....•.....'s Plan of *[Arrangement and Reorganization / Distribution]* under the *Companies' Creditors Arrangement Act* (Canada) (the "*Plan*") on September 10, 2009 at • *[a.m./p.m.]* (MST) in the offices of:

[Osler, Hoskin & Harcourt LLP

2500, 450 - 1st Street SW]

Calgary, Alberta

and at any adjournment thereof.

Before completing this Ordinary Creditors' Proxy, please read carefully the instructions accompanying this Ordinary Creditors' Proxy for information respecting the proper completion and return of this Ordinary Creditors' Proxy.

THIS ORDINARY CREDITORS' PROXY MUST BE COMPLETED AND SIGNED BY THE ORDINARY CREDITOR AND PROVIDED TO THE MONITOR, ERNST & YOUNG INC., BY 5:00 P.M. (MST) ON THE BUSINESS DAY PRIOR TO THE MEETING OR WITH THE CHAIR PRIOR TO THE COMMENCEMENT OF THE MEETING OR ANY ADJOURNMENT THEREOF IF ANY PERSON ON SUCH ORDINARY CREDITOR'S BEHALF IS TO ATTEND THE MEETING AND VOTE ON THE PLAN OR IF SUCH ORDINARY CREDITOR WISHES TO APPOINT AN OFFICER OF THE MONITOR TO ACT AS SUCH ORDINARY CREDITOR'S PROXY.

THE UNDERSIGNED ORDINARY CREDITOR hereby revokes all proxies previously given and nominates, constitutes and appoints ..... or, if no person is named, Neil Narfason of Ernst & Young Inc., in its capacity as Monitor, or such other representative of the Monitor as the Monitor may designate, as nominee of the undersigned Ordinary Creditor, with full power of substitution, to attend on behalf of and act for the undersigned Ordinary Creditor at the Meeting of Ordinary Creditors of .....•..... to be held in connection with the Plan and at any and all adjournments thereof, and to vote the amount of the undersigned Ordinary Creditor's Affected Claims for voting purposes as determined pursuant to the Canadian Creditors' Meetings Order, the Claims Process, the Plan, the CCAA and any further order of the Court as follows:

A. (mark one only):

[_] VOTE FOR approval of the Plan; or

[_] VOTE AGAINST approval of the Plan;

— and —

B. vote at the nominee's discretion and otherwise act for and on behalf of the undersigned Ordinary Creditor with respect to any amendments or variations to the Plan and to any other matters that may come before the Meeting of Ordinary Creditors of .....•..... or any adjournment thereof.

DATED this ..... day of ....., 2009.

Print Name of Ordinary Creditor

Signature of Ordinary Creditor. If the Ordinary Creditor is a corporation, signature of an authorized signing officer of the corporation.

Title of the authorized signing officer of the corporation, if applicable.

Mailing Address of the Ordinary Creditor

Phone Number of the Ordinary Creditor

Instructions for Completion of Proxy

1. Noteholder Creditors and Secured Lenders are not entitled to vote at the Creditors' Meeting and as a consequence, should not complete a proxy.

2. Each Ordinary Creditor who has a right to vote at the Creditors' Meeting has the right to appoint a person (who need not be an Ordinary Creditor) to attend, act and vote for and on behalf of such Ordinary Creditor and such right may be exercised by inserting in the space provided the name of the person to be appointed. *If no name has been inserted in the space provided, the Ordinary Creditor will be deemed to have appointed Neil Narfason of the Monitor (or such other representative of the Monitor as the Monitor may designate) as the Ordinary Creditor's proxyholder*.

3. *If an officer of Ernst & Young Inc. is appointed or is deemed to be appointed as proxyholder and the Ordinary Creditor fails to indicate on this ordinary creditors' proxy a vote for or against approval of the Plan, this ordinary creditors' proxy will be voted FOR approval of the Plan*.

4. If this ordinary creditors' proxy is not dated in the space provided, it will be deemed to be dated on the date it is received by the Monitor.

5. This ordinary creditors' proxy must be signed by the Ordinary Creditor or by the Ordinary Creditor's attorney duly authorized in writing or, if the Ordinary Creditor is a corporation, by a duly authorized officer or attorney of the corporation with an indication of the title of such officer or attorney.

6. Valid proxies bearing or deemed to bear a later date will revoke this ordinary creditors' proxy. If more than one valid proxy for the same Ordinary Creditor and bearing or deemed to bear the same date are received with conflicting instructions, such proxies will be treated as disputed proxies and will not be counted.

7. *This ordinary creditors' proxy should be sent to the Monitor by facsimile at the address set out below so that it is received by the Monitor no later than 5:00 p.m. (MST) on September 9, 2009*.

Ernst & Young Inc.

Court-Appointed Monitor

1000, 440 - 2nd Avenue S.W.

Calgary AB T2P 5E9

Attention: Neil Narfason

Telephone: (403) 206-5067

Fax: (403) 206-5075

Schedule "E" Meeting Schedule

Applicant(s)	Date	Time (MST)	Place
SemCAMS ULC	September 10, 2009	10:00 a.m.	*[Osler, Hoskin & Harcourt LLP, 2500, 450 -1{st} Street SW, Calgary, AB T2P 5Hl]*

—

SemCanada CrudeCompany	September 10, 2009	11:30 a.m.	*[Osler, Hoskin & Harcourt LLP, 2500, 450 -1{st} Street SW, Calgary, AB T2P 5Hl]*
—			
SemCanada Energy Company, A.E. Sharp Ltd. and CEG Energy Options, Inc.	September 10, 2009	1:00 p.m.	*[Osler, Hoskin & Harcourt LLP, 2500, 450 -1{st} Street SW, Calgary, AB T2P 5Hl]*
—			

Schedule "B"

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 SemCanada Crude Company, SemCAMS ULC, SemCanada Energy Company, A.E. Sharp Ltd., CEG Energy Options, Inc., 3191278 Nova Scotia Company and 1380331 Alberta ULC

IN THE COURT OF QUEEN'S BENCH OF ALBERTA JUDICIAL DISTRICT OF CALGARY

Consolidated SemCanada Service List — Service List Last updated on July 13, 2009 — 12:44 p.m.

Counsel	**Telephone**	**Fax**	**Counsel For**
AIRD & BERLIS LLP Barristers & Solicitors BCE Place, 18th Floor Box 754, 181 Bay Street Toronto, Ontario M5J 2T9	*(416) 865-4748*	*(416) 863-1515*	*US Bank National Association*
— D. ROBB ENGLISH E-mail: renglish@airdberlis.com			
—			
ALBERTA JUSTICE AND ATTORNEY GENERAL Legal Services Division Energy Legal Services Business Unit 11th fl Petroleum Plaza NT 9945 - 108 Street Edmonton, Alberta T5K 2G6			*Alberta Petroleum Marketing Commission*
— SANDRO MARROCCO E-mail: Sandro.Marrocco@gov.ab.ca	(780) 644-4956	(780) 427-1871	
—			
ALTA TECH ENVIRONMENTAL SERVICES INC. PO Box 1138, Unit 2, 5023-50 Ave Whitecourt, Alberta T7S 1P1	*(780) 779-6665*	*(780) 778-5350*	
— WADE OSTRANDER, B.Sc., MBA E-mail: wade@altatechenv.com			
—			
BENNETT JONES LLP 4500 Bankers Hall East 855 - 2{nd} Street S.W. Calgary, Alberta T2P 4K7	*(403) 298-3100*	*(403) 265-7219*	*Apache Canada Ltd.*
— CHRIS SIMARD E-mail: simardc@bennettjones.ca	(403) 298-4485		
—			

BLANEY MCMURTRY LLP The Maritime Life Tower Suite 1500, 2 Queen Street East Toronto, Ontario M5C 3G5		*(416) 593-5437*	
— DOMENICO MAGISANO E-mail: dmagisano@blaney.com	(416) 593-2996		
— *BORDEN LADNER GERVAIS LLP* 1000 Canterra Tower 400 Third Avenue, S.W. Calgary, Alberta T2P 4H2	*(403) 232-9500*	*(403) 266-1395*	*Ernst & Young Inc.*
— PATRICK McCARTHY, Q.C. E-mail: pmccarthy@blgcanada.com	(403) 232-9441		
— JOSEF A. KRÜGER E-mail: jkruger@blgcanada.com	(403) 232-9563		
— RAHIM PUNJANI E-mail: rpunjani@blgcanada.com	(403) 232-9615		
— *BURNET DUCKWORTH & PALMER LLP* 1400, 350 - 7 Ave. S.W. Calgary, Alberta T2P 3N9	*(403) 260-0100*	*(403) 260-0332*	*Coastal Resources Limited* *ARC Resources Ltd.* *City of Medicine Hat*
DOUGLAS NISHIMURA E-mail: dsn@bdplaw.com	(403) 260-0269		*Penn West Energy Trust*
— TREVOR BATTY	(403) 260-0263		*Avenir Trading Corp.*
— E-mail: tbatty@bdplaw.com			*Nuvista Energy Ltd.*
— —			*Black Rider Resources Inc.* *Tristar Oil & Gas*
— —			*NetThruPut Inc.* *Wolf Coulee Resources Inc.*
— —			*Profound Energy Inc.* *Orleans Energy Ltd.*
— —			*Advantage Income* *True Oil Purchasing Company*
— —			*CalTech Group Trilogy Energy Ltd.* *Trilogy Blue Mountain LP*
— —			*Progress Energy*
— *BURSTALL WINGER LLP*	*(403) 264-1915*	*(403) 266-6016*	*Artemis Exploration Inc.*

Suite 1600, Dome Tower 333 - 7th Avenue SW Calgary, Alberta T2P 2Z1 PATRICK FITZPATRICK E-mail: Fitzpatrick@burstall.com —	(403) 234-3327		*Corinthian Energy Corp.* *OMERS Energy Inc.* *Superman Resources Inc.* *Active Energy ULC*
— *BURSTALL WINGER LLP* Burstall Winger LLP Suite 1600, Dome Tower 333 - 7th Avenue SW Calgary, Alberta T2P 2Z1 —	*(403) 264-1915*	*(403) 266-6016*	*Tarpon Energy Services Ltd.*
CANDICE ROSS E-mail: ross@burstall.com —	(403) 234-3336		
CASSELS BROCK & BLACKWELL LLP 2100 Scotia Plaza 40 King Street West Toronto, Ontario M5H 3C2 —	*(416) 860-6455*	*(416) 640-3054*	*ES (BC) Limited Partnership*
HARVEY M. GARMAN E-mail: hgarman@casselsbrock.com —			
BRUCE LEONARD E-mail: bleonard@casselsbrock.com			
CHAITONS LLP Barristers & Solicitors 185 Sheppard Ave. West Toronto, Ontario M2N 1M9 —	*(416) 222-8888*	*(416) 222-8402*	*HSBC Bank USA, National Association*
HARVEY G. CHAITON E-mail: Harvey@chaitons.com —			
(Service by email individually)			
DELOITTE & TOUCHE LLP 3000 Scotia Centre 700 Second Street SW Calgary, Alberta T2P 0S7 —	*(403) 267-1700*	*(403) 260-4060*	*Financial advisors to the Lending Syndicate*
VICTOR P. KROEGER E-mail: vkroeger@deloitte.ca —	(403) 267-0609		
DELOITTE & TOUCHE LLP Bay Wellington Tower — Brookfield Place 181 Bay Street Toronto, Ontario M5J 2V1 —	*(416) 601-6369*		
PAUL CASEY E-mail: paucasey@deloitte.ca —	(416) 775-7172		
DEPARTMENT OF JUSTICE CANADA Prairie Region	*(780) 495-7595*	*(780) 495-3319*	*Government of Canada*

Tax Law Services 211 Bank of Montreal Bldg 10199-101 Street N. W. Edmonton, Alberta T5J 3Y4			
— JILL MEDHURST-TIVADAR E-mail: Jill.Medhurst-Tivadar@JUSTICE.GC.CA			
— *ENMAX CORPORATION* 141 - 50 Avenue SW Calgary, Alberta T2G 4S7	*(403) 514-2831*	*(403) 514-6823*	
— RYAN H. EDWARDS E-mail: rhedwards@enmax.com			
— *ERNST & YOUNG LLP* Ernst & Young Tower 1000, 440 - 2nd Avenue S.W. Calgary, Alberta T2P 5E9	*(403) 290-4100*	*(403) 206-5075*	*Monitor*
— NEIL NARFASON E-mail: Neil.Narfason@ca.ey.com	(403) 206-5067		
— PETER CHISHOLM E-mail: peter.chisholm@ca.ey.com	(403) 206-5061		
— KEVIN MEYLER E-mail: kevin.e.meyler@ca.ey.com	(403) 206-5096		
— OREST KONOWALCHUK E-mail: Orest.Konowalchuk@ca.ey.com	(403) 206-5698		
— DERYCK HELKAA E-mail: Deryck.Helkaa@ca.ey.com	(403) 206-5381		
— JEFFREY BOURASSA E-mail: Jeffrey.A.Bourassa@ca.ey.com			
— *ERNST & YOUNG LLP* Ernst & Young Tower Toronto-Dominion Centre 222 Bay Street, PO Box 251 Toronto, Ontario M5K 1J7	*(416) 943-3300* (416) 943-2652		
— BRENT BEEKENKAMP E-mail: brent.r.beekenkamp@ca.ey.com	(416) 943-2170		
— RICK KANABAR E-mail: Rick.Kanabar@ca.ey.com			
— *FASKEN MARTINEAU DUMOULIN LLP* Toronto Dominion Bank Tower 66 Wellington Street West Box 20, Suite 4200 Toronto, Ontario M5K 1N6		*(416) 364-7813*	*BNP Paribas*
— DONALD MILNER	(416) 865-4411		

e-mail: dmilner@tor.fasken.com —			
CAROLE HUNTER E-mail: chunter@fasken.com —	(416) 865-4536		
ALEX KOTKAS E-mail: akotkas@fasken.com —			
RINUS DE WAAL E-mail: rdewaal@fasken.com —			
AUBREY KAUFFMAN Email: akauffinan@tor.fasken.com —	(416) 868-3538		
FRASER MILNER CASGRAIN LLP 30{th} Floor, Fifth Avenue Place 237 - 4{th} Avenue S.W. Calgary, Alberta T2P 4X7 —	*(403) 268-7000*	*(403) 268-3100*	*Nexen Marketing* *Keyera Energy Partnership*
DAVID MANN E-mail: david.mann@fmc-law.com —	(403) 268-7097		
DAVID LeGEYT E-mail: david.legeyt@fmc-law.com —	(403) 268-3075		
REBECCA LEWIS E-mail: rebecca.lewis@fmc-law.com —	(403) 268-6354		
ROBERT KENNEDY E-mail: robert.kennedy@fmc-law.com	(403)268-7161		
GOODMANS LLP 250 Yonge Street, Suite 2400 Toronto, Ontario M5B 2M6 —	(416) 979-2211	*(416) 979-1234*	*Fortis Capital Corp.*
BRENDAN O'NEILL E-mail: boneiIl@goodmans.ca —	(416) 849-6017		
FRED MYERS E-mail: fmyers@goodmans.ca —			
JASON WADDEN E-mail: jwadden@goodmans.ca —	(416) 597-5165		
GOWLING LAFLEUR HENDERSON LLP 1400 Scotia Centre 700 - 2{nd} St. S.W. Calgary, Alberta T2P 4V5	*(403) 298-1000*	*(403) 263-9193*	*Vitol Inc.* *Fulcrum Energy Management Inc*
PETER JULL E-mail: peter.jull@gowlings.com	(403) 292-9807 (403) 298-1874	(403) 292-9880	*Auriga Energy Inc.* *Quorum Business Solutions (Canada), Inc.*
CRAIG MCMAHON E-mail: craig.mcmahon@gowlings.com —			*Crocotta Energy Inc.* *Phase Energy Ltd*
—			*Reece Energy Exploration Corp.*

—

GOWLING LAFLEUR HENDERSON LLP Suite 1400 700 - 2nd Street S.W. Calgary, Alberta T2P 4V5	*(403) 298-1000*	*(403) 263-9193*	*Barnwell of Canada*
— TOM CUMMING E-mail: tom.cumming@gowlings.com	(403) 298-1938		
— *HEENAN BLAIKIE LLP* 12{th} Floor, 425 - 1{st} Street SW Calgary, Alberta T2P 3L8	*(403) 234-8223*	*(403) 234-7987*	*Fractal Systems Inc.* *Bellamont Exploration Ltd.*
— WILLIAM EJ. SKELLY E-mail: wskelly@heenan.ca	(604) 891-1177		*Enersul Limited Partnership*
— CAIREEN E. HANERT E-mail: chanert@heenan.ca	(403) 234-1662		*Dynamysk Automation Ltd.*
— *HEENAN BLAIKIE LLP* 12{th} Floor, Fifth Avenue Place 425-1{st} Street SW Calgary, Alberta T2P 3L8	*(403) 234-8223*	*(403) 234-7987*	*Shell Energy North America (Canada) Inc.*
— PATRICK L. ROCHE E-mail: proche@heenan.ca			
— KENNETH KRAFT E-mail: kkraft@heenan.ca			
— RYAN P. PELLETIER E-mail: rpelletier@heenan.ca			*Black Sea*
— *HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA* c/o Ministry of Attorney General Legal Services Branch Revenue & Taxation Group Suite 601, 1175 Douglas Street PO Box 9289 Stn Prov Govt Victoria, British Columbia V8W 9J7	*250-356-8589*	*250-387-0700*	
— AARON WELCH E-mail: Aaron.Welch@gov.bc.ca			
— *KAY, RIGGINS & BUTLIN* #B 212-3{rd} Ave West Bag 1227 Brooks, Alberta T1R 1C1	*(403) 362-5733*	*(403) 362-5770*	*Midfield Supply ULC*
— GORDON KAY, Q.C. jennifer.bruner@kayandriggins.ca			
— *KAYE SCHOLER LLP* 425 Park Avenue New York, New York 10022			*Bank of America*

— MARC ROSENBERG E-mail: mrosenberg@kayescholer.com	(212) 836-8774		
— SCOTT TALMADGE E-mail: stalmadge@kayescholer.com	(212) 836-7039		
— PENELOPE JENSEN E-mail: pjensen@kayescholer.com	(212) 836-8809		
— NICHOLAS CREMONA E-mail: ncremona@kayescholer.com	(212) 836-7189		
— ALBERT M. FENSTER E-mail: afenster@kayescholer.com	(212) 836-8205	(212) 836-6205	
— SHERYL GITTLITZ E-mail: sgittlitz@kayescholer.com			
— MARGOT SCHONHOLTZ E-mail: MSchonholtz@kayescholer.com			
— *LEGAL RISK CONSULTANTS* 3505 - 18St. S.W. Calgary, Alberta T2T 4T9	*(403)681-8842*	*(403) 287-8300*	*Joe Shiminov*
— BRAD MINUK Email: brad@legalriskconsultants.com			
— *MCMILLAN LLP* Brookfield Place 181 Bay Street, Suite 4400 Toronto, Ontario M5J 2T3			*Counsel to BMO Nesbitt Burns as financial advisor to SemCAMS ULC and SemCanada Crude Company*
— ANDREW KENT E-mail: Andrew.kent@mcmillan.ca	416.865.7160		
— *MacPHERSON LESLIE & TYERMAN LLP* 1500 - 410 22nd Street East Saskatoon, Saskatchewan S7K 5T6	*(306) 975-7136*	*(306) 975-7145*	*Young EnergyServe Inc.* *Rutter Hinz Inc.*
— JEFFREY M. LEE E-mail: jmlee@mlt.com			
— *MAY JENSEN SHAWA SOLOMON LLP* 800, 304 - 8{th} Ave SW Calgary, Alberta T2P 1C2	*(403) 571-1520*	*(403)571-1528*	*Pearl Exploration and Production Ltd.*
— CARSTEN JENSEN E-mail: jensenc@mjss.ca			
— *MCCARTHY TÉTRAULT LLP* 3300 - 421 7 Ave. S.W.	*(403) 260-3500*	*(403) 260-3501*	*Crescent Point Energy Trust*

Calgary, Alberta T2P 4K9			*Enbridge Pipelines Inc.*
SEAN COLLINS E-mail: scollins@mccarthy.ca	(403) 260-3531		*Flint Hills Resource Canada, LP*
—			*Tidal Energy Marketing Inc.*
MCDOUGALL GAULEY LLP 701 Broadway Avenue Saskatoon, Saskatchewan S7K 3L7	*(306) 665-5417*	*(306) 652-1323*	*T-Bird Oil Ltd.* *Aldon Oils Ltd.*
—			
IAN A. SUTHERLAND E-mail: isutherland@mcdougallgauley.com			*Midale Petroleums Ltd.*
—			
MCLENNAN ROSS LLP 600 West Chambers 12220 Stony Plain Rd Edmonton, Alberta T5N 3Y4	*(403) 543-9120*	*(780) 482-9102*	*Husky Marketing and Supply Company* *Husky Energy Marketing Inc.*
CHUCK RUSSELL E-mail: crussell@mross.com	(780) 482-9115		
—			
MILES DAVISON LLP 1600 Bow Valley Square II 205 - 5 Avenue SW Calgary, Alberta T2P 2V7		*(403) 263-6840*	*Herbert Hamilton and Erin Jones*
—			
DAN JUKES E-mail: djukes@milesdavison.com	(403) 298-0327		*SemCrude re: Daylight Matter*
—			*Tri-Ocean Engineering Ltd.*
MILES DAVISON LLP 1600 Bow Valley Square II 205 - 5 Avenue SW Calgary, Alberta T2P 2V7			
—			
SEAN T. FITZGERALD E-mail fitz@milesdavison.com	(403) 298-0348		
—			
MUNSCH HARDT KOPF HARR & DINAN, P.C. 3800 Lincoln Plaza 500 N. Akard Street Dallas, Texas USA 75201		*(214) 978-4395*	*BNP Paribas*
—			
PAUL SEILER E-mail: pseiler@munsch.com	(214) 855-7576		
—			
KEVIN M. LIPPMAN E-mail: klippman@munsch.com	(214) 855-7553	(214) 978-4335	
—			
OSLER, HOSKIN & HARCOURT LLP 1 First Canadian Place 100 King Street West P.O. Box 50, Suite 6100 Toronto, Ontario M5X 1B8	*(416) 362-2111*	*(416) 862-6666*	
—			
RUPERT H. CHARTRAND E-mail: rchartrand@osler.com	(416) 862-6575		

—
MICHAEL DE LELLIS (416) 862-5997
E-mail: mdelellis@osler.com
OSLER, HOSKIN & HARCOURT LLP (416) 362-2111 *(416) 862-6666* *BMO*
1 First Canadian Place
100 King Street West
P.O. Box 50, Suite 6100
Toronto, Ontario M5X 1B8
—
STEVEN GOLICK (416) 862-6704
E-mail: sgolick@osler.com
—
MARC WASSERMAN (416) 862-4908
E-mail: mwasserman@osler.com
—
OSLER, HOSKIN & HARCOURT LLP (416) 362-2111 *(416) 862-6666* *J. Aron & Company*
1 First Canadian Place
100 King Street West
P.O. Box 50, Suite 6100
Toronto, Ontario M5X 1B8
—
TRACY SANDLER (416) 862-5890
E-mail: tsandler@osler.com
OSLER, HOSKIN & HARCOURT LLP (403) 260-7000 *(403) 260-7024*
Suite 2500, Trans Canada Tower
450- 1st Street SW
Calgary, Alberta T2P 5H1
—
A. ROBERT ANDERSON
E-mail: randerson@osler.com (403) 260-7004
—
TRISTRAM J. MALLETT
E-mail: tmallett@osler.com (403) 260-7041
—
CHRISTA L. NICHOLSON
E-mail: cnicholson@osler.com (403) 260-7025
—
JANICE BUCKINGHAM
E-mail: jbuckingham@osler.com (403) 260-7006
—
TAMARA PRINCE
E-mail: tprince@osler.com (403) 260-7054
—
CYNTHIA SPRY
E-mail: cspry@osler.com (403) 260-7023
—
THOMAS GELBMAN
E-mail: tgeIbman@osler.com (403) 260-7073
—
DOUGLAS SCHWEITZER
E-mail: dschweitzer@osler.com (403) 260-7075
—
BEN PULLEN
E-mail: bpullen@osler.com (403) 260-7038
—
JESSICA NG
E-mail: jeng@osler.com (403) 260-7030
—

PAMELA NUTTER E-mail: pnutter@osler.com	(403) 592-7302		
OSLER, HOSKIN & HARCOURT LLP Suite 2500, Trans Canada Tower 450 - 1st Street SW Calgary, Alberta T2P 5Hl	(403) 260-7000	*(403) 260-7024*	*Chevron*
— COLIN FEASBY E-mail: cfeasby@osler.com			
OSLER, HOSKIN & HARCOURT LLP Suite 2500, Trans Canada Tower 450 - 1st Street SW Calgary, Alberta T2P 5H1	(403) 260-7000	*(403) 260-7024*	*ConocoPhillips*
— MAUREEN KlLLORAN E-mail: mkilloran@osler.com	(403) 260-7003		
PARLEE MCLAWS LLP 1500 Manulife Place 10180-101 Street Edmonton, Alberta T5J 4K1	*(780) 423-8500*	*(780) 423-2870*	*Edmonton Exchanger & Refinery Services Ltd.* *Canada Safeway*
— JERRY HOCKIN E-mail: jhockin@parlee.com	(780) 423-8532		
— *PARLEE MCLAWS LLP* 3400 Petro-Canada Centre 150-6th Avenue SW Calgary, Alberta T2P 3Y7		*(403) 265-8263*	
— SCOTT WATSON E-mail: swatson@parlee.com	(403) 294-7038		
— *PEACOCK LINDER & HALT LLP* 850, 607 - 8 Avenue SW Calgary, Alberta T2P 0A7 J. PATRICK PEACOCK, Q.C. Email: jppeacock@plhlaw.ca EDWARD W. HALT, Q.C. Email: ehalt@plhlaw.ca — PETER T. LINDER, Q.C. Email: plinder@plhlaw.ca — ERMINIA R. BOSSIO Email: ebossio@plhlaw.ca	*(403) 296-2280* (403) 296-2281 (403) 296-2283	*(403) 296-2299*	*Global Petroleum Marketing Inc.* *SemCAMS ULC* *SemCanada Energy Company*
— *ROBERT S. RIDDLE PROFESSIONAL CORPORATION* Barrister & Solicitor 2445 Manulife Place 10180 - 101 Street Edmonton, Alberta T5J 3S4	*(780) 423-6817*	*(780) 429-5054*	*Cobra Maintenance LP* *Cobra Group of Companies*
— ROBERT RIDDLE E-mail: bob@rsriddle.com			
—			

ROWBOTHAM LAW OFFICE 320, 703 - 6th Ave. S.W. Calgary, Alberta T2P 0T9		*(403) 571-4624*	*TERA Environmental Consultants*
— DAVID ROWBOTHAM E-mail: rlo.dwr@shaw.ca	(403) 571-4621		
— *SASKENERGY* 1000-1777 Victoria Ave Regina, Saskatchewan S4P 4K5	*(306) 777-9415*	*(306) 565-3332*	
— MARILYN WAPPEL E-mail: mwappel@saskenergy.com			
— *SEMCAMS ULC* 2000, 450 - 1{st} Street S.W. Calgary, Alberta T2P 5H1	*(403) 536-3006*	*(403) 536-3158*	*SemCAMS ULC (in house counsel)*
— Darren Marine E-mail: darren.marine@semcams.com	(403) 536-3075		
— *SHELL TRADING* 909 Fannin, Plaza Level 1 Houston, Texas 77010-1016		*(713) 230-2900*	*Shell Trading Canada*
— GINA E. KIM E-mail: gma.kim@shell.com	(713) 230-3445		
— *STIKEMAN ELLIOTT LLP* 5300 Commerce Court West 199 Bay Street Toronto, Ontario M5L 1B9	*(416) 869-5500*	*(416) 947-0866*	*Bank of America*
— DAVID BYERS E-mail: dbyers@stikeman.com	(416) 869-5697		
— ASHLEY TAYLOR E-mail: ataylor@stikeman.com	(416) 869-5236		
— SHARON POLAN E-mail: SPolan@stikeman.com	(416) 869-5645		
— JUSTIN PARAPPALLY E-mail: jparappally@stikeman.com	(416) 869-5591		
— SEAN DUNPHY E-mail: SDunphy@stikeman.com	(416) 869-5662		
— MAYA POLIAK E-mail: mpoliak@stikeman.com	(416) 869-6866		
— ERICA TAIT E-mail: ETait@stikeman.com	(416) 869-6805		
— *STIKEMAN ELLIOTT LLP* 4300 Bankers Hall West 888 - 3{rd} St. SW	(403) 266-9078		

Calgary, Alberta T2P 5C5 — MIKE MESTINSEK E-mail: mmestinsek@stikeman.com			
STIKEMAN ELLIOTT LLP 1155 René-Lévesque Blvd. West, 40th Floor Montréal, Quebec H3B 3V2	*(514) 397-3000*	*(514) 397-3222*	*Trafigura* *BP Canada Energy Company*
— GUY MARTEL E-mail: gmartel@stikeman.com	(514) 397-3163		*Pembina Pipeline Corporation*
— MATTHEW LIBEN E-mail: mliben@stikeman.com	(514) 397-3115	(514) 397-3636	
— MÉLANIE BÉLAND E-mail: mbeland@stikeman.com	(514) 397-3197	(514) 397-3591	
— DAVID TOURNIER Email: dtournier@stikeman.com			
— *STIKEMAN ELLIOTT LLP* 4300 Bankers Hall West 888 - 3{rd} St. SW Calgary, Alberta T2P 5C5	*(403) 266-9000*	*(403) 266-9034*	
— HAROLD K. ANDERSEN E-mail: handersen@stikeman.com	(403) 266-9063		
THACKRAY BURGESS 1900, 736-6{th} Ave SW Calgary, Alberta T2P 3T7		*(403) 531-4720*	*Longhorn Oil & Gas Ltd.* *Canol Resources Ltd.*
—			*Circumpacific Energy Corporation*
—			*TRAFINA Energy Ltd.*
—			*Sogar Resources Ltd.*
— *TORYS LLP* Suite 3000 79 Wellington Street West Box 270, TD Centre Toronto, Ontario			*Morgan Stanley Capital Group Inc.*
— MICHAEL ROTSZTAIN E-mail: mrotsztain@torys.com	(416) 865-7508	(416) 865-7380	
— *U.S. BANK NATIONAL ASSOCIATION* U.S. Bancorp Center BC-MN-H21R 800 Nicollet Mall Minneapolis, MN 55402		*(612) 303-7886*	*U.S. Bank National Association (in-house counsel)*
— PATRICK RYAN E-mail: patrick.ryan@usbank.com	(612) 303-7831		

—

WALSH WILKINS CREIGHTON LLP 2800,801 6{TH} Ave SW Calgary, Alberta T2P 4A3 — PAUL J. PIDDE E-mail: ppidde@wwclawyers.com	*403-267-8400* (403) 267-8421	*403-264-9400*	*Aluma Systems Inc.*

—

Additional Recipients

OGILVY RENAULT LLP Suite 3800, P.O. Box 84 Royal Bank Plaza, South Tower 200 Bay Street Toronto, Ontario M5J 2Z4 — JENNIFER STAM E-mail: jstam@ogilvyrenault.com — MARIO FORTE E-mail: mforte@ogilvyrenault.com — DERRICK TAY E-mail: dtay@ogilvyrenault.com —	*(416) 216-4000*	*(416) 216-3930*	*Canadian counsel to the Unsecured Creditors Committee in the Chapter 11 proceedings of SemGroup L.P. et al*

End of Document

I.I.C. Ct. Filing 341079516004

Sem Canada Crude Company — Action Number 0801-008510
205. — **Reasons for Decision of the Honourable Madam Justice B.E. Romaine, August 24, 2009**

Re Sem Canada Crude Company, SemCAMS ULC, Sem Canada Energy Company, A.E. Sharp Ltd., CEG Energy Options, Inc., 3191278 Nova Scotia Company, and 1380331 Alberta ULC, Action Number 0801-008510 (Alberta Court of Queen's Bench, Calgary, Alberta)

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 SemCanada Crude Company, SemCAMS ULC, SemCanada Energy Company, A.E. Sharp Ltd., CEG Energy Options, Inc., 319278 Nova Scotia Company and 1380331 Alberta ULC

Court of Queen's Bench of Alberta

Citation: SemCanada Crude Company (Re), 2009 ABQB 490

Date:

Docket: 0801 08510

Registry: Calgary

Reasons for Decision of the Honourable Madam Justice B.E. Romaine

Introduction

[1] The SemCanada Group applied for various relief related to the holding of meetings of creditors to consider three plans to restructure and distribute assets of the CCAA applicants, including applications for orders authorizing the establishment of a single class of creditors for each plan for the purpose of considering and voting on the plans. I granted the applications, and these are my reasons.

Relevant Facts

[2] On July 22, 2008, SemCanada Crude Company ("SemCanada Crude") and SemCAMS ULC ("SemCAMS") were granted initial Orders pursuant to s. 11(1) of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c.C-36, as amended (the "CCAA").

[3] On July 30, 2008, the CCAA proceedings of SemCAMS and SemCanada Crude and the bankruptcy proceedings of SemCanada Energy Company ("SemCanada Energy") A.E. Sharp Ltd. ("AES") and CEG Energy Options, Inc. ("CEG") which had been commenced on July 24, 2008 were procedurally consolidated for the purpose of administrative convenience.

[4] In addition, CCAA protection was granted to two affiliated companies, 3191278 Nova Scotia Company ("319") and 1380331 Alberta ULC ("138"). SemCanada Energy, AES, CEG, 319 and 138 are collectively referred to as the "SemCanada Energy Companies". The CCAA applicants are collectively referred to as the "SemCanada Group".

[5] On July 22, 2008, SemGroup L.P. and its direct and indirect subsidiaries in the United States (the "U.S. Debtors") filed voluntary petitions to restructure under Chapter 11 of the U.S. Bankruptcy Code in the United States Bankruptcy Court for the District of Delaware.

[6] According to the second report of the Monitor, the financial problems of the SemGroup arose from a failed trading strategy and the volatility of petroleum products prices, leading to material margin calls related to large futures and options positions

on the NYMEX and OTC markets, resulting in a severe liquidity crisis. SemGroup's credit facilities were insufficient to accommodate its capital needs, and the corporate group sought protection under Chapter 11 and the CCAA.

[7] The SemCanada Group are indirect, wholly-owned subsidiaries of SemGroup LP. The SemCanada Group is comprised of three separate businesses:

(a) SemCanada Crude, a crude oil marketing and blending operation;

(b) the SemCanada Energy Companies, whose business was gas marketing, including the purchase and sale of gas to certain of its four subsidiaries as well as to SemCAMS; and

(c) SemCAMS, whose business consists of ownership interests in large gas processing facilities located in Alberta, as well as agreements to operate these facilities.

[8] SemCrude, L.P. as U.S. borrower and a predecessor company of SemCAMS as Canadian borrower, certain U.S. SemGroup corporations and Bank of America as administrative agent for a syndicate of lenders (the "Secured Lenders") entered into a credit agreement in 2005 (the "Credit Agreement"). The Credit Agreement provides four different credit facilities. There are no advances outstanding with respect to the Canadian term loan facility, but in excess of U.S. $2.9 billion is owing under the U.S. term loan facility, the working capital loan facility and the revolver loan.

[9] Five of the SemCanada Group, including SemCanada Crude, SemCanada Energy and SemCAMS, have provided a guarantee of all obligations under the Credit Agreement to the Secured Lenders, who rank as senior secured lenders, and under a US $600 million bond indenture issued by SemGroup. The guarantee is secured by a security and pledge agreement (the "Security Agreement") signed by the five members of the SemCanada Group.

[10] The SemCanada Energy Companies were liquidated or have ceased operations and no longer have significant ongoing operations. As a result of liquidation proceedings and the collection of outstanding accounts receivable, the SemCanada Energy Companies hold approximately $113 million in cash. An application to distribute that cash to the Secured Lenders was adjourned *sine die* on January 19, 2009: Re SemCanada Crude Company *(Companies' Creditors Arrangement Act)*, 2009 ABQB 90.

[11] Originally, SemCAMS and SemCanada Crude proposed to restructure their businesses as stand-alone operations without further affiliation with the U.S. Debtors and accordingly sought bids in a solicitation process undertaken in early 2009. Unfortunately, no acceptable bids were received. It also became apparent that, as SemCanada Crude's business was closely integrated with certain North Dakota transportation rights and assets owned by the U.S. Debtors, restructuring SemCanada Crude's operations on a stand alone basis would be problematic. The SemCanada Group turned to the alternative of joining in the restructuring of the entire SemGroup through concurrent and integrated plans of arrangement in both Canada and the United States.

Summary of the U.S. and Canadian Plans

[12] The U.S. and Canadian plans are complex and need not be described in their entirety in these reasons. For the purpose of these reasons, the relevant aspects of the plans are as follows:

1. The disclosure statement relating to a joint plan of affiliated U.S. Debtors was approved for distribution to creditors by the U.S. Bankruptcy Court on July 21, 2009. Under the Chapter 11 process, meetings of creditors are not necessary. Voting takes place through a notice and balloting mechanism that has been approved by the U.S. Court and September 3, 2009 has been set as the voting deadline for acceptance or rejection of the U.S. plan.

2. The total distributable value of the SemGroup for the purpose of the plans is expected to be US $2.3 billion, consisting of US $965 million in cash, US $300 million in second lien term loan interests and US $1.035 billion in new common stock and warrants of the U.S. Debtors.

3. The SemCanada Group will contribute approximately US $161 million in available cash to the U.S. plan and US $54 million is expected to be received from SemCanada Crude relating to crude oil settlements that will occur after the effective date of the plans, being cash received from prepayments that are outstanding on the implementation date which will be replaced with letters of credit or other post-plan financing.

4. Approximately US $50 million will be retained by the corporate group for working capital and general corporate purposes, including for the post plan cash needs of SemCAMS and SemCanada Crude.

5. Certain U.S. causes of action will be contributed to a "litigation trust" and will be distributed through the U.S. Plan, including to the Secured Lenders on their deficiency claims. No value has been placed on the litigation trust by the U.S. Debtors. The Monitor reports that it is unable to make an informed assessment of the value of the litigation trust assets as the trust is a complicated legal mechanism that will likely require the expenditure of significant time and professional fees before there will be any recovery.

6. The U.S. plan contains a condition precedent that, on the effective date of the plan, the restructured corporate group will enter into a US $500 million exit financing facility, which will apply to all post-restructuring affiliates, including SemCAMS and SemCanada Crude, and which will allow the corporate group to re-enter the crude marketing business in the United States and to continue operations in Canada.

7. It is expected that the Secured Lenders will receive cash, second lien term loan interests and equity in priority to unsecured creditors on their secured guarantee claims of US $2.9 billion, which will leave them with a deficiency of approximately US $1.07 billion on the secured loans. The Secured Lenders are entitled under the U.S. Plan to a share in the litigation trust on their deficiency claim. If certain other classes of creditors do not vote to approve the U.S. plan, the Secured Lenders may also receive equity of a value up to 4.53% of their deficiency, subject to other contingencies. The Monitor reports that the Secured Lenders are thus estimated to recover approximately 57.1% of their estimated claims of US $2.1 billion on secured working capital claims and 73.3% of their estimated claims of US $811 million on secured revolver/term claims. The Monitor estimates that the Secured Lenders will recover no value on their deficiency claims, assuming no reallocation of equity from other categories of debtors and no value for the litigation trust.

8. The holders of the US $600 million bonds (the "Noteholders") are entitled to receive common shares and warrants in the restructured corporate group, plus an interest in the litigation trust and certain trustee fees, for an estimated recovery of 8.34% on their claims of US $610 million under the U.S. plan, assuming all classes of Noteholders approve the plan and no value is given to the litigation trust. Depending on certain contingencies, the range of recovery is 0.44$ to 11.02% of their claim. Noteholders are treated more advantageously under the plans than general unsecured creditors in recognition that the Senior Notes are jointly and severally guaranteed by 23 U.S. debtors and the Canadian debtors, while in most instances only one SemGroup debtor is liable with respect to each ordinary unsecured creditor. In addition, the Noteholders have waived their right to receive distributions under the Canadian plans.

9. Under the U.S. Plan, general unsecured creditors will receive common shares, warrants and an interest in the litigation trust. Depending on the level of approval, recovery levels will range from 0.08% to 8.03% on claims of US $811 million. The Monitor reports that it expects recovery to general unsecured creditors under the U.S. Plan to be 2.09% of their claim.

10. Pursuant to section 503(b)(9) of the U.S. Bankruptcy Code, entities that provided goods to the U.S. Debtors in the ordinary course of business that were received within 20 days of the filing of Chapter 11 proceedings are entitled to a priority claim that ranks above the claims of the Secured Lenders.

11. There are 3 Canadian plans. As the Secured Lenders will be entitled to some recovery in respect of their deficiency claim and the Noteholders will be entitled to some recovery on their unsecured claim under the U.S. Plan, the Secured Lenders and the Noteholders are deemed to have waived their rights to any additional recovery under the Canadian plans for the most part. However, the votes of the Secured Lenders and the Noteholders entitled to vote on the U.S. Plan are deemed to be votes for the purpose of the Canadian plans, both with respect to numbers of parties and value of claims,

and are to be included in the single class of "Affected Creditors" entitled to vote on the Canadian plans. Originally, the Canadian plans provided that the value attributable to the Secured Lenders' votes would be based on the full amount of their guarantee claim, approximately US $2.9 billion, and not only on their deficiency claim of approximately US $1.07 billion. Thus, the aggregate value of the Secured Lenders' voting claims would be:

a) US $2.939 billion for the SemCAMS plan;

b) US $2.939 billion less C $145 million for the SemCanada Crude plan, recognizing that the Secured Lenders would be entitled to receive C $145 million in respect of a negotiated Lenders' Secured Claim under the SemCanada Crude plan; and

c) US $2.939 billion less C $108 million for the SemCanada Energy plan, recognizing that the Secured Lenders will receive that amount in respect of a negotiated Lenders' Secured Claim under the SemCanada Energy plan.

At the conclusion of the classification hearing, the CCAA applicants proposed a revision to the proposed orders which stipulates that, if the approval of a plan by the creditors would be determined by the portion of the votes cast by the Secured Lenders that represents an amount of indebtedness that is greater than their estimated aggregate deficiency after taking into consideration the payments they are to receive under the U.S. plan and the Canadian plans, the Court shall determine whether the voting claim of the Secured Lenders should be limited to their estimated deficiency claim.

12. Only "Ordinary Creditors" receive any distribution under the Canadian Plans. Ordinary Creditors are defined as creditors holding "Affected Claims" other than the Secured Lenders, Noteholders, CCAA applicants and U.S. Debtors. Each plan provides that the Affected Creditors of the CCAA applicant will vote at the Creditors' Meeting as a single class.

13. The SemCAMS plan will be funded by a cash advance from SemCanada Crude and establishes two pools of cash. One pool will fund the full amount of secured claims which have not been paid prior to the implementation date of the plan up to the realizable value of the property secured, and the other pool will fund distributions to ordinary unsecured creditors. Ordinary unsecured creditors will receive cash subject to a maximum total payment of 4% of their proven claims. The Monitor estimates that the distribution will equal 4% of claims unless claims in excess of the current highest estimate are established.

14. The SemCanada Crude plan also establishes two pools of cash, one for secured claims and one for ordinary unsecured creditors. Again, the distribution to ordinary unsecured creditors is estimated to be 4% of claims unless claims in excess of the current highest estimate against SemCanada Crude are established.

15. Any cash remaining in SemCanada Crude after deducting amounts necessary to fund the above-noted payments to secured and unsecured ordinary creditors of SemCAMS and SemCanada Crude, unaffected claims and administrative costs, less a reserve for disputed claims, will be paid to the Secured Lenders through the U.S. plan as part of the payment on secured debt.

16. The SemCanada Energy distribution plan is funded from the cash received from the liquidation of the assets of the companies. It also establishes two pools of cash, one of which will be used to pay secured ordinary creditors and a one of which will be used to pay cash distributions to ordinary unsecured creditors. The Monitor estimates that the distribution to ordinary unsecured creditors will be in the range of 2.16% to 2.27% of their claims, unless claims in excess of the current maximum estimate are established. Any amounts outstanding after payment of these claims, unaffected claims and administration costs will be paid to the Secured Lenders. The proposed lower amount of recovery is stated to be in recognition of the fact that the SemCanada Energy Companies have been liquidated and have no going concern value.

17. As this summary indicates, the U.S. Plan and the Canadian plans are closely integrated and economically interdependent. Each of the plans requires that the other plans be approved by the requisite number of creditors and implemented on the same date in order to become effective. The receipt of at least $160 million from the SemCanada Group is a condition precedent to the implementation of the U.S. Plan.

18. The Monitor reports that the SemCanada Group has indicated that there is no viable option to the proposed plans and that a formal liquidation under bankruptcy legislation would provide a lower recovery to creditors. The Monitor notes that the rationale for the treatment of the Secured Lenders and the ordinary unsecured creditors under the plans is that the Secured Lenders have valid and enforceable secured claims, and that, in the event of the liquidation of the Canadian companies, the Secured Lenders would be entitled to all proceeds, resulting in no recovery to ordinary creditors. Therefore, reports the Monitor, the CCAA plans are considered to be better than the alternative of a liquidation. The Secured Lenders derive some benefit from the plans through the preservation of the going concern value of SemCAMS and SemCanada Crude and by having a prompt distribution of funds held by the SemCanada Energy Companies.

19. The Monitor notes that the distribution to the SemGroup unsecured creditors under the U.S. plan is viewed as better than a liquidation, and that, therefore, given the effect of the U.S. Bankruptcy Code's "cram-down" provisions, it is likely that the U.S. plan will be confirmed. The Monitor comments that the proposed distribution to ordinary unsecured creditors under the CCAA plans is considered to be fair as it is comparable to and potentially slightly more favourable than the distributions being made to the U.S. ordinary unsecured creditors.

Positions of Various Parties

[13] The SemCanada Group applied for orders

a) accepting the filing of, in the case of SemCAMS and SemCanada Crude, proposed plans of arrangement and compromise, and in the case of SemCanada Energy, a proposed plan of distribution;

b) authorizing the calling and holding of meetings of the Canadian creditors of these three CCAA applicants;

c) authorizing the establishment of a single class of creditors for each plan for the purpose of considering and voting on the plans;

d) approving procedures with respect to the calling and conduct of such meetings; and

e) other non-contentious enabling relief.

[14] Certain unsecured creditors of the applicants objected to the proposed classification of creditors, submitting that the Secured Lenders should not be allowed a vote in the same class as the unsecured creditors either with respect to the secured portion of their overall claim or any deficiency in their claims that would remain unpaid, and that the Noteholders should not be allowed a vote in the same class as the rest of the unsecured creditors.

[15] As noted previously, the CCAA applicants proposed a revision to the proposed orders at the conclusion of the classification hearing which would allow the Court to consider whether the voting claim of the Secured Lenders should be limited to their estimated deficiency claim. The objecting creditors continued to object to the proposed classification, even if eligible votes were limited to the deficiency claim of the Secured Lenders.

Analysis

[16] Section 6 of the CCAA provides that, where a majority in number representing two-thirds in value of "the creditors or class of creditors, as the case may be" vote in favour of a plan of arrangement or compromise at a meeting or meetings, the plan of arrangement may be sanctioned by the Court. There is little by way of specific statutory guidance on the issue of classification of claims, leaving the development of this issue in the CCAA process to case law. Prior decisions have recognized that the starting point in determining classification is the statute itself and the primary purpose of the statute is to facilitate the reorganization of insolvent companies: Paperny, J. in *Re Canadian Airlines Corp.*, (2000) 20 C.B.R. (4th) 46 (Alta. Q.B.), leave to appeal refused (2000), 20 C.B.R. (4th) 46, (Alta. C.A.), affirmed [2001] 4. W.W.R. (Alta. C.A.), leave to appeal to SCC refused [2001] S.C.C.A. No. 60 at para. 14. As first noted by Forsyth, J. 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 (Q.B.) at page 28, and often repeated in classification decisions since, "this factor must be given due consideration at every stage of the process, including the classification of creditors . . . "

[17] Classification is a key issue in CCAA proceedings, as a proposed plan must achieve the requisite level of creditor support in order to proceed to the stage of a sanction hearing. The CCAA debtor seeks to frame a class or classes in order to ensure that the plan receives the maximum level of support. Creditors have an interest in classifications that would allow them enhanced bargaining power in the negotiation of the plan, and creditors aggrieved by the process may seek to ensure that classification will give them an effective veto (see *Rescue: The Companies' Creditors Arrangement Act*, Janis P. Sarra, 2007 ed. Thomson Carswell at page 234). Case law has developed from the comments of the British Columbia Court in *Re Woodwards* (1993), 84 B.C.L.R. (5d) 206 (B.C.S.C.) warning against the danger of fragmenting the voting process unnecessarily, through the identification of principles applicable to the concept of "commonality of interest" articulated in *Re Canadian Airlines* and elaborated further in Alberta in *Re San Francisco Gifts Ltd.* (2004), 2004 CarswellAlta 1241, [2004] A.J. No. 1062 (Alta. Q.B.), leave to appeal refused (2004), 5 C.B.R. (5th) 300 (Alta. C.A.).

[18] The parties in this case agree that "commonality of interest" is the key consideration in determining whether the proposed classification is appropriate, but disagree on whether the plans as proposed with their single class of voters meet that requirement. It is clear that classification is a fact-driven inquiry, and that the principles set out in the case law, while useful in considering whether commonality of interest has been achieved by the proposed classification, should not be applied rigidly: *Re Canadian Airlines* at para. 18; *Re San Francisco Gifts* at para. 12; *Re Stelco Inc.*, (2005), 15 C.B.R. (5th) 307 (Ont. C.A.) at para. 22.

[19] Although there are no fixed rules, the principles set out by Paperny, J. in para. 31 of *Re Canadian Airlines* provide a useful structure for discussion of whether to the proposed classification is appropriate:

> *1. Commonality of Interest Should Be Viewed Based on the Non-Fragmentation Test, Not on the Identity of Interest Test.*

[20] Under the now-rejected "identity of interest" test, all members of the class had to have identical interests. Under the non-fragmentation test, interests need not be identical. The interests of the creditors in the class need only be sufficiently similar to allow them to vote with a common interest: *Re Woodwards* at para. 8.

[21] The objecting creditors submit that the creation of two classes rather than one cannot be considered to be fragmentation. The issue, however, is not the number of classes, but the effect that fragmentation of classes may have on the ability to achieve a viable reorganization. As noted by Farley, J. in para. 13 of his reasons relating to the classification of creditors in *Stelco*, as endorsed by the Ontario Court of Appeal:

> . . . absent valid reason to have separate classes it would be reasonable, logical, rational and practical to have all this unsecured debt in the same class. Certainly that would avoid fragmentation — and in this respect multiplicity of classes does not mean that fragmentation starts only when there are many classes. Unless more than one class is necessary, fragmentation would start at two classes. Fragmentation if necessary, but not necessarily fragmentation.

> *2. The Interests to Be Considered Are the Legal Interests That a Creditor Holds Qua Creditor in Relationship to the Debtor Company Prior to and under the Plan as Well as on Liquidation.*

[22] The classification of creditors is viewed with respect to the legal rights they hold in relation to the debtor company in the context of the proposed plan, as opposed to their rights as creditors in relation to each other: *Re Woodwards* at para. 27, 29; *Re Stelco* at para. 30. In the proposed single classification, the rights of the creditors in the class against the debtor companies are unsecured (other than the proposed votes attributable to the secured portion of the debt of the Secured Lenders, which will be discussed separately).

[23] With respect to the Secured Lenders' deficiency claim, there is a clear precedent for permitting a secured creditor to vote a substantial deficiency claim as part of the unsecured class: *Re Campeau Corp.* (1991) 10 C.B.R. (3d) 100 (Ont. Gen. Div.; *Re Canadian Airlines*, supra.

[24] The classification issues in the *Campeau* restructuring were similar to the present issues. In *Re Campeau*, a secured creditor, Olympia & York, was included in the class of unsecured creditors for the deficiency in its secured claim, which represented approximately 88% of the value of the unsecured class. The Court rejected the submission that the legal interests of Olympia & York were different from other unsecured creditors in the class. Montgomery, J. noted at para. 16 that Olympic & York's involvement in the negotiation of the plan was necessary and appropriate given that the size of its claims would allow it a veto no matter how the classes were constituted and that its co-operation was necessary for the success of both the U.S. and Canadian plans.

[25] In the same way, the size and scope of the Secured Lenders claim makes their participation in the negotiation and endorsement of the proposed plans essential. That participation does not disqualify them from a vote in the process, nor necessitate their isolation in a special class. While under the integrated plans, the Secured Lenders will receive a different kind of distribution on their unsecured deficiency claim (a share of the litigation trust), that is an issue of fairness for the sanction hearing and does not warrant the establishment of a separate class.

[26] The interests of the Noteholders are unsecured. While it is true that under the integrated plans, the Noteholders would be entitled to a higher share of the distribution of assets than ordinary unsecured creditors, the rationale for such difference in treatment relates to the multiplicity of debtor companies that are indebted to the Noteholders, as compared to the position of the ordinary unsecured creditors. That difference, while it may be subject to submissions at the sanction hearing, is an issue of fairness, and not a difference material enough to warrant a separate class for the Noteholders in this case. A separate class for the Noteholders would only be necessary if, after considering all the relevant factors, it appeared that this difference would preclude reasonable consultation among the creditors of the class: *Re San Francisco Gifts* at para. 24.

[27] The question arises whether the fact that the Secured Lenders and the Noteholders have waived their rights to recover under the Canadian plans should result in either the requirement of separate classes or the forfeiture of their right to vote on the Canadian plans at all.

[28] This is a unique case: a cross-border restructuring with separate but integrated and interdependent plans that are designed to comply with the restructuring legislation of two jurisdictions. As the applicants point out, the co-ordinated structure of the plans is designed to ensure that the Secured Lenders and the Noteholders receive sufficient recoveries under the U.S. plan to justify the sacrifices in recovery that result from their waiver of distributions under the Canadian plans. In considering the context of the proposed classification, it would be unrealistic and artificial to consider the Canadian plans in isolation, without regard to the commercial outcome to the creditors resulting from the implementation of the plans in both jurisdictions. Thus, the fact that the distributions to Secured Lenders and Noteholders will take place through the operation of the U.S. plan, and that the effective working of the plans require them to waive their rights to receive distributions under the Canadian plans does not deprive them of the right to an effective voice in the consideration of the Canadian plans through a meaningful vote.

[29] It is not sufficient to say that the Secured Lenders and the Noteholders have a vote in the U.S. plans. The "cram down" power which exists under Chapter 11 of the U.S. Bankruptcy Code includes a "best interests test" that requires that if a class of holders of impaired claims rejects the plan, they can be "crammed down" and their claims will be satisfied if they receive property of a value that is not less than the value that the class would receive or retain if the debtor were liquidated under Chapter 7 of the U.S. Bankruptcy Code. Thus, the votes available to the Secured Lenders and the Noteholders with respect to their claims under the U.S. Plan do not give them the right available to creditors under Canadian restructuring law to vote on whether a proposed plan should proceed to the next step of a sanction hearing There is no reason to deprive the Secured Lenders and the Noteholders of that right as creditors of the Canadian debtors, even if the distributions they would be entitled to flow through the U.S. plan. The question becomes, then, whether that right should be exercised in a class with other unsecured creditors as proposed or in a separate class.

[30] It is noteworthy that the proposed single classification does not have the effect of confiscating the legal rights of any of the unsecured creditors, or adversely affecting any existing security position. It is in fact arguable that seeking to exclude the

Secured Lenders and the Noteholders from the class prejudices these similarly-placed creditors by denying them a meaningful voice in the approval or rejection of the plans in Canada.

[31] A number of cases suggest that the Court should also consider the rights of the parties in liquidation in determining whether a proposed classification is appropriate: *Re Woodwards* at para. 14; *Re San Francisco Gifts* at para. 12.

[32] Under a liquidation scenario, the Secured Lenders would be entitled to nearly all of the proceeds of the liquidated corporate group, other than the relatively few secured claims that have priority. This suggests that the Secured Lenders are entitled to a meaningful vote with respect to both the U.S. plan and the Canadian plans.

3. The Commonality of Interests Is to Be Viewed Purposively, Bearing in Mind the Object of the CCAA, Namely to Facilitate Organizations If Possible.

4. In Placing a Broad and Purposive Interpretation on the CCAA, the Court Should Be Careful to Resist Classification Approaches That Would Potentially Jeopardize Viable Plans.

[33] The Ontario Court of Appeal in *Re Stelco* cautioned that, in addition to considering commonality of interest issues, the court in a classification application should be alert to concerns about the confiscation of legal rights and should avoid "a tyranny of the minority", citing the comments of Borins, J. in *Sklar-Peppler Furniture Corp. v. Bank of Nova Scotia* (1991), 86 (4th) 621 (Ont. Gen. Div.), where he warned against creating "a special class simply for the benefit of the opposing creditor, which would give that creditor the potential to exercise an unwarranted degree of power": *Stelco* at para 28.

[34] Excluding of the Secured Lenders and the Noteholders from the proposed single class would allow the objecting creditors to influence the voting process to a degree not warranted by their status. It is true that if the Secured Lenders and the Noteholders are not excluded from the class, even if only the votes related to the Secured Lenders' deficiency claim are tabulated, the positive vote will likely be enough to allow the proposed plans to proceed to a sanction hearing. It is also true that the Secured Lenders and the Noteholders may have been part of the negotiations that led to the proposed plans. Neither of those factors standing alone is sufficient to warrant a separate class unless rights are being confiscated or the classification creates an injustice.

[35] The structure of the classification as proposed creates in effect what was imposed by the Court in *Re Canadian Airlines*, a method of allowing the "voice" of ordinary unsecured creditors to be heard without the necessity of a separate classification, thus permitting rather than ruling out the possibility that the plans might proceed to a sanction hearing. Given that the votes of the Secured Lenders and the Noteholders on the U.S. plan will be deemed to be votes of those creditors on the Canadian plans, there will be perforce a separate tabulation of those votes from the votes of the remaining unsecured creditors. In accordance with the revision to the plans made at the end of the classification hearing, there will be a separate tabulation of the votes of the Secured Lenders relating to the secured portion of their claims and the votes relating to the unsecured deficiency.

[36] The situation in this classification dispute is essentially the same as that which faced Paperny, J. in *Re Canadian Airlines*. Fragmenting the classification prior to the vote raises the possibility that the plans may not reach the stage of a sanction hearing where fairness issues can be fully canvassed. This would be contrary to the purpose of the CCAA. This is particularly an issue recognizing that the U.S. plan and the Canadian plans must all be approved in order for any one of them to be implemented. Conrad, J.A. in denying leave to appeal in Re *San Francisco Gifts* 2004 ABCA 386 at para. 9 noted that the right to vote in a separate class and thereby defeat a proposed plan of arrangement is the statutory protection provided to the different classes of creditors, and thus must be determined reasonably at the classification stage. However, she also noted that "it is important to carefully examine classes with a view of protecting against injustice": para. 10. In this case, the goals of preventing confiscation of rights and protecting against injustice favour the proposed single classification.

[37] This is the "pragmatic" factor referred to in Re *Campea* at para. 21. The CCAA judge must keep in mind the interests of all stakeholders in reviewing the proposed classification, as in any step in the process. If a classification prevents the danger of a veto of a plan that promises some better return to creditors than the alternative of a liquidating insolvency, it should not be interfered with absent good reason. The classification hearing is not the only avenue of relief for aggrieved creditors. If a

plan received the minimum required level of approval by vote of creditors, it must still be approved at a hearing where issues of fairness must be addressed.

5. Absent Bad Faith, the Motivations of the Creditors to Approve or Disapprove [of the Plan] Are Irrelevant.

[38] As noted in *Re Canadian Airlines* at para. 35, fragmenting a class because of an alleged conflict of interest not based on legal rights is an error. The issue of the motivation of a party to vote for or against a plan is an issue for the fairness hearing. There is no doubt that the various affected creditors in the proposed single class may have differing financial or strategic interests. To recognize such differences at the classification stage, unless the proposed classification confiscates rights, results in an injustice or creates a situation where meaningful consultation is impossible, would lead to the type of fragmentation that may jeopardize the CCAA process and be counter-productive to the legislative intent to facilitate viable reorganizations.

6. The Requirement of Creditors Being Able to Consult Together Means Being Able to Assess Their Legal Entitlement as Creditors before or after the Plan in a Similar Manner.

[39] The issue of meaningful consultation was addressed by both the supervising justice and the Court of Appeal in *Re San Francisco Gifts*. In that case, Topolniski, J. noted that two corporate insiders that the proposed plan had included in the classification of affected creditors held claims that were uncompromised by the plan, that they gave up nothing, and that it "stretches the imagination to think other creditors in the class could have meaningful consultation [with them] about the Plan": para. 49. Her decision to place these parties in a separate class was confirmed by the Court of Appeal, which commented that Topolniski, J. was "absolutely correct" to find no ability to consult "between shareholders whose debts would not be cancelled and other unsecured creditors whose debts would be": para. 14.

[40] That is not the situation here. The deficiency claims of the Secured Lenders and the unsecured claims of the Noteholders are being compromised in the U.S. plan, and there is nothing to block consultations among affected creditors on the basis of dissimilarity of legal interests. While there are differences in the proposed distributions on the unsecured claims, they are not so major that they would preclude consultation.

[41] The objecting creditors point to statements made by counsel for the Secured Lenders during the classification application about the alternatives to approval of the plans, which they submit indicates the impossibility of consultation. These comments were made in the context of advocacy on behalf of the proposed classification, and I do not take them as a clear statement by the Secured Lenders that they would refuse to consult with the other creditors.

Secured Portion of Secured Lenders' Claim

[42] The CCAA applicants and the Secured Lenders submit that it would be unfair and inappropriate to limit the votes of the Secured Lenders in the Canadian plans to the amount of the deficiency in their secured claim, rather than the entire amount owing under the guarantee. They argue that, by endorsing the plans, the Secured Lenders have in effect elected to treat their entire claim under the guarantee as unsecured with respect to the Canadian plans, except for relatively small negotiated secured claims under the SemCanada Crude plan and the SemCanada Energy plan. They also submit that the fact that under bankruptcy law, a creditor of a bankrupt debtor is entitled to prove for the full amount of its debt in the estates of both the debtor and a bankrupt guarantor of the debt justifies granting the Secured Lenders the right to vote the full amount of the guarantee claim, even if part of the claim is to be recovered through the U.S. plan, as long as they do not actually recover more than 100 cents on the dollar.

[43] It became apparent during the course of the classification hearing that it may not matter whether the plans are approved by the requisite number of creditors and value of their claims if the Secured Lenders are only entitled to vote the deficiency portion of their claims or the full amount of their claims. It was this that led to the revision in the language of the voting provisions of the plans. I defer a decision on the question of whether or not the Secured Lenders are entitled to vote the entire amount of their guarantee claims until after the vote has been conducted and the votes separately tabulated as directed. As noted by the Court of Appeal in *Re Canadian Airlines*, (2000), 19 C.B.R. (4th) 33 at para. 39, such a deferral of a voting issue is not an error of law and is in fact consistent with the purpose of the CCAA.

Recent Amendments

[44] The following amendment to the *CCAA* that has been proclaimed in effect from September 18, 2009 sets out certain factors that may be considered in approving a classification for voting purposes:

> 22.2 (2) *Factors* — For the purpose of subsection (1), creditors may be included in the same class if their interests or rights are sufficiently similar to give them a commonality of interest, taking into account:
>
> (a) the nature of the debts, liabilities or obligations giving rise to their claims;
>
> (b) the nature and rank of any security in respect of their claims;
>
> (c) the remedies available to the creditors in the absence of the compromise or arrangement being sanctioned, and the extent to which the creditors would recover their claims by exercising those remedies; and
>
> (d) any further criteria, consistent with those set out in paragraphs (a) to (c), that are prescribed. (R.S.C. 2005, c. 47, s. 131, amended R.S.C. 2007, Bill C-12, c.36, s.71)

[45] These factors do not change in any material way the factors that have been identified in the case law and discussed in these reasons nor would they have a material effect on the consideration of the proposed classification in this case.

Creditors with Claims in Process

[46] Two creditors advised that, because their claims of secured status had not yet been resolved with the applicants and the Monitor, they were not in a position to evaluate whether or not to object to the proposed classification. The plans were revised to ensure that the votes of creditors whose status as secured creditors remains unresolved until after the meetings of creditors be recorded with votes of creditors with disputed claims and reported to the Court by the Monitor if these votes affect the approval or non-approval of the plan in question.

Conclusion

[47] In summary, I have concluded that there is no good reason to exclude the Secured Lenders and the Noteholders from the single classification of voters in the proposed plans, nor to create a separate class for their votes. There are no material distinctions between the claims of these two creditors and the claims of the remaining unsecured creditors that are not more properly the subject of the sanction hearing, apart from the deferred issue of whether the Secured Lenders are entitled to vote their entire guarantee claim. No rights of the remaining unsecured creditors are being confiscated by the proposed classification, and no injustice arises, particularly given the separate tabulation of votes which enables the voice of the remaining unsecured creditors to be heard and measured at the sanction hearing. There are no conflicts of interest so over-riding as to make consultation impossible. While there are differences of interests and treatment among the affected creditors in the class, these are issues that will be addressed at the sanction hearing. Approval of the proposed classification in the context of the integrated plans is in accordance with the spirit and purpose of the CCAA.

Heard on the 5th day of August, 2009.

Dated at the City of Calgary, Alberta this 24th day of August, 2009.

B.E. Romaine

J.C.Q.B.A.

Appearances:

A. Robert Anderson, Q.C., Rupert Chartrand, Michael De Lellis, Cynthia L. Spry and Douglas Schweitzer

Osier, Hoskin & Harcourt LLP

for the Applicants

David R. Byers

Stikeman Elliott LLP

for The Bank of America

Patrick T. McCarthy and Josef A. Kruger

Borden Ladner Gervais LLP

for the Monitor

Douglas S. Nishimura

Burnet Duckworth & Palmer LLP

for ARC Resources Ltd., City of Medicine Hat, Black Rider Resources Inc. Wolf Coulee Resources Inc., Orleans Energy Ltd., Crew Energy Inc., Trilogy Energy LP

Brendan O'Neill and Jason Wadden

Goodmans LLP

for Fortis Capital Corp.

Sean Fitzgerald

Miles Davison LLP

for Tri-Ocean Engineering Ltd.

Dean Hutchison

McCarthy Tetrault LLP

for Crescent Point Energy Trust, Enbridge Pipelines Inc.

Caireen Hanert

Herman Blaikie LLP

for Bellamount Exploration Ltd., Enersul Limited Partnership

Bryce McLean

Field Law LLP

for DPH Focus Corporation

Aubrey Kauffman

Fasken Martineau Dumoulin LLP

for BNP Paribas

End of Document

Tab 12

I.I.C. Ct. Filing 44993447021

The T. Eaton Company Ltd. — Court File Nos. 31-OR-364921, 99-CL-3516, 99-CL-3514
21 — **Amended and Restated Plan of Compromise and Arrangement as approved by creditors pursuant to ss. 4 & 5 of Companies' Creditors Arrangement Act**

Re. The T. Eaton Company Limited, Court File No. 99-CL-3516:Toronto

Amended and Restated Plan of Compromise and Arrangement

Pursuant to the *Companies' Creditors Arrangement Act* (Canada) and the *Business Corporations Act* (Ontario) concerning, affecting and involving

The T. Eaton Company Limited

Article 1 — Interpretation

1.1 — Definitions

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

"Abandoned Premises" means any premises under a Lease in whole or in part with Eaton's, abandoned by Eaton's, or for which Eaton's has delivered or delivers an abandonment notice or a repudiation notice after the Valuation Date.

"Affiliate" means affiliate as defined in the OBCA.

"Agency Agreement" means the agreement among the Agent, Eaton's and the Interim Receiver dated as of July 29, 1999, as amended from time to time.

"Agent" means, collectively, Gordon Brothers Retail Partners, LLC, Schottenstein/Bernstein Capital Group, LLC, Hilco Trading Co., Inc. and Garcel, Inc. and their successors and permitted assigns.

"Articles of Arrangement" means the Articles of Arrangement for each of Distributionco and Eaton's contemplated by the Plan.

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

"BIA Orders" means those Orders made in the BIA Proceedings on August 23, 27, 29 and September 2 and 20, 1999, and *"BIA Order"* means any one of them.

"BIA Proceedings" means the proceedings commenced under Part III of the BIA by Eaton's by the filing of a notice of intention to make a proposal on August 20, 1999.

"Business Day" means a day, other than Saturday, Sunday or a statutory holiday, on which banks are generally open for business in Toronto, Ontario.

"Calendar Day" means a day, including Saturday, Sunday and any statutory holiday.

"Canadian Dollars" or *"$"* means dollars denominated in lawful currency of Canada.

"CCAA" means the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36.

"CCAA Proceedings" means the proceedings in respect of Eaton's under the CCAA commenced pursuant to the Initial CCAA Order.

"CCAA Sanction Order" means the Order to be made in the CCAA Proceedings to sanction this Plan, as such Order may be amended, varied or modified by the Court from time to time.

"Chair" means Mr. John Swidler, F.C.A., President of the Monitor, or another official of the Monitor designated by the Monitor, appointed to preside as the chair of the Meetings.

"Charge" means a valid mortgage, charge, pledge, assignment by way of security, lien, privilege, hypothec or security interest.

"Claim" means any right of any Person against Eaton's in connection with any indebtedness, liability or obligation of any kind of Eaton's, whether in contract, tort, or otherwise, which indebtedness, liability or obligation is in existence prior to the Valuation Date and any interest that may accrue thereon, whether liquidated, reduced to judgment, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, statutory, penal, equitable, secured, unsecured, present, future, known or unknown, by guarantee, surety or otherwise, and whether or not such right is executory or anticipatory in nature, including without limitation, any claim relating to the administration or winding up of the Pension Plans including, without limitation, any unfunded liability, or the administration, distribution or investment of the funds relating to the Pension Plans or any employee benefit plans including, without limitation, any long term disability plan, fund or arrangement, and any claim made or asserted against Eaton's through any affiliate, associate or related person (as such terms are defined in the OBCA), or any right or ability of any Person to advance a claim for subrogation, 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 with respect to any matter, action, cause or chose in action whether existing at present or commenced in the future (including, without limitation, any claims which may exist or arise against Eaton's as assignor of any contract, right, licence or property) based in whole or in part on facts, contracts or arrangements which exist prior to the Valuation Date, together with any other claims that would have been claims provable in bankruptcy had Eaton's become bankrupt on the Valuation Date.

"Claims Administrator" means the Person identified in the schedules to the Claims Procedure for purposes of receiving the notices described in those schedules.

"Claims Officer" means each of The Honourable W. David Griffiths, Q.C., The Honourable Robert F. Reid, Q.C., The Honourable Robert S. Montgomery, Q.C., The Honourable Joseph W. O'Brien, Q.C., The Honourable John B. Webber, Q.C., The Honourable Hilda M. McKinlay and The Honourable Alvin B. Rosenberg, Q.C. or such other Person or Persons as may be appointed by the Court for the purposes of determining a Claim or an Interim Period Claim for voting and distribution purposes.

"Claims Procedure" means the claims procedure and the schedules thereto, attached to this Plan as Schedule "A", for determining Claims and Interim Period Claims for voting and distribution purposes approved in the Initial CCAA Order, as may be amended from time to time.

"Classes" means the two classes of Creditors grouped in accordance with their Claims and Interim Period Claims for the purposes of considering and voting upon this Plan in accordance with the provisions of this Plan, and receiving distributions hereunder, such classes being comprised of Unsecured Creditors and Landlord Creditors, and the single class of Shareholders, respectively, and *"Class"* means any one of such classes.

"Common Shares" means the authorized, issued and outstanding common shares of Eaton's.

"Court" means the Superior Court of Justice for the Province of Ontario, Canada.

"Creditor" means any Person having a Claim or an Interim Period Claim and may, where the context requires, include the assignee of a Claim or an Interim Period Claim, or a trustee, liquidator, interim receiver, receiver, receiver and manager or other Person acting on behalf of such Person.

"Creditor Approval" means the approval of this Plan by all of the Classes of Creditors voting on this Plan under the CCAA.

"Distribution Claim" of a Creditor means the compromised amount of the Claim or Interim Period Claim of such Creditor as finally determined for distribution purposes, in accordance with the provisions of the Claims Procedure, the Plan, the Initial CCAA Order and the CCAA.

"Distributionco" means a business corporation incorporated under the OBCA that will assume the Distributionco Assumed Liabilities and the Unsatisfied Unaffected Liabilities in exchange for the Distributionco Transferred Assets and the Eaton's Note (which will be satisfied by Eaton's upon the receipt of the Sears Equity Contribution), that will distribute the net cash proceeds from the Distributionco Transferred Assets and the satisfaction of the Eaton's Note to Creditors pursuant to this Plan and the OBCA Sanction Order, that will receive the Sears Variable Note for distribution to Shareholders pursuant to this Plan and the OBCA Sanction Order and that will act as agent and nominee for the holders of the Participation Units to hold the Sears Variable Note for their benefit.

"Distributionco Assumed Liabilities" means all of the obligations, indebtedness and liabilities of Eaton's which are compromised on the Plan Implementation Date.

"Distributionco Common Share" means the single common share of Distributionco issued to Eaton's for the subscription price of $1 (which common share is only entitled to receive $1 on dissolution of Distributionco), and which common share will be transferred to the Liquidator on the Plan Implementation Date for $1.

"Distributionco Transferred Assets" means all of the assets of Eaton's on the Plan Implementation Date (including the benefit of all insurance policies of Eaton's in effect as of the Plan Implementation Date) other than the Eaton's Remaining Assets, excluding the Sears Equity Contribution.

"Eaton's" means The T. Eaton Company Limited and, from and after the Plan Implementation Date, any successor thereof.

"Eaton's Elected Stores" means Eaton's leasehold interests in such of the stores listed on Schedule B to the Sears Agreement as Sears elects should be retained by Eaton's under the Sears Agreement.

"Eaton's Note" means the promissory note in the principal amount of $60 million (subject to any adjustment of the Sears Equity Contribution which may be required on closing of the Sears Transaction pursuant to the Sears Agreement) to be issued by Eaton's to Distributionco on the Plan Implementation Date in part consideration for the assumption by Distributionco of the Distributionco Assumed Liabilities and the Unsatisfied Unaffected Liabilities.

"Eaton's Operating Stores" means those stores under the Sears Agreement which Eaton's will continue to operate under the Sears Operating Agreement.

"Eaton's Remaining Assets" means those assets of Eaton's which under the Sears Agreement will remain with Eaton's from and after the Plan Implementation Date, and includes:

(i) Eaton's leasehold interests in the Eaton's Remaining Stores and the Eaton's Elected Stores;

(ii) Eaton's freehold and leasehold interests in and pertaining to its Calgary Eaton Centre downtown store location;

(iii) any inventory of saleable merchandise owned by Eaton's and located at the Eaton's Operating Stores;

(iv) subject to any valid Charge or other ownership rights of third parties, the furniture, fixtures and equipment in the Eaton's Remaining Stores and the Eaton's Elected Stores, other than those specifically excluded under the Sears Agreement;

(v) the goodwill, names (including private label brand names), trade-marks, trade names, copyrights, other intellectual property, contractual rights and accrued benefits relating to the assets described above (including the benefit of prepaid expenses) and licenses, sub-leases and contracts relating to the assets described above (except for those which Sears

elects not be retained by Eaton's) owned or used by Eaton's, books and records owned or used by Eaton's in connection with Eaton's business, the assets of Eaton's used in connection with the credit card operations owned and operated by NRCS, software and websites, rights to the licensed departments, concession arrangements or subleases designated by Sears in the Eaton's Remaining Stores and the Eaton's Elected Stores and any contracts retained by Eaton's upon election by Sears, customer lists, exclusive rights and all assets of Eaton's relating to the carrying on of Eaton's credit card operations or any other credit services for or in respect of Eaton's (including cardholders' lists, account property, the right to use and operate the Eaton's credit card operations and the right to use Eaton's intellectual property in connection with credit services);

(vi) the Eaton's Tax Losses;

(vii) Eaton's interest under the trademark license agreements in respect of:

(a) Victoria Eaton Centre dated July 27, 1995;

(b) Toronto Eaton Centre dated July 14, 1997; and

(c) Montreal Eaton Centre dated September 19, 1997 (unless repudiated by Eaton's prior to November 19, 1999); and

as each has been modified or amended from time to time.

(viii) the interests of any subsidiaries or affiliates of Eaton's in any of the assets described above.

"Eaton's Remaining Liabilities" means:

(i) those liabilities (except in respect of Pension Plans) to those employees of Eaton's selected by Sears currently working at the Eaton's Operating Stores (as indicated in a written notice to be provided by Sears to Eaton's in accordance with the Sears Agreement) and other current employees of Eaton's selected by Sears (as indicated in a written notice to be provided by Sears to Eaton's in accordance with the Sears Agreement) who agree to continue to work for Eaton's upon the completion of the Sears Transaction on terms which are substantially comparable to the terms of employment of employees of Sears in comparable positions and (except in respect of Pension Plans) comparable seniority;

(ii) all Lease liabilities and obligations to Landlords commencing the day after the Plan Implementation Date in respect of stores included in the Eaton's Remaining Assets:

(iii) Eaton's obligations to Sears pursuant to the Sears Agreement, the Sears Operating Agreement and any other agreements entered into by Eaton's and Sears pursuant thereto; and

(iv) Eaton's obligations commencing the day after the Plan Implementation Date under the trademark license agreements in respect of:

(a) Victoria Eaton Centre dated July 27, 1995;

(b) Toronto Eaton Centre dated July 14, 1997; and

(c) Montreal Eaton Centre dated September 19, 1997 (unless repudiated by Eaton's prior to November 19, 1999);

as each has been modified or amended from time to time.

"Eaton's Remaining Stores" means the stores listed in Schedule "A" to the Sears Agreement, being (i) Brentwood Mall, Burnaby; (ii) St. Vitale Centre, Winnipeg; (iii) Les Galleries de la Capitale, Quebec; (iv) Westmount Shopping Centre, London; (v) Sherway Gardens, Etobicoke; (vi) Yorkdale Shopping Centre, North York; (vii) Halifax Shopping Centre,

Halifax; (viii) Scarborough Town Centre, Scarborough; (ix) Eaton Centre, Victoria; (x) Pacific Centre, Vancouver; (xi) Polo Park, Winnipeg; (xii) Eaton Centre, Toronto; and (xiii) such other stores as may be added to Schedule "A" from time to time under the Sears Agreement.

"Eaton's Tax Losses" means all the non-capital loss carryforwards of Eaton's for income tax purposes, including such tax losses of Eaton's amounting to approximately $294.3 million as of January 30, 1999, additional non-capital loss carryforwards generated since January 30, 1999 estimated at $100 million, subject to the increase or decrease in such tax losses which may be created by the Sears Transaction, including the Plan, and the transfer of the Distributionco Transferred Assets to Distributionco at fair market value.

"Eaton's Tax Savings" means an amount equal to 45% of the Eaton's Tax Losses utilized by Sears from time to time, provided that aggregate Eaton's Tax Savings shall not exceed $20 million.

"Employee Representative" means Carmen Siciliano, as appointed by the BIA Order made August 27, 1999 as such BIA Order was continued by the Initial CCAA Order, or such other Person as the Court may appoint to represent former and present employees of Eaton's or a group or class of them.

"Initial CCAA Order" means the Order made in respect of Eaton's on September 28, 1999 under the CCAA, as such Order may be amended or varied from time to time.

"Initial Director" means the first director of Distributionco under Subsection 119(1) of the OBCA.

"Initial OBCA Order" means the Order made in respect of Eaton's on September 28, 1999 under the OBCA, as such Order may be amended or varied from time to time.

"Interim Period Claim" means any right of any Person against Eaton's in connection with any indebtedness, liability or obligation of any kind of Eaton's, whether in contract, tort or otherwise, and any interest that may accrue thereon, whether liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, statutory, penal, equitable, secured, unsecured, present, future, known or unknown, by guarantee, surety or otherwise, and whether or not such right is executory or anticipatory in nature, arising from and after the Valuation Date up to and including the Plan Implementation Date, including any claim made or asserted against Eaton's through any affiliate, associate or related person (as such terms are defined in the OBCA), or any right or ability of any Person to advance a claim for subrogation, 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, whether or not arising from or caused by, directly or indirectly, the implementation of, or any action taken pursuant to, the Plan, including claims arising from the abandonment of any premises or the repudiation of any Lease, lease, licence, or contract, agreement or arrangement, the assignment of any contract, Lease or lease of personal, real, moveable or immoveable property (including any future liability as assignor thereof) or the repudiation of any Lease, lease, licence, contract, agreement or arrangement to take effect up to and including the Plan Implementation Date (including any anticipatory breach thereof), by express notice or by virtue of this Plan, the repudiation of any contract of employment, the termination, administration, distribution or winding up of any of the Pension Plans including, without limitation, any unfunded liability, or the administration or investment of the funds relating to the Pension Plans or employee benefit plans, including, without limitation, any long term disability plan, fund or arrangement, and any other claim whatsoever arising at law or equity against Eaton's.

"Interim Period Suppliers" means those Persons who supply goods and services in the ordinary course of business to Eaton's from and after the Valuation Date up to the Plan Implementation Date including concessionaires, suppliers under consignment arrangements and Landlord Creditors in respect of amounts constituting rent or payable as rent as provided for in the applicable Leases (excluding for greater certainty any amounts payable in connection with Abandoned Premises) for premises occupied by Eaton's for the period from the Valuation Date to the effective date of abandonment or repudiation of the premises in accordance with the provisions of the Initial CCAA Order.

"Interim Receiver" means Richter & Partners Inc., in its capacity as interim receiver as defined in the BIA Order made on August 23, 1999 and continued under the Initial CCAA Order, and any successor thereof.

"Known Creditors" means those Creditors whose Claims are identified in Eaton's books and records, and *"Known Creditor"* means any one of them.

"Known Interim Period Creditors" means those Persons Eaton's believes may have Interim Period Claims, and *"Known Interim Period Creditor"* means any one of them.

"Landlord Creditor" means:

> (i) a landlord, head landlord or owner of real property, whether or not in direct privity with Eaton's, who has a Claim or Interim Period Claim in respect of any premises leased by Eaton's pursuant to a Lease to which such landlord, head landlord or owner is a party or by which such landlord, head landlord or owner is bound, and includes (i) any mortgagee of such premises who has taken possession of such premises or is collecting rent in respect of such premises; (ii) any Person who has taken an assignment of rents or assignment of Lease in respect of such premises, whether as security or otherwise; and (iii) any Person whose Claim or Interim Period Claim would be duplicative of or derivative from the Claim or Interim Period of Claim of such landlord, head landlord or owner; and
>
> (ii) any Person who has a Claim or Interim Period Claim in such Person's capacity as a co-owner, partner, shareholder or trust beneficiary of a Person which is the landlord, head landlord or owner of any premises leased by Eaton's and includes (i) any holder of a Charge against such ownership, partnership, shareholder or beneficial interest who is entitled to receive any dividends or distributions thereon; (ii) any Person who has taken an assignment of such ownership, partnership, shareholder or beneficial interest; and (iii) any Person whose Claim or Interim Period Claim would be duplicative of or derivative from the Claim or Interim Period Claim of such first mentioned Person,

and *"Landlord Creditors"* means all of them.

"Landlord Interim Period Claim" means an Interim Period Claim of a Landlord Creditor under Class 2 in connection with Abandoned Premises, which shall be determined for voting and distribution purposes as the amount equal to the lesser of:

> (i) the aggregate of
>
> > (A) the rent provided for in the Lease in respect of the Abandoned Premises for the first year of such Lease following the date on which the repudiation and/or abandonment becomes effective; and
> >
> > (B) fifteen percent of the rent for the remainder of the Term of such Lease after that year; and
>
> (ii) three years' rent.

"Landlord Pool" means an amount of $12 million (plus the amounts remittable by the Landlord Creditors in respect of federal goods and services tax, harmonized sales tax and Quebec sales tax exigible on the distribution of the $12 million) held by the Liquidator on behalf of Distributionco on and after the Plan Implementation Date, representing a portion of the net cash proceeds from the realization of the Distributionco Transferred Assets and the Sears Equity Contribution.

"Lease" means any lease, sublease, licence, sublicence, agreement to lease, offer to lease, or similar agreement, whether written or oral, pursuant to which Eaton's has or had the right to occupy premises and includes all amendments and supplements thereto and all documents ancillary thereto.

"Liquidator" means Richter & Partners Inc. in its capacity as the liquidator of Distributionco, to be appointed by the Court under the OBCA Sanction Order, or any successor thereof.

"Meetings" means the special meetings of the Creditors and Shareholders called for the purpose of considering and voting in respect of this Plan pursuant to the CCAA and the OBCA, and *"Meeting"* means any one of them.

"Merchandising Funds and Discounts" means merchandise funds including but not limited to volume rebates, co-op advertising, marketing allowances, fixturing allowances, research and development expenses, demonstrator wages and commissions pursuant to agreements with Eaton's entered into on, prior to or following the Valuation Date and any discounts taken with respect to payments on account of supplier invoices in accordance with Eaton's standard business practices.

"Monitor" means Richter & Partners Inc., in its capacity as the monitor appointed pursuant to the Initial CCAA Order, and any successor thereof.

"NRCS" means National Retail Credit Services Company.

"OBCA" means the *Business Corporations Act*, R.S.O. 1990, c. B.16.

"OBCA Proceedings" means the proceedings instituted by Eaton's under Section 182 of the OBCA on September 24, 1999.

"OBCA Sanction Order" means the Order to be made in the OBCA Proceedings to approve the Plan, as such Order may be amended, varied or modified by the Court from time to time.

"Omnibus Proof of Claim (Employees)" means the Proof of Claim to be sent by the Employee Representative to Eaton's as described in paragraph 6 of the Claims Procedure.

"Optionholders" means holders of Options.

"Options" means the options issued by Eaton's for the issue of common shares of Eaton's and all agreements relating thereto.

"Order" means any order of the Court in the CCAA Proceedings, the OBCA Proceedings, or the BIA Proceedings.

"Participation Unit" means a unit of participation allocated to a Shareholder on the basis of one unit per each Common Share held by such Shareholder and representing a *pari passu* beneficial ownership interest in the proceeds of the Sears Variable Note and any payment thereof after deducting the costs and expenses of Distributionco as agent and nominee for the holders of Participation Units and the costs, expenses and fees of the Liquidator incurred in administering the Sears Variable Note, including the costs of enforcing the Sears Variable Note.

"Pension Plans" means:

(i) Eaton Retirement Annuity Plan — Registration No. 337238;

(ii) Eaton Retirement Annuity Plan II — Registration No. 1036102;

(iii) Eaton Retirement Annuity Plan III — Registration No. 1037035;

(iv) Eaton Superannuation Plan for Designated Employees — Registration No. 593673;

(v) Pension Plan of The T. Eaton Company Limited for C. Reginald Hunter — Registration No. 1031780;

(vi) Pension Plan of The T. Eaton Company Limited for R. A. Hubert — Registration No. 1029321;

(vii) Pension Plan of The T. Eaton Company Limited for Roy Evans — Registration No. 1031798; and

(viii) Pension Plan of The T. Eaton Company Limited for Rex P. Prangley — Registration No. 1031806.

"Person" means any individual, partnership, joint venture, trust, corporation, unincorporated organization, government or any agency or instrumentality thereof, or any other juridical entity howsoever designated or constituted.

"Plan" means this plan of compromise and arrangement filed by Eaton's pursuant to the Initial CCAA Order, as such Plan may be amended, varied or supplemented by Eaton's from time to time in accordance with Article 9 hereof.

"Plan Filing Date" means October 8, 1999, being the date upon which this Plan is to be filed with the Court in the CCAA Proceedings, or such later date as the Court may set for the filing of the Plan.

"Plan Implementation Date" means a Business Day selected by Eaton's which is on or before December 31, 1999.

"Proof of Claim" means a proof of claim referred to in paragraphs 4 and 16 of the Claims Procedure.

"RFI" means Retail Funding, Inc.

"Sears" means Sears Canada Inc., and on or following the Plan Implementation Date, any corporation formed by the amalgamation of Sears and Eaton's as restructured under the Plan, and any successor of either of them.

"Sears Agreement" means the agreement between Sears and Eaton's dated September 19, 1999, as amended by Addendum No. 1 dated as of September 29, 1999 and Addendum No. 2 dated October 3, 1999, as further amended or supplemented from time to time, pursuant to which Sears will acquire all the issued and outstanding shares of Eaton's.

"Sears Equity Contribution" means the sum of $60 million (subject to any adjustment which may be required on closing of the Sears Transaction pursuant to the Sears Agreement) paid to Eaton's on the Plan Implementation Date pursuant to the Sears Agreement for the issue to Sears of common shares of Eaton's, which amount is to be transferred to Distributionco in satisfaction of the Eaton's Note.

"Sears Operating Agreement" means the agreement dated as of October 1, 1999 among Sears, Eaton's and the Interim Receiver for the continued operation of the Eaton's Operating Stores, as may be amended or supplemented from time to time.

"Sears Transaction" means the transaction or transactions which are required to be completed pursuant to the Sears Agreement.

"Sears Variable Note" means the promissory note made payable to Distributionco to be issued by Sears on the Plan Implementation Date in the principal amount of up to $20 million to be paid by Sears only from the use of the Eaton's Tax Losses in accordance with the Sears Agreement, and which will bear interest at the same rate of interest as earned by the Liquidator on the funds received by Distributionco from Sears under the terms of the Sears Variable Note.

"Secured Creditors" means Persons with Claims or Interim Period Claims secured by a Charge against the property, assets or undertaking of Eaton's, including, without limitation, any co-owner of Eaton's who has a Charge against Eaton's interest in the co-owned property.

"Shareholder Approval" means the approval of this Plan by the Shareholders voting on this Plan under the OBCA.

"Shareholders" means all of the holders of Common Shares, and *"Shareholder"* means any one of them.

"Stay Period" means the period from and after the Valuation Date up to and including the Stay Termination Date.

"Stay Termination Date" means October 28, 1999, or such later date as may be ordered by the Court.

"Term" means the balance of the then existing term of a Lease assuming that renewal rights are not exercised, and any right of early termination is exercised.

"Trustee" means Richter & Partners Inc., in its capacity as trustee in the BIA Proceedings.

"Unaffected Creditors" means Persons having Claims or Interim Period Claims which are described in Section 3.2 hereof, and *"Unaffected Creditor"* means any one of such Creditors.

"Unsatisfied Unaffected Liabilities" means all of the Claims and Interim Period Claims of the Unaffected Creditors which are not satisfied by Eaton's on or before the Plan Implementation Date.

"Unsecured Creditors" means all Persons with Claims and/or Interim Period Claims, other than Landlord Interim Period Claims and Unaffected Creditors (other than as provided in Section 3.3 hereof) and *"Unsecured Creditor"* means any one of such Creditors.

"Unsecured Creditors Pool" means all amounts held by the Liquidator on and after the Plan Implementation Date representing proceeds from the realization of the Distributionco Transferred Assets and the satisfaction of the Eaton's Note with the Sears Equity Contribution, less amounts paid by Distributionco in payment of Unsatisfied Unaffected Liabilities, the Landlord Pool, the costs and expenses of Distributionco (except those in connection with the Sears Variable Note) including any taxes payable by Distributionco and the costs, expenses and remuneration of the Liquidator (except those in connection with the Sears Variable Note).

"Valuation Date" means August 20, 1999.

"Voting Claim" of a Creditor means the amount of the Claim and/or Interim Period Claim of such Creditor determined for voting purposes in accordance with the provisions of the Claims Procedure, the Plan, the Initial CCAA Order and the CCAA.

1.2 — Certain Rules of Interpretation

In this Plan and any Schedules hereto:

(a) all accounting terms not otherwise defined herein shall have the meanings ascribed to them, from time to time, in accordance with Canadian generally accepted accounting principles, including those prescribed by the Canadian Institute of Chartered Accountants;

(b) all references to currency are to Canadian Dollars;

(c) if, for the purposes of voting or distribution, an amount denominated in a currency other than Canadian Dollars must be converted to Canadian Dollars, such amount shall be regarded as having been converted at the noon spot rate of exchange quoted by the Bank of Canada for exchanging such currency to Canadian Dollars as at the Valuation Date;

(d) the division of this Plan into Articles and Sections and the insertion of a table of contents are for convenience of reference only and do 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;

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

(f) 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;

(g) unless otherwise specified, all references to time herein and in any document issued pursuant hereto mean local time in Toronto, Ontario and any reference to an event occurring on a Business Day shall mean prior to 5:00 p.m. on such Business Day;

(h) 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;

(i) whenever any payment to be made or action to be taken under this Plan is required to be made or to be taken on a day other than a Business Day, such payment shall be made or action taken on the next succeeding Business Day;

(j) unless otherwise provided, any reference to a statute or other enactment of parliament or a legislature 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; and

(k) references to a specified Article, Section or Schedule shall, unless something in the subject matter or context is inconsistent therewith, be construed as references to that specified Article or Section of, or Schedule to, 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 Article, Section, Schedule or other portion of this Plan and include any documents supplemental hereto.

1.3 — Schedules

The following Schedules annexed hereto are an integral part of this Plan:

Schedule "A" — Claims Procedure for Voting and Distribution Purposes

Schedule "B" — Entities Eligible for Investments by Liquidator

To the extent that any definition in Schedule "A" differs from a definition in the Plan, the Plan definition governs for the purposes of the Plan.

1.4 — 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 named or referred to in, or subject to, this Plan.

1.5 — Governing Law

This Plan shall be governed by and construed in accordance with the laws of Ontario 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 exclusive jurisdiction of the Court.

Article 2 — Purpose and Effect of the Plan

2.1 — Purpose

The purpose of this Plan is to effect a reorganization of the Common Shares and certain of the assets of Eaton's and a compromise of Eaton's liabilities to permit the disposition of Eaton's as a going concern to Sears and the orderly disposition of certain of the assets of Eaton's for the benefit of Creditors. The Plan is an intrinsic part of the Sears Transaction pursuant to which Sears has agreed to acquire Eaton's on a going concern basis. Pursuant to the Plan, the Distributionco Transferred Assets will be transferred from Eaton's to Distributionco, Distributionco will assume the Distributionco Assumed Liabilities and the Unsatisfied Unaffected Liabilities, Sears will acquire the Common Shares and make the Sears Equity Contribution and

Distributionco will ultimately receive the benefit of the Sears Equity Contribution as a repayment of the Eaton's Note. The Sears Equity Contribution will then be distributed to Creditors and as soon as practicable in the circumstances the Distributionco Transferred Assets will be realized and the net cash proceeds thereof will be distributed to Creditors. Sears will acquire the Common Shares from Distributionco after Distributionco acquires the Common Shares from the Shareholders in consideration for the issuance to the Shareholders of rights to receive undivided interests in the Sears Variable Note. Eaton's believes that Creditors will derive greater benefit from the continued operation of Eaton's and the orderly disposition of the Distributionco Transferred Assets than they would recover in a bankruptcy. In addition, this Plan provides for a recovery for Shareholders that would not otherwise be available. Accordingly, this Plan is designed to provide a fair recovery to all Creditors and Shareholders and to provide Eaton's with the financial stability necessary to implement a disposition plan for the benefit of all Creditors and to continue its business operations from and after the Plan Implementation Date.

2.2 — Overview of Plan

The restructuring contemplated by this Plan is to be implemented under the CCAA and OBCA. This Plan involves the following essential elements:

(a) the compromise of the Claims and Interim Period Claims of the Unsecured Creditors and Landlord Creditors;

(b) the transfer of the Distributionco Transferred Assets to Distributionco for the orderly disposition of the Distributionco Transferred Assets, and the delivery by Eaton's of the Sears Equity Contribution to Distributionco by means of the repayment of the Eaton's Note by Eaton's to Distributionco;

(c) the assumption by Distributionco of the Distributionco Assumed Liabilities as compromised under this Plan and of the Unsatisfied Unaffected Liabilities and the release of Eaton's from any liability for or arising from the Distributionco Assumed Liabilities and the Unsatisfied Unaffected Liabilities;

(d) the winding up of Distributionco for the purposes of the distribution of proceeds from the realization of the Distributionco Transferred Assets, and the Sears Equity Contribution, to the Creditors;

(e) the exchange of all of the Common Shares for the Participation Units;

(f) the cancellation of the Options; and

(g) the acquisition by Sears of the Common Shares.

Article 3 — Creditors and Shareholders

3.1 — Classification of Creditors

Subject to Sections 3.2 and 3.3 of this Plan, the classification of Creditors for the purposes of considering and voting on this Plan and receiving distributions hereunder is based upon the commonality of interest of such Creditors, such that Creditors with essentially similar rights against Eaton's and which Creditors are to receive essentially similar treatment have been grouped together in the following Classes for voting and distribution purposes:

(a) *Class 1*

Claims and Interim Period Claims of the Unsecured Creditors and Landlord Creditors (excluding in respect of Landlord Interim Period Claims) shall be designated as Class 1, and shall include the Claims relating to the notes in the aggregate principal amount of $5 million issued by Eaton's pursuant to the amended and restated plan of compromise or arrangement sanctioned by the Court on September 12, 1997, and all amounts pertaining to arrears of rent or other amounts payable as rent under the Leases, Claims in respect of tenant inducements or any other Claims or Interim Period Claims in respect of premises not constituting Abandoned Premises, but for greater certainty shall exclude Landlord Interim Period Claims, which amounts shall be included in Class 2.

(b) *Class 2*

Landlord Interim Period Claims shall be designated as Class 2.

3.2 — Unaffected Creditors

This Plan does not affect or compromise the Claims or Interim Period Claims of the following Creditors and others, except to the extent provided for in Section 3.3 hereof:

(a) RFI, which shall be paid by Eaton's on or before the Plan Implementation Date in accordance with Eaton's credit facility arrangements with RFI;

(b) the Agent, which shall be paid by Eaton's in accordance with the Agency Agreement on or before the Plan Implementation Date;

(c) the Trustee, the Monitor and the Interim Receiver, including legal and other advisors retained by any of them in accordance with the BIA Orders and the Initial CCAA Order, which shall be paid by Eaton's on or before the Plan Implementation Date:

(d) Sears;

(e) those Creditors having Claims or Interim Period Claims which constitute Eaton's Remaining Liabilities, which Claims or Interim Period Claims shall be satisfied by Eaton's in the ordinary course of business prior to, on or after the Plan Implementation Date and those Landlord Creditors having arrears of amounts constituting rent or payable as rent as provided for in the applicable Leases (excluding for greater certainty any amounts payable in connection with Abandoned Premises) in respect of Leases constituting Eaton's Remaining Assets, which shall be paid such rent prior to or on the Plan Implementation Date;

(f) those Landlord Creditors having Claims in respect of Leases, where such Leases are assigned by Eaton's on or prior to the Plan Implementation Date to Persons other than Distributionco, to the extent such Landlord Creditors deliver a full release to Eaton's;

(g) Interim Period Suppliers, which shall be paid by Eaton's in the ordinary course prior to, on or after the Plan Implementation Date;

(h) the legal, accounting and financial advisors and sales agents engaged by Eaton's for the purposes of assisting Eaton's in reorganizing its assets, debt and equity pursuant to this Plan, which shall be paid by Eaton's on or before the Plan Implementation Date;

(i) Secured Creditors, unless the Claims or Interim Period Claims of such Secured Creditors are otherwise provided for in this Plan, or their Claims or Interim Period Claims are settled by agreement with Eaton's;

(j) Creditors having claims arising in the ordinary course of business against Eaton's to the extent that such claims are covered by Eaton's insurance policies or are required by law or otherwise to be paid by Eaton's insurers;

(k) Her Majesty in right of Canada or any province, in respect of any environmental matters, but only to the extent of the Charge granted under Subsection 11.8(8) of the CCAA and, in respect of other matters, only to the extent that such matters or obligations (i) give rise to deemed trusts which are not paid pursuant to Subsection 18.2(1) of the CCAA or are the subject of other deemed trusts protected by Subsection 18.3(2) of the CCAA; or (ii) are secured by a Charge which complies with Subsection 18.5(1) of the CCAA; and

(l) the members of the Board of Directors of Eaton's in respect of their fees and disbursements up to and including the Plan Implementation Date.

3.3 — Affected Claims of Unaffected Creditors

(a) — Secured Creditors

Secured Creditors shall have no Voting Claim or Distribution Claim, except to the extent of any deficiency Claim or deficiency Interim Period Claim to which they may be entitled in respect of the Charge held by them. The Claims and Interim Period Claims of the Secured Creditors (other than the Monitor and Interim Receiver in respect of the Charge granted to them in the BIA Order made on August 23, 1999 and continued under the Initial CCAA Order, Sears, RFI, and the Agent) to the extent compromised by this Plan, and the Unsatisfied Unassumed Liabilities shall be assumed by Distributionco and thereupon all of the obligations of Eaton's to such Secured Creditors, including obligations arising under guarantees, sureties, indemnities and similar covenants and all Charges in favour of the Secured Creditors against the Eaton's Remaining Assets, shall be and shall be deemed to be released and discharged. Distributionco shall satisfy its obligations to the Secured Creditors from the realization of the Distributionco Transferred Assets to the extent of any Charges attaching to any of the Distributionco Transferred Assets, and any deficiency Claims to the extent such Secured Creditors may be entitled thereto from such realization shall constitute such Secured Creditors' Claims or Interim Period Claims to be compromised as Distribution Claims.

(b) — Insurance Claims

To the extent that any Claim or Interim Period Claim of a Creditor is not fully insured under Eaton's insurance policies or at law, the Creditor will be entitled to pursue a Claim or Interim Period Claim in respect of such uninsured portion, in accordance with this Plan and the Claims Procedure.

(c) — Claims Against Distributionco

The Unaffected Creditors shall have no Claims or Interim Period Claims against Distributionco except to the extent of the Unsatisfied Unaffected Liabilities, which shall be assumed and satisfied by Distributionco.

(d) — Owned Properties

All obligations of Eaton's continuing after the Plan Implementation Date under shareholder agreements, co-ownership agreements, rights of first refusal, co-tenancy agreements and other project documents (excluding for greater certainty operating agreements with adjacent land owners which shall be deemed to be repudiated on the Plan Implementation Date unless expressly affirmed by Eaton's before the Plan Implementation Date) in respect of Eaton's interest in owned or co-owned real or immoveable properties which constitute Distributionco Transferred Assets shall be assumed by Distributionco and the rights and obligations thereunder shall continue with Distributionco, and thereupon all obligations of Eaton's to such Persons who are parties to such agreements, including obligations arising under guarantees, securities, indemnities and similar covenants in favour of such Persons shall be and shall be deemed to be released and discharged, provided however, that any amounts or obligations owing by Eaton's to such Persons which constitute Claims or Interim Period Claims shall be compromised only to the extent provided by this Plan, including subsection 3.3(a), and any right to demand against Eaton's any reconveyance of Eaton's interest in such owned or co-owned real or immoveable properties shall be forever barred and stayed. Co-owner and other Charges affecting owned and co-owned properties which constitute Distributionco Transferred Assets shall be dealt with pursuant to subsections 3.2(i) and 3.3(a) of this Plan.

3.4 — Classification of Shareholders

The Shareholders shall constitute a single class which shall be designated as Class 3. The Optionholders shall not have the right to vote or receive any distributions under the Plan.

Article 4 — Treatment of Creditors and Shareholders

For purposes of this Plan, the Creditors shall receive the treatment provided in this Article 4 on account of their Claims and Interim Period Claims and on the Plan Implementation Date, the Claims and Interim Period Claims affected by this Plan will be compromised in accordance with the terms of this Plan.

4.1 — Unsecured Creditors

(a) — Voting Claims

(i) — Voting Claims of Greater than $500

Subject to Subsection 4.1(a)(ii) hereof, each Unsecured Creditor having a Voting Claim as an Unsecured Creditor shall be entitled to vote in Class 1 to the extent of the amount which is equal to its Voting Claim as an Unsecured Creditor.

(ii) — Voting Claims of $500 or Less

An Unsecured Creditor with a Voting Claim as an Unsecured Creditor of $500 or less, or an Unsecured Creditor with a Voting Claim greater than $500 which elects to value its Voting Claim at $500 in accordance with the procedure set out below, shall not be entitled to vote at the Meeting of Creditors for the Class of Unsecured Creditors.

(b) — Distribution Claims

(i) — Unsecured Creditors Pool

The distribution to the Unsecured Creditors shall not exceed in the aggregate the Unsecured Creditors Pool. For purposes of distribution of the Unsecured Creditors Pool, the Distribution Claims of the Unsecured Creditors shall rank *pari passu*, except to the extent that they receive payments of $500 or less in full satisfaction of their Distribution Claims.

(ii) — Distribution Claims of Greater than $500

After the Plan Implementation Date, each Unsecured Creditor with a Distribution Claim as an Unsecured Creditor which is greater than $500 and who did not elect to value such Distribution Claim at $500 shall receive from the Liquidator from time to time, in full satisfaction of such Distribution Claim as an Unsecured Creditor, a *pari passu* cash distribution from the Unsecured Creditors Pool.

(iii) — Distribution Claims of $500 or Less

As soon as practicable after the Plan Implementation Date, each Unsecured Creditor with a Distribution Claim as an Unsecured Creditor not exceeding in the aggregate $500, and each Unsecured Creditor with a Distribution Claim as an Unsecured Creditor which is greater than $500 which elects to value such Distribution Claim at $500 shall receive, from the Liquidator in priority to any distributions under Section 4(b)(ii) hereof, in full satisfaction of such Distribution Claim as an Unsecured Creditor, cash in an amount equal to the lesser of $500 and the amount of such Distribution Claim. Such election must be made in writing and delivered to Eaton's prior to December 1, 1999 and, in the case of an employee or former employee of Eaton's, prior to January 14, 2000. For greater certainty, such election must be made in respect of the whole amount of such Distribution Claim.

4.2 — Landlord Creditors

(a) — Voting Claims

Each Landlord Creditor shall be entitled to vote in Class 2 to the extent of the amount which is equal to its Voting Claim in respect only of its Landlord Interim Period Claim. Each Landlord Creditor shall be entitled to vote in Class 1 in respect of Claims or Interim Period Claims not constituting Landlord Interim Period Claims.

(b) — Distribution Claims

(i) — Landlord Pool

The distributions to the Landlord Creditors of their Distribution Claims in respect of or relating to their Landlord Interim Period Claims shall not exceed in the aggregate the Landlord Pool. For purposes of distribution of the Landlord Pool, the Distribution Claims of the Landlord Creditors in respect of or relating to their Landlord Interim Period Claims shall rank *pari passu*.

(ii) — Distribution to Landlord Creditors

After the Plan Implementation Date, each Landlord Creditor with a Distribution Claim in respect of or relating to its Landlord Interim Period Claim shall receive from the Liquidator from time to time, in full satisfaction of such Distribution Claim, a *pari passu* cash distribution from the Landlord Pool.

(c) — Abandonment or Repudiation

If Eaton's has delivered an abandonment notice or a repudiation notice with respect to Abandoned Premises, the relevant Lease pursuant to which Eaton's occupied or was obligated to occupy such Abandoned Premises and any obligation of Eaton's thereunder shall terminate in accordance with the Initial CCAA Order and the Plan without affecting the relevant Landlord's Distribution Claim.

4.3 — Unaffected Creditors

For greater certainty, each Unaffected Creditor shall not be entitled to vote or to receive any distributions under this Plan.

4.4 — Guarantees and Similar Covenants

No Person who has a Claim or Interim Period Claim under any guarantee, surety, indemnity or similar covenant (other than the holder of a guarantee, surety, indemnity or similar covenant from Eaton's) in respect of any Claim or Interim Period Claim which is compromised under this Plan or who has any right to claim over in respect of or to be subrogated to the rights of any Person in respect of a Claim or Interim Period Claim which is compromised under this Plan shall be entitled to any greater rights than the Creditor whose Claim or Interim Period Claim was compromised under this Plan.

4.5 — Claims Generally

(a) — Assignment of Claims and Interim Period Claims

If a Creditor who has a Voting Claim transferred or transfers all or part of its Voting Claim and the transferee delivers evidence of its ownership of all or part of such Voting Claim and a written request to Eaton's, no later than five (5) Calendar Days prior to the date of the Meeting of the Creditors of the Class to which such Voting Claim is subject, that such transferee's name be included on the list of Creditors entitled to vote at such Meeting, such transferee shall be entitled to attend and vote the transferred portion of such Voting Claim at such Meeting if and to the extent such Voting Claim may otherwise be voted at such Meeting; provided, however, that for the purposes of determining whether this Plan has been approved by a majority in number of the Creditors of such Class, only the vote of the transferor or the transferee, whichever holds the highest dollar value of such Voting Claim, will be counted, and, if such value shall be equal, only the vote of the transferee will be counted. If a Voting Claim has been transferred to more than one transferee, for purposes of determining whether this Plan has been approved by a majority in number of the Creditors of the Class, to which such Voting Claim is subject, only the vote of the transferee with the highest value of such Voting Claim will be counted unless all of the transferees of such Voting Claim deliver a notice to Eaton's at least five (5) Calendar Days prior to the date of the Meeting of the Creditors of the Class to which such Voting Claim is subject and designate therein the name of the transferee whose vote is to be counted, in which case the vote of such designated transferee will be counted.

(b) — Voting by Landlord Creditors

For the purpose of determining whether this Plan has been approved by a majority in number of the Landlord Creditors under Class 2, the vote of the Person which is the landlord of premises leased to Eaton's shall be counted as one vote notwithstanding that such Person may be under common ownership with or may be an Affiliate or a Person who is a landlord of other Premises leased to Eaton's. Each co-ownership, joint venture or partnership in respect only of a particular leased premises shall be regarded as a separate Person and counted as one vote. For greater certainty, if the same Person is a Landlord Creditor voting under this Plan in respect of more than one leased premises, the vote of such Person shall be counted as only one vote.

(c) — Merchandising Funds and Discounting

A Distribution Claim of a Creditor shall be net of any amount owing by the Creditor to Eaton's prior to the Valuation Date. For greater certainty, Eaton's shall be entitled to exercise rights of set-off prior to the Valuation Date in respect of Merchandising Funds and Discounts relating to purchases and transactions occurring prior to the Valuation Date on a per diem basis notwithstanding that the relevant contract, agreement or arrangement relating to such Merchandising Funds and Discounts may provide for a calculation of or entitlement to Merchandising Funds and Discounts on a different basis. No amount shall be provable as a Claim by a Creditor in respect of Merchandising Funds and Discounts which have been taken or claimed by Eaton's prior to the Valuation Date.

(d) — Allocation of Distributions

All distributions made by the Liquidator to Creditors pursuant to this Plan and the OBCA Sanction Order shall be applied first in payment of accrued and unpaid interest, if any, which form part of the Claim or Interim Period Claim, and the balance shall then be applied in payment of the outstanding principal amount of such Claim or Interim Period Claim. Each Creditor shall be responsible for providing for any non-resident withholding tax imposed under Part XIII of the *Income Tax Act* (Canada) as a condition of receiving any amounts under this Plan.

(e) — Interest

No interest shall accrue from and after the Valuation Date for the purpose of valuing Voting Claims and Distribution Claims.

(f) — Set-Off

Without limiting the provisions of Subsection 4.5(c) in respect of Merchandising Funds and Discounts, the law of set-off shall apply as of the Plan Implementation Date to all Distribution Claims filed against Eaton's in the same manner and to the same extent as if Eaton's or Distributionco were plaintiff or defendant, as the case may be provided, however, that there shall be no set-off (i) between a Claim and any indebtedness, liability or obligation owed by a Creditor to Eaton's which arose or occurred from and after the Valuation Date and (ii) between an Interim Period Claim and any indebtedness, liability or obligation owed by a Creditor to Eaton's which arose or occurred before the Valuation Date.

4.6 — Shareholders

(a) — Exchange of Common Shares

On the Plan Implementation Date. the Shareholders shall exchange and shall be deemed to have exchanged the Common Shares for the right of each of them to receive Participation Units. Each Shareholder shall have the right to receive a Participation Unit on the basis of one Participation Unit for each Common Share held.

(b) — Exercise of Right to Receive Participation Units

On the Plan Implementation Date, on the receipt by Distributionco of the Sears Variable Note, the Shareholders shall exercise and shall be deemed to have exercised their right to receive Participation Units, and Distributionco, through the Liquidator, shall issue Participation Units to each Shareholder in accordance with its entitlement, on the basis of one Participation Unit for each Common Share.

(c) — Participation Units

The Liquidator will hold the Sears Variable Note on behalf of Distributionco. The Liquidator will hold the proceeds received on the repayment or maturity of the Sears Variable Note and income earned thereon on behalf of Distributionco, and Distributionco will hold such proceeds and income for the benefit of Persons holding from time to time Participation Units in accordance with their respective entitlements. The Sears Variable Note shall be paid by Sears only from the use of the Eaton's Tax Losses. There shall be no other recourse against Sears or Eaton's in respect of the Sears Variable Note. Upon the filing of a tax return by Sears in which any of the Eaton's Tax Losses are utilized, a payment will be made by Sears to the Liquidator equal to the Eaton's Tax Savings with the aggregate of all the Eaton's Tax Savings being a maximum of $20 million. The Liquidator shall invest such funds, plus any interest thereon earned by the Liquidator, until the later of (i) the expiry of the relevant assessment period, and (ii) the resolution of any appeal from an assessment in respect of the use by Sears of such Eaton's Tax Losses. Thereupon, the Eaton's Tax Savings, plus interest earned thereon by the Liquidator, shall reduce the amount payable under the Sears Variable Note and the Liquidator shall distribute such amounts to the holders of Participation Units. To the extent that Sears is not ultimately able to utilize the Eaton's Tax Losses to a maximum amount of $44.44 million, the difference between the Eaton's Tax Savings paid to the Liquidator and 45% of the Eaton's Tax Losses actually utilized, plus any interest earned thereon, shall be repaid by the Liquidator to Sears upon the expiry of all appeal rights of Sears in respect of any disallowance of such Eaton's Tax Losses and, in that event, Sears shall have no obligation to pay such amounts under the Sears Variable Note. Sears shall claim sufficient of the Eaton's Tax Losses to generate no less than $20 million in Eaton's Tax Savings prior to claiming any tax losses of Sears.

(d) — No Dissent Rights

The Shareholders shall not have any rights of dissent under Section 185 of the OBCA in respect of this Plan.

4.7 — Optionholders

On the Plan Implementation Date, the Options shall be cancelled and shall be deemed to be cancelled, and the Optionholders shall have no further rights against Eaton's, Distributionco or the Liquidator nor shall they be entitled to receive any Participation Units.

4.8 — Effect of Plan Generally

On the Plan Implementation Date, the treatment of Claims and Interim Period Claims under this Plan shall be final and binding on Eaton's and all Creditors affected thereby (and their respective heirs, executors, administrators, legal personal representatives, successors and assigns) and this Plan shall constitute (i) a full, final and absolute settlement of all rights of the holders of all Claims and Interim Period Claims affected hereby; (ii) an absolute release and discharge of all indebtedness, liabilities and obligations of Eaton's of or in respect of the Claims and Interim Period Claims, including, without limitation, the Unsatisfied Unaffected Liabilities, and any Charges against the Eaton's Remaining Assets in respect thereof (whether created by contract, statute or otherwise); and (iii) a termination of all Leases pertaining to Abandoned Premises and all contracts, rights and licenses granted by Eaton's not constituting Eaton's Remaining Assets, Distributionco Transferred Assets or Eaton's existing insurance policies of any kind whatsoever in accordance with the terms and conditions of this Plan.

4.9 — Waiver of Defaults by Persons

From and after the Plan Implementation Date, all Persons shall be deemed to have waived any and all defaults of Eaton's then existing or previously committed by Eaton's or caused by Eaton's, or non-compliance with any covenant, warranty, representation, term, provision, condition or obligation, express or implied, in any contract, credit document, agreement for sale, Lease, lease or other agreement, written or oral, and any and all amendments or supplements thereto, existing between such Person and Eaton's, and any and all notices of default and demands for payment under any instrument, including any guarantee, shall be deemed to have been rescinded and Distributionco and the Liquidator shall be entitled to the benefit of such waiver.

4.10 — Waiver of Defaults by Eaton's

From and after the Plan Implementation Date, Eaton's shall be deemed to have waived any and all defaults of a Person then existing or previously committed by such Person or caused by such Person, or non-compliance with any covenant, warranty, representation, term, provision, condition or obligation, express or implied, in any contract, credit document, agreement for sale, lease, Lease or other agreement, written or oral, constituting Eaton's Remaining Assets and any and all amendments or supplements thereto, existing between Eaton's and such Person, and any and all notices of default and demands for payment under any instrument, including any guarantee, shall be deemed to have been rescinded provided, however, that such waiver shall not apply to any defaults which are continuing after the Plan Implementation Date.

Article 5 — Steps of the Plan and Closing Procedures

5.1 — Implementation of Plan

Prior to the Plan Implementation Date, Eaton's shall incorporate Distributionco as a wholly owned subsidiary, Eaton's shall hold the Distributionco Common Share and shall cause Distributionco to become subject to the OBCA Proceedings. Subject to the satisfaction or waiver (in accordance with Section 9.1 hereof), of the conditions set forth in Article 6 hereof, the following shall occur, and be deemed to occur, sequentially in the following order on the Plan Implementation Date:

(a) all of the subsidiaries of Eaton's shall release and be deemed to have released Eaton's from all obligations, indebtedness and liabilities, including, without limitation, all Unsatisfied Unaffected Liabilities, and all Claims and Interim Period Claims which they may have against Eaton's;

(b) the Initial Director shall resign and be deemed to have resigned without any ongoing liability as a director of Distributionco;

(c) the appointment of the Liquidator will take effect in accordance with the provisions of the OBCA Sanction Order;

(d) the compromise of the Claims and Interim Period Claims between the Creditors and Eaton's shall be effected and be deemed to be effected at the amounts which the Creditors are to be entitled to receive from Distributionco;

(e) Eaton's shall transfer and be deemed to have transferred to Distributionco the Distributionco Transferred Assets and issued the Eaton's Note to Distributionco in exchange for which Distributionco shall assume and be deemed to have assumed the Distributionco Assumed Liabilities, as compromised under paragraph (d) hereof and, the Unsatisfied Unaffected Liabilities;

(f) Eaton's shall be released and be deemed to be released by all Creditors from all Claims and Interim Period Claims including, without limitation, from the Unsatisfied Unaffected Liabilities, excluding Eaton's Remaining Liabilities;

(g) the Shareholders shall exchange and be deemed to exchange their Common Shares for the right to receive Participation Units;

(h) the Options shall be cancelled and shall be deemed to be cancelled and Eaton's shall be released and be deemed to be released from all obligations and liabilities to the Optionholders;

(i) the Articles of Arrangement shall be filed;

(j) Sears will acquire the Common Shares held by Distributionco in exchange for the Sears Variable Note to be issued to Distributionco;

(k) the Liquidator shall hold the Sears Variable Note on behalf of Distributionco, and Distributionco shall in turn hold the Sears Variable Note for the benefit of the holders of Participation Units from time to time in accordance with their respective interests;

(l) Distributionco shall deliver and be deemed to have delivered Participation Units to the Shareholders in full satisfaction of the Shareholders' right to receive such Participation Units;

(m) Sears will subscribe for new common shares of Eaton's and will pay to Eaton's the Sears Equity Contribution;

(n) the Sears Equity Contribution shall be paid by Eaton's to Distributionco in full satisfaction of the Eaton's Note; and

(o) Eaton's shall transfer the Distributionco Common Share to the Liquidator.

5.2 — Effect of CCAA Sanction Order

In addition to sanctioning this Plan, the CCAA Sanction Order shall, among other things:

(a) declare that the compromises effected hereby are approved, binding and effective as herein set out upon all Creditors affected by this Plan;

(b) declare that agreements (including without limitation, Leases) to which Eaton's is a party and which are not repudiated or not deemed to be repudiated by Eaton's shall be and shall remain in full force and effect, unamended, as at the Plan Implementation Date and no Person party to any such agreements shall, following the Plan Implementation Date, accelerate, terminate, rescind, refuse to perform or otherwise repudiate its obligations thereunder, or enforce or exercise any right (including any right of set-off, dilution, buy-out, divestiture, forced sale, option or other remedy) or make any demand under or in respect of any such obligations or agreements, by reason:

(i) of any event(s) which occurred on or prior to the Valuation Date which would have entitled any other Person party thereto to enforce those rights or remedies (including defaults or events of default arising as a result of the financial condition or insolvency of Eaton's);

(ii) of the fact that Eaton's has sought or obtained relief under the CCAA Proceedings, BIA Proceedings or the OBCA Proceedings or that the Plan has been implemented;

(iii) of the effect on Eaton's of the completion of any of the transactions contemplated by this Plan; or

(iv) of any compromises or arrangements effected pursuant to this Plan;

(c) with respect to those leases, contracts, licences, agreements or arrangements, or other rights, which do not constitute Eaton's Remaining Assets or Eaton's insurance policies Col any kind whatsoever), all such leases, contracts, licences, agreements or arrangements, or other rights, shall be deemed to be repudiated and abandoned, as applicable, as of the Plan Implementation Date and the other Persons who are party thereto shall be deemed to be Creditors having Interim Period Claims unless Distributionco expressly agrees to assume any such lease (other than a Lease), contract, licence, agreement, or arrangements, or other rights, by written notice within ten (10) Calendar Days after the Plan Implementation Date;

(d) with respect to those Leases in respect of Abandoned Premises, declare that all such Leases shall be deemed to be repudiated and abandoned on the effective date specified in the notice delivered by Eaton's;

(e) provide that paragraph 11 of the Initial CCAA Order be extended and remain in full force and effect until August 31, 2000;

(f) discharge the Monitor and the Interim Receiver;

(g) stay any and all steps or proceedings, including, without limitation, administrative orders, declarations or assessments, commenced, taken or proceeded with or that may be commenced, taken or proceeded with against any or all past, present and future directors and officers of Eaton's and the Initial Director in respect of any Claim or Interim Period Claim;

(h) discharge all past, present and future directors and officers of Eaton's and the Initial Director from any liability with respect to all Claims and Interim Period Claims;

(i) release and discharge Eaton's from any and all indebtedness, obligations and liabilities (other than in respect of Eaton's Remaining Liabilities) including without limitation, any liability with respect to Claims or Interim Period Claims, including, without limitation, the Unsatisfied Unaffected Liabilities, or any liability as an assignor of any rights, or as employer under, or administrator of, the Pension Plans;

(j) to make provision for the creation of adequate reserves to be held by Distributionco, or the Liquidator appointed under the OBCA Sanction Order, to pay Unsatisfied Unaffected Liabilities; and

(k) provide that the Distributionco Transferred Assets, wherever situate, shall vest in Distributionco free and clear of all Charges, estate, right, title, or interest except as otherwise provided under this Plan.

5.3 — Effect of OBCA Sanction Order

In addition to sanctioning this Plan, the OBCA Sanction Order shall provide, among other things, that:

(a) Distributionco shall be wound up commencing on the Plan Implementation Date;

(b) the Liquidator shall be appointed effective on the Plan Implementation Date to receive and liquidate all of the Distributionco Transferred Assets and the Sears Equity Contribution for distribution to the Creditors in accordance with the Plan and the Claims Procedure;

(c) the Liquidator shall have all necessary powers to carry out its duties and obligations as described in this Plan and the OBCA Sanction Order, including the authority to pay any taxes exigible as a result of the transfer of the Distributionco Transferred Assets to Distributionco, and all of the rights, powers, duties and obligations of a court-appointed liquidator under Part XVI of the OBCA, except as may be varied by the OBCA Sanction Order, and Distributionco and the Liquidator shall have all of the rights, privileges, protections and immunities typically afforded to an indenture trustee in connection with the enforcement and administration of the Sears Variable Note;

(d) from and after the Plan Implementation Date, the Liquidator shall assume the functions of Eaton's (as defined in the Claims Procedure) under the Claims Procedure for the determination of Distribution Claims and shall distribute (including on an interim basis) to the Creditors amounts realized from the Distributionco Transferred Assets and the Sears Equity Contribution, in accordance with the Plan, including the Claims Procedure;

(e) the Liquidator shall hold the Sears Variable Note and the proceeds thereof received on the maturity of the Sears Variable Note on behalf of Distributionco and distribute on behalf of Distributionco such proceeds and all interest thereon in accordance with the provisions of this Plan and the Sears Variable Note to the holders of Participation Units;

(f) the Liquidator shall keep any funds received under the Sears Variable Note prior to any repayment thereunder or the maturity thereof segregated from any other funds held by the Liquidator, and shall return such funds (and any interest thereon) to Sears to the extent provided in the Sears Variable Note, and upon such return of funds to Sears, no Person shall have any claim including, without limitation, the holders of Participation Units or Distributionco, in respect of such funds;

(g) the Liquidator shall invest all funds held or received by Distributionco under the Sears Variable Note, pending distribution as contemplated under the Sears Variable Note, in deposits, bankers acceptances and Treasury Bills with or of the financial institutions and the Canadian or provincial governments and their respective agencies or agents listed or referred to in Schedule "B" attached to this Plan;

(h) the Liquidator shall invest all funds held or received from the Distributionco Transferred Assets, the Sears Equity Contribution and any reserves held pending distributions to Creditors in deposits, bankers acceptances and Treasury Bills

with or of the financial institutions and the Canadian or provincial governments and their respective agencies or agents listed or referred to in Schedule "B" attached to this Plan;

(i) the Liquidator shall keep and maintain a register of holders of Participation Units and of transfers thereof;

(j) neither Distributionco nor the Liquidator shall have any obligation to take any proceedings or any other steps to enforce the Sears Variable Note or the rights of the Participation Unit holders to receive monies thereunder, unless the Liquidator is provided with funds and the appropriate indemnities from Participation Unit holders;

(k) the form and terms of the Sears Variable Note shall be approved;

(l) a committee of Creditors of up to 5 members may be appointed by the Liquidator to assist the Liquidator in reviewing and settling Distribution Claims and establishing reserves to allow the Liquidator to make interim distributions to the Creditors;

(m) the Initial Director shall be discharged from any liability with respect to the Claims and Interim Period Claims effective on the Plan Implementation Date;

(n) no further directors shall be appointed for Distributionco;

(o) no action or other proceeding shall be proceeded with or commenced against Distributionco or the Liquidator and no attachment, sequestration, distress or execution shall be put in force against the estate or effects of Distributionco except by leave of the Court;

(p) Distributionco shall not assume any liability in respect of any Claims or Interim Period Claims, except those liabilities compromised under this Plan and the Unsatisfied Unaffected Liabilities;

(q) no Person who is a party to any agreement assigned to Distributionco as part of the Distributionco Transferred Assets shall, from and after the Plan Implementation Date, have any right to accelerate, terminate, rescind, refuse to perform or otherwise repudiate its obligations thereunder, or enforce or exercise any right (including without limitation any charge, right of set-off, dilution, buy-out, reconveyance, divestiture, forced sale, option or other remedy) or make any demand under or in respect of such agreement by reasons of:

(i) the fact that Distributionco is the transferee of the Distributionco Transferred Assets;

(ii) the fact that Distributionco has sought or obtained relief under the OBCA Proceedings;

(iii) the fact that the Plan has been implemented: or

(iv) the fact that Distributionco is being wound up and the Liquidator has been appointed; and

(r) the Liquidator shall only apply for an Order dissolving Distributionco when all funds received under the Sears Variable Note and any income earned thereon have been fully distributed to the holders of the Participation Units and when all proceeds of realization from the Distributionco Transferred Assets have been distributed to the Creditors, in each case in accordance with this Plan and the OBCA Sanction Order.

Article 6 — Conditions Precedent

6.1 — Application for Sanction Orders

If the Creditor Approval and Shareholder Approval are obtained, Eaton's shall apply for the CCAA Sanction Order and the OBCA Sanction Order on November 23, 1999. The CCAA Sanction Order and the OBCA Sanction Order shall not become effective until the Plan Implementation Date. On the Plan Implementation Date, subject to the satisfaction or waiver of the conditions contained in Section 6.2, the Plan will be implemented by Eaton's, Distributionco and the Liquidator and shall be binding upon all Persons having Claims, Interim Period Claims, and Unsatisfied Unaffected Liabilities against Eaton's or

Distributionco or the Liquidator to the extent of their Claims, Interim Period Claims or Unsatisfied Unaffected Liabilities. If the conditions contained in Section 6.2 are not satisfied or waived on or before the Plan Implementation Date, this Plan, the CCAA Sanction Order and the OBCA Sanction Order shall cease to have any further force or effect (other than the provisions therein protecting the Interim Receiver, the Monitor and the Liquidator, including with respect to their fees and disbursements).

Eaton's may apply for an Order extending the Stay Period so that the application for the CCAA Sanction Order may be made before the Stay Period expires and the Stay Period shall not expire until the Plan Implementation Date.

6.2 — Conditions Precedent to Implementation of Plan

The implementation of this Plan shall be conditional upon the fulfilment or waiver (in accordance with Section 9.1) of the following conditions:

(a) — Expiry of Appeal Period

The appeal period with respect to the CCAA Sanction Order and OBCA Sanction Order shall have expired without an appeal of such Orders having been commenced or, in the event of an appeal or application for leave to appeal, a final determination shall have been made by the applicable appellate tribunal.

(b) — Sears Agreement

The satisfaction of all conditions in the Sears Agreement unless waived by Sears.

(c) — Deliveries of Documents

All relevant Persons shall have executed, delivered and filed all documentation which in the opinion of Eaton's, acting reasonably, are necessary to give effect to all material terms and provisions of this Plan including, without limitation, the Articles of Arrangement.

(d) — Governmental Approvals

All applicable governmental, regulatory and Judicial consents, orders and similar consents and approvals and all filings with all governmental authorities, securities commissions, stock exchanges and other regulatory authorities having jurisdiction, in each case to the extent deemed necessary or desirable by counsel to Eaton's and in form and substance satisfactory to Eaton's for the completion of the transactions contemplated by this Plan or any aspect hereof, shall have been obtained or received.

Article 7 — Meetings and Procedural Matters

7.1 — Meetings of Creditors

(a) Meetings of Creditors shall be held in accordance with this Plan, the Initial CCAA Order and any further Order.

(b) Subject to the Initial CCAA Order, the Chair shall decide all matters relating to the conduct of each Meeting of Creditors and the validity of proxies and the voting of Voting Claims.

(c) The quorum required at each Meeting of Creditors shall be the lesser of two or the number of Creditors in the Class of Creditors present in person or by proxy.

(d) The Monitor shall appoint scrutineers for the supervision and tabulation of the attendance at, quorum at and votes cast at each Meeting of Creditors. A Person designated by the Monitor shall act as secretary at the Meeting of Creditors.

(e) The only Persons entitled to notice of or to attend, speak and vote at each Meeting of Creditors are the Creditors of the Class of Creditors to which the Meeting relates (including, for purposes of attendance and speaking, their proxy holders),

representatives of Eaton's, the Monitor, the Employee Representative, and their respective legal and financial advisors. Any other Person may be admitted to a Meeting of Creditors on the invitation of Eaton's representatives or the Chair.

(f) If the requisite quorum is not present at a Meeting of Creditors, or if a Meeting of Creditors is postponed by the vote of the majority in number of the Creditors present in person or by proxy, then the Meeting of Creditors shall be adjourned by the Chair to a date thereafter and to such time and place as may be appointed by the Chair.

(g) Any proxy which any Creditor wishes to submit in respect of a Meeting of Creditors (or any adjournment thereof) must be received by Eaton's one Business Day prior to the day on which the Meeting of Creditors (or any adjournment thereof) is to be held, provided that proxies may also be deposited with the Chair at the Meeting of Creditors (or any adjournment thereof) prior to the commencement of such Meeting.

(h) The Employee Representative shall file an Omnibus Proof of Claim (Employees) (as defined in the Claims Procedure) on behalf of all former and present employees of Eaton's and shall be deemed to hold an omnibus proxy for voting purposes for all former and present employees of Eaton's. The omnibus proxy for voting purposes shall be without prejudice to the ability of any former or present employee to file his or her own Proof of Claim and to appear in person or by proxy held by a Person other than the Employee Representative. In the event that the employee files his or her own Proof of Claim, the Omnibus Proof of Claim (Employees) and omnibus proxy for voting purposes shall be reduced or revised accordingly. The omnibus proxy shall be counted for the total number of individual employees voting and the total value of their Claims and Interim Period Claims.

(i) In respect of any Meeting of Creditors, the Chair shall direct a vote, by written ballot, with respect to a resolution to approve this Plan and any amendments thereto as Eaton's may consider appropriate.

(j) For voting purposes, Eaton's shall keep a separate record and tabulation of any votes cast in respect of Claims and Interim Period Claims which have not been allowed in whole or in part by Eaton's by the time of the Meeting.

7.2 — Creditor Approval

In order that this Plan be binding on the Creditors in accordance with the CCAA, it must first be accepted by each Class of Creditors as prescribed by this Plan by a majority in number of the Creditors in such Class who actually vote on this Plan (in person or by proxy) at the relevant Meeting. representing two-thirds (66 $2/_3$%) in value of the Voting Claims of the Creditors in such Class who actually vote on this Plan (whether in person or by proxy) at the relevant Meeting.

7.3 — Meeting of Shareholders

(a) The Meeting of Shareholders shall be called, held and conducted in accordance with the OBCA, other applicable laws and the articles and by-laws of Eaton's, subject to the terms of the Initial OBCA Order and subject to any further Order.

(b) Subject to the Initial OBCA Order, the Chair shall decide all matters relating to the conduct of the Meeting of Shareholders and the annual meeting of Shareholders postponed to November 19, 1999 by Order made September 24, 1999 and the validity of proxies and the voting of Common Shares relating to each.

(c) The only Persons entitled to notice of or to attend the Meeting of Shareholders shall be the Shareholders as at the record date for the Meeting of Shareholders, holders of valid proxies from Shareholders, Eaton's representatives, Eaton's directors, Eaton's auditors, and the Monitor. The only Persons entitled to be represented and to vote at the Meeting of Shareholders shall be the Shareholders as at the record date for the Meeting of Shareholders, subject to the provisions of the OBCA with respect to Persons who become registered Shareholders after that date. Other Persons may attend at the Meeting of Shareholders only on the invitation of Eaton's representatives or the Chair.

(d) Eaton's, if it deems it advisable, is specifically authorized to adjourn or postpone the Meeting of Shareholders on one or more occasions, without the necessity of first convening the Meeting of Shareholders or first obtaining any vote of any Shareholders respecting the adjournment or postponement.

(e) The accidental omission to give notice of the Meeting of Shareholders, or the non-receipt of such notice, shall not invalidate any resolution passed or proceedings taken at the Meeting of Shareholders.

(f) Eaton's is authorized, at its expense, to solicit proxies, directly and through its officers, directors and employees, and through such agents or representatives as it may retain for the purpose, and by mail or such other forms of personal or electronic communication as it may determine.

(g) Votes shall be taken at the Meeting of Shareholders on the basis of one (1) vote per Common Share.

(h) Optionholders shall not be entitled to vote at the Meeting of Shareholders.

7.4 — Shareholder Approval

In order that this Plan be binding on the Shareholders in accordance with the OBCA, it must first be accepted by an affirmative vote by not less than two-thirds (66 2/3%) of the votes cast (for this purpose any spoiled votes, illegible votes, defective votes and abstentions shall be deemed not to be votes cast) by the Shareholders present in person or represented by proxy at the Meeting of Shareholders.

Article 8 — Claims Procedure

8.1 — Claims Procedure

(a) The Claims and Interim Period Claims for voting and distribution purposes are to be determined in accordance with the Claims Procedure.

(b) All steps to be taken by Eaton's under the Claims Procedure from and after the Plan Implementation Date shall be performed by the Liquidator.

Article 9 — Amendment of Plan

9.1 — Plan Amendment

(a) Subject to the provisions of the Sears Agreement, Eaton's reserves the right, at any time and from time to time, to amend, modify and/or supplement this Plan, or to waive in whole or in part any condition from time to time set forth in Article 6, provided that any such amendment, modification, supplement or waiver must be contained in a written document which is filed with the Court and (i) if made prior to the Meetings, communicated to the Creditors and/or Shareholders in the manner required by the Court (if so required); and (ii) if made following the Meetings, approved by the Court following notice to the Creditors and/or Shareholders affected thereby.

(b) Subject to the provisions of the Sears Agreement, any amendment, modification, supplement or waiver may be made unilaterally by the Liquidator following the OBCA Sanction Order and CCAA Sanction Order, provided that it concerns a matter which, in the opinion of the Liquidator, acting reasonably, is of an administrative nature required to better give effect to the implementation of this Plan and to the OBCA Sanction Order and/or CCAA Sanction Order and is not adverse to the financial or economic interests of any Class of Creditors or Shareholders.

(c) Any supplementary plan or plans of compromise or arrangement filed with the Court and, if required by this Section, approved by the Court, shall, for all purposes, be and be deemed to be a part of and incorporated in this Plan.

Article 10 — General Provisions

10.1 — Termination

Subject to the provisions of the Sears Agreement, at any time prior to the Plan Implementation Date, Eaton's may determine not to proceed with this Plan, notwithstanding any prior approvals given at any of the Meetings.

10.2 — Paramountcy

From and after the Plan implementation Date, any conflict between this Plan and the covenants, warranties, representations, terms, conditions, provisions or obligations, express or implied, of any contract, credit document, agreement for sale, by-laws of Eaton's, lease or other agreement, written or oral and any and all amendments or supplements thereto existing between one or more of the Creditors and Eaton's as at the Plan Implementation Date will be deemed to be governed by the terms, conditions and provisions of this Plan and the OBCA Sanction Order and CCAA Sanction Order, which shall take precedence and priority.

10.3 — Compromise Effective For All Purposes

The compromise or other satisfaction of any Claim or Interim Period Claim under this Plan, if sanctioned and approved by the Court under the CCAA Sanction Order shall, in the case of any Creditor whose Claim or Interim Period Claim is in a Class voting in favour of this Plan, be binding on the Plan Implementation Date on such Creditor and such Creditor's heirs, executors, administrators, legal personal representatives, successors and assigns, for all purposes.

10.4 — Consents, Waivers And Agreements

On the Plan Implementation Date, each Creditor and Shareholder shall be deemed to have consented and agreed to all of the provisions of this Plan in their entirety. In particular, each Creditor and Shareholder shall be deemed:

(a) to have executed and delivered to Eaton's all consents, releases, assignments and waivers, statutory or otherwise, required to implement and carry out this Plan in its entirety;

(b) to have waived any non-compliance by Eaton's with any provision, express or implied, in any agreement or other arrangement, written or oral, existing between such Creditor and Eaton's that has occurred on or prior to the Plan Implementation Date and, where provided for in the CCAA Sanction Order, after the Plan Implementation Date; and

(c) to have agreed that, if there is any conflict between the provisions, express or implied, of any agreement or other arrangement, written or oral, existing between such Creditor and Eaton's at the Plan Implementation Date (other than those entered into by Eaton's on, or with effect from, the Plan Implementation Date) and the provisions of this Plan, the provisions of this Plan take precedence and priority and the provisions of such agreement or other arrangement shall be deemed to be amended accordingly.

10.5 — Releases

On the Plan Implementation Date, Eaton's and each and every present and former Shareholder, officer, director, employee, auditor, financial advisor, legal counsel (other than in respect of legal opinions) and agent of Eaton's, the Initial Director, the Interim Receiver and the Monitor (individually, 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, expenses, executions, Charges and other recoveries on account of any liability, obligation, demand or cause of action of whatever nature which any Person may be entitled to assert, including, without limitation, any and all claims in respect of potential statutory liabilities of the former, present and future directors and officers of Eaton's and the Initial Director, 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, dealing or other occurrence existing or taking place on or prior to the Plan Implementation Date relating to, arising out of or in connection with Claims or Interim Period Claims, the business and affairs of Eaton's, the administration and winding up of the Pension Plans including, without limitation, any unfunded liability, and the administration, distribution, and investment of the funds relating to the Pension Plans, any employee benefit plan, including without limitation, any long

tern disability plan, fund or arrangement, this Plan, the BIA Proceedings, the CCAA Proceedings and the OBCA Proceedings, provided that nothing herein shall release or discharge a Released Party (other than Eaton's) if the Released Party (other than Eaton's) is adjudged by the express terms of a judgment rendered on a final determination on the merits to have committed fraud or wilful misconduct.

10.6 — Deeming Provisions

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

10.7 — Information Circular

Copies of this Plan will be included with an information circular mailed to Shareholders, Optionholders, Known Creditors, Known Interim Period Creditors, and Creditors who submit Proofs of Claim.

10.8 — Notices

Any notice or communication to be delivered hereunder shall be in writing and shall reference this Plan and may, subject as hereinafter provided, be made or given by personal delivery or by telecopier addressed to the respective parties as follows:

(a) if to Eaton's:

The T. Eaton Company Limited

c/o Richter & Partners Inc.

Court-Appointed Monitor of Eaton's

90 Eglinton Avenue East, Suite 700

Toronto, Ontario M4P 2Y3

Attention: Messrs. John J. Swidler, F.C.A. and Robert Harlang, C.A.

Telephone: (416) 932-6261

Telecopier: (416) 932-6262

(b) if to a Creditor:

to the known address (including telecopier number) for such Creditor or the address for such Creditor specified in the Proofs of Claim filed by such Creditor in the CCAA Proceedings;

(c) if to the Monitor:

Richter & Partners Inc.

Court-Appointed Monitor of Eaton's

90 Eglinton Avenue East, Suite 700

Toronto, ON M4P 2Y3

Attention: Messrs. John J. Swidler, F.C.A. and Robert Harlang, C.A.

Telecopier: (416) 932-6200

Telephone: (416) 932-8000

or to such other address as any party may from time to time notify the others in accordance with this Section. All such notices and communications which are delivered shall be deemed to have been received on the date of delivery. All such notices and communications which are telecopied shall be deemed to be received on the date telecopied if sent before 5:00 p.m. on a Business Day and otherwise shall be deemed to be received on the Business Day next following the day upon which such telecopy was sent. Any notice or other communication sent by mail shall be deemed to have been received on the fifth Business Day after the date of mailing. The unintentional failure by Eaton's to give a notice contemplated hereunder shall not invalidate any action taken by any Person pursuant to this Plan.

10.9 — Different Capacities

Creditors whose Claims and Interim Period Claims are affected by this Plan may be affected in more than one capacity. Unless expressly provided herein to the contrary, each such Creditor shall be entitled to participate hereunder in each such capacity. Any action taken by a Creditor in any one capacity shall not affect the Creditor in any other capacity, unless expressly agreed by the Creditor in writing or unless the Claims or Interim Period Claims overlap or are otherwise duplicative.

10.10 — Further Assurances

Notwithstanding that the transactions and events set out in this Plan shall be deemed to occur without any additional act or formality other than as set out herein, each of the Persons affected hereby shall make, do and execute or cause to be made, done or executed all such further acts, deeds, agreements, transfers, assurances, instruments, documents or discharges as may be reasonably required by Eaton's (and after the Plan Implementation Date, by Distributionco or the Liquidator) in order to better implement this Plan.

Dated at Toronto, Ontario this 19th day of November, 1999.

Schedule "A" — Claims Procedure for Voting and Distribution Purposes

Claims Procedure for Voting Purposes

Definitions

1. The following terms shall have the following meanings ascribed thereto:

(a) "Eaton's" means The T. Eaton Company Limited and after the Plan Implementation Date, the Person under the Plan which will be making the distribution under the Plan;

(b) "Business Day" means a day, other than Saturday, Sunday or a statutory holiday, on which banks are generally open for business in Toronto, Ontario;

(c) "Calendar Day" means a day, including, Saturday, Sunday and any statutory holidays;

(d) "CCAA" means the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36;

(e) "Claim" means any right of any Person against Eaton's in connection with any indebtedness, liability or obligation of any kind of Eaton's, which indebtedness, liability or obligation is in existence prior to the Valuation Date, and any interest that may accrue thereon, whether liquidated, reduced to judgment, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, unsecured, present, future, known, or unknown, by guarantee, surety or otherwise, and whether or not such right is executory or anticipatory in nature, including without limitation, any claim made or asserted against Eaton's through any affiliate, associate or related Person as such terms are defined in the Ontario *Business Corporations Act*, or 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 with respect to any matter, action, cause or chose in action whether existing at present or commenced in the future based in whole or in part on facts which exist prior to the Valuation Date, together with any other claims that would have been claims provable in bankruptcy had Eaton's become bankrupt on the Valuation Date;

(f) "Claims Administrator" means the person identified in the Schedules for purposes of receiving the notices described in those Schedules;

(g) "Claims Officer" means the Person or Persons to be designated by this Court;

(h) "Claims\Procedure" means the claims procedure and schedules set out herein and as approved in the Initial Order, as may be amended from time to time;

(i) "Court" means the Superior Court of Justice (Commercial List) in the Province of Ontario;

(j) "Creditor" means any Person having a Claim or an Interim Period Claim and may, where the context requires, include the assignee of a Claim or Interim Period Claim or a trustee, interim receiver, receiver, receiver and manager, or other Person acting on behalf of such Person;

(k) "Dispute Notice" means the notices referred to in paragraphs 9 and 17 hereof, being Schedule "7" hereto;

(l) "Distribution Claim" of a Creditor means the compromised amount of the Claim of such Creditor as finally determined for distribution purposes, in accordance with the provisions of the Claims Procedure described herein, in the Plan and in the CCAA;

(m) "Distribution Claims Bar Date" means 11:59 p.m. (Toronto time) on January 25, 2000 or such later date as may be ordered by the Court;

(n) "Employee Representative" means Carmen Siciliano, as appointed by the Order of the Court made August 27th, 1999 as continued in the Initial Order, or such other Person as the Court may appoint to represent former and present employees of Eaton's or a group or class of them;

(o) "Initial Order" means the Order of this Court made in respect of Eaton's on September 28, 1999 under the CCAA, as amended from time to time;

(p) "Instruction Letter for Distribution Purposes" means the instruction letter to Creditors regarding completion by Creditors of the Dispute Notice described in paragraph 17 hereof;

(q) "Instruction Letter for Voting Purposes" means the instruction letter to Creditors regarding completion by Creditors of the Proof of Claim and Dispute Notice described in paragraphs 4 and 9 hereof;

(r) "Interim Period" means the period from and after the Valuation Date to and including the Plan Implementation Date;

(s) "Interim Period Claim" means any right of any Person against Eaton's in connection with any indebtedness, liability or obligation of any kind of Eaton's, and any interest that may accrue thereon, whether liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, unsecured, present, future, known, or unknown, by guarantee, surety or otherwise, and whether or not such right is executory or anticipatory in nature, including without limitation, any claim made or asserted against Eaton's through any affiliate, associate or related Person as such terms are defined in the Ontario *Business Corporations Act*, or 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, arising from or caused by, directly or indirectly, the implementation of, or any action taken pursuant to, the Plan, including claims arising from the abandonment of any premises or the repudiation or variation of any lease, the assignment of any contract or lease of personal, real, moveable or immoveable property (including any future liability as assignor thereof) or the repudiation or variation of any contract to take effect up to and including Plan

Implementation Date (including any anticipatory breach thereof), repudiation or variation of any contract of employment, the termination or winding up of any pension or employee benefit plans and any other claim arising at law or equity;

(t) "Interim Period Creditors" means those Creditors having an Interim Period Claim;

(u) "Known Creditors" means those Creditors whose Claims are identified in Eaton's books and records;

(v) "Known Interim Period Creditors" means those Persons Eaton's believes may have Interim Period Claims;

(w) "Monitor" means the monitor appointed under the Initial Order;

(x) "Notice to Creditors" means the notice for publication as described in paragraph 4 hereof;

(y) "Notice of Dispute of Valuation for Voting Purposes" means the Notice of Dispute of Valuation for Voting Purposes referred to in paragraph 3 hereof, delivered by a Known Creditor disputing a Notice of Voting Claim with reasons for its dispute;

(z) "Notice of Distribution Claim" means the notice referred to in paragraph 16 hereof, advising a Creditor of the value ascribed by Eaton's for such Creditor's Distribution Claim;

(aa) "Notice of Revision or Disallowance for Voting Purposes" means the notice referred to in paragraph 8 hereof, advising a Creditor that Eaton's has revised or rejected all or part of such Creditor's Claim or Interim Period Claim set out in its Proof of Claim or advising a Known Creditor that Eaton's has revised or rejected all or part of such Creditor's Claim or Interim Period Claim as set out in the Notice of Dispute of Valuation for Voting Purposes;

(bb) "Notice of Voting Claim" means the notice referred to in paragraph 3 hereof, advising a Creditor of the value ascribed by Eaton's for such Creditor's Voting Claim;

(cc) "Omnibus Proof of Claim (Employees)" means the Proof of Claim to be sent by the Employee Representative to Eaton's as described in paragraph 6 hereof;

(dd) "Person" means any and all of Eaton's shareholders and former shareholders, creditors, customers, employees, retirees, pension plans, clients, suppliers, contractors, lenders, factors, customs brokers, purchasing agents, landlords (including, without limitation, equipment lessors and lessors of real property and immoveables), sub-landlords, tenants, sub-tenants, licensors, licensees, concessionaires, co-owners, co-tenants, joint venture partners, co-venturers, partners, the Crown (except as provided under subsections 11.4(2) and (3) of the CCAA), municipalities or any other entity exercising executive, legislative, judicial, regulatory or administrative functions of or pertaining to government in Canada or elsewhere and any corporation or other entity owned or controlled by or which is the agent of any of the foregoing, and any other person, firm, corporation or entity wherever situate or domiciled (collectively, "Persons" and, individually, "Person");

(ee) "Plan" means the plan of compromise or arrangement to be filed by Eaton's pursuant to the Initial Order, which Plan may be amended or supplemented from time to time;

(ff) "Plan Implementation Date" means the date on which the Plan is to be effective, as provided for in the Plan;

(gg) "Proof of Claim" means the form of Proof of Claim referred to in paragraph 4 hereof;

(hh) "Unknown Creditor" means a Creditor whose claim is not recorded or shown in Eaton's books and records;

(ii) "Unknown Interim Period Creditors" means those Interim Period Creditors of which Eaton's has no knowledge;

(jj) "Valuation Date" means August 20, 1999;

(kk) "Voting Claim" of a Creditor means the amount of the Claim and/or Interim Period Claim of such Creditor determined for voting purposes in accordance with the provisions of the Claims Procedure described herein and the CCAA; and

(ll) "Voting Claims Bar Date" means 11:59 p.m. (Toronto time) on October 25, 1999.

Schedules

2. The following Schedules form part of this Claims Procedure:

(a) Schedule "1" — Notice of Voting Claim

(b) Schedule "2" — Notice of Dispute of Valuation for Voting Purposes

(c) Schedule "3" — Notice To Creditors

(d) Schedule "4" — Proof of Claim

(e) Schedule "5" — Instruction Letter for Voting Purposes

(f) Schedule "6" — Notice of Revision or Disallowance for Voting Purposes

(g) Schedule "7" — Dispute Notice

(h) Schedule "8" — Notice of Distribution Claim

(i) Schedule "9" — Instruction Letter for Distribution Purposes

3. Eaton's shall send, on or before 11:59 p.m. (Toronto time) on October 4, 1999, by ordinary mail, courier or telecopier to each of the Known Creditors (other than employees represented by the Employee Representative), to each of the Known Interim Period Creditors (other than employees represented by the Employee Representative) and by facsimile transmission to each Person on the service list in Eaton's CCAA proceeding a Notice of Voting Claim substantially in the form attached as Schedule "1". In so doing, Eaton's is not admitting liability to such Persons. The Notice of Voting Claim shall set out, to the extent possible, Eaton's best estimate of the Creditor's Voting Claim, as may be shown in Eaton's books and records. Where not practicable to estimate the Creditor's Interim Period Claim, Eaton's intends to ascribe a value of $1 to such Creditor's Interim Period Claim. With respect to the Notice of Voting Claim for the landlords of Eaton's, Eaton's shall value each landlord's Interim Period Claim in accordance with the formula set out in subsection 65.2(4) of the *Bankruptcy and Insolvency Act*, irrespective of actual damages suffered, if any. A Creditor shall be deemed to have received the Notice of Voting Claim three Calendar Days after the mailing of the Notice of Voting Claim. If the Creditor disputes the amount of the Voting Claim set out therein, the Creditor shall deliver to Eaton's Claims Administrator a Notice of Dispute of Valuation for Voting Purposes in the form attached as Schedule "2" no later than the Voting Claims Bar Date. Where the Creditor does not deliver to Eaton's by such date a completed Notice of Dispute of Valuation for Voting Purposes, then the Creditor shall be deemed to have accepted the Creditor's Claim or Interim Period Claim as set out in the Notice of Voting Claim, which Creditor's Claim or Interim Period Claim shall be treated as a Voting Claim for voting purposes under the Plan.

4. Commencing on October 7, 1999, Eaton's shall publish the Notice to Creditors substantially in the form attached as Schedule "3" hereto, for a period of two consecutive Business Days in the Globe & Mail (National Edition), National Post, La Presse, and the Wall Street Journal (National Edition). The Notice to Creditors shall provide that any Creditor of Eaton's who has not received a Notice of Voting Claim, must provide notice of that Creditor's Claim or Interim Period Claim to Eaton's by no later than 11:59 p.m. (Toronto time) on October 13, 1999 which notice shall include particulars as to the Creditor's name, address and facsimile number, in order to be able to vote on the Plan. Eaton's shall send by facsimile or courier to each such Creditor, a Proof of Claim in substantially the form attached as Schedule "4" and the Instruction Letter for Voting Purposes in substantially

the form attached as Schedule "5" as soon as practicable. Such Creditor's Proof of Claim must be returned to Eaton's by no later than the Voting Claims Bar Date unless Eaton's otherwise agrees or this Court otherwise orders.

5. A Creditor that does not receive a Notice of Voting Claim and that does not file a Proof of Claim by the Voting Claims Bar Date shall not be entitled to vote at any Creditors' meeting in respect of the Plan unless Eaton's otherwise agrees or this Court otherwise orders.

6. Notwithstanding any other provision in this Claims Procedure, Koskie Minsky as Court-appointed counsel to the Employee Representative, shall, on behalf of the Employee Representative, deliver to Eaton's by the Voting Claims Bar Date an Omnibus Proof of Claim (Employees) for all present and former employees of Eaton's. In addition, the Employee Representative shall be given an omnibus proxy for voting purposes for all former and present employees of Eaton's. The Omnibus Proof of Claim (Employees) and the omnibus proxy for voting purposes shall be without prejudice to the ability of any former or present employee to file his or her own Proof of Claim by the Voting Claims Bar Date and to appear in person or by proxy at a Creditors' meeting to approve the Plan. In the event that an employee files his or her own Proof of Claim, the Omnibus Proof of Claim (Employees) and the omnibus proxy for voting purposes shall be reduced or revised accordingly. The omnibus proxy for voting purposes shall be counted for the total number of individual employees voting and the total value of their Claims and Interim Period Claims.

7. On or about October 12, 1999, Eaton's shall mail its Management Information Circular, in connection with the Plan, to Known Creditors and to Known Interim Period Creditors. Eaton's shall also provide a copy of the Management Information Circular (once mailing of same has commenced) to those Creditors to whom Eaton's provides a Proof of Claim in accordance with paragraph 4 hereof.

8. Eaton's, with the assistance of the Monitor, shall review all Notices of Dispute of Valuation for Voting Purposes and all Proofs of Claim, including the Omnibus Proof of Claim (Employees), received by the Voting Claims Bar Date and shall accept, revise or reject the amount of each Claim and Interim Period Claim set out therein for voting purposes under the Plan. Eaton's shall by no later than 11:59 p.m. (Toronto time) on October 29, 1999, notify each Creditor who has filed a Notice of Dispute of Valuation for Voting Purposes or a Proof of Claim if such Creditor's Claim or Interim Period Claim as set out therein has been revised or rejected, and the reasons therefor, by sending on or before October 29, 1999 by facsimile or courier a Notice of Revision or Disallowance for Voting Purposes substantially in the form attached as Schedule "6" hereto. Where Eaton's does not send by such date a Notice of Revision or Disallowance for Voting Purposes to a Creditor who has submitted a Notice of Dispute of Valuation for Voting Purposes or a Proof of Claim, Eaton's shall be deemed to have accepted such Creditor's Claim or Interim Period Claim for voting purposes only, which shall be deemed to be that Creditor's Voting Claim.

9. Any Creditor who intends to dispute a Notice of Revision or Disallowance for Voting Purposes shall by no later than 11:59 p.m. (Toronto time) on November 5, 1999, deliver by facsimile or courier to the Claims Administrator, a Dispute Notice substantially in the form attached as Schedule "7" hereto in order to have the value of such Creditor's Voting Claim determined by the Claims Officer. Eaton's, with the assistance of the Monitor, shall attempt to resolve any dispute as to the value of the Creditor's Voting Claim as set out in the Dispute Notice by no later than November 9, 1999. In the event that Eaton's is unable to resolve the dispute with the Creditor by November 9, 1999, Eaton's shall so notify the Claims Officer, the Monitor and the Creditor.

10. Where a Creditor that receives a Notice of Revision or Disallowance for Voting Purposes does not file a Dispute Notice, the value of such Creditor's Voting Claim under the Plan shall be deemed for voting purposes to be as set out in the Notice of Revision or Disallowance for Voting Purposes.

11. Upon receiving notice that Eaton's is unable to resolve a dispute with a Creditor in respect of a Voting Claim, the Claims Officer shall resolve the dispute between Eaton's and such Creditor, and the Claims Officer shall, by no later than 11:59 p.m. (Toronto time) on November 17, 1999, notify Eaton's, such Creditor and the Monitor of the Claims Officer's determination of the value of the Creditor's Voting Claim for voting purposes under the Plan. Such determination of the value of the Voting Claim by the Claims Officer shall be deemed to be the Creditor's Voting Claim for voting purposes under the Plan.

12. Subject to the direction of the Court, the Claims Officer shall determine the manner, if any, in which evidence may be brought before him or her by the parties as well as any other procedural matters which may arise in respect of his or her determination of a Creditor's Voting Claim. The resolution shall be on an expedited basis and the determination of the value by the Claims Officer for voting purposes shall not prohibit a Creditor from a further hearing under paragraph 17 hereof with respect to the value of such Creditor's Distribution Claim.

13. The decision of the Claims Officer in determining the value of the Creditor's Voting Claim shall be final and binding on the Creditor and Eaton's for voting purposes only and not for distribution purposes under the Plan and there shall be no rights of appeal or recourse to the Court from the Claims Officer's final determination for voting purposes only and not for distribution purposes.

14. Where any Creditor applies to have the value of its Voting Claim determined by the Claims Officer, but the Voting Claim has not been finally determined by the Claims Officer prior to the date of the meeting at which the Creditor is to vote, as provided in the Initial Order, Eaton's shall either:

(a) accept the Creditor's determination and the value of the Claim only for the purposes of voting on the Plan, and conduct the vote of the particular class(es) of creditors into which such Creditor falls, subject to a final determination of its Distribution Claim;

(b) delay the vote of the class(es) into which that Creditor falls until a final determination of the Claim is made;or

(c) deal with the matter as the Court may otherwise direct.

Claims Procedure for Distribution Purposes

15. Eaton's shall publish commencing on January 4, 2000 a notice of the Distribution Claims Bar Date for a period of two consecutive Business Days in The Globe and Mail (National Edition), National Post, La Presse, and The Wall Street Journal (National Edition). This notice shall advise Creditors of the Distribution Claims Bar Date.

16. Eaton's shall review and consider all Voting Claims (including the Voting Claim of the Employee Representative) for the purpose of valuing such Voting Claims to determine Distribution Claims. Eaton's shall accept, revise or reject the amount of all Voting Claims for distribution purposes under the Plan. Eaton's shall by no later than the Distribution Claims Bar Date, notify each Creditor as to whether such Creditor's Voting Claim as set out therein has been confirmed, revised or rejected for distribution purposes and the reasons therefor by delivery of a Notice of Distribution Claim together with an Instruction Letter for Distribution Purposes by facsimile or courier in the forms attached as Schedules "8" and "9" respectively. Creditors who did not receive a Notice of Voting Claim and who were not part of the voting process must file a Proof of Claim with the Claims Administrator, which Proof of Claim shall set out such Creditor's Claim and Interim Period Claim, by the Distribution Claims Bar Date. Any such Creditor who fails to file a Proof of Claim by the Distribution Claims Bar Date shall be forever barred from advancing any Claims or Interim Period Claims against Eaton's or from receiving a distribution under the Plan and such Creditor's Claims and Interim Period Claims shall be forever extinguished and barred. Eaton's shall review and consider all Proofs of Claim which it receives in respect of Distribution Claims for distribution purposes under the Plan to determine if it accepts, revises or rejects the amount set out therein. If Eaton's does not contact a Creditor who has filed a Proof of Claim to advise that it disputes the amount set out in such Creditor's Proof of Claim by February 29, 2000, Eaton's shall be deemed to have accepted the amount set out in such Creditor's Proof of Claim as such Creditor's Distribution Claim for distribution purposes under the Plan. If Eaton's disputes the amount of a Claim or Interim Period Claim set out in a Proof of Claim filed in accordance with this paragraph it shall with the assistance of the Monitor attempt to resolve the dispute with the Creditor by February 29, 2000. In the event that Eaton's is unable to resolve the dispute by such date, it shall so notify the Claims Officer, the Monitor and the Creditor.

17. A Creditor who intends to dispute a Notice of Distribution Claim shall by 11:59 p.m. (Toronto time), on February 15, 2000, notify the Claims Administrator in writing of such intent, by delivery of a Dispute Notice in the form attached as Schedule "7"

hereto by facsimile or courier. Eaton's, with the assistance of the Monitor, shall attempt to resolve the dispute with the Creditor by February 29, 2000. In the event that Eaton's is unable to resolve the dispute with the Creditor by February 29, 2000, Eaton's shall so notify the Claims Officer, the Monitor and the Creditor. If a Creditor does not deliver a Dispute Notice by 11:59 p.m. (Toronto time) on February 15, 2000, such Creditor will be deemed to have accepted the value of its Distribution Claim as set out in the Notice of Distribution Claim and will be thereafter barred from otherwise disputing or appealing same.

18. Upon receiving notice that Eaton's is unable to resolve a dispute with a Creditor regarding any Distribution Claim, the Claims Officer shall resolve the dispute between Eaton's and such Creditor, and shall, by no later than 11:59 p.m. (Toronto time) on March 31, 2000, notify Eaton's, such Creditor and the Monitor of the Claims Officer's determination of the value of the Creditor's Distribution Claim.

19. Subject to the direction of the Court, the Claims Officer shall determine the manner, if any, in which evidence may be brought before him or her by the parties, as well as any other procedural matters which may arise in respect of his or her determination of a Creditor's Distribution Claim.

20. If neither party appeals the determination of value of Distribution Claim by the Claims Officer in accordance with paragraph 21 below, the decision of the Claims Officer in determining the value of the Creditor's Distribution Claim shall be final and binding upon Eaton's and the Creditor for distribution purposes under the Plan and there shall be no further right of appeal, review or recourse to the Court from the Claims Officer's final determination.

21. Either a Creditor or Eaton's may, within five (5) Calendar Days of notification of the Claims Officer's determination of the value of a Creditor's Distribution Claim, appeal such determination to the Court, which appeal shall be made returnable within five (5) Calendar Days of the filing of the notice of appeal. The determination of such appeal shall be final and binding upon Eaton's and the Creditor for all purposes under the Plan. There shall be no further rights of appeal, review or recourse to the courts.

General Provisions

22. In the event that Eaton's makes interim distribution payments under the Plan, to the extent that it is thereafter determined that the Creditor's Distribution Claim is greater than that for which Eaton's made interim payments, then Eaton's shall forthwith make such further payments contemplated by the Plan to such Creditor so that such Creditor shall receive the aggregate amount of payments which such Creditor would have received if its Distribution Claim had been finally determined prior to the interim distribution under the Plan.

23. In the event that no Plan is approved by the Court, the Voting Claims Bar Date shall be of no effect with respect to any and all claims made by Creditors in any subsequent proceeding or distribution.

Schedule "1" — 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 the T. Eaton Company Limited

Court File No. 99-CL-3516

Superior Court of Justice Commercial List

..... Applicant

Notice of Voting Claim

Please read carefully the Instruction Letter for Voting Purposes accompanying this Notice.

The T. Eaton Company Limited ("Eaton's") proposes to present a plan of arrangement to its Creditors (the "Plan") under the Companies' Creditors Arrangement Act (the "CCAA"). The Order of Mr. Justice Farley made September 28, 1999 in the CCAA proceedings provides for a Claims Procedure for Creditors for voting and distribution under the Plan.

TAKE NOTICE that Eaton's has valued your Voting Claim (comprised of your Claim and Interim Period Claim) against Eaton's for voting purposes (and NOT for distribution purposes) as set out in the attached Schedule. Claims in a foreign currency were converted to Canadian Dollars at the Bank of Canada noon spot rate as at August 20, 1999. U.S. exchange rate conversion on such date was $1.4941.

If you DISAGREE with the value of your VOTING CLAIM as set out in the Schedule attached to this Notice, please be advised of the following:

1. If you intend to dispute this Notice of Voting Claim, you must, by no later than 11:59 p.m. (Toronto time) on *October 25, 1999,* deliver to Eaton's (to the attention of the Claims Administrator) a Notice of Dispute of Valuation for Voting Purposes by facsimile, courier or registered mail to the address/fax number indicated thereon. The form of Notice of Dispute of Valuation for Voting Purposes is enclosed.

2. If you do not deliver a Notice of Dispute of Valuation for Voting Purposes to Eaton's (to the attention of the Claims Administrator), *the value of your Voting Claim for voting purposes under the Plan shall be deemed to be as set out in this Notice of Voting Claim.*

IF YOU FAIL TO TAKE ACTION WITHIN THE PRESCRIBED TIME PERIOD, THE AMOUNT SET OUT IN THIS NOTICE SHALL BE DEEMED TO BE YOUR VOTING CLAIM FOR VOTING PURPOSES UNDER THE PLAN.

DATED at Toronto, the ..... day of ..... 1999.

THE T. EATON COMPANY LIMITED

Schedule "2" — 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 the T. Eaton Company Limited

Court File No. 99-CL-3516

Superior Court of Justice Commercial List

..... Applicant

Notice of Dispute of Valuation for Voting Purposes

Please read carefully the Instruction Letter for Voting Purposes accompanying this Notice.

A. PARTICULARS OF CREDITOR:

(1) Full Legal Name of Creditor: ..... *(Full legal name should be the name of the original Creditor of Eaton's, notwithstanding whether an assignment of a claim, or a portion thereof, has occurred. Do not file separate Notices of Dispute of Valuation For Voting Purposes by division or Dun and Bradstreet Number.)*

(2) Full Mailing Address of Creditor (not the Assignee): .....

(3) Telephone Number of Creditor: .....

(4) Facsimile Number of Creditor: .....

(5) Attention (Contact Person): .....

(6) Has the Claim been sold or assigned by Creditor to another party?..... [_] Yes [_] No

B. PARTICULARS OF ASSIGNEE(S) (IF ANY):

(1) Full Legal Name of Assignee(s): ..... *(If Claim has been assigned, insert full legal name of assignee(s) of Claim (if all or a portion of the Claim has been sold). If there is more than one assignee, please attach separate sheet with the required information).*

(2) Full Mailing Address of Assignee(s): .....

(3) Telephone Number of Assignee(s): .....

(4) Facsimile Number of Assignee(s): .....

(5) Attention (Contact Person): .....

C. NOTICE OF DISPUTE OF VALUATION:

(Claims in foreign currency are to be converted to Canadian dollars at the Bank of Canada noon spot rate as at August 20, 1999. U.S. exchange rate conversion on such date was $1.4941.)

We hereby disagree with the value of our Voting Claim as set out in Eaton's Notice of Voting Claim dated .....

(1) Creditor's valuation of Claim prior to August 20, 1999: ..... *$[insert value of claim] CAD*

(2) Creditor's valuation of Interim Period Claim from and after August 20, 1999: ..... *$[insert value of claim] CAD*

(3) Creditor's total valuation of Voting Claim (Total 1 and 2): ..... *$[total (1) plus (2)] CAD*

D. REASONS FOR DISPUTE:

(Provide full particulars of the Claim and supporting documentation, including amount, description of transaction(s) or agreement(s) giving rise to the Claim, name of any guarantor which has guaranteed the Claim, any relevant Dun and Bradstreet Numbers and amount of Claim allocated thereto, date and number of all invoices, particulars of all credits, discounts, etc. claimed; description of the security, if any, granted by Eaton's to Creditor and estimated value of such security, particulars of loss attributable to implementation of the Plan including loss from the repudiation or variation of any lease and the abandonment of premises, and any contingent liability of Eaton's as assignor, or the repudiation or variation of any contract, including any contingent liability of Eaton's as assignor).

This Notice of Dispute of Valuation For Voting Purposes must be returned to and received by Eaton's by no later than 11:59 p.m. (Toronto Time) on October 25, 1999, at the following address or facsimile:

Courier Address

Claims Administrator

The T. Eaton Company Limited

c/o Richter & Partners Inc.

Court-appointed Monitor of Eaton's

90 Eglinton Avenue East, Suite 700

Toronto, ON M4P 2Y3

Telephone: ..... (416) 932-6261

Fax: ..... (416) 932-6262

Schedule "3" — Notice to Creditors of the T. Eaton Company Limited

RE: NOTICE OF VOTING CLAIMS BAR DATE IN COMPANIES' CREDITORS ARRANGEMENT ACT ("CCAA") PROCEEDINGS

PLEASE TAKE NOTICE that pursuant to an Order of the Superior Court of Justice made September 28, 1999 (the "Order"), any person with any claim whatsoever against The T. Eaton Company Limited ("Eaton's") prior to August 20, 1999, contingent or otherwise, including without limitation any claim made against Eaton's through any affiliate or associate of Eaton's, who has not received a Notice of Voting Claim from Eaton's, must contact Eaton's with notice of its claim by no later than 11:59 p.m. (Toronto time) on *October 13, 1999* in order to obtain a Proof of Claim from Eaton's. Proofs of Claim must be filed with Eaton's on or before 11:59 p.m. (Toronto time) on *October 25, 1999* (the "Voting Claims Bar Date") for the purpose of voting on the Plan of Arrangement under the CCAA to be presented by Eaton's to its Creditors (the "Plan").

PLEASE TAKE NOTICE THAT the Claims Procedure approved by the Order also addresses all Creditor claims which have arisen or may arise from and after August 20, 1999 as a result of the implementation of the Plan. Such claims may include losses arising from the repudiation or variation of any lease and the abandonment of premises and any contingent liability of Eaton's as assignor, or the repudiation or variation of any contract or agreement with Eaton's, including any contingent liability of Eaton's as assignor, and, further, including any employment contracts and any contracts in relation to Eaton's pension plans. If you have a contract with Eaton's, and have not been advised that Eaton's or any Purchaser wishes to continue that contract, you should treat the contract as terminated for the purpose of determining your claims against Eaton's.

HOLDERS OF CLAIMS WHICH ARE NOT FILED BY THE VOTING CLAIMS BAR DATE WILL BE BARRED FROM VOTING ON THE PLAN.

PLEASE TAKE NOTICE that any former or present employees with claims against Eaton's should contact Carmen Siciliano, Employee Representative, c/o Susan Rowland, Koskie Minsky, Box 52, 900-20 Queen Street West, Toronto, Ontario, M5H 3R3, (Telephone: (416) 977-8353; fax (416) 977-3316).

Creditors who have not received a Notice of Voting Claim should contact the Eaton's Claims Administrator, c/o Richter & Partners Inc., Court-Appointed Monitor of Eaton's (*Telephone 416-932-6261 and fax 416-932-6262*) by no later than 11:59 p.m. (Toronto time) on October 13, 1999 to obtain a Proof of Claim package.

DATED this 7th day of October, 1999 at Toronto, Canada.

RICHTER & PARTNERS INC.

in its capacity as Court-appointed Monitor of Eaton's

Schedule "4" — 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 the T. Eaton Company Limited

Court File No. 99-CL-3516

Superior Court of Justice Commercial List

..... Applicant

Proof of Claim

Please read carefully the enclosed Instruction Letter for completing this Proof of Claim.

A. PARTICULARS OF CREDITOR:

(1) Full Legal Name of Creditor: ..... *(Full legal name should be the name of the original Creditor of Eaton's, notwithstanding whether an assignment of a claim, or a portion thereof, has occurred)*.

(2) Full Mailing Address of Creditor (original Creditor not the Assignee): .....

(3) Telephone Number: .....

(4) Facsimile Number: .....

(5) Attention (Contact Person): .....

(6) Has the Claim been sold or assigned by Creditor to another party?..... Yes [_] No [_]

B. PARTICULARS OF ASSIGNEE(S) (IF ANY):

(1) Full Legal Name of Assignee(s): ..... *(If Claim has been assigned, insert full legal name of assignee(s) of Claim (if all or a portion of the claim has been sold). If there is more than one assignee, please attach separate sheet with the required information.)*

(2) Full Mailing Address of Assignee(s): .....

(3) Telephone Number of Assignee(s): .....

(4) Facsimile Number of Assignee(s): .....

(5) Attention (Contact Person): .....

C. PROOF OF CLAIM:

I, ... *[name of Creditor or Representative of the Creditor]*, do hereby certify:

(a) that I am a *[Creditor of Eaton's or hold the position of ..... of the Creditor of Eaton's]*, and have knowledge of all the circumstances connected with the Claim described herein; and

(b) Eaton's is indebted to *[Creditor]* as follows:

(i) CLAIM PRIOR TO AUGUST 20, 1999: ..... *$[insert $ value of claim] CAD*

(Claims in a foreign currency are to be converted to Canadian Dollars at the Bank of Canada noon spot rate as at August 20, 1999. U.S. exchange rate conversion on such date was 1.4941.)

(ii) INTERIM PERIOD CLAIM: ..... *$[insert $ value of claim] CAD*

(Interim Period Claim against Eaton's which has or may have arisen during the period from and after August 20, 1999 to the Plan Implementation Date as a result of the proposed implementation of the Plan. Include loss from the repudiation or variation of any lease and the abandonment of premises and any contingent liability of Eaton's as assignor, or the repudiation or variation of any contract, including any contingent liability of Eaton's as assignor. If Eaton's has not notified you that it wishes to continue your contract, then you should treat the contract as if it has been terminated for the purposes of calculating your Proof of Claim.)

(iii) TOTAL VOTING CLAIM: ..... *$[total (i) plus (ii)] CAD*

D. PARTICULARS OF VOTING CLAIM:

The Particulars of the undersigned's total Voting Claim are attached.

(Provide full particulars of the Voting Claim and supporting documentation, including amount, description of transaction(s) or agreement(s) giving rise to the Voting Claim, name of any guarantor which has guaranteed the Voting Claim, any relevant Dun and Bradstreet Numbers and amount of Voting Claim allocated thereto, date and number of all invoices, particulars of all credits, discounts, etc. claimed, description of the security, if any, granted by Eaton's to Creditor and estimated value of such security, particulars of loss attributable to implementation of Plan including loss from the repudiation or variation of any lease and the abandonment of premises and any contingent liability of Eaton's as assignor or repudiation or variation of any contract, including any contingent liability of Eaton's as assignor.)

This Proof of Claim must be returned to Eaton's at the following address or facsimile:

Mailing Address

Claims Administrator

The T. Eaton Company Limited

c/o Richters & Partners Inc. Court-appointed Monitor of Eaton's

90 Eglinton Avenue East

Toronto, ON M4P 2Y3

Telephone: ..... (416) 932-6261

Fax: ..... (416) 932-6262

Dated at ..... this ..... day of .....,1999.

•, Creditor

Per: .....

Schedule "5" — 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 the T. Eaton Company Limited

Court File No. 99-CL-3516

Superior Court of Justice Commercial List

..... Applicant

Instruction Letter Claims Procedure for Voting Purposes

A. — Claims Procedure

The T. Eaton Company Limited ("Eaton's") proposes to present a Plan of Arrangement to its creditors (the "Plan") under the Companies' Creditors Arrangement Act (the "CCAA"). The Order of Mr. Justice Farley made September 28, 1999 in Eaton's CCAA proceedings provides for a Claims Procedure with respect to voting and distribution under the Plan.

This letter provides instructions for responding to or completing the following forms:

- Notice of Voting Claim

- Proof of Claim
- Notice of Dispute of Valuation for Voting Purposes
- Notice of Revision or Disallowance for Voting Purposes
- Dispute Notice

The Claims Procedure is intended for any Person with any claims whatsoever against Eaton's prior to August 20, 1999 contingent or otherwise, including without limitation any claims made against Eaton's through any affiliate or associate of Eaton's ("Claims").

The Claims Procedure also addresses all claims which have arisen or may arise from and after August 20, 1999, up to and including the Plan Implementation Date as a result of the implementation of the Plan ("Interim Period Claims"). Such Interim Period Claims may include losses arising from the repudiation or variation of any lease or the abandonment of any premises and any contingent liability of Eaton's as assignor, the repudiation or variation of any contract or agreement with Eaton's, including any contingent liability of Eaton's as assignor, and further, including employment contracts and any contracts in relation to Eaton's pension plans.

The value of your claims against Eaton's for the purposes of voting at a meeting of Creditors to approve the Plan is the total of your Claim and Interim Period Claim which is described as your *Voting Claim*.

If you have a contract with Eaton's and have not been advised that Eaton's or any purchaser wishes to continue your contract, you should treat your contract as terminated for the purposes of assessing your Interim Period Claim under the Claims Procedure.

If you have any questions regarding the Claims Procedure for ensuring that your claim is valued and that you are entitled to vote on the Plan, please contact the Eaton's Claims Administrator at the address provided below.

All notices and enquiries with respect to Eaton's Claims Procedure should be addressed to:

Claims Administrator

The T. Eaton Company Limited

c/o Richter & Partners Inc.

Court-appointed Monitor of Eaton's

90 Eglinton Avenue East, Suite 700

Toronto, ON M4P 2Y3

Telephone: ..... (416) 932-6261

Fax: ..... (416) 932-6262

B. — For Creditors Receiving Notice of Voting Claim

Eaton's has already mailed to all Known Creditors (apart from former and present employees of Eaton's) a Notice of Voting Claim.

Any former or present employees with claims against Eaton's should contact Carmen Siciliano, Employee Representative, c/o. Susan Rowland, Koskie Minsky, Box 52, 900 - 20 Queen Street West, Toronto, Ontario, M5H 3R3 Telephone: (416) 977-8353; fax: (416) 977-3316. The Claims Procedure provides that the Employee Representative shall file an Omnibus Proof of Claim

(Employees) by the Voting Claims Bar Date *(October 25, 1999)* on behalf of all former and present employees of Eaton's and has been given an omnibus proxy for voting purposes for all such former and present employees of Eaton's. Employees retain their right to file their own Proofs of Claim by the Voting Claims Bar Date *(October 25, 1999)* and to appear at the meeting of creditors to consider the Plan in person or by proxy. If you are a former or present employee and wish to file your own Proof of Claim, you must follow the procedure set out in this letter (see section C below for instructions on filing a Proof of Claim).

If you are a Landlord, your Interim Period Claim has been valued according to the formula set out in subsection 65.2(4) of the *Bankruptcy and Insolvency Act*, irrespective of any actual damages you may have suffered.

If you have received a Notice of Voting Claim there is no need to submit a Proof of Claim in order to be entitled to vote on the Plan. Please note, however, that Eaton's does not admit liability to any Creditor by sending a Notice of Voting Claim to such Creditor.

If you have received a Notice of Voting Claim and you wish to dispute the value of your Claim or Interim Period Claim as set out in the Notice of Voting Claim, you should fill out a Notice of Dispute of Valuation for Voting Purposes (enclosed with your Notice of Voting Claim) (see Section D below for instructions).

C. — For Creditors Submitting a Proof of Claim

If you have not received a Notice of Voting Claim from Eaton's and do not have any claims against Eaton's, there is no need to file a Proof of Claim with the Eaton's Claims Administrator.

If you have not received a Notice of Voting Claim from Eaton's and believe that you have a claim against Eaton's, you should file a Proof of Claim with the Eaton's Claims Administrator. *The Proof of Claim must be filed by OCTOBER 25, 1999, the Voting Claims Bar Date, if you intend to vote in respect of the Plan.* Failure to send the Proof of Claim by this date will disentitle you from voting on the Plan, unless Eaton's agrees or the Court orders that the Proof of Claim be accepted after that date.

Proof of Claim forms can be obtained by contacting the Eaton's Claims Administrator at the phone and fax numbers indicated above by *no later than October 13, 1991* and providing particulars as to your name, address and facsimile number. Once Eaton's has this information, you will receive, as soon as practicable, a Proof of Claim form.

If Eaton's disagrees with the value that you have ascribed to your Claim or Interim Period Claim as set out in your Proof of Claim, you will receive from Eaton's a Notice of Revision or Disallowance for Voting Purposes (see section E below for details).

D. — For Creditors Submitting Notice of Dispute of Valuation for Voting Purposes

If you have received a Notice of Voting Claim, you are entitled to dispute the value of your Claim or Interim Period Claim as set out in such notice by sending a Notice of Dispute of Valuation for Voting Purposes to the Eaton's Claims Administrator at the address and fax number indicated above (the form for this Notice is enclosed with your Notice of Voting Claim). *The Notice of Dispute of Valuation for Voting Purposes must be delivered to Eaton's no later than the Voting Claims Bar Date, 11:59 p.m. on October 25,1999. Failure to deliver a Notice of Dispute of Valuation for Voting Purposes to Eaton's by this date will mean that the value of your Claim or Interim Period Claim for the purposes of voting on the Plan will be as set out in the Notice of Voting Claim and you will have no further right to dispute the value of your Voting Claim for the purposes of voting on the Plan.*

If you have sent a Notice of Dispute of Valuation for Voting Purposes to the Eaton's Claims Administrator and Eaton's has rejected or revised your Claim or Interim Period Claim, Eaton's will notify you of such rejection or disallowance by sending to you a Notice of Revision or Disallowance for Voting Purposes (see section E below for details). The last day for Eaton's to have sent out this notice is *no later than 11:59 p.m. on October 19, 1999.*

If you do NOT receive a Notice of Revision or Disallowance for Voting Purposes, the value of your Claim or Interim Period Claim has been *accepted* by Eaton's for voting purposes as set out in your Notice of Dispute of Valuation for Voting Purposes.

E. — For Creditors Receiving Notice of Revision or Disallowance for Voting Purposes

If you have sent a Proof of Claim or a Notice of Dispute of Valuation for Voting Purposes to Eaton's, Eaton's is entitled to challenge the valuation of your claim by sending to you a Notice of Revision or Disallowance for Voting Purposes no later than *11:59 p.m. on October 29, 1999*. If you do not receive such a Notice, Eaton's has accepted the value of your Claim or Interim Period Claim for voting purposes as set out in your Proof of Claim or Notice of Dispute of Valuation for Voting Purposes.

If you have received a Notice of Revision or Disallowance for Voting Purposes, you are entitled to dispute the revision or disallowance of your Claim as set out in the Notice of Revision or Disallowance for Voting Purposes by sending a Dispute Notice to Eaton's (see Section F below for instructions).

F. — For Creditors Submitting Dispute Notice

If you have received a Notice of Revision or Disallowance for Voting Purposes, you are entitled to dispute the revision or disallowance of your Claim or Interim Period Claim by delivering by facsimile or courier a Dispute Notice (enclosed with your Notice of Revision or Disallowance for Voting Purposes) to the Eaton's Claims Administrator *no later than 11:59 p.m. on November 5, 1999*. If you do not deliver a Dispute Notice to Eaton's by November 5, 1999, the value of your Claim or Interim Period Claim for the purposes of voting on the Plan will be as set out in your Notice of Revision or Disallowance for Voting Purposes.

Once Eaton's has received your Dispute Notice, you will be contacted by Eaton's, and/or by Richter & Partners Inc., the Monitor assisting Eaton's with its Plan, to see if the dispute can be resolved.

If the dispute has not been resolved by November 9, 1999, you will be notified that your Claim will be determined by the Claims Officer. You may be required to attend a hearing and to present evidence documenting your Claim or Interim Period Claim and its value. The Claims Officer must resolve the dispute by November 17, 1999. You will be notified by that date of the Claims Officer's determination of the value of your Voting Claim. The decision of the Claims Officer will be final and binding on you and Eaton's for the purposes of voting on the Plan at a meeting of Creditors. You will have no right to appeal.

In the event that the Claims Officer cannot resolve the dispute regarding the value of your Voting Claim by November 17, 1999, there are three alternatives:

- you may be permitted to vote on the Plan and the dispute regarding your Voting Claim will be resolved later for the purposes of any distribution under the Plan;

- Eaton's may determine that it is necessary to delay the vote of the class of Creditors to which you belong until your Voting Claim has been finally determined; or

- Eaton's may request that the Court determine how your Voting Claim will be addressed for voting purposes.

Schedule "6" — 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 the T. Eaton Company Limited

Superior Court of Justice Commercial List

Court File No. 99-CL-3516

..... Applicant

Notice of Revision or Disallowance for Voting Purposes

Please read carefully the Instruction Letter for Voting Purposes accompanying this Notice.

TO:

[insert name of creditor]

The T. Eaton Company Limited ("Eaton's) hereby gives you notice that it has reviewed your Voting Claim and has revised or rejected your Voting Claim for voting purposes only (and NOT for distribution purposes) as follows:

A. CLAIM PRIOR TO AUGUST 20, 1999: ..... *$[insert $value of claim] CAD*

B. INTERIM PERIOD CLAIM FROM AND AFTER AUGUST 20, 1999: ..... *$[insert $value of claim] CAD*

C. TOTAL VOTING CLAIM: ..... *$[total A plus B] CAD*

D. REASONS FOR DISALLOWANCE OR REVISION:

[insert explanation]

If you do not agree with this Notice of Revision or Disallowance for Voting Purposes, please take notice of the following:

1. If you intend to dispute this Notice of Revision or Disallowance for Voting Purposes, you must, no later than 11:59 p.m. (Toronto time) on *November 5, 1999*, notify Eaton's, the Monitor and the Claims Officer of such intent by delivery of a Dispute Notice in accordance with the accompanying Instruction Letter for Voting Purposes. The form of Dispute Notice is enclosed.

2. If you do not deliver a Dispute Notice, *the value of your Claim for voting purposes under the Plan shall be deemed to be as set out in this Notice of Revision or Disallowance for Voting Purposes*.

IF YOU FAIL TO TAKE ACTION WITHIN THE PRESCRIBED TIME PERIOD, THIS NOTICE OF REVISION OR DISALLOWANCE FOR VOTING PURPOSES WILL BE BINDING UPON YOU FOR VOTING PURPOSES UNDER THE PLAN.

DATED at Toronto, this ..... day of, ... 1999.

THE T. EATON COMPANY LIMITED

Schedule "7" — 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 the T. Eaton Company Limited

Court File No. 99-CL-3516

Superior Court of Justice Commercial List

..... Applicant

Dispute Notice

TO: The T. Eaton Company Limited ("Eaton's")

We hereby give you notice of our intention to dispute the *(Check one)*:

[_] Notice of Revision or Disallowance for Voting Purposes dated .....

[_] Notice of Distribution Claim dated .....

issued by Eaton's in respect of our claim as detailed below.

A. Name of Creditor: .....

(For completion of claim amounts in sections B, C, or D, claims in foreign currency are to be converted to Canadian dollars at the Bank of Canada noon spot rate as at August 20, 1999. U.S. exchange rate conversion on such date was $1.4941.)

B. If a Secured Creditor:

Description of Security held: ..... Claim Amount $..... CAD

C. If an Unsecured Creditor:

Dun and Bradstreet Number: ..... Claim Amount $..... CAD

(If more than one Dun and Bradstreet Number, attach schedule showing numbers and corresponding claims.)

D. If a Landlord:

Location of Premises: ..... Claim Amount $..... CAD

(If more than one location, attach schedule.)

E. Reasons for Dispute (attach additional sheet and copies of all supporting documentation if necessary):

..... (Signature of Individual competing this Dispute)

..... Date

..... (Please print name)

.....

Telephone Number: ..... ( ) .....

Facsimile Number: ..... ( ) .....

Full Mailing Address:

THIS FORM IS TO BE RETURNED BY COURIER OR FACSIMILE TO ALL OF THE FOLLOWING:

CLAIMS ADMINISTRATOR

The T. Eaton Company Limited

c/o Richter & Partners Inc.

Court-appointed Monitor of Eaton's

90 Eglinton Avenue East, Suite 700

Toronto, ON M4P 2Y3

Telephone: ..... (416) 932-6261

Fax: ..... (416) 932-6262

— AND —

Mr. Robert Harlang

RICHTER & PARTNERS INC.

in its capacity as Monitor of

The T. Eaton Company Limited

90 Eglinton Avenue East, Suite 700

Toronto, ON M4P 2Y3

Telephone: ..... (416) 932-8000

Fax: ..... (416) 932-6200

— AND —

CLAIMS OFFICER FOR

THE T. EATON COMPANY LIMITED

ADR CHAMBERS

48 Yonge Street, Suite 1100

Toronto, ON M5W 1G6

Telephone: ..... (416) 362-8555/1-800-856-5154

Fax: ..... (416) 362-8825

Schedule "8" — 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 the T. Eaton Company Limited

Court File No. 99-CL-3516

Superior Court of Justice Commercial List

..... Applicant

Notice of Distribution Claim

Please read carefully the Instruction Letter for Distribution Purposes accompanying this Notice.

The T. Eaton Company Limited ("Eaton's") proposes to present a plan of arrangement to its Creditors (the "Plan") under the Companies' Creditors Arrangement Act (the "CCAA"). The Order of Mr. Justice Farley made September 28, 1999 in the CCAA proceedings provides for a Claims Procedure for Creditors for voting and distribution under the Plan.

TAKE NOTICE that Eaton's has valued your Distribution Claim (comprised of your Claim and Interim Period Claim) against Eaton's for distribution purposes as set out in the attached Schedule. Claims in a foreign currency were converted to Canadian Dollars at the Bank of Canada noon spot rate as at August 20, 1999. U.S. exchange rate conversion on such date was $1.4941.

If you DISAGREE with the value of your DISTRIBUTION CLAIM as set out in the Schedule attached to this Notice, please be advised of the following:

1. If you intend to dispute this Notice of Distribution Claim, you must, by no later than 11:59 p.m. (Toronto time) on *February 15, 2000*, deliver to Eaton's (to the attention of the Claims Administrator) a Dispute Notice by facsimile, courier or registered mail to the address/fax number indicated thereon. The form of Dispute Notice is enclosed.

2. If you do not deliver a Dispute Notice to Eaton's (to the attention of the Claims Administrator), the value of your claim for distribution purposes under the Plan shall be deemed to be as set out in this Notice of Distribution Claim.

IF YOU FAIL TO TAKE ACTION WITHIN THE PRESCRIBED TIME PERIOD, THE AMOUNT SET OUT IN THIS NOTICE SHALL BE DEEMED TO BE YOUR DISTRIBUTION CLAIM FOR DISTRIBUTION PURPOSES UNDER THE PLAN.

DATED at Toronto, the day, of ....., ... 1999.

THE T. EATON COMPANY LIMITED

Schedule "9" — 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 the T. Eaton Company Limited

Court File No. 99-CL-3516

Superior Court of Justice Commercial List

..... Applicant

Instruction Letter Claims Procedure for Distribution Purposes

A. — Claims Procedure

The T. Eaton Company Limited ("Eaton's") has presented a Plan of Arrangement to its creditors (the "Plan") under the Companies' Creditors Arrangement Act (the "CCAA") which Plan has been approved by Eaton's creditors and by Order of Mr. Justice Farley made *[insert date]* in Eaton's CCAA proceedings.

The Order of Mr. Justice Farley made September 28, 1999 in Eaton's CCAA proceedings provided for a Claims Procedure dealing in part with distribution under the Plan.

This letter provides instructions for responding to or completing the following forms:

- Notice of Distribution Claim
- Proof of Claim
- Dispute Notice

The Claims Procedure is intended for any Person with any claims whatsoever against Eaton's prior to August 20, 1999, contingent or otherwise, including without limitation any claims made against Eaton's through any affiliate or associate of Eaton's ("Claims").

The Claims Procedure also addresses all claims which have arisen or may arise from and after August 20, 1999, up to and including the Plan Implementation Date of *[insert date]* as a result of the implementation of the Plan ("Interim Period Claims"). Such Interim Period Claims may include losses arising from the repudiation or variation of any lease, and the abandonment of premises and any contingent liability of Eaton's as assignor, or the repudiation or variation of any contract or agreement with Eaton's including any contingent liability of Eaton's as assignor, and further, including employment contracts and any contracts in relation to Eaton's pension plans.

The value of your claims against Eaton's for the purposes of receiving a distribution under the Plan is the total of your Claim and Interim Period Claim, which amount is described as your Distribution Claim.

If you have any questions regarding the Claims Procedure for ensuring that your claim is valued and that you are entitled to receive a distribution under the Plan, please contact the Eaton's Claims Administrator at the address provided below.

All notices and enquiries with respect to Eaton's Claims Procedure should be addressed to:

Claims Administrator

The T. Eaton Company Limited

c/o Richter & Partners Inc.

Court-appointed Monitor of Eaton's

90 Eglinton Avenue East, Suite 700

Toronto, ON M4P 2Y3

Telephone: ..... (416) 932-6261

Fax: ..... (416) 932-6262

B. — For Creditors Receiving Notice of Distribution Claim

Eaton's has already mailed to all Known Creditors (apart from former and present employees of Eaton's) a Notice of Voting Claim for the purposes of facilitating the voting on the Plan. Pursuant to the Claims Procedure, Eaton's has reviewed all Voting Claims for the purposes of valuing Distribution Claims of its Creditors, to enable a distribution under the Plan. Accordingly, all Creditors whose Voting Claims were determined for voting purposes have received a Notice of Distribution Claim from Eaton's wherein Eaton's has accepted, revised or rejected such Creditors' Voting Claims for distribution purposes and setting out the reasons therefor.

Any former or present employees with claims against Eaton's should contact Carmen Siciliano, Employee Representative, c/o. Susan Rowland, Koskie Minsky, Box 52, 900 — 20 Queen Street West, Toronto, Ontario, M5H 3R3 phone: (416) 977-8353; fax: (416) 977-3316. The Claims Procedure provides that the Employee Representative was to file an Omnibus Proof of Claim (Employees) by the Voting Claims Bar Date (October 25, 1999) on behalf of all former and present employees of Eaton's and was given an omnibus proxy for voting purposes for all such former and present employees of Eaton's. Employees retained their right to file their own Proofs of Claim by the Voting Claims Bar Date (October 25, 1999) and to appear at the meeting of creditors to consider the Plan in person or by proxy. If you are a former or present employee for the purposes of receiving a distribution under the Plan, there is no need to file a Proof of Claim if your claim is included in the Omnibus Proof of Claim (Employees) filed by thc Employee Representative in this regard. In the alternative, if you wish to file your own Proof of Claim, you must follow the procedure set out in this letter (see section D below for instructions on filing a Proof of Claim).

C. — For Creditors Receiving Notice of Distribution Claim

If you have received a Notice of Distribution Claim and do not agree with the value ascribed by Eaton's to your Distribution Claim, you are entitled to dispute same. To do so, you must deliver a Dispute Notice in the form enclosed by facsimile or courier to the Eaton's Claims Administrator by no later than 11:59 p.m. (Toronto time) on February 15, 2000. If you fail to deliver a Dispute Notice by such date, you will be deemed to have accepted the value of your Distribution Claim as set out in the Notice of Distribution Claim and will be thereafter barred from otherwise disputing or appealing same.

Once Eaton's has received your Dispute Notice, you will be contacted by Eaton's and/or by Richter & Partners Inc., the Monitor assisting Eaton's with its Plan, to see if the dispute can be resolved. A resolution must be achieved on or before February 29, 2000. If the dispute is not resolved by such date, Eaton's shall refer the dispute to the Claims Officer (see Section E for instructions in this regard).

D. — For Creditors Submitting a Proof of Claim

If you did not receive a Notice of Voting Claim or Notice of Distribution Claim from Eaton's and were not part of the Voting Process and do not have any claims against Eaton's, there is no need to file a Proof of Claim with the Eaton's Claims Administrator.

If you did not receive a Notice of Voting Claim from Eaton's and were not part of the voting process and believe that you have a claim against Eaton's, you should file a Proof of Claim with the Eaton's Claims Administrator.

The Proof of Claim must be filed by January 25, 2000, the Distribution Claims Bar Date. Failure to file the Proof of Claim by the Distribution Claims Bar Date will disentitle you from receiving a distribution under the Plan.

Proof of Claim forms can be obtained by contacting the Eaton's Claims Administrator at the phone and fax numbers indicated above and providing particulars as to your name, address and facsimile number. Once Eaton's has this information, you will receive, as soon as practicable, a Proof of Claim form *which must be filed with Eaton's by no later than January 25, 2000, the Distribution Claims Bar Date.*

If Eaton's disagrees with the value that you have ascribed to your Distribution Claim as set out in your Proof of Claim, you will be contacted by Eaton's and/or by Richter & Panners Inc., the Monitor assisting Eaton's with its Plan, to see if the dispute can be resolved. A resolution must be achieved on or before February 29, 2000. If the dispute is not resolved by such date, Eaton's will refer the dispute to the Claims Officer (see Section E below for instructions on resolution of disputes by Claims Officers).

E. — Resolution of Disputes by Claims Officers

If the dispute has not been resolved by February 29, 2000, Eaton's will notify you on or before such date that the value of your Distribution Claim will be determined by the Claims Officer appointed by the Court. The Claims Officer must resolve the dispute by March 31, 2000. You will be notified by that date of the Claims Officer's determination of the value of your Distribution Claim.

Either party will have the right to appeal the Claims Officer's determination of value of the Distribution Claim to the Court, within five (5) Calendar Days of notification by Claims Officer's determination of value. The appeal must be made returnable within five (5) Calendar Days of filing the notice of appeal. The determination of such appeal shall be final and binding on Eaton's and the Creditor for all purposes under the Plan. There shall be no further rights of appeal, review or recourse to the Court.

Schedule "B" — Entities Eligible for Investments by Liquidator

ENTITIES	*STANDARD & POOR'S "ISSUER CREDIT RATING"*
Financial Institutions	
SCHEDULE I BANKS	
Bank of Montreal	AA-
The Bank of Nova Scotia	A+
Royal Bank of Canada	AA-
Canadian Imperial Bank of Commerce	AA-
The Toronto-Dominion Bank	AA-
National Bank Canada	A
	DOMINION BOND RATING SERVICES RATING — Short Term Debt
SCHEDULE II BANKS	

ABN AMRO Bank Canada	R1H
Banque Nationale de Paris (Canada)	R1M
Credit Suisse First Boston (Canada)	R1M
Deutsche Bank Canada	R1M
Dresdner Bank of Canada	R1M
HSBC Bank Canada	R1M
Société Générale (Canada)	R1M

No authorized investment with a Schedule II Bank shall exceed at any time $5,000,000 in the aggregate.

	STANDARD & POOR'S "ISSUER CREDIT RATING"
Public Sector	
Government of Canada	AAA
Province of Alberta	AA+
Province of British Columbia	AA-
Province of New Brunswick	AA-
Province of Ontario	AA-

Any agency or agent of the Government of Canada or the Provinces of Alberta, British Columbia, New Brunswick or Ontario having a credit rating similar to those specifically noted above.

Other Entities

All other investments in other entities must be fully guaranteed by one of the public sector entities, agencies or agents described above.

End of Document

I.I.C. Ct. Filing 44993495001

The T. Eaton Company Ltd. — Court File Nos. 31-OR-364921, 99-CL-3516, 99-CL-3514
26 — **Order under s. 6 of Companies' Creditors Arrangement Act sanctioning the plan of compromise and arrangement, made November 23, 1999 by Farley, J.**

Re. The T. Eaton Company Limited, Court File No. 99-CL-3516:Toronto

Appendix — 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 the T. Eaton Company Limited

Court File No. 99-CL-3516

Superior Court of Justice (Commercial List)

THE HONOURABLE	)	TUESDAY, THE 23RD DAY
	)	
MR. JUSTICE FARLEY	)	OF NOVEMBER, 1999

..... Applicant

Order

THIS MOTION made by The T. Eaton Company Limited for an Order sanctioning the Amended and Restated Plan of Compromise and Arrangement of Eaton's dated November 19, 1999 as approved by the Creditors on November 19, 1999 and attached as Exhibit "A" to the Affidavit of Harold S. Stephen sworn November 21, 1999 (the "Amended and Restated Plan") was heard this day at the Court House, 393 University Avenue, Toronto, Ontario.

ON READING the Affidavit of Harold S. Stephen sworn November 21, 1999 and the Exhibits thereto, the Report of the Monitor dated November 22, 1999 and the Affidavits of Mailing and Publication, filed, and on hearing the submissions of counsel for The T. Eaton Company Limited and other counsel.

Definitions

1. THIS COURT ORDERS that capitalized terms not otherwise defined in this Order shall have the meanings ascribed thereto in the Amended and Restated Plan.

Service

2. THIS COURT ORDERS AND DECLARES that there has been good and sufficient service and delivery of the Amended and Restated Plan and that the Meetings were duly convened and held.

3. THIS COURT ORDERS that the time for service of the Notice of Motion and the Motion Record in respect of this Motion be and it is hereby abridged, such that this Motion is properly returnable today and that any further service of the Notice of Motion and the Motion Record is hereby dispensed with.

Sanction of Amended and Restated Plan

4. THIS COURT ORDERS AND DECLARES that Eaton's has complied with the provisions of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA") and the Orders of this Honourable Court made thereunder and in the BIA Proceedings, and that the Amended and Restated Plan is fair, reasonable and in the best interests of the Creditors.

5. THIS COURT ORDERS AND DECLARES that the Amended and Restated Plan is hereby sanctioned and approved pursuant to section 6 of the CCAA.

Plan Implementation

6. THIS COURT ORDERS that, upon the filing with this Court by Eaton's of a certificate signed by a senior officer of Eaton's on or prior to the implementation of the Amended and Restated Plan on the Plan Implementation Date ("Plan Implementation"), certifying that all of the conditions precedent to Plan Implementation set out in Section 6.2 of the Amended and Restated Plan (the "Conditions Precedent") have been fulfilled or waived, the Conditions Precedent shall be and be deemed to be fulfilled or waived.

7. THIS COURT ORDERS AND DECLARES that, upon Plan Implementation, the Amended and Restated Plan and all of the compromises and transactions effected thereby shall be effective in accordance with the provisions of the Amended and Restated Plan and shall enure to the benefit of and be binding upon Eaton's, the Creditors, the Shareholders and Distributionco and their respective successors and assigns.

8. THIS COURT ORDERS that, effective on Plan Implementation, Eaton's shall be and it is hereby discharged and released from any and all indebtedness, obligations and liabilities (other than in respect of the remaining liabilities or obligations as set out on Schedules A and A.1 hereto) including, without limitation, any and all indebtedness, obligations and liabilities with respect to Claims or Interim Period Claims or Unsatisfied Unaffected Liabilities, or any liability as an assignor of any rights, or as employer under, or administrator of, the Pension Plans and that all Charges, trusts, deemed trusts or other limitations or restrictions of any nature whatsoever in connection therewith against the Eaton's Remaining Assets, including without limitation the Charges listed in Schedules "B" and "C" hereto (but not including the Charges listed in Schedule "B1" hereto) shall be and they are hereby discharged and released as against Eaton's and the Eaton's Remaining Assets. Eaton's or any of its agents are hereby authorized to take all steps necessary to register or record the discharge of all Charges discharged pursuant to this Paragraph 8.

9. THIS COURT ORDERS AND DECLARES that the Petition for a Receiving Order filed against Eaton's by The Cadillac Fairview Corporation Limited on November 18, 1999 (the "Petition") be and the same shall continue to be stayed pending either further Order of this Court or Plan Implementation, and such Petition be and shall be deemed to be dismissed on the Plan Implementation Date.

Repudiation of Contracts and Leases

10. THIS COURT ORDERS AND DECLARES that, with respect to those leases, contracts, licences, agreements or arrangements, or other rights which do not constitute (i) Eaton's Remaining Assets and the remaining liabilities and contracts set out in Schedule A and Schedule A.1 hereto, (ii) shareholder agreements, co-ownership agreements, rights of first refusal, co-tenancy agreements and other project documents (excluding operating agreements with adjacent land owners which are repudiated under the Amended and Restated Plan) referred to in Subsection 3.3(d) of the Amended and Restated Plan and the Charges related thereto, or (iii) Eaton's insurance policies (of any kind whatsoever), all such leases, contracts, licences, agreements or arrangements, or other rights be and shall be deemed to be repudiated and abandoned, as applicable, as of the earlier of the effective date of repudiation specified in any notice of repudiation and Plan Implementation, and the other Persons who are parties thereto shall be deemed to be Creditors having Interim Period Claims; provided, however, that in the case where Eaton's has not delivered a written notice of repudiation, Distributionco shall be entitled to expressly assume any such lease (other than a Lease), contract, licence, agreement or arrangement, or other rights, by written notice sent to the other party or parties thereto within ten (10) Calendar Days after the Plan Implementation Date, provided however that between the Plan Implementation Date and the date of written notice from Distributionco, any licensor or contractor shall have no obligation to continue to supply goods and services. For greater certainty, those leases, contracts, licences, agreements or arrangements or other rights set out in subparagraphs (i), (ii) and (iii) of this Paragraph 10 shall not be deemed to be repudiated or abandoned.

11. THIS COURT ORDERS AND CONFIRMS that all Leases, subleases (where Eaton's is the landlord), operating agreements, and similar agreements or arrangements, in respect of Abandoned Premises are and shall be deemed to be repudiated and abandoned on the effective date specified in the notice delivered by Eaton's in respect of such Abandoned Premises.

12. THIS COURT ORDERS that, the amounts owing to Eaton's pursuant to the Card License and Services Agreement dated February 13, 1998 between Eaton's and National Retail Credit Services Company (as successor to The T. Eaton Acceptance Co. Limited) ("NRCS") by way of Net Settlement (as defined therein) for the period prior to the date of termination shall be paid to Distributionco by the next Business Day following the Plan Implementation Date. Notwithstanding paragraphs 10, 15 and 16 of this Order, the endorsement of this Court made on November 10, 1999 in respect of the withdrawal of the Motion of NRCS shall remain in full force and effect.

Stay of Proceedings

13. THIS COURT ORDERS that, subject to further Order of this Court, the Stay Termination Date under the Initial CCAA Order be and it is hereby extended to and including the Plan Implementation Date.

14. THIS COURT ORDERS that, notwithstanding Paragraph 13 of this Order, paragraph 11 of the Initial CCAA Order shall remain in full force and effect until and including August 31, 2000.

15. THIS COURT ORDERS AND DECLARES that, subject to the provisions of the Amended and Restated Plan, upon Plan Implementation, all agreements (including without limitation, Leases) to which Eaton's is a party and which are not repudiated or deemed to be repudiated by Eaton's (including the remaining liabilities and contracts set out in Schedule A and A.1 hereto), shall be and shall remain in full force and effect, unamended, and no Person party to any such agreements shall, following the Plan Implementation Date, accelerate, terminate, rescind, refuse to perform or otherwise repudiate its obligations thereunder, or enforce or exercise any right (including any right of set-off, dilution, buy-out, divestiture, forced sale, option or other remedy) or make any demand under or in respect of any such obligations or agreements, by reason:

(a) of any event(s) which occurred on or prior to the Valuation Date which would have entitled any other Person party thereto to enforce those rights or remedies (including defaults or events of default arising as a result of the financial condition or insolvency of Eaton's);

(b) of the fact that Eaton's has sought or obtained relief in the CCAA Proceedings, the BIA Proceedings or the OBCA Proceedings or that the Amended and Restated Plan has been implemented;

(c) of the effect on Eaton's of the completion of any of the transactions contemplated by the Amended and Restated Plan; or

(d) of any compromises or arrangements effected pursuant to the Amended and Restated Plan.

16. THIS COURT ORDERS that, from and after Plan Implementation, all Persons shall be deemed to have waived any and all defaults of Eaton's then existing or previously committed by Eaton's, or caused by Eaton's, or non-compliance with any covenant, warranty, representation, term, provision, condition or obligation, expressed or implied, in any contract, instrument, credit document, guarantee, agreement for sale, Lease, lease or other agreement, written or oral, and any and all amendments or supplements thereto (each, an "Agreement"), existing between such Person and Eaton's or any other Person and any and all notices of default, demands for payment or any step or proceeding taken or commenced in connection therewith under any Agreement shall be deemed to be rescinded and of no further force or effect, provided that nothing herein shall excuse or be deemed to excuse Eaton's from performing its obligations under the Amended and Restated Plan, and Distributionco and the Liquidator shall be entitled to the benefit of such waiver. Nothing herein shall be deemed to be a waiver of defaults by Eaton's which occur after the Plan Implementation Date.

16A. THIS COURT ORDERS that, from and after the Plan Implementation Date, Eaton's shall be deemed to have waived any and all defaults of a Person then existing or previously committed by such Person or caused by such Person, or non-compliance with any covenant, warranty, representation, term, provision, condition or obligation, express or implied, in any contract, credit

document, agreement for sale, lease, Lease or other agreement, written or oral, constituting Eaton's Remaining Assets and any and all amendments or supplements thereto, existing between Eaton's and such Person, and any and all notices of default and demands for payment under any instrument, including any guarantee, shall be deemed to have been rescinded provided, however, that such waiver shall not apply to any defaults which are continuing after the Plan Implementation Date.

17. THIS COURT ORDERS that, effective on Plan Implementation, all past, present and future directors and officers of Eaton's and the Initial Director shall be and they are hereby discharged and released from any liability with respect to all Claims and Interim Period Claims in accordance with Section 10.5 of the Amended and Restated Plan. For greater certainty, in the event that there should be any deficiency in any of the Pension Plans, section 10.5 of the Amended and Restated Plan should not in any way prevent the Superintendent of Financial Services (Ontario) or the future administrators of the Pension Plans, from seeking redress from professional advisors to Eaton's who may have provided reports or opinions either directly or indirectly to the Superintendent in connection with the Pension Plans, or to prevent those advisors from seeking contribution or indemnity from other advisors to Eaton's in relation to such reports or opinions.

18. THIS COURT ORDERS that, until further order of this Court, any and all Persons shall be and are hereby stayed from commencing, taking, applying for or issuing or continuing any and all steps or proceedings, including, without limitation, administrative hearings or orders, declarations or assessments, against any or all past, present and future directors and officers of Eaton's and the Initial Director in respect of any Claim or Interim Period Claim.

Vesting

19. THIS COURT ORDERS that, upon Plan Implementation, the Distributionco Transferred Assets, wherever situate, shall vest in Distributionco free and clear of all estate, right, title, or interest of Eaton's and those claiming by or through Eaton's and free of all Charges, trusts, deemed trusts or other limitations or restrictions of any nature whatsoever which attach prior to Plan Implementation to any assets, property or undertakings of Eaton's (including without limitation the property described in subsection 3.3(d) of the Amended and Restated Plan), except as otherwise provided under the Amended and Restated Plan and, for greater certainty, subject to the Charges listed in Schedule "C" hereto, which Charges shall be deemed to be registered against Distributionco in the same order of priority as they were registered against Eaton's. Distributionco, the Liquidator or their respective agents are hereby authorized but not obligated to take all steps necessary to register or record the transfer of the Charges listed in Schedule "C" hereto in accordance with this Paragraph 19 without any liability on its or their part.

20. THIS COURT ORDERS AND DECLARES that the *Bulk Sales Act*, R.S.O. 1990, c. B-14 and similar legislation in other Provinces do not apply to the transfer of the Distributionco Transferred Assets to Distributionco, and such transfer shall constitute a judicial sale.

21. THIS COURT ORDERS AND DECLARES that, upon Plan Implementation, all notices of lease, caveats, and other title registrations in respect of Leases at Abandoned Premises, including without limitation those set out on Schedule "D" hereto, shall be and they are hereby discharged and released, and the applicable Land Registrar or other appropriate official is hereby authorized and directed to remove such registrations from title to the affected lands.

The Monitor

22. THIS COURT ORDERS AND DECLARES that the Monitor and the Interim Receiver have satisfied all of their obligations to prepare, compile, assemble and distribute the financial and other information required in the BIA Proceedings and the CCAA Proceedings and shall have no further obligations to report or disclose any further information or otherwise in such proceedings, and the Monitor has no liability in respect of any information disclosed.

23. THIS COURT ORDERS AND DECLARES that Richter & Partners Inc. shall be and be deemed to be discharged from its duties as the Monitor and the Interim Receiver, effective on Plan Implementation and that the Monitor and the Interim Receiver shall pass their accounts as soon as practicable thereafter.

24. THIS COURT ORDERS that, effective on Plan Implementation, the Charge in favour of the Interim Receiver and the Monitor and their professional advisors, as provided in the BIA Orders and the Initial CCAA Order, shall be and is hereby discharged and released as against Eaton's and the Eaton's Remaining Assets (but, for greater certainty, shall continue as against the Distributionco Transferred Assets).

25. THIS COURT ORDERS that, effective on Plan Implementation, any and all claims against the Monitor and Interim Receiver in connection with the performance of its duties as Monitor and Interim Receiver, shall be and they are hereby stayed, extinguished and forever barred and the Monitor and Interim Receiver shall have no liability in respect thereof except in respect of any remaining obligations under commitments made by the Interim Receiver to Interim Period Suppliers and except for any liability arising out of the gross negligence or wilful misconduct on the part of the Monitor or the Interim Receiver.

Creditors' Committee

26. THIS COURT ORDERS that the Committee of Creditors shall be disbanded and the appointments of the members thereof shall be terminated, effective on Plan Implementation.

27. THIS COURT ORDERS that, effective on Plan Implementation, any and all claims against the Committee of Creditors or any of its members in connection with the proper performance of their duties as such shall be and are hereby stayed, extinguished and forever barred and the Committee of Creditors and its members shall have no liability in respect thereof.

Additional Provisions

28. THIS COURT ORDERS that this Order shall have full force and effect in all provinces and territories in Canada and abroad and as against all Persons against whom it may otherwise apply.

29. THIS COURT ORDERS that Eaton's, the Monitor, the Interim Receiver, Sears or any Creditor may apply to this Court for directions or to seek relief in respect of any matter arising out of or incidental to the Amended and Restated Plan or this Order, including without limitation the interpretation of this Order and the Amended and Restated Plan or the implementation thereof, and for any further Order that may be required, on notice to any party likely to be affected by the Order sought or on such notice as this Court orders.

30. THIS COURT SEEKS AND REQUESTS the aid and recognition of any Court or administrative body in any province or territory of Canada and the Federal Court of Canada and any administrative tribunal or other court constituted pursuant to the authority of the Parliament of Canada, including the assistance of any Court in Canada pursuant to section 17 of the CCAA, and any federal or state court or administrative body in the United States of America and all other jurisdictions to act in aid of and to be complementary to this Court in carrying out the terms of this Order.

as per Mr. Justice Farley .....

ENTERED AT/INSCRIT À TORONTO

ON/BOOK NO:

LE/DANS LE REGISTRE NO: NOV 24 1999

PER/PAR:

End of Document

Tab 13

2016 CarswellOnt 8815
Ontario Superior Court of Justice [Commercial List]

Target Canada Co., Re

2016 CarswellOnt 8815

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 Target Canada Co., Target Canada Health Co., Target Canada Mobile GP Co., Target Canada Pharmacy (BC) Corp., Target Canada Pharmacy (Ontario) Corp., Target Canada Pharmacy Corp., Target Canada Pharmacy (SK) Corp., and Target Canada Property LLC (collectively the "Applicants")

Morawetz R.S.J.

Judgment: June 2, 2016
Docket: Toronto CV-15-10832-00CL

Counsel: Tracy Sandler, Jeremy Dacks, Shawn Irving, Robert Carson, for Applicants

Subject: Insolvency

Headnote

Bankruptcy and insolvency

***Morawetz R.S.J.*:**

Sanction and Vesting Order

1 *THIS MOTION*, made by the Applicants and the partnerships listed on Schedule "A" hereto (together with the Applicants, the *"Target Canada Entities"*) for an order pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the *"CCAA"*), *inter alia:* (a) sanctioning the Second Amended and Restated Joint Plan of Compromise and Arrangement dated May 19, 2016 (as amended, varied or supplemented from time to time in accordance with the terms thereof, and together with all schedules thereto, the *"Plan"*), which Plan is attached as Schedule "B" hereto; and (b) vesting all of the Target Canada Entities' right, title and interest in and to the IP Assets (as defined in the Plan) was heard this day at 393 University Avenue, Toronto, Ontario.

2 *ON READING* the Notice of Motion, the Affidavit of Mark J. Wong sworn May 26, 2016 (the *"Wong Affidavit"*), the Twenty-Seventh Report of Alvarez & Marsal Canada Inc. in its capacity as monitor of the Target Canada Entities (the *"Monitor"*) dated May 11, 2016, the Twenty-Eighth Report of the Monitor dated May 27, 2016, and on hearing the submissions of respective counsel for the Target Canada Entities, the Monitor, and such other counsel as were present, and on being advised that the Service List was served with the Motion Record herein:

Defined Terms

3 1. *THIS COURT ORDERS* that any capitalized terms not otherwise defined in this Order shall have the meanings ascribed to such terms in the Plan.

Service, Notice and Meetings

4 2. *THIS COURT ORDERS* that the time for service of the Notice of Motion and the Motion Record is hereby abridged and validated so that this Motion is properly returnable today and that service thereof upon any interested party other than the persons served with the Motion Record is hereby dispensed with.

5 3. *THIS COURT ORDERS AND DECLARES* that there has been good and sufficient notice, service and delivery of the Meeting Materials (as defined in the Meeting Order granted by this Court on April 13, 2016 (the *"Meeting Order"*)) and that the Creditors' Meeting was duly called, convened, held and conducted, all in conformity with the CCAA and the Orders of this Court made in the CCAA Proceedings, including, without limitation, the Meeting Order.

Sanction of the Plan

6 4. *THIS COURT ORDERS AND DECLARES* that:

(a) the Plan has been approved by the Required Majority of Affected Creditors with Proven Claims as required by the Meeting Order, and in conformity with the CCAA;

(b) the Target Canada Entities have complied with the provisions of the CCAA and the Orders of the Court made in the CCAA Proceedings in all respects;

(c) the Court is satisfied that the Target Canada Entities have not done or purported to do anything that is not authorized by the CCAA; and

(d) the Target Canada Entities have acted in good faith and with due diligence, and the Plan and the Plan Transaction Steps contemplated therein are fair and reasonable.

7 5. *THIS COURT ORDERS* that the Plan is hereby sanctioned and approved pursuant to Section 6 of the CCAA.

Plan Implementation

8 6. *THIS COURT ORDERS* that each of the Target Canada Entities, their respective directors and officers, and the Monitor is authorized and directed to take all steps and actions (including, without limitation, the Plan Transaction Steps), and to do all things, necessary or appropriate to implement the Plan in accordance with its terms and to enter into, execute, deliver, complete, implement and consummate all of the steps, transactions, distributions, disbursements, payments, deliveries, allocations, instruments and agreements contemplated pursuant to the Plan, and such steps and actions are hereby authorized, ratified and approved. None of the Target Canada Entities, their respective directors and officers or the Monitor shall incur any liability as a result of acting in accordance with the terms of the Plan and this Order, other than any liability arising out of or in connection with the gross negligence or wilful misconduct of such parties.

9 7. *THIS COURT ORDERS AND DECLARES* that the Plan and all associated steps, compromises, transactions, arrangements, releases and reorganizations effected thereby (including, without limitation, the Plan Transaction Steps) are hereby approved, shall be deemed to be implemented and shall be binding and effective as of the Effective Time in accordance with the terms of the Plan or at such other time, times or manner as may be set forth in the Plan in the sequence provided therein, and shall enure to the benefit of and be binding and effective upon the Target Canada Entities, the Plan Sponsor, all Affected Creditors, the Released Parties and all other Persons and parties named or referred to in, affected by, or subject to the Plan.

10 8. *THIS COURT ORDERS* that upon delivery to the Monitor of written notice from the Target Canada Entities and the Plan Sponsor of the fulfilment or waiver of the conditions precedent to implementation of the Plan as set out in section 8.3 of the Plan, the Monitor shall deliver to the Target Canada Entities a certificate signed by the Monitor substantially in the form attached as Schedule "C" hereto confirming that all of the conditions precedent set out in section 8.3 of the Plan have been

satisfied or waived, as applicable, in accordance with the terms of the Plan and that the Plan Implementation Date has occurred and the Plan is effective in accordance with its terms and the terms of this Order (the *"Monitor's Plan Implementation Date Certificate"*). The Monitor is hereby directed to file the Monitor's Plan Implementation Date Certificate with the Court as soon as reasonably practicable on or forthwith following the Plan Implementation Date after delivery thereof and shall post a copy of same, once filed, on the Website and provide a copy to the Service List.

Compromise of Claims and Effect of Plan

11 9. *THIS COURT ORDERS* that, pursuant to and in accordance with the terms of the Plan, on the Plan Implementation Date, all Affected Claims shall be fully, finally, irrevocably and forever compromised, discharged and released with prejudice, and the ability of any Person to proceed against the Released Parties in respect of or relating to any such Affected Claims shall be and shall be deemed forever discharged, extinguished, released and restrained, and all proceedings with respect to, in connection with or relating to such Affected Claims shall permanently be stayed against the Released Parties, subject only to the right of Affected Creditors to receive the distributions pursuant to the Plan and this Order in respect of their Affected Claims, in the manner and to the extent provided for in the Plan.

12 10. *THIS COURT ORDERS* that the determination of Proven Claims in accordance with the Claims Procedure Order and Plan shall be final and binding on the Target Canada Entities and all Affected Creditors.

13 11. *THIS COURT ORDERS* that an Affected Creditor holding a Disputed Claim shall not be entitled to receive a distribution under the Plan in respect of any portion thereof unless and until such Disputed Claim becomes a Proven Claim in accordance with the Claims Procedure Order and Plan.

14 12. *THIS COURT ORDERS* that nothing in the Plan extends to or shall be interpreted as extending or amending the Claims Bar Date or gives or shall be interpreted as giving any rights to any Person in respect of Claims that have been barred or extinguished pursuant to the Claims Procedure Order. Any Affected Claim, any Propco Unaffected Claim and any Property LP Unaffected Claim for which a Proof of Claim has not been filed by the Claims Bar Date in accordance with the Claims Procedure Order, whether or not the holder of such Affected Claim, Propco Unaffected Claim or Property LP Unaffected Claim has received personal notification of the claims process established by the Claims Procedure Order, shall be and are hereby forever barred, extinguished and released with prejudice.

15 13. *THIS COURT ORDERS* that each Person named or referred to in, or subject to, the Plan shall be and is hereby deemed to have consented and agreed to all of the provisions in the Plan, in its entirety, and each Person named or referred to in, or subject to, the Plan shall be and is hereby deemed to have executed and delivered to the Target Group Entities all consents, releases, assignments and waivers, statutory or otherwise, required to implement and carry out the Plan in its entirety.

16 14. *THIS COURT ORDERS AND DECLARES* that all distributions or payments by TCC, in each case on behalf of the Target Canada Entities, to Affected Creditors with Proven Claims, to Propco Unaffected Creditors and to Property LP Unaffected Creditors under the Plan are for the account of the Target Canada Entities and the fulfillment of their respective obligations under the Plan.

17 15. *THIS COURT ORDERS* that sections 95 to 101 of the BIA and any other federal or provincial law relating to preferences, fraudulent conveyances or transfers at undervalue, shall not apply to the Plan or to any transactions, distributions or settlement payments implemented pursuant to the Plan.

18 16. *THIS COURT ORDERS AND DECLARES* that TCC shall be authorized, in connection with the making of any payment or distribution, and in connection with the taking of any step or transaction or performance of any function under or in connection with the Plan, to apply to any Governmental Authority for any consent, authorization, certificate or approval in connection therewith.

19 17. *THIS COURT ORDERS* that the Target Canada Entities are authorized to take any and all such actions as may be necessary or appropriate to comply with applicable Tax withholding and reporting requirements. All amounts withheld on account of Taxes shall be treated for all purposes as having been paid to the Affected Creditors, Propco Unaffected Creditors

or Property LP Unaffected Creditors in respect of which such withholding was made, provided such withheld amounts be remitted to the appropriate Governmental Authority.

20 18. *THIS COURT ORDERS AND DECLARES* that any distributions, disbursements or payments made under the Plan or this Order (including without limitation distributions made to or for the benefit of the Affected Creditors, Propco Unaffected Creditors or Property LP Unaffected Creditors) shall not constitute a "distribution" by any person for the purposes of section 107 of the *Corporations Tax Act* (Ontario), section 22 of the *Retail Sales Tax Act* (Ontario), section 117 of the *Taxation Act*, 2007 (Ontario), section 34 of the *Income Tax Act* (British Columbia), section 104 of the *Social Service Tax Act* (British Columbia), section 49 of the *Alberta Corporate Tax Act*, section 22 of the *Income Tax Act* (Manitoba), section 73 of *The Tax Administration and Miscellaneous Taxes Act* (Manitoba), section 14 of *An Act respecting the Ministere du Revenu* (Quebec), section 85 of *The Income Tax Act*, 2000 (Saskatchewan), section 48 *of The Revenue and Financial Services Act* (Saskatchewan), section 56 of the *Income Tax Act* (Nova Scotia), section 159 of the *Income Tax Act* (Canada), section 270 of the *Excise Tax Act* (Canada), section 46 of the *Employment Insurance Act* (Canada), or any other similar federal, provincial or territorial tax legislation (collectively, the *"Tax Statutes"*), and TCC, in making any such distributions, disbursements or payments, as applicable, is merely a disbursing agent under the Plan and is not exercising any discretion in making payments under the Plan and no person is "distributing" such funds for the purpose of the Tax Statutes, and TCC and any other person shall not incur any liability under the Tax Statutes in respect of distributions, disbursements or payments made by it and TCC and any other person is hereby forever released, remised and discharged from any claims against it under or pursuant to the Tax Statutes or otherwise at law, arising in respect of or as a result of distributions, disbursements or payments made by it in accordance with the Plan and this Order and any claims of this nature are hereby forever barred.

Establishment of Cash Reserves

21 19. *THIS COURT ORDERS* that on the Plan Implementation Date, TCC shall be and is hereby authorized and directed to fund the Administrative Reserve out of the TCC Cash Pool in an aggregate amount to be agreed upon by TCC, the Monitor and the Plan Sponsor three (3) Business Days prior to the Plan Implementation Date.

22 20. *THIS COURT ORDERS* that, pursuant to and in accordance with the Plan, TCC is hereby authorized to establish the Propco Disputed Claims Reserve on the Plan Implementation Date from the Propco Cash Pool for the benefit of Propco in an amount equal to the face value of disputed Claims of the Propco Creditors and the Property LP Creditors (excluding Landlord Restructuring Period Claims but not excluding any disputed Property LP Unaffected Claims held by Landlords).

23 21. *THIS COURT ORDERS* that, pursuant to and in accordance with the Plan, TCC is hereby authorized to establish the TCC Disputed Claims Reserve on the Plan Implementation Date from the TCC Cash Pool in an amount equal to the expected distributions to be made to all Creditors with Disputed Claims (based on the face value of each Disputed Claim) as such amount is agreed to between TCC, the Monitor and the Plan Sponsor three (3) Business Days prior to the Plan Implementation Date.

Vesting

24 22. *THIS COURT ORDERS* that on the Plan Implementation Date, all of the Target Canada Entities' right, title and interest in and to the IP Assets listed on Schedule "D" shall vest absolutely in 3293849 Nova Scotia Company and all of the Target Canada Entities' right, title and interest in and to the IP Assets listed on Schedule "E" shall vest absolutely in Target Brands Inc., in each case free and clear of and from any and all security interests (whether contractual, statutory, or otherwise), hypothecs, mortgages, trusts or deemed trusts (whether contractual, statutory, or otherwise), liens, executions, levies, charges, Claims (as defined in the Plan), or other financial or monetary claims, whether or not they have attached or been perfected, registered or filed and whether secured, unsecured or otherwise (collectively, the *"IP Asset Claims"*), including, without limiting the generality of the foregoing:

> (a) the Administration Charge, the KERP Charge, the Directors' Charge, the Financial Advisor Subordinated Charge, the DIP Lender's Charge, and the Agent's Charge and Security Interest (as defined in the Approval Order - Agency Agreement dated February 4, 2015); and

(b) all charges, security interests or claims evidenced by registrations pursuant to the *Personal Property Security Act* (Ontario) or any other personal properly registry system;

(all of which are collectively referred to as the *"Encumbrances"*)

and, for greater certainty, this Court orders that all of the IP Asset Claims and Encumbrances affecting or relating to the IP Assets are hereby expunged and discharged as against the IP

25 Assets.

26 23. *THIS COURT ORDERS* that, notwithstanding:

(a) the pendency of these proceedings;

(b) any applications for a bankruptcy order now or hereafter issued pursuant to the *Bankruptcy and Insolvency Act* (Canada) in respect of any of the Target Canada Entities and any bankruptcy order issued pursuant to any such applications; and

(c) any assignment in bankruptcy made in respect of any of the Target Canada Entities;

the vesting of the IP Assets in 3293849 Nova Scotia Company and Target Brands Inc. pursuant to this Order shall be binding on any trustee in bankruptcy that may be appointed in respect of any of the Target Canada Entities and shall not be void or voidable by creditors of the Target Canada Entities, nor shall it constitute nor be deemed to be a fraudulent preference, assignment, fraudulent conveyance, transfer at undervalue, or other reviewable transaction under the *Bankruptcy and Insolvency Act* (Canada) or any other applicable federal or provincial legislation, nor shall it constitute oppressive or unfairly prejudicial conduct pursuant to any applicable federal or provincial legislation.

27 24. *THIS COURT ORDERS* that the transfer of the IP Assets is exempt from the application of the *Bulk Sales Act* (Ontario).

Employee Trust

28 25. *THIS COURT ORDERS* that the form of Employee Trust Termination Certificate attached as Schedule "F" to the Plan and Employee Trust Property Joint Direction attached as Schedule "G" to the Plan are each hereby approved.

29 26. *THIS COURT ORDERS* that the Employee Trust Trustee and the Employee Trust Administrator shall be and are hereby authorized and directed to perform their functions and fulfill their obligations under the Plan without liability to facilitate the implementation and administration of the Plan, as necessary, pursuant to and in accordance with the terms of the Plan, including without limitation to remit the balance of the Employee Trust Property, net of the payments set out in Sections 6.3(v)(ii) and 6.3(v)(iii) and any applicable Withholding Obligations, to the Plan Sponsor or its designee upon delivery by the Employee Trust Trustee and the Employee Trust Administrator of an Employee Trust Property Joint Direction to The Royal Bank of Canada, and such performance of their functions and fulfillment of their obligations are hereby authorized, ratified and approved.

30 27. *THIS COURT ORDERS* that upon the delivery of the Employee Trust Termination Certificate from the Employee Trust Trustee to the Monitor:

(a) any remaining Trustee Fees, Trustee Expenses, Administrator Fees and Administrator Expenses (each as defined in the Employee Trust Agreement) shall be paid from any remaining Employee Trust Property to the Employee Trust Trustee and the Employee Trust Administrator, as applicable;

(b) the Employee Trust Trustee shall satisfy any commitments to pay Eligible Employee Claims (as defined in the Employee Trust Agreement) made under Article 2 of the Employee Trust Agreement with the assistance of the

Employee Trust Administrator;

(c) the Employee Trust Trustee and the Employee Trust Administrator shall deliver the Employee Trust Property Joint Direction to The Royal Bank of Canada in accordance with Section 6.3(v)(iv) of the Plan;

(d) the Employee Trust Trustee and the Employee Trust Administrator shall be and shall be deemed to be fully and finally released and discharged from all of their respective obligations under the Employee Trust Agreement and from all claims relating to their activities as Employee Trust Trustee and Employee Trust Administrator, respectively; and

(e) the Employee Trust shall be and shall be deemed to be wound-up and terminated.

31 28. *THIS COURT ORDERS* that the Monitor is hereby directed to file the Employee Trust Termination Certificate with the Court as soon as reasonably practicable after delivery thereof and shall post a copy of same, once filed, on the Website and provide a copy to the Service List.

Releases

32 29. *THIS COURT ORDERS AND DECLARES* that the compromises and releases set out in Article 7 of the Plan are approved and shall be binding and effective as at the Plan Implementation Date, provided that the releases in favour of an Employee Trust Released Party shall be effective immediately upon delivery of the Employee Trust Termination Certificate to the Monitor in accordance with the Plan.

33 30. *THIS COURT ORDERS* that from and after the Plan Implementation Date (and in respect of an Employee Trust Released Party, from and after the delivery of the Employee Trust Termination Certificate to the Monitor) any and all Persons shall be and are hereby forever barred, estopped, stayed and enjoined from commencing, taking, applying for or issuing or continuing any and all steps or proceedings, whether directly, derivatively or otherwise, and 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, Propco Unaffected Claims, Property LP Unaffected Claims and matters which are released pursuant to paragraph 29 of this Order and Article 7 of the Plan or discharged, compromised or terminated pursuant to the Plan.

Directors and Officers

34 31. *THIS COURT ORDERS* that the remaining Directors and Officers of the Target Canada Entities (other than the current Directors of TCC or Target Canada Pharmacy (Ontario) Corp.) shall be deemed to have resigned without replacement at the Effective Time on the Plan Implementation Date, unless such Persons affirmatively elect to remain as a Director or Officer in order to facilitate any Plan Transaction Steps in connection with the wind-down of any of the Target Canada Entities.

35 32. *THIS COURT ORDERS* that the Directors of Target Canada Pharmacy (Ontario) Corp. shall be deemed to have resigned in accordance with Section 6.3(r) of the Plan.

Plan Charges

36 33. *THIS COURT ORDERS* that each of the Financial Advisor Subordinated Charge, the DIP Lender's Charge, the Liquidation Agent's Charge and Security Interest and the KERP Charge is hereby terminated, released and discharged on the Plan Implementation Date and each of the Administration Charge and the Directors' Charge shall continue and shall attach solely against the Propco Cash Pool and the TCC Cash Pool and the Cash Reserves from and after the Plan Implementation Date.

The Monitor

37 34. *THIS COURT ORDERS* that in addition to its prescribed rights and obligations under the CCAA and the Orders of the Court made in these CCAA Proceedings, the Monitor is granted the powers, duties and protections contemplated by and required under the Plan and that the Monitor be and is hereby authorized, entitled and empowered to perform its duties and fulfil its obligations under the Plan to facilitate the implementation thereof, including without limitation:

(a) to take all such actions to market and sell any remaining assets and pursue any outstanding accounts receivable owing to any of the Target Canada Entities, or to assist the Target Canada Entities with respect thereto;

(b) to act, if required, as trustee in bankruptcy, liquidator, receiver or a similar official of the Target Canada Entities; and

(c) apply to this Court for any orders necessary or advisable to carry out its powers and obligations under any other Order granted by this Court including for advice and directions with respect to any matter arising from or under the Plan.

38 35. *THIS COURT ORDERS* that, without limiting the provisions of the Initial Order or the provisions of any other Order granted in the CCAA Proceeding, including this Order, the Target Canada Entities shall remain in possession and control of the Property (each as defined in the Initial Order) and that the Monitor shall not take possession or be deemed to be in possession and/or control of the Property.

39 36. *THIS COURT ORDERS AND DECLARES* that the Monitor shall be authorized, in connection with the taking of any step or transaction or performance of any function under or in connection with the Plan, to apply to any Governmental Authority for any consent, authorization, certificate or approval in connection therewith.

40 37. *THIS COURT ORDERS* that the Plan Sponsor shall be and is hereby directed to maintain the books and records of the Target Canada Entities for purposes of assisting the Monitor in the completion of the resolution of the Disputed Claims and Claims of the Propco Creditors and the Property LP Creditors and the orderly wind-down of the Target Canada Entities.

41 38. *THIS COURT ORDERS AND DECLARES* that: (i) in carrying out the terms of this Order and the Plan, the Monitor shall have all the protections given to it by the CCAA, the Initial Order, and as an officer of the Court, including the Stay of Proceedings in its favour; (ii) the Monitor shall incur no liability or obligation as a result of carrying out the provisions of this Order and/or the Plan, other than any liability arising out of or in connection with the gross negligence or wilful misconduct of the Monitor; (iii) the Monitor shall be entitled to rely on the books and records of the Target Canada Entities and any information provided by the Target Canada Entities without independent investigation; and (iv) the Monitor shall not be liable for any claims or damages resulting from any errors or omissions in such books, records or information.

42 39. *THIS COURT ORDERS AND DECLARES* that in no circumstance will the Monitor have any liability for any of the Target Canada Entities' tax liabilities regardless of how or when such liability may have arisen.

43 40. *THIS COURT ORDERS* that the Monitor shall publish a notice to Affected Creditors, substantially in the form attached as Schedule "F" hereto (the "*Notice of Final Distribution*"), at least thirty (30) days in advance of the Final Distribution Date in *The Globe and Mail* (National Edition), *La Presse* and *The Wall Street Journal* notifying Affected Creditors of the Final Distribution Date.

44 41. *THIS COURT ORDERS* that the form of Monitor's Plan Completion Certificate attached as Schedule "G" hereto is hereby approved and declares that the Monitor, in its capacity as Monitor, following receipt of a written notice from TCC pursuant to section 5.12(d) of the Plan that TCC has completed its duties to effect distributions, disbursements and payments in accordance with the Plan, shall file the Monitor's Plan Completion Certificate with this Court stating that all of its duties and the Target Canada Entities' duties under the Plan and the Orders have been completed, and thereafter the Monitor shall seek an Order, *inter alia*, (a) approving its final fees and disbursements and those of its counsel; (b) discharging the Monitor from its duties as Monitor in the CCAA Proceedings, (c) terminating, releasing and discharging the Administration Charge (subject to payment of final fees and disbursements) and the Directors' Charge, and (d) releasing the Target Canada Entities, the Monitor and any Directors and Officers holding such office following the Plan Implementation Date and their advisors,

from all claims relating to the implementation of the Plan.

45 42. *THIS COURT ORDERS* that the Monitor is hereby directed to post a copy of the Monitor's Plan Completion Certificate, once filed, on the Website and provide a copy to the Service List.

Stay Extension

46 43. *THIS COURT ORDERS* that the Stay Period in the Initial Order be and is hereby extended until and including September 26, 2016, or such later date as this Court may order.

Extension of Notice of Objection Bar Date

47 44. *THIS COURT ORDERS* that the definition of "Notice of Objection Bar Date" set out in paragraph 3(aa) of the Claims Procedure Order (issued by Regional Senior Justice Morawetz on June 11, 2015, as amended) is hereby amended to extend the Notice of Objection Bar Date to the Plan Implementation Date and that the Notice of Objection Bar Date will expire on the Plan Implementation Date.

Discharge of the Consultative Committee

48 45. *THIS COURT ORDERS* that, effective immediately upon delivery of the Monitor's Plan Implementation Date Certificate, the Consultative Committee and each Member thereof shall be and is hereby discharged and the Members shall no longer be entitled to payments of $5,000 plus HST per month, and such payments shall cease, subject to payment by the Target Canada Entities of any such monthly amounts then outstanding to Members.

General

49 46. *THIS COURT ORDERS* that the Target Canada Entities and the Monitor may apply to this Court from time to time for advice and direction with respect to any matter arising from or under the Plan or this Order.

50 47. *THIS COURT ORDERS* that this Order shall have full force and effect in all provinces and territories of Canada and abroad as against all persons and parties against whom it may otherwise be enforced.

51 48. *THIS COURT ORDERS* that the Target Canada Entities (at their sole election) are hereby authorized to seek an order of any court of competent jurisdiction to recognize the Plan and this Order, to confirm the Plan and this Order as binding and effective in any appropriate foreign jurisdiction, and to assist the Target Canada Entities, the Monitor and their respective agents in carrying out the terms of the Plan and this Order.

52 49. *THIS COURT HEREBY REQUESTS* the aid and recognition of any court or any judicial, regulatory or administrative body having jurisdiction in Canada, the United States, or in any other foreign jurisdiction, to recognize and give effect to the Plan and this Order, to confirm the Plan and this Order as binding and effective in any appropriate foreign jurisdiction, and to assist the Target Canada Entities, the Monitor and their respective agents in carrying out the terms of the Plan and this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Target Canada Entities and to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Monitor in any foreign proceeding, or to assist the Target Canada Entities and the Monitor and their respective agents in carrying out the terms of this Order.

Schedule "A"

Partnerships

Target Canada Pharmacy Franchising LP
Target Canada Mobile LP

2016 CarswellOnt 8815

Target Canada Property LP

Schedule "B"

Second Amended and Restated Plan

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 TARGET CANADA CO., TARGET CANADA HEALTH CO., TARGET CANADA MOBILE GP CO., TARGET CANADA PHARMACY (BC) CORP., TARGET CANADA PHARMACY (ONTARIO) CORP., TARGET CANADA PHARMACY CORP., TARGET CANADA PHARMACY (SK) CORP., and TARGET CANADA PROPERTY LLC (collectively the *"Applicants"*)

SECOND AMENDED AND RESTATED JOINT PLAN OF COMPROMISE AND ARRANGEMENT

pursuant to the Companies' Creditors Arrangement Act

May 19, 2016

TABLE OF CONTENTS

Second Amended and Restated Joint Plan of Compromise and Arrangement
WHEREAS:

A. Target Canada Co., Target Canada Health Co., Target Canada Mobile GP Co., Target Canada Pharmacy (BC) Corp., Target Canada Pharmacy (Ontario) Corp., Target Canada Pharmacy Corp., Target Canada Pharmacy (SK) Corp. and Target Canada Property LLC (collectively, the *"Applicants"*) are insolvent;

B. The Applicants filed for and obtained protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c.

C-36, as amended (the *"CCAA"*) pursuant to an Order of the Ontario Superior Court of Justice (Commercial List) on January 15, 2015, as amended and restated on February 11, 2015 (and as further amended, restated or varied from time to time, the *"Initial Order"*);

C. The Initial Order declared that, although not Applicants, each of Target Canada Pharmacy Franchising LP, Target Canada Mobile LP and Target Canada Property LP shall enjoy the protections and authorizations provided by the Initial Order (together with the Applicants, the *"Target Canada Entities"*);

D. Pursuant to the Initial Order, the Applicants have the authority to file with the Court, individually or collectively, a plan of compromise or arrangement, which plan will provide, among other things, a method of distribution to Creditors with Proven Claims and the framework for the completion of the orderly wind-down of the Target Canada Entities' Business;

E. The Target Canada Entities brought a motion before the Court heard on December 21 and 22, 2015 for an Order, *inter alia*, accepting the filing of a Joint Plan of Compromise and Arrangement dated November 27, 2015 (the *"Original Plan"*) and authorizing the Target Canada Entities to hold a meeting of Affected Creditors to consider and vote on a resolution to approve the Original Plan;

F. The Court declined to grant the relief for the reasons set out in the Endorsement of Regional Senior Justice Morawetz dated January 15, 2016 (the *"January 15 Endorsement"*); and

G. The Target Canada Entities amended and restated the Original Plan in the form of an Amended and Restated Joint Plan of Compromise and Arrangement under and pursuant to the CCAA dated April 6, 2016 to, among other things, comply with the January 15 Endorsement (the *"Amended Plan"*).

H. On April 13, 2016, the Court issued an Order (the *"April 13 Order"*), *inter alia*, accepting the filing of the Amended Plan and authorizing the Target Canada Entities to hold a meeting of Affected Creditors to consider and vote on a resolution to approve the Amended Plan.

I. Pursuant to and in accordance with the April 13 Order, the Target Canada Entities hereby propose and present this Second Amended and Restated Joint Plan of Compromise and Arrangement under and pursuant to the CCAA, which includes certain administrative amendments to the Amended Plan, that have been consented to by the Plan Sponsor and the Monitor, to better give effect to the implementation of the Amended Plan.

Article 1 Interpretation

1.1 Definitions

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

"A&M" means Alvarez & Marsal Canada Inc. and its affiliates;

"Administration Charge" means the charge over the Property created by paragraph 54 of the Initial Order, and having the priority provided in paragraphs 63 and 65 of such Order;

"Administrative Reserve" means a Cash reserve from the TCC Cash Pool approved by the Court pursuant to the Sanction and Vesting Order, in an amount to be agreed by the Monitor, the Target Canada Entities and the Plan Sponsor three (3) Business Days prior to the Plan Implementation Date, to be deposited by TCC into the Administrative Reserve Account for the purpose of paying the Administrative Reserve Costs, which Administrative Reserve shall be subject to the Administrative Reserve Adjustment;

"Administrative Reserve Account" means a segregated interest-bearing trust account established by TCC to hold the Administrative Reserve;

"Administrative Reserve Adjustment" means, on or after the Plan Implementation Date, an increase in the

Administrative Reserve in such amount as the Monitor may determine to be necessary or desirable, in consultation with the Target Canada Entities and the Plan Sponsor, which increase shall be funded from the TCC Cash Pool Account;

"Administrative Reserve Costs" means costs incurred and payments to be made on or after the Plan Implementation Date (including costs incurred prior to the Plan Implementation Date which remain outstanding as of the Plan Implementation Date) in respect of (a) the Monitor's fees and disbursements (including of its legal counsel and other consultants and advisors) in connection with the performance of its duties under the Plan and in the CCAA Proceedings, including without limitation all costs associated with resolving Disputed Claims; (b) the Plan Sponsor's fees and disbursements (including of its legal counsel and other consultants and advisors) in connection with maintaining the books and records of the Target Canada Entities for purposes of assisting the Monitor in the completion of the resolution of the Disputed Claims and Claims of the Propco Creditors and the Property LP Creditors and the wind-down of the Target Canada Entities; (c) costs of any shared services (including in connection with the performance of TCC's duties under the Plan, including without limitation administering distributions, disbursements and payments under the Plan) and employee-related expenses of the Target Canada Entities, including retention payments due to its employees; (d) any third-party fees incurred in connection with the administration of distributions, disbursements and payments under the Plan (including, without limitation, Bank of America); (e) any fees incurred in connection with the dissolution under corporate law or otherwise of a Target Canada Entity; (f) Post-Filing Trade Payables; (g) the lawyer, consultant and advisor fees and disbursements of the Target Canada Entities (including the fees and disbursements of Northwest); (h) the fees and disbursements of Employee Representative Counsel; (i) the fees and disbursements of any claims officer appointed under the Claims Procedure Order or the Employee Trust Claims Resolution Order; (j) Excluded Claims, Government Priority Claims, Employee Priority Claims, to the extent such amounts have not been satisfied from the Employee Trust, and TCC Secured Construction Lien Claims; and (k) any other reasonable amounts in respect of any other determinable contingency as the Monitor may determine in its sole discretion;

"Affected Claim" means all Claims other than Unaffected Claims;

"Affected Creditor" means a Creditor who has an Affected Claim;

"Applicable Law" means any law (including any principle of civil law, common law or equity), statute, Order, decree, judgment, rule, regulation, ordinance, or other pronouncement having the effect of law, whether in Canada or any other country or any domestic or foreign province, state, city, county or other political subdivision;

"Applicants" has the meaning ascribed thereto in the Recitals;

"Assessments" means Claims of Her Majesty the Queen in Right of Canada or of Her Majesty the Queen in Right of any province or territory or of any municipality or of any other Taxing Authority in any Canadian or other jurisdictions, including without limitation amounts which may arise or have arisen under any notice of assessment, notice of objection, notice of reassessment, notice of appeal, audit, investigation, demand or similar request from any Taxing Authority;

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

"Business" means the direct and indirect operations and activities formerly carried on by the Target Canada Entities;

"Business Day" means a day on which banks are open for business in the City of Toronto, Ontario, Canada, but does not include a Saturday, Sunday or a statutory holiday in the Province of Ontario;

"Cash" means cash, certificates of deposit, bank deposits, commercial paper, treasury bills and other cash equivalents;

"Cash Elected Amount" means **$25,000;**

"Cash Management Lender Claim" means any claim of Royal Bank of Canada, The Toronto-Dominion Bank, Bank of America and JPMorgan Chase Bank, National Association in connection with the provision of cash management services to any of the Target Canada Entities and for greater certainty shall include any such claims which have been assigned to the Plan Sponsor or in respect of which the Plan Sponsor has a subrogated claim;

"Cash Reserves" means the Administrative Reserve, the TCC Disputed Claims Reserve and the Propco Disputed Claims Reserve;

"CCAA" has the meaning ascribed thereto in the Recitals;

"CCAA Charges" means the Administration Charge, the KERP Charge, the Directors' Charge, the Financial Advisor Subordinated Charge, the DIP Lender's Charge and the Liquidation Agent's Charge and Security Interest;

"CCAA Proceedings" means the CCAA proceedings in respect of the Target Canada Entities commenced pursuant to the Initial Order;

"Claim" means a Pre-filing Claim, a Restructuring Period Claim, a Landlord Restructuring Period Claim and a D&O Claim, provided however that **"Claim"** shall not include a Landlord Guarantee Claim or an Excluded Claim, but for greater certainty, shall include any Claim arising through subrogation or assignment against any Target Canada Entity or Director or Officer;

"Claims Bar Date" means: (a) in respect of a Pre-filing Claim or a D&O Claim, 5:00 p.m. on August 31, 2015; and (b) in respect of a Restructuring Period Claim (which for purposes of the **"Claims Bar Date"** includes a Landlord Restructuring Period Claim), the later of (i) 45 days after the date on which the Monitor sends a Claims Package (as defined in the Claims Procedure Order) with respect to such Claim, and (ii) 5:00 p.m. on August 31, 2015;

"Claims Procedure Order" means the Order of the Court made June 11, 2015 (including all schedules and appendices thereto) approving and implementing the claims procedure in respect of the Target Canada Entities and the Directors and Officers, as amended on September 21, 2015, October 30, 2015, December 8, 2015, February 1, 2016 and March 14, 2016 and as may be further amended, restated or varied from time to time;

"Conditions Precedent" means the conditions precedent to Plan implementation set out in Section 8.3;

"Consultative Committee Members" means the "Members" as defined in the Revised Consultative Committee Protocol approved by Order of the Court made November 18, 2015;

"Contributed Claim Amount" means that amount of the Property LP (Propco) Intercompany Claim equal to the amount of the Property LP Unaffected Claims;

"Convenience Class Claim" excludes a Disputed Claim and means: (a) an Affected Creditor with one or more Proven Claims that are less than or equal to **$25,000** in the aggregate; and (b) an Affected Creditor with one or more Proven Claims in an amount in excess of **$25,000** in the aggregate that such Affected Creditor has validly elected to value at **$25,000** for purposes of the Plan by filing a Convenience Class Claim Election by the Election/Proxy Deadline;

"Convenience Class Claim Election" means an election pursuant to which an Affected Creditor with one or more Proven Claims that are in an amount in excess of **$25,000** in the aggregate has elected by the Election/Proxy Deadline to receive only the Cash Elected Amount and is thereby deemed to vote in favour of the Plan in respect of such Proven Claims and to receive no other entitlements under the Plan;

"Convenience Class Creditor" means a Person having a Convenience Class Claim;

"Court" means the Ontario Superior Court of Justice (Commercial List) or any appellate court seized with jurisdiction in the CCAA Proceedings, as the case may be;

"Creditor" means any Person asserting an Affected Claim or an Unaffected Claim and may, where the context requires, include the assignee of such Claim or a personal representative, agent, litigation guardian, mandatary, trustee, interim receiver, receiver, receiver and manager, liquidator or other Person acting on behalf of such Person;

"Creditors' Meeting" means the meeting of Affected Creditors to be called and held pursuant to the Meeting Order for the purpose of considering and voting upon the Plan, and includes any adjournment, postponement or rescheduling of such meeting;

"D&O Claim" means any right or claim of any Person against one or more of the Directors and/or Officers howsoever arising, whether or not such right or claim is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, unsecured, perfected, unperfected, present, future, known or unknown, by guarantee, surety or otherwise, and whether or not such right is executory or anticipatory in nature, including any Assessments and any right or ability of any Person to advance a claim for contribution, indemnity or otherwise against any of the Directors and/or Officers with respect to any matter, action, cause or chose in action, whether existing at present or commenced in the future, for which any Director or Officer is alleged to be, by statute or otherwise by law or equity, liable to pay in his or her capacity as a Director or Officer;

"DIP Lender's Charge" means the charge over the DIP Property created by paragraph 60 of the Initial Order, and having the priority provided in paragraphs 63 and 65 of such Order;

"DIP Property" means the Property of the Target Canada Entities (other than Propco and Property LP) described in paragraph 7 of the Initial Order;

"Director" means anyone who is or was or may be deemed to be or have been, whether by statute, operation of law or otherwise, a director or **de facto** director of any of the Target Canada Entities, in such capacity;

"Directors' Charge" means the charge over the Property created by paragraph 40 of the Initial Order, and having the priority provided in paragraphs 63 and 65 of such Order;

"Disputed Claim" means that portion of an Affected Claim of an Affected Creditor in respect of which a Proof of Claim has been filed in accordance with the Claims Procedure Order that has not been finally determined to be a Proven Claim in whole or in part in accordance with the Claims Procedure Order, the Meeting Order, or any other Order made in the CCAA Proceedings;

"Distribution Date" means the day on which a distribution to Creditors of the Target Canada Entities is made, other than the Initial Distribution Date or the Final Distribution Date;

"Effective Time" means 12:01 a.m. on the Plan Implementation Date or such other time on such date as the Target Canada Entities, the Plan Sponsor and the Monitor shall determine or as otherwise ordered by the Court;

"Election/Proxy Deadline" means the deadline for making a Convenience Class Claim Election and for submitting Proxies in accordance with the Meeting Order;

"Employee Priority Claims" means the following claims of Employees:

(a) claims equal to the amounts that such Employees would have been qualified to receive under paragraph 136(1)(d) of the BIA if the Target Canada Entities had become bankrupt on the Filing Date; and

(b) claims for wages, salaries, commissions or compensation for services rendered by them after the Filing Date and on or before the Plan Implementation Date together with, in the case of travelling salespersons, disbursements properly incurred by them in and about the Business during the same period;

"Employee Representative Counsel" means Koskie Minsky LLP, appointed pursuant to paragraph 31 of the Initial Order as counsel for all Employees in the CCAA Proceedings, any proceeding under the BIA or in any other proceeding respecting the insolvency of the Applicants which may be brought before the Court;

"Employee Representatives" means the Employees appointed by the Court pursuant to an Order of the Court dated February 11, 2015 to represent all Employees in the CCAA Proceedings;

"Employee Trust" means the Employee Trust approved pursuant to paragraph 26 of the Initial Order and governed by the Employee Trust Agreement;

"Employee Trust Administrator" means the Monitor, in its capacity as administrator of the Employee Trust;

"Employee Trust Agreement" means the Trust Agreement between the Plan Sponsor, the Monitor and the Employee Trust Trustee dated January 14, 2015, as amended, restated, supplemented or varied from time to time;

"Employee Trust Claims Resolution Order" means the Order of the Court dated October 21, 2015, as amended, restated or varied from time to time, establishing the procedure for resolving disputes by claimants in respect of their entitlement under the Employee Trust;

"Employee Trust Property" means the aggregate amount contributed by the Plan Sponsor (in its capacity as Settlor) to the Employee Trust to be held under the terms of the Employee Trust Agreement together with interest and other revenues generated thereby and any property into which all of the foregoing may be converted less amounts which have been paid or distributed pursuant to the terms of the Employee Trust Agreement (including Trustee Fees (as defined in the Employee Trust Agreement));

"Employee Trust Property Joint Direction" has the meaning ascribed thereto in Section 6.3(v);

"Employee Trust Released Party" has the meaning ascribed thereto in Section 7.1(d);

"Employee Trust Termination Certificate" has the meaning ascribed thereto in Section 6.3(v);

"Employee Trust Trustee" means the Hon. John D. Ground, in his capacity as trustee of the Employee Trust;

"Employees" means all current and former employees of the Target Canada Entities other than Directors and Officers;

"Encumbrance" means any charge, mortgage, lien, pledge, claim, restriction, security interest, security agreement, hypothecation, assignment, deposit arrangement, hypothec, lease, rights of others including without limitation Transfer Restrictions, deed of trust, trust or deemed trust, lien, financing statement, preferential arrangement of any kind or nature whatsoever, including any title retention agreement, or any other arrangement or condition which in substance secures payment or performance of any obligations, action, claim, demand or equity of any nature whatsoever, execution, levy, charge or other financial or monetary claim, whether or not they have attached or been perfected, registered or filed and whether secured, unsecured or otherwise, or other encumbrance, whether created or arising by agreement, statute or otherwise at law, attaching to property, interests or rights and shall be construed in the widest possible terms and principles known under law applicable to such property, interests or rights and whether or not they constitute specific or floating charges as those terms are understood under Applicable Law, including without limiting the generality of the foregoing, the CCAA Charges;

"Equity Claim" has the meaning ascribed thereto in section 2 of the CCAA;

"Excluded Claim" means any:

(a) Claim secured by any of the CCAA Charges;

(b) Claim enumerated in sections 5.1(2) and 19(2) of the CCAA; and

(c) Cash Management Lender Claim;

"Filing Date" means January 15, 2015;

"Final Distribution Date" means such date, after all of the Disputed Claims and disputed Claims against Propco and Property LP have been finally resolved, that the Monitor, in consultation with TCC, shall determine or the Court shall otherwise order;

"Final Order" means a final Order of the Court, the implementation, operation or effect of which shall not have been stayed, varied, vacated or subject to pending appeal and as to which Order any appeal periods relating thereto shall have expired;

"Financial Advisor Subordinated Charge" means the charge over the Property created by paragraph 55 of the Initial

Order, and having the priority provided in paragraphs 63 and 65 of such Order;

"Government **Priority Claims"** means all Claims of Governmental Authorities that are enumerated in section 38(3) of the CCAA in respect of amounts that are outstanding and that are of a kind that could be subject to a demand on or before the Final Distribution Date;

"Governmental Authority" means any government, including any federal, provincial, territorial or municipal government, and any government department, body, ministry, agency, tribunal, commission, board, court, bureau or other authority exercising or purporting to exercise executive, legislative, judicial, regulatory or administrative functions of, or pertaining to, government including without limitation any Taxing Authority;

"GST/HST" means the goods and services tax and harmonized sales tax imposed under the **Excise Tax Act** (Canada), and any equivalent or corresponding tax imposed under any applicable provincial or territorial legislation imposing a similar value added or multi-staged tax;

"Guarantee" means any guarantee, indemnity, surety or similar agreement by a Person to guarantee, indemnify or otherwise hold harmless any Person from or against any Indebtedness, losses, Liabilities or damages of that Person, and excludes all Plan Sponsor Guarantees;

"HBC Entities" means Zellers Inc. and Hudson's Bay Company and their respective successors and assigns and any predecessors in interest to such Persons;

"Indebtedness" means, without duplication:

(a) all debts and liabilities of a Person for borrowed money;

(b) all debts and liabilities of a Person representing the deferred acquisition cost of property and services; and

(c) all Guarantees given by a Person;

"Initial Distribution Date" means a date no more than five (5) Business Days after the Plan Implementation Date or such other date as the Target Canada Entities, the Plan Sponsor and the Monitor may agree;

"Initial Order" has the meaning ascribed thereto in the Recitals;

"Input Tax Credit" means an input tax credit receivable under the *Excise Tax Act* (Canada) or any equivalent or corresponding amount receivable under any applicable provincial or territorial legislation imposing a similar value-added or multi-staged tax, on account of GST/HST paid or payable;

"Intercompany Claim" means any Claim filed by any of the Target Canada Entities, or any of their affiliated companies, partnerships, or other corporate entities, including the Plan Sponsor or any of the Plan Sponsor Subsidiaries in accordance with the terms of the Claims Procedure Order, including the Claims set out on Schedule "A" but excluding any Claim arising through subrogation or assignment;

"Intercompany Claims Report" means the Twentieth Report of the Monitor dated August 31, 2015 providing the Monitor's review of the Intercompany Claims pursuant to and in accordance with paragraph 35 of the Claims Procedure Order;

"IP Assets" means all rights, title and interest of the Target Canada Entities in intellectual property of any type, including the domain names set out in Schedule "B";

"ITA" means the *Income Tax Act* (Canada), R.S.C. 1985, c. 1 (5th Supp.), as amended, and any regulations thereunder;

"KERP" means the Key Employees Retention Plan approved by paragraph 24 of the Initial Order;

"KERP Charge" means the charge over the Property created by paragraph 25 of the Initial Order, and having the

priority provided in paragraphs 63 and 65 of such Order;

"KERP Claim" means a claim of any Person under the KERP;

"Landlord" means any Person (excluding Propco and Property LP) who in its capacity as lessor was a party to a real property lease with TCC;

"Landlord Guarantee Claim" means the rights, remedies and claims of a Landlord against the Plan Sponsor or the HBC Entities arising under a lease, guarantee or indemnity, solely in respect of leases listed on Schedule "D", but excluding however, amounts owing by the Target Canada Entities to the Landlord in respect of its Pre-filing Claim, if any, which amount forms part of a Landlord Guarantee Creditor's Landlord Guarantee Creditor Base Claim Amount;

"Landlord Guarantee Creditor" means a Person holding a Landlord Guarantee Claim solely in respect of leases listed on Schedule "D";

"Landlord Guarantee Creditor Base Claim Amount" means the amount payable to an individual Landlord Guarantee Creditor on account of its Landlord Restructuring Period Claim and its Pre-filing Claim, if any, as consensually agreed to between such Landlord Guarantee Creditor and TCC in accordance with the Claims Procedure Order, payment of which is dealt with in the Landlord Guarantee Creditor Settlement Agreement;

"Landlord Guarantee Creditor Base Claim Cash Pool" means the Cash pool in the aggregate amount equal to the total of the Landlord Guarantee Creditor Base Claim Amounts, being approximately **$140.7 million;**

"Landlord Guarantee Creditor Base Claim Cash Pool Account" means a segregated, interest-bearing trust account established by TCC to hold the Landlord Guarantee Creditor Base Claim Cash Pool on behalf of the Target Canada Entities;

"Landlord Guarantee Creditor Settlement Agreement" means an agreement between the Plan Sponsor and all Landlord Guarantee Creditors to settle and release the Landlord Guarantee Claims on a consensual basis and to support the Plan;

"Landlord Guarantee Enhancement Amount" means the amount payable to an individual Landlord Guarantee Creditor as consensually agreed between the Plan Sponsor and such Landlord Guarantee Creditor pursuant to the Landlord Guarantee Creditor Settlement Agreement;

"Landlord Guarantee Enhancement Cash Pool" means the Cash pool mandated by the Landlord Guarantee Creditor Settlement Agreement in the aggregate amount of **$59,532 million;**

"Landlord Guarantee Enhancement Cash Pool Account" means a segregated, interest-bearing trust account established to hold the Landlord Guarantee Enhancement Cash Pool on behalf of the Plan Sponsor as mandated by the Landlord Guarantee Creditor Settlement Agreement;

"Landlord Non-Guarantee Creditor" means a Person holding a Landlord Restructuring Period Claim other than a Landlord Guarantee Creditor solely in respect of leases listed on Schedule "E";

"Landlord Non-Guarantee Creditor Consent and Support Agreement" means an agreement between TCC and a Landlord Non-Guarantee Creditor to settle the amount of such Landlord's Landlord Restructuring Period Claim and Pre-filing Claim, if any, on a consensual basis in accordance with the Claims Procedure Order and to support the Plan;

"Landlord Non-Guarantee Creditor Equalization Amount" means the amount payable to an individual Landlord Non-Guarantee Creditor as consensually agreed to between such Landlord Non-Guarantee Creditor and TCC in a Landlord Non-Guarantee Creditor Consent and Support Agreement, which in the aggregate shall equal the Landlord Non-Guarantee Creditor Equalization Cash Pool;

"Landlord Non-Guarantee Creditor Equalization Cash Pool" means the Cash pool in the aggregate amount of all of the Landlord Non-Guarantee Creditor Equalization Amounts;

"Landlord Non-Guarantee Creditor Equalization Cash Pool Account" means a segregated, interest-bearing trust account established by TCC to hold the Landlord Non-Guarantee Creditor Equalization Cash Pool;

"Landlord Restructuring Period Claim" means any right or claim of any Landlord against TCC in connection with any Indebtedness, Liability or obligation of any kind whatsoever owed by TCC to such Landlord arising out of the disclaimer, resiliation, termination or breach by TCC, on or after the Filing Date, of any real property lease or other contract or agreement in respect of any real property lease, including a shopping centre lease, whether written or oral, provided that any Landlord whose real property lease was assigned to a Person or returned (subject to any prior settlement agreement to the contrary) to such Landlord in the CCAA Proceedings shall not have a Landlord Restructuring Period Claim;

"Lazard" means Lazard Frères and Co. LLC, Court-appointed financial advisor to TCC in connection with the Real Property Portfolio Sales Process;

"Liabilities" means all Indebtedness, obligations and other liabilities of a Person whether absolute, accrued, contingent, fixed or otherwise, or whether due or to become due;

"Liquidation Agent" means the contractual joint venture composed of Merchant Retail Solutions ULC, Gordon Brothers Canada ULC and GA Retail Canada, ULC, in its capacity as agent pursuant to the Agency Agreement between the agent and TCC, Target Canada Pharmacy Corp. and Target Canada Pharmacy (Ontario) Corp. dated January 29, 2015, as amended, restated or varied from time to time, in connection with the Liquidation Sale;

"Liquidation Agent's Charge and Security Interest" means the charge over a portion of the Property created by, and as more particularly described in, paragraph 19 of the Approval Order - Agency Agreement dated February 4, 2015, and having the priority provided in paragraphs 20 and 22 of such Order;

"Liquidation Sale" means the sale of the Target Canada Entities' inventory, furniture, fixtures and equipment that was approved by the Court pursuant to an Order dated February 4,2015;

"LPA" means the Ontario *Limited Partnerships Act*, R.S.O. 1990, c. L. 16, as amended;

"Meeting Materials" has the meaning ascribed thereto in the Meeting Order;

"Meeting Order" means the Order, substantially in the form set out in Schedule "C" (including all schedules and appendices thereto), to be made by the Court under the CCAA that, among other things, sets the date for the Creditors' Meeting and approves the Meeting Materials, as same may be amended, restated or varied from time to time;

"Monitor" means A&M, in its capacity as Court-appointed monitor of the Target Canada Entities and not in its personal capacity;

"Monitor's Plan Completion Certificate" means the certificate substantially in the form to be attached to the Sanction and Vesting Order to be filed by the Monitor with the Court upon completion of its duties under the Plan;

"Monitor's Plan Implementation Date Certificate" means the certificate substantially in the form to be attached to the Sanction and Vesting Order to be filed by the Monitor with the Court, declaring that all of the Conditions Precedent to implementation of the Plan have been satisfied or waived;

"NE1" means Nicollet Enterprise 1 S.à.r.l., a company formed under Luxembourg law and the sole shareholder of TCC;

"NE1 Intercompany Claim" means the Intercompany Claim 1 filed by NE1 pursuant to the Claims Procedure Order against TCC in an amount of $3,068,729,438 and not adjusted by the Monitor in the Intercompany Claims Report as set out in Schedule "A" and which Intercompany Claim was subordinated pursuant to a subordination and postponement agreement as of January 12, 2015, which subordination and postponement was confirmed in the terms of the Initial Order;

"Northwest" means Northwest Atlantic (Canada) Inc., real estate advisor to TCC in connection with the Real Property

Portfolio Sales Process;

"Notice of Final Distribution" means a notice to Affected Creditors to be published by the Monitor at least 30 days in advance of the Final Distribution Date in The Globe and Mail (National Edition), La Presse and The Wall Street Journal notifying Affected Creditors of the Final Distribution Date, substantially in the form to be attached to the Sanction and Vesting Order;

"NSCA" means the Nova Scotia *Companies Act*, R.S.N. 1989, c. 81, as amended;

"Officer" means anyone who is or was or may be deemed to be or have been, whether by statute, operation of law or otherwise, an officer or *de facto* officer of any of the Target Canada Entities, in such capacity;

"Order" means any order of the Court, or any order, directive, judgment, decree, injunction, decision, ruling, award or writ of any Governmental Authority;

"Person" means any individual, firm, corporation, limited or unlimited liability company, general or limited partnership, association, trust (including a real estate investment trust), unincorporated organization, joint venture, government or any agency or instrumentality thereof or any other entity;

"Pharmacists' Representative Counsel" means Sutts, Strosberg LLP, appointed pursuant to an Endorsement of the Court dated February 18, 2015, as clarified by Order of the Court dated February 12, 2016, as representative counsel in the CCAA Proceedings for the pharmacist franchisees who operated Target-branded retail pharmacies in TCC stores across Canada;

"Pharmacy Purchaser" means the Person who shall have been selected by the Target Canada Entities, in consultation with the Monitor, as the successful bidder for the Pharmacy Shares;

"Pharmacy Shares" means all of the issued and outstanding shares of Target Canada Pharmacy (Ontario) Corp.;

"Pharmacy Share Sale Agreement" means the binding share sale agreement between the Pharmacy Purchaser and TCC providing for the sale of the Pharmacy Shares to the Pharmacy Purchaser free and clear of all Encumbrances conditional on, *inter alia*, the issuance of the Pharmacy Share Sale Approval and Vesting Order, the Sanction and Vesting Order and the implementation of this Plan;

"Pharmacy Share Sale Approval and Vesting Order" means the Order to be sought by the Applicants approving the Pharmacy Share Sale Agreement and vesting all of TCC's right, title and interest in and to the Pharmacy Shares absolutely in the Pharmacy Purchaser free and clear of all Encumbrances;

"Plan" means this amended and restated joint plan of compromise and arrangement under the CCAA, including the Schedules hereto, as amended, supplemented or replaced from time to time;

"Plan Implementation Date" means the Business Day or Business Days on which all of the Conditions Precedent to the implementation of the Plan have been fulfilled or, to the extent permitted pursuant to the terms and conditions of the Plan, waived, as evidenced by the Monitor's Plan Implementation Date Certificate to be filed with the Court;

"Plan Sanction Date" means the date that the Sanction and Vesting Order issued by the Court becomes a Final Order;

"Plan Sponsor" means Target Corporation, a corporation incorporated under Minnesota law;

"Plan Sponsor GST/HST Contribution Amounts" has the meaning ascribed thereto in Section 5.17;

"Plan Sponsor Guarantee" means any guarantee, indemnity, covenant or surety granted by the Plan Sponsor or the HBC Entities in favour of a Landlord Guarantee Creditor as set out on Schedule "D", and for greater certainty including the Plan Sponsor's or the HBC Entities' guarantee in respect of the real property leases identified in Schedule "D";

"Plan Sponsor (Propco) Intercompany Claim" means the Intercompany Claim 4A filed by the Plan Sponsor pursuant to the Claims Procedure Order against Propco in an amount of **US$89,079,107** and not adjusted by the Monitor in the

Intercompany Claims Report as set out in Schedule "A";

"Plan Sponsor Propco Recovery Limit" means an amount equal to **$23,427,369;**

"Plan Sponsor Propco Recovery Limit Reserve" means a Cash reserve in an amount equal to the Plan Sponsor Propco Recovery Limit to be established by TCC for the benefit of Plan Sponsor from the Propco Cash Pool for distribution to the Plan Sponsor in accordance with the Plan;

"Plan Sponsor Propco Recovery Limit Reserve Account" means a segregated interest-bearing trust account established by TCC to hold the Plan Sponsor Propco Recovery Limit Reserve on behalf of Plan Sponsor;

"Plan Sponsor Released Party" has the meaning ascribed thereto in Section 7.1(c);

"Plan Sponsor Subrogated Claim" means any direct or indirect Claim of the Plan Sponsor against any of the Target Canada Entities arising from subrogation or assignment, but for greater certainty excluding any Plan Sponsor subrogated Claims arising as a result of payments to Landlord Guarantee Creditors of their respective Landlord Guarantee Enhancement Amounts, payments to Landlord Non-Guarantee Creditors of their respective Landlord Non-Guarantee Creditor Equalization Amounts and any Cash Management Lender Claim assigned to the Plan Sponsor or in respect of which the Plan Sponsor has a subrogated claim;

"Plan Sponsor Subsidiaries" means all Plan Sponsor subsidiary entities, including corporations and partnerships, other than the Target Canada Entities;

"Plan Transactions" has the meaning ascribed thereto in Section 6.3;

"Plan Transaction Steps" means the steps or transactions considered necessary or desirable to give effect to the transactions contemplated in the Plan, including those set out in Sections 6.2 and 6.3, and **"Plan Transaction Step"** means any individual transaction step;

"Post-Filing Trade Payables" means post-Filing Date trade payables (excluding for greater certainty any Tax Claims) that were incurred by the Target Canada Entities (a) after the Filing Date and before the Plan Implementation Date; (b) in the ordinary course of business; and (c) in compliance with the Initial Order and other Orders issued in connection with the CCAA Proceedings;

"Pre-filing Claim" means any right or claim of any Person against any of the Target Canada Entities, whether or not asserted, in connection with any Indebtedness, Liability or obligation of any kind whatsoever of any such Target Canada Entity in existence on the Filing Date, whether or not such right or claim is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, unsecured, perfected, unperfected, present, future, known, or unknown, by guarantee, surety or otherwise, and whether or not such right is executory or anticipatory in nature, including any Assessments and any right or ability of any Person to advance a claim for contribution or indemnity or otherwise against any of the Target Canada Entities with respect to any matter, action, cause or chose in action, whether existing at present or commenced in the future, which Indebtedness, Liability or obligation is based in whole or in part on facts that existed prior to the Filing Date, including for greater certainty any claim against any of the Target Canada Entities for indemnification by any Director or Officer in respect of a D&O Claim (but excluding any such claim for indemnification that is covered by the Directors' Charge);

"Principal Claim" has the meaning ascribed thereto in Section 3.9;

"Pro Rata Share" means the fraction that is equal to (a) the amount of the Proven Claim of an Affected Creditor who is not a Convenience Class Creditor or a Landlord Guarantee Creditor, divided by (b) the aggregate amount of all Proven Claims held by Affected Creditors who are not Convenience Class Creditors or Landlord Guarantee Creditors;

"Proof of Claim" means the form that was to be completed by a Creditor setting forth its applicable Claim and filed by the Claims Bar Date or such later date as the Monitor may have agreed to in its sole discretion, pursuant to the Claims Procedure Order;

"Propco" means Target Canada Property LLC, a limited liability company incorporated under Minnesota law;

"Propco Cash" means all Cash of Propco as at the Plan Implementation Date;

"Propco Cash Pool" means the Cash pool comprised of the Propco Cash;

"Propco Cash Pool Account" means a segregated interest-bearing trust account established by TCC to hold the Propco Cash Pool on behalf of Propco;

"Propco Creditor" means a Creditor asserting a Claim against Propco;

"Propco Disputed Claims Reserve" means the Cash Reserve to be established on the Plan Implementation Date by TCC for the benefit of Propco in an amount equal to the face value of disputed Claims of the Propco Creditors and the Property LP Creditors (excluding Landlord Restructuring Period Claims but not excluding any disputed Property LP Unaffected Claims held by Landlords) and as approved by the Court under the Sanction and Vesting Order, which Cash Reserve shall be held by TCC in the Propco Disputed Claims Reserve Account on behalf of Propco for distribution in accordance with the Plan;

"Propco Disputed Claims Reserve Account" means a segregated interest-bearing trust account established by TCC to hold the Propco Disputed Claims Reserve;

"Propco Intercompany Claim" means the Intercompany Claim 6B filed by Propco pursuant to the Claims Procedure Order against TCC in an amount of **$1,911,494,242** and adjusted downwards by the Monitor in the Intercompany Claims Report to an amount of **$1,356,756,051** as set out in Schedule "A";

"Propco (Post-filing TCC) Intercompany Claim" means the Intercompany Claim 6C filed by Propco pursuant to the Claims Procedure Order against TCC in a gross amount of **$43,651,173** and adjusted downwards by the Monitor in the Intercompany Claims Report to a gross amount of **$43,526,186** as set out in Schedule "A";

"Propco (Pre-filing TCC) Intercompany Claim" means the Intercompany Claim 6A filed by Propco pursuant to the Claims Procedure Order against TCC in a gross amount of **$46,873,620** and adjusted downwards by the Monitor in the Intercompany Claims Report to a gross amount of $45,852,897 as set out in Schedule "A";

"Propco Unaffected Claim" means a proven Claim of a Propco Creditor but excluding the balance of the Property LP (Propco) Intercompany Claim in excess of the Contributed Claim Amount, the TCC (Pre-filing Propco) Intercompany Claim, the TCC (Post-filing Propco) Intercompany Claim and the Plan Sponsor (Propco) Intercompany Claim;

"Propco Unaffected Creditor" means a Creditor who has a Propco Unaffected Claim;

"Property" means all current and future assets, undertakings and properties of the Target Canada Entities, of every nature and kind whatsoever, and wherever situate, including all Cash or other proceeds thereof;

"Property LP" means Target Canada Property LP, a limited partnership formed under the LPA;

"Property LP (Propco) Intercompany Claim" means the Intercompany Claim 5A filed by Property LP pursuant to the Claims Procedure Order against Propco in an amount of $1,449,577,927 and not adjusted by the Monitor in the Intercompany Claims Report as set out in Schedule "A";

"Property LP Creditor" means a Creditor asserting a Claim against Property LP;

"Property LP Unaffected Claim" means a proven Claim of a Property LP Creditor;

"Property LP Unaffected Creditor" means a Creditor who has a Property LP Unaffected Claim;

"Proven Claim" means a Claim of an Affected Creditor finally determined for distribution purposes in accordance with the Claims Procedure Order and the Plan;

"Proxy" means the proxy form enclosed with the Meeting Materials to be delivered to or otherwise made available to the Affected Creditors in accordance with the Meeting Order;

"Real Property Portfolio Sales Process" means the sales process conducted in respect of the Target Canada Entities' leased and owned real property assets, which sales process was approved by the Court pursuant to an Order dated February 11, 2015;

"Released Parties" means those Persons who are released pursuant to Section 7.1, including the Target Canada Released Parties, the Plan Sponsor Released Parties, the Third Party Released Parties and the Employee Trust Released Parties;

"Required Majority" means a majority in number of Affected Creditors who represent at least two-thirds in value of the Voting Claims of such Affected Creditors who actually vote on the Resolution (in person or by Proxy) at the Creditors' Meeting or who were deemed to vote on the Resolution in accordance with the Plan and the Meeting Order;

"Resolution" means the resolution approving the Plan presented to the Affected Creditors for consideration at the Creditors' Meeting;

"Restructuring Period Claim" means any right or claim of any Person against any of the Target Canada Entities in connection with any Indebtedness, Liability or obligation of any kind whatsoever owed by any such Target Canada Entity to such Person arising out of the restructuring, assignment, disclaimer, resiliation, termination or breach by such Target Canada Entity, on or after the Filing Date, of any contract, lease or other agreement, whether written or oral, excluding a Landlord Restructuring Period Claim;

"Sanction and Vesting Order" means the Order to be sought by the Applicants from the Court as contemplated under the Plan which, *inter alia*, approves and sanctions the Plan and the transactions contemplated thereunder;

"Stay of Proceedings" means the stay of proceedings created by the Initial Order as amended and extended by further Orders of the Court from time to time;

"Subordinated Intercompany Claims" means only the NE1 Intercompany Claim, the Propco Intercompany Claim, the Propco (Pre-filing TCC) Intercompany Claim and the Propco (Post-filing TCC) Intercompany Claim;

"Target Canada Entities" has the meaning ascribed thereto in the Recitals;

"Target Canada Released Party" has the meaning ascribed thereto in Section 7.1(a);

"Tax" means any and all taxes including all income, sales, use, goods and services, harmonized sales, value added, capital gains, alternative, net worth, transfer, profits, withholding, payroll, employer health, excise, franchise, real property, and personal property taxes and other taxes, customs, duties, fees, levies, imposts and other assessments or similar charges in the nature of a tax, including Canada Pension Plan and provincial pension plan contributions, employment insurance and unemployment insurance payments and workers' compensation premiums, together with any instalments with respect thereto, and any interest, penalties, fines, fees, other charges and additions with respect thereto;

"Tax Claims" means any claims of any Taxing Authorities against the Target Canada Entities arising on and after the Plan Implementation Date;

"Tax Obligation" means any amount of Tax owing by a Person to a Taxing Authority;

"Taxing Authorities" means Her Majesty the Queen in right of Canada, Her Majesty the Queen in right of any province or territory of Canada, any municipality of Canada, the Canada Revenue Agency, the Canada Border Services Agency, any similar revenue or taxing authority of Canada and each and every province or territory of Canada and any political subdivision thereof and any Canadian or foreign government, regulatory authority, government department, agency, commission, bureau, minister, court, tribunal or body or regulation making entity exercising taxing authority or power, and **"Taxing Authority"** means any one of the Taxing Authorities;

"TCC" means Target Canada Co., an unlimited liability company incorporated under the NSCA;

"TCC Cash Pool" means the Cash pool comprised of all Cash of the Target Canada Entities (excluding Propco) and including the net proceeds of the liquidation of TCC's Property;

"TCC Cash Pool Account" means a segregated interest-bearing trust account established by TCC to hold the TCC Cash Pool on behalf of the Target Canada Entities;

"TCC Disputed Claims Reserve" means the Cash Reserve to be established on the Plan Implementation Date by TCC from the TCC Cash Pool in an amount equal to the expected distributions to be made to all Creditors with Disputed Claims (based on the face value of each Disputed Claim), and as approved by the Court under the Sanction and Vesting Order, which Cash Reserve shall be held by TCC in the TCC Disputed Claims Reserve Account for distribution in accordance with the Plan;

"TCC Disputed Claims Reserve Account" means a segregated interest-bearing trust account established by TCC to hold the TCC Disputed Claims Reserve;

"TCC (Post-filing Propco) Intercompany Claim" means the Intercompany Claim 7B filed by TCC pursuant to the Claims Procedure Order against Propco in an amount of $6,303,621 and adjusted upwards by the Monitor in the Intercompany Claims Report to an amount of $6,966,363 as set out in Schedule "A";

"TCC (Pre-filing Propco) Intercompany Claim" means the Intercompany Claim 7A filed by TCC pursuant to the Claims Procedure Order against Propco in an amount of **$19,619,511** and adjusted downwards by the Monitor in the Intercompany Claims Report to an amount of **$11,620,369** as set out in Schedule "A";

"TCC Secured Construction Lien Claim" means a proven Claim against TCC in respect of amounts secured by a perfected construction lien pursuant to Applicable Law against a leasehold interest of TCC that was assigned pursuant to the Real Property Portfolio Sales Process;

"Third Party Released Party" has the meaning ascribed thereto in Section 7.1(b);

"Transfer Restrictions" means any and all restrictions on the transfer of shares, limited partnership or other units or interests in real property including rights of first refusal, rights of first offer, shotgun rights, purchase options, change of control consent rights, puts or forced sales provisions or similar rights of shareholders or lenders in respect of such interests;

"Unaffected Claim" means: (a) an Excluded Claim; (b) a claim in respect of the Administrative Reserve Costs; (c) a Propco Unaffected Claim; (d) a Property LP Unaffected Claim; (e) a claim in respect of a Plan Sponsor Guarantee, including a Landlord Guarantee Claim; and (f) a TCC Secured Construction Lien Claim;

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

"Unsecured Creditors' Class" has the meaning ascribed thereto in Section 3.1;

"Voting Claim" means the amount of the Affected Claim of an Affected Creditor as finally determined for voting purposes in accordance with the Claims Procedure Order and the Meeting Order entitling such Affected Creditor to vote at the Creditors' Meeting in accordance with the provisions of the Meeting Order, the Plan and the CCAA, and includes, for greater certainty, a Proven Claim;

"Website" means www.alvarezandmarsal.com/targetcanada; and

"Withholding Obligation" has the meaning ascribed thereto in Section 5.16(c).

1.2 Certain Rules of Interpretation

For the purposes of the Plan:

(a) any reference in the 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 the Plan to an Order or an existing document or exhibit filed or to be filed means such Order, document or exhibit as it may have been or may be amended, restated or varied from time to time;

(c) unless otherwise specified, all references to currency and to "$" or "Cdn$" are to Canadian dollars;

(d) the division of the Plan into "Articles" and "Sections" and the insertion of a Table of Contents are for convenience of reference only and do not affect the construction or interpretation of the Plan, nor are the descriptive headings of "Articles" and "Sections" otherwise intended as complete or accurate descriptions of the content thereof;

(e) references in the Plan to "Articles", "Sections", "Subsections" and "Schedules" are references to Articles, Sections, Subsections and Schedules of or to the Plan;

(f) 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 the Plan or a Schedule hereto to such Person (or Persons) or circumstances as the context otherwise permits;

(g) 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;

(h) unless otherwise provided, any reference to a statute or other enactment of parliament or a legislature 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) the terms "the Plan", "hereof, "herein", "hereto", "hereunder" and similar expressions shall be deemed to refer generally to the Plan and not to any particular "Article", "Section" or other portion of the Plan and include any documents supplemental hereto; and

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

1.3 Time

For purposes of the Plan, unless otherwise specified, all references to time herein and in any document issued pursuant hereto mean prevailing local time in Toronto, Ontario, Canada, unless otherwise stipulated.

1.4 Date and Time for any Action

For purposes of the Plan:

(a) In the event that any date on which any action is required to be taken under the Plan by any Person is not a Business Day, that action shall be required to be taken on the next succeeding day which is a Business Day, and any reference to an event occurring on a Business Day shall mean prior to 5:00 p.m. on such Business Day; and

(b) 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.

1.5 Successors and Assigns

The Plan shall be binding upon and shall enure to the benefit of the heirs, administrators, executors, legal personal representatives, liquidators, receivers, trustees in bankruptcy, and successors and assigns of any Person or party named or referred to in the Plan.

1.6 Governing Law

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

1.7 Currency

Unless specifically provided for in the Plan or the Sanction and Vesting Order, for the purposes of voting or distribution under the Plan, a Claim shall be denominated in Canadian dollars and all payments and distributions to Affected Creditors on account of their Proven Claims, to Propco Unaffected Creditors on account of their Propco Unaffected Claims, to Property LP Unaffected Creditors on account of their Property LP Unaffected Claims and to Landlord Guarantee Creditors on account of their Landlord Guarantee Enhancement Amounts shall be made in Canadian dollars. In accordance with paragraph 6 of the Claims Procedure Order, any Claim in a currency other than Canadian dollars must be converted to Canadian dollars, and any such amount shall be regarded as having been converted at the noon spot rate of exchange quoted by the Bank of Canada for exchanging such currency to Canadian dollars as at the Filing Date, which rate is US*$1:Cdn$1.1932*.

1.8 Schedules

The following are the Schedules to the Plan, which are incorporated by reference into the Plan and form a part of it:

Schedule “A”	Intercompany Claims
Schedule “B”	Domain Names
Schedule “C”	Meeting Order
Schedule “D”	Landlord Guarantee Creditors
Schedule “E”	Landlord Non-Guarantee Creditors
Schedule “F”	Employee Trust Termination Certificate
Schedule “G”	Employee Trust Property Joint Direction
Schedule “H”	Co-Tenancy Stay Schedule

Article 2 Purpose and Effect of the Plan

2.1 Purpose of Plan

The purpose of the Plan is to:

(a) complete the controlled, orderly and timely wind down of certain of the Target Canada Entities;

(b) effect a compromise, settlement and payment of all Proven Claims as finally determined for voting and distribution purposes pursuant to the Claims Procedure Order and the Meeting Order;

(c) obtain third party releases of the Plan Sponsor and Plan Sponsor Subsidiaries, among others, other than in respect of the Landlord Guarantee Claims; and

(d) comply with the January 15 Endorsement, avoid protracted litigation and effect a global resolution of the CCAA Proceedings,

in the expectation that all Persons with an economic interest in the Business will derive a greater benefit from the implementation of the Plan than would result from a bankruptcy of the Target Canada Entities.

2.2 Persons Affected

The Plan provides for a wind down of certain of the Target Canada Entities and a compromise of the Affected Claims. The

Plan will become effective at the Effective Time on the Plan Implementation Date. On the Plan Implementation Date, the Affected Claims will be fully and finally compromised, released, settled and discharged to the extent provided for under the Plan. The Plan shall be binding on and shall enure to the benefit of the Target Canada Entities, the Affected Creditors, the Released Parties and all other Persons named or referred to in, receiving the benefit of or subject to, the Plan.

2.3 Persons Not Affected

For greater certainty, the Plan does not affect the Unaffected Creditors with respect to and to the extent of their Unaffected Claims, including for greater certainty the Landlord Guarantee Creditors with respect to and to the extent of their Landlord Guarantee Claims. Nothing in the Plan shall affect any Target Canada Entity'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.

2.4 Subordinated Intercompany Claims

Notwithstanding anything to the contrary in the Plan, no Person shall be entitled to any distributions under the Plan in respect of its Subordinated Intercompany Claim unless and until all of the Affected Creditors (including Affected Creditors that are holders of non-subordinated Intercompany Claims and holders of Plan Sponsor Subrogated Claims) have received aggregate distributions under the Plan totalling the full amount of their respective Proven Claims.

2.5 Plan Sponsor Agreement

Plan Sponsor shall enter into an agreement with the Target Canada Entities to be bound by the Plan and the Landlord Guarantee Creditor Settlement Agreement and to perform all of its obligations hereunder and thereunder, conditional on the occurrence of the Plan Implementation Date, including without limitation delivering *$25,451 million* to TCC to be deposited to the Landlord Guarantee Enhancement Cash Pool pursuant to Section 4.3 and contributing *$7,521* million to TCC for purposes of TCC establishing the Landlord Non-Guarantee Creditor Equalization Cash Pool pursuant to Section 4.8. For greater certainty, these payments do not give rise to a subrogated claim by the Plan Sponsor.

2.6 Equity Claims

All Persons holding Equity Claims shall not be entitled to vote at or attend the Creditors' Meeting, and shall not receive any distributions under the Plan or otherwise receive any other compensation in respect of their Equity Claims.

Article 3 Classification of Creditors, Voting Claims and Related Matters

3.1 Classification of Creditors

For the purposes of considering, voting on and receiving distributions under the Plan, the Affected Creditors shall constitute a single class, the *"Unsecured Creditors' Class"*.

3.2 Claims of Affected Creditors/Convenience Class Creditors

(a) Affected Creditors with Proven Claims that are less than or equal to *$25,000* in the aggregate shall be deemed to vote in favour of the Plan and shall be entitled to receive cash distributions equivalent to the amount of their Proven Claims and no further distributions under the Plan.

(b) Affected Creditors with Proven Claims in excess of *$25,000* who deliver a duly completed and executed Convenience Class Claim Election to the Monitor by the Election/Proxy Deadline, shall be treated for all purposes as Convenience Class Creditors and shall be deemed to vote in favour of the Plan and shall be entitled to receive only the Cash Elected Amount and no further distributions under the Plan.

(c) Affected Creditors who are not Convenience Class Creditors (including Affected Creditors with Disputed Claims which have become Proven Claims) shall be entitled to vote their Voting Claims at the Creditors' Meeting in respect of the Plan and shall be entitled to receive distributions on their Proven Claims pursuant to the Plan.

3.3 Unaffected Claims

Unaffected Claims shall not be compromised under the Plan. No holder of an Unaffected Claim shall:

(a) be treated as a Convenience Class Creditor;

(b) be entitled to vote on the Plan or attend at any Creditors' Meeting in respect of such Unaffected Claim; or

(c) be entitled to or receive any distributions pursuant to the Plan in respect of such Unaffected Claim, unless specifically provided for under and pursuant to the Plan.

3.4 Priority Claims

The Employee Priority Claims and the Government Priority Claims, if any, shall be paid on or after the Plan Implementation Date from the Administrative Reserve Account pursuant to and in accordance with Section 6.3 of the Plan, the Sanction and Vesting Order and the CCAA.

3.5 Creditors' Meeting

The Creditors' Meeting shall be held in accordance with the Plan, the Claims Procedure Order, the Meeting Order and any further Order of the Court. The only Persons entitled to attend the Creditors' Meeting shall be representatives of the Target Canada Entities and the Plan Sponsor and their respective legal counsel and advisors, the Monitor and its legal counsel and advisors, the Pharmacists' Representative Counsel, the Employee Representative Counsel, the Employee Trust Trustee and his legal counsel and all other Persons, including the holders of Proxies, entitled to vote at the Creditors' Meeting and their respective legal counsel and advisors.

3.6 Voting

(a) Each Affected Creditor in the Unsecured Creditors' Class who is entitled to vote at the Creditors' Meeting, pursuant to and in accordance with the Claims Procedure Order, the Meeting Order, the Plan and the CCAA, shall be entitled to one vote equal to the dollar value of its Affected Claim determined as a Voting Claim.

(b) Convenience Class Creditors shall be deemed to vote in favour of the Plan.

(c) Holders of Intercompany Claims shall not be entitled to vote on the Plan.

(d) The Plan Sponsor shall not be entitled to vote on the Plan in respect of its Plan Sponsor Subrogated Claims.

(e) The Plan Sponsor shall not be entitled to vote on the Plan in respect of any amounts contributed to the Landlord Guarantee Enhancement Cash Pool and to the Landlord Non-Guarantee Creditor Equalization Cash Pool.

(f) The Plan Sponsor shall not be entitled to vote on the Plan in respect of any Cash Management Lender Claims (which constitute Unaffected Claims).

3.7 Procedure for Valuing Voting Claims

The procedure for valuing Voting Claims and resolving disputes and entitlements to voting shall be as set forth in the Claims Procedure Order, the Meeting Order, the Plan and the CCAA. The Monitor, in consultation with the Target Canada Entities, shall have the right to seek the assistance of the Court in valuing any Voting Claim in accordance with the Meeting Order and the Plan, if required, and to ascertain the result of any vote on the Plan.

3.8 Approval by Creditors

In order to be approved, the Plan must receive the affirmative vote of the Required Majority of the Unsecured Creditors' Class.

3.9 Guarantees and Similar Covenants

No Person who has a Claim under a Guarantee in respect of any Claim which is compromised under the Plan (such compromised Claim being the *"Principal Claim"*), or who has any right to or claim over in respect of or to be subrogated to the rights of any Person in respect of the Principal Claim, shall:

(a) be entitled to any greater rights as against the Target Canada Entities than the Person holding the Principal Claim;

(b) be entitled to vote on the Plan to the extent that the Person holding the Principal Claim is voting on the Plan; or

(c) be entitled to receive any distribution under the Plan to the extent that the Person holding the Principal Claim is receiving a distribution.

Article 4 Propco Cash Pool, TCC Cash Pool, Cash Reserves, and Landlord Cash Pools

4.1 Creation of the Propco Cash Pool

On the Plan Implementation Date, Propco shall deliver to TCC by way of wire transfer to the Propco Cash Pool Account (in accordance with the wire transfer instructions provided by TCC at least three (3) Business Days prior to the Plan Implementation Date) the aggregate of all of its Cash, which Cash shall be held by TCC on behalf of Propco as the Propco Cash Pool.
TCC shall hold the Propco Cash Pool in the Propco Cash Pool Account and shall distribute such Cash in the Propco Cash Pool Account, net of the Propco Disputed Claims Reserve, in accordance with Sections 5.2, 5.3, 5.4 and 5.5 of the Plan.

4.2 The Propco Disputed Claims Reserve

On the Plan Implementation Date, TCC shall transfer from the Propco Cash Pool Account the Cash necessary to establish the Propco Disputed Claims Reserve for the benefit of Propco. TCC shall hold the Propco Disputed Claims Reserve in the Propco Disputed Claims Reserve Account on behalf of Propco for the purpose of paying amounts to Propco Creditors and Property LP Creditors in respect of their disputed Claims against Propco or Property LP which have become Propco Unaffected Claims or Property LP Unaffected Claims, in whole or in part, in accordance with the Plan.
TCC shall distribute such Cash in the Propco Disputed Claims Reserve Account in accordance with Sections 5.4 and 5.5 of the Plan.

4.3 Creation of the Landlord Guarantee Enhancement Cash Pool

Two (2) Business Day prior to the Plan Implementation Date, the Plan Sponsor shall deliver *$25.451 million* to TCC by way of wire transfer (in accordance with the wire transfer instructions provided by TCC at least five (5) Business Days prior to the Plan Implementation Date), which amount TCC shall hold in trust for the Plan Sponsor and shall deposit into the Landlord Guarantee Enhancement Cash Pool Account for the benefit of the Plan Sponsor on the Plan Implementation Date. On the Initial Distribution Date, the Plan Sponsor shall direct and shall be deemed to direct TCC to deposit for the benefit of the Plan Sponsor *$34.081 million* from the distributions payable under Section 5.3 of the Plan into the Landlord Guarantee Enhancement Cash Pool Account in accordance with Section 5.3 of the Plan.
TCC shall hold the Landlord Guarantee Enhancement Cash Pool in the Landlord Guarantee Enhancement Cash Pool Account on behalf of the Plan Sponsor in accordance with Section 5.10 of the Plan for the purpose of satisfying the Plan Sponsor's obligations to pay the Landlord Guarantee Enhancement Amounts in accordance with Section 2.5 of the Plan.

4.4 The Plan Sponsor Propco Recovery Limit Reserve

The Plan Sponsor Propco Recovery Limit Reserve shall be funded in accordance with Section 5.3 up to a maximum amount equal to the Plan Sponsor Propco Recovery Limit.
TCC shall distribute such Cash in the Plan Sponsor Propco Recovery Limit Reserve Account for the account of Propco in

accordance with Section 5.6 of the Plan.

4.5 Creation of the TCC Cash Pool

On the Plan Implementation Date, the Target Canada Entities (other than TCC and Propco) shall deliver to TCC by way of wire transfer (in accordance with the wire transfer instructions provided by TCC at least three (3) Business Days prior to the Plan Implementation Date) the aggregate of all of their Cash, if any, which Cash, together with TCC's Cash, shall be held by TCC on behalf of the Target Canada Entities as the TCC Cash Pool.
TCC shall hold the TCC Cash Pool in the TCC Cash Pool Account and shall distribute such Cash in the TCC Cash Pool Account, net of the Administrative Reserve, the TCC Disputed Claims Reserve, the Landlord Guarantee Creditor Base Claim Cash Pool and the Landlord Non-Guarantee Creditor Equalization Cash Pool, in accordance with Sections 5.7, 5.11 and 5.12 of the Plan.

4.6 The Administrative Reserve

On the Plan Implementation Date, TCC shall transfer from the TCC Cash Pool Account the Cash necessary to establish the Administrative Reserve.
TCC shall hold the Administrative Reserve in the Administrative Reserve Account for the purpose of paying the Administrative Reserve Costs in accordance with the Plan and shall distribute any remaining balance in the Administrative Reserve Account in accordance with Section 5.12 of the Plan.

4.7 The TCC Disputed Claims Reserve

On the Plan Implementation Date, TCC shall transfer from the TCC Cash Pool Account the Cash necessary to establish the TCC Disputed Claims Reserve. TCC shall hold the TCC Disputed Claims Reserve in the TCC Disputed Claims Reserve Account for the purpose of paying amounts to Affected Creditors in respect of their Disputed Claims which have become Proven Claims, in whole or in part, in accordance with the Claims Procedure Order and the Plan.
As Disputed Claims are resolved by the Monitor, TCC shall at the direction of the Monitor transfer amounts from the TCC Disputed Claims Reserve Account to the TCC Cash Pool Account, with any final balance remaining in the TCC Disputed Claims Reserve Account (once all Disputed Claims have been finally determined), including any interest thereon, to be contributed by TCC to the TCC Cash Pool Account for distribution to Affected Creditors with Proven Claims pursuant to and in accordance with Section 5.12 the Plan.

4.8 Landlord Non-Guarantee Creditor Equalization Cash Pool

Two (2) Business Days prior to the Plan Implementation Date, the Plan Sponsor shall deliver *$7.521 million* to TCC by way of wire transfer (in accordance with the wire transfer instructions provided by TCC at least five (5) Business Days prior to the Plan Implementation Date), which amount TCC shall hold in trust for the benefit of the Plan Sponsor, and which shall on the Plan Implementation Date be deemed to be contributed by the Plan Sponsor to TCC, and which shall then be deposited by TCC into the Landlord Non-Guarantee Creditor Equalization Cash Pool.
TCC shall hold the Landlord Non-Guarantee Creditor Equalization Cash Pool in the Landlord Non-Guarantee Creditor Equalization Cash Pool Account in accordance with Section 5.8 of the Plan for the purpose of paying the Landlord Non-Guarantee Creditor Equalization Amounts in accordance with Section 5.8 of the Plan.

4.9 Landlord Guarantee Creditor Base Claim Cash Pool

On the Plan Implementation Date, TCC shall transfer from the TCC Cash Pool Account the Cash necessary to establish the Landlord Guarantee Creditor Base Claim Cash Pool. TCC shall hold the Landlord Guarantee Creditor Base Claim Cash Pool in the Landlord Guarantee Creditor Base Claim Cash Pool Account for the purpose of paying the Landlord Guarantee Creditor Base Claim Amounts in accordance with Section 5.9 of the Plan.

Article 5 Provisions Regarding Distributions and Disbursements

All distributions and disbursements to be effected pursuant to the Plan shall be made pursuant to this Article 5 and shall occur in the manner set out below under the supervision of the Monitor.

Notwithstanding any other provisions of the Plan, no distributions or transfers of Cash shall be made by TCC with respect to all or any portion of a Disputed Claim, all or any portion of a disputed Claim against Propco or Property LP or all or any portion of a disputed TCC Secured Construction Lien Claim unless and only to the extent that such Disputed Claim has become a Proven Claim, or such disputed Claim against Propco or Property LP has become a Propco Unaffected Claim or Property LP Unaffected Claim, as applicable, or such disputed TCC Secured Construction Lien Claim has become a proven Unaffected Claim, in whole or in part.

5.1 Subordination in respect of Propco and Property LP

On the Plan Implementation Date in order to provide for the payment in full of the Propco Unaffected Claims and the Property LP Unaffected Claims:

(a) Property LP shall subordinate that amount of the Property LP (Propco) Intercompany Claim that is in excess of the Contributed Claim Amount, in favour of the proven Claims of all Propco Creditors;

(b) the Plan Sponsor shall subordinate the Plan Sponsor (Propco) Intercompany Claim in favour of (i) the proven Claims of the Propco Unaffected Creditors and (ii) the Contributed Claim Amount; and

(c) TCC shall subordinate the TCC (Pre-filing Propco) Intercompany Claim and the TCC (Post-filing Propco) Intercompany Claim in favour of (i) the proven Claims of the Propco Unaffected Creditors and (ii) the Contributed Claim Amount.

5.2 Distributions to Propco Unaffected Creditors

Forthwith after giving effect to the subordinations set out in Section 5.1, TCC shall create the Propco Disputed Claims Reserve, and thereafter TCC shall on behalf of and for the account of Propco, pay Propco Unaffected Creditors (other than Property LP) with Propco Unaffected Claims in full solely from the Propco Cash Pool Account, by cheque sent by pre-paid ordinary mail to the address for such Propco Unaffected Creditor as set out in its Proof of Claim. For greater certainty, Claims of Creditors who are Landlords (excluding a Landlord holding a Property LP Unaffected Claim) shall not receive a distribution from the Propco Cash Pool Account.
If a Propco Unaffected Creditor has submitted a Proof of Claim against the Target Canada Entities (in addition to its Proof of Claim against Propco) in respect of its Propco Unaffected Claim, such Propco Unaffected Creditor shall not be entitled to and shall not receive any distributions from the TCC Cash Pool Account in respect of such Claim.

5.3 Re-contribution by Plan Sponsor in respect of Property LP (Propco) Intercompany Claim

(a) On the Initial Distribution Date, following the payments to Propco Unaffected Creditors set out in Section 5.2:

(i) TCC, on behalf of and for the account of Property LP, shall first pay the Property LP Unaffected Claims at the direction of Property LP in accordance with Section 5.4; and

(ii) TCC, on behalf of and for the account of Propco, shall then distribute the remaining Cash in the Propco Cash Pool Account to the following Persons on a pro rata basis:

(A) TCC, on account of the TCC (Pre-filing Propco) Intercompany Claim and the TCC (Post-filing Propco) Intercompany Claim in partial satisfaction of such Intercompany Claims;

(B) the Plan Sponsor, on account of the Plan Sponsor (Propco) Intercompany Claim in partial satisfaction of such Intercompany Claim; and

(C) Property LP, on account of that amount of the Property LP (Propco) Intercompany Claim that is in excess of the Contributed Claim Amount in partial satisfaction of such Intercompany Claim.

(b) On the Initial Distribution Date:

(i) First, Property LP shall direct and shall be deemed to direct TCC to pay to the Plan Sponsor any amounts payable to Property LP on account of the distributions set out in Section 5.3(a)(ii)(C);

(ii) Second, Plan Sponsor shall direct and shall be deemed to direct TCC to deposit an amount of *$34,081 million* into the Landlord Guarantee Enhancement Cash Pool Account on account of the distributions set out in Sections 5.3(a)(ii)(B) and amounts payable to the Plan Sponsor as set out in Section 5.3(b)(i);

(iii) Third, Plan Sponsor shall and shall be deemed to direct TCC to deposit any remaining balance of the distributions set out in Sections 5.3(a)(ii)(B) and amounts payable to the Plan Sponsor as set out in Section 5.3(b)(i) into the Plan Sponsor Propco Recovery Limit Reserve Account up to a maximum amount equal to the Plan Sponsor Propco Recovery Limit; and

(iv) Fourth, TCC shall deposit its distribution set out in Section 5.3(a)(ii)(A) into the TCC Cash Pool Account, and the Plan Sponsor shall and shall be deemed to direct TCC to deposit any ultimate balance of the distributions set out in Sections 5.3(a)(ii)(B) and amounts payable to the Plan Sponsor as set out in Section 5.3(b)(i) into the TCC Cash Pool Account as a contribution by Plan Sponsor to TCC.

(c) After disputed Claims of Propco Creditors and Property LP Creditors are resolved by the Monitor, TCC shall, at the direction of the Monitor distribute the balance of the Cash in the Propco Disputed Claims Reserve to TCC, the Plan Sponsor and Property LP on a pro rata basis on account of the remaining balance, if any, of those Intercompany Claims set out in Section 5.3(a)(ii) in full and final satisfaction of such Intercompany Claims and such amounts shall and shall be deemed to have been treated by the applicable parties in the same manner as provided for in Section 5.3(b).

5.4 Distributions on Account of Property LP Unaffected Claims

Property LP shall be obligated to satisfy all Property LP Unaffected Claims.
For purposes of facilitating the payment of all such Property LP Unaffected Claims, Property LP directs and shall be deemed to direct that Propco shall pay such Property LP Unaffected Claims on behalf of and for the account of Property LP in payment and satisfaction by Propco of that portion of the Property LP (Propco) Intercompany Claim that is equal to the Contributed Claim Amount.
For ease and convenience, a disputed Claim against Property LP shall be resolved pursuant to Section 5.5 as if it were a disputed Claim against Propco, and the payment of any such Claim shall be deemed to be treated by the applicable parties in the same manner as provided for in Section 5.2 and Section 5.3.

5.5 Resolution of Disputed Propco Creditor Claims and Disputed Property LP Creditor Claims

From and after the Plan Implementation Date, as frequently as the Monitor may determine in its sole and unfettered discretion, TCC on behalf of Propco shall pay to each Propco Creditor or Property LP Creditor with a disputed Claim that has become a Propco Unaffected Claim or a Property LP Unaffected Claim, respectively, in whole or in part, on or before the third Business Day prior to a Distribution Date (other than the Final Distribution Date), an amount of Cash from the Propco Disputed Claims Reserve Account equal to such Propco Unaffected Claim or Property LP Unaffected Claim, and any balance remaining in the Propco Disputed Claims Reserve Account relating to such Propco Creditor's or Property LP Creditor's disputed Claim shall be deposited into the Plan Sponsor Propco Recovery Limit Reserve Account or the TCC Cash Pool Account, as the case may be, in accordance with Section 5.3(c).

5.6 Distributions from Plan Sponsor Propco Recovery Limit Reserve Account

(a) On the Initial Distribution Date, TCC, on behalf of Propco, shall pay to the Plan Sponsor in respect of the Plan Sponsor (Propco) Intercompany Claim an amount of Cash from the Plan Sponsor Propco Recovery Limit Reserve Account equal to the product of (a) the Plan Sponsor Propco Recovery Limit multiplied by (b) the percentage recovery to Affected Creditors (other than a Convenience Class Creditor or a Landlord Guarantee Creditor in respect of its

Landlord Guarantee Creditor Base Claim Amount) from the TCC Cash Pool on the Initial Distribution Date in accordance with Section 5.7(b) below.

(b) On each subsequent date on which TCC makes distributions to Affected Creditors pursuant to Section 5.11, TCC:

(i) with the assistance of the Monitor, shall determine the aggregate percentage recovery to Affected Creditors (other than a Convenience Class Creditor or a Landlord Guarantee Creditor in respect of its Landlord Guarantee Creditor Base Claim Amount) from the TCC Cash Pool up to and including such distribution (and taking into account prior distributions) on such date (the *"Aggregate Recovery Percentage"*); and

(ii) shall pay to the Plan Sponsor an amount of Cash from the Plan Sponsor Propco Recovery Limit Reserve Account equal to (i) the product of (1) the Plan Sponsor Propco Recovery Limit multiplied by (2) the Aggregate Recovery Percentage, less (ii) the amount of distributions already made to the Plan Sponsor from the Plan Sponsor Propco Recovery Limit Reserve Account.

(c) On the Final Distribution Date, TCC:

(i) with the assistance of the Monitor, shall determine the final aggregate percentage recovery to Affected Creditors (other than a Convenience Class Creditor or a Landlord Guarantee Creditor in respect of its Landlord Guarantee Creditor Base Claim Amount) from the TCC Cash Pool up to and including the final distribution (and taking into account prior distributions) (the *"Final Aggregate Recovery Percentage"*);

(ii) shall pay to the Plan Sponsor an amount of Cash from the Plan Sponsor Propco Recovery Limit Reserve Account equal to (i) the product of (1) the Plan Sponsor Propco Recovery Limit multiplied by (2) the Final Aggregate Recovery Percentage, less (ii) the amount of distributions already made to the Plan Sponsor from the Plan Sponsor Propco Recovery Limit Reserve Account; and

(iii) thereafter, shall deposit into the TCC Cash Pool Account on behalf of Plan Sponsor as a contribution to TCC any remaining balance in the Plan Sponsor Propco Recovery Limit Reserve Account.

5.7 Initial Distributions from TCC Cash Pool Account to Affected Creditors with Proven Claims

On the Initial Distribution Date, the Cash in the TCC Cash Pool Account shall be distributed by TCC, on behalf and for the account of the Target Canada Entities, as follows:

(a) each Convenience Class Creditor shall receive a distribution in the amount of its Convenience Class Claim, by cheque sent by prepaid ordinary mail to the address for such Convenience Class Creditor as set out in its Proof of Claim; and

(b) each Affected Creditor (other than a Convenience Class Creditor or a Landlord Guarantee Creditor in respect of its Landlord Guarantee Creditor Base Claim Amount) with a Proven Claim shall receive a distribution in an amount equal to its Pro Rata Share of the Cash in the TCC Cash Pool Account (after effecting the payments in Section 5.7(a)) by cheque sent by prepaid ordinary mail to the address for such Affected Creditor as set out in its Proof of Claim (or, at the election of TCC, by wire transfer in accordance with the wire transfer instructions provided by the applicable Affected Creditor).

5.8 Disbursements of Landlord Non-Guarantee Creditor Equalization Amounts

On the Initial Distribution Date, TCC, on behalf and for the account of the Target Canada Entities, shall disburse to each Landlord Non-Guarantee Creditor with a Proven Claim that is a Landlord Restructuring Period Claim, each Landlord Non-Guarantee Creditor's Landlord Non-Guarantee Creditor Equalization Amount from the Landlord Non-Guarantee Creditor Equalization Cash Pool Account by cheque sent by prepaid ordinary mail to the address for such Landlord in

accordance with such Landlord's Proof of Claim (or, at the election of TCC, by wire transfer in accordance with the wire transfer instructions provided by the applicable Landlord Non-Guarantee Creditor).

5.9 Disbursements of Landlord Guarantee Creditor Base Claim Amounts

On the Initial Distribution Date, TCC, on behalf and for the account of the Target Canada Entities, shall disburse to each Landlord Guarantee Creditor with a Proven Claim that is a Landlord Restructuring Period Claim, each Landlord Guarantee Creditor's Landlord Guarantee Creditor Base Claim Amount from the Landlord Guarantee Creditor Base Claim Cash Pool Account by cheque sent by prepaid ordinary mail to the address for such Landlord in accordance with such Landlord's Proof of Claim (or, at the election of TCC, by wire transfer in accordance with the wire transfer instructions provided by the applicable Landlord Guarantee Creditor).

5.10 Disbursements of Landlord Guarantee Enhancement Amount

On the Initial Distribution Date, TCC, on behalf and for the account of the Plan Sponsor in satisfaction of the Plan Sponsor's obligations under the Landlord Guarantee Creditor Settlement Agreement, shall disburse, in accordance with the Landlord Guarantee Creditor Settlement Agreement, to each Landlord Guarantee Creditor each Landlord Guarantee Creditor's Landlord Guarantee Enhancement Amount from the Landlord Guarantee Enhancement Cash Pool Account by cheque sent by prepaid ordinary mail to the address for such Landlord in accordance with such Landlord's Proof of Claim (or, at the election of TCC, by wire transfer in accordance with the wire transfer instructions provided by the applicable Landlord Guarantee Creditor).

5.11 Resolution of Disputed TCC Creditor Claims and Subsequent Distributions

Subject to Section 5.7, from and after the Initial Distribution Date, as frequently as the Monitor may determine in its sole and unfettered discretion, TCC, on behalf of the Target Canada Entities, shall distribute to:

(a) each Affected Creditor (other than a Convenience Class Creditor or a Landlord Guarantee Creditor in respect of its Landlord Guarantee Creditor Base Claim Amount) with a Disputed Claim that has become a Proven Claim in whole or in part, on or before the third (3rd) Business Day prior to a Distribution Date (other than the Final Distribution Date), an amount of Cash from the TCC Disputed Claims Reserve Account equal to the aggregate amount of all distributions such Affected Creditor would have otherwise already received pursuant to the Plan had its Disputed Claim been a Proven Claim on and as of the Initial Distribution Date, and any remaining balance in the TCC Disputed Claims Reserve Account relating to such Affected Creditor's Disputed Claim shall be deposited into the TCC Cash Pool Account; and

(b) each Affected Creditor (other than a Convenience Class Creditor or a Landlord Guarantee Creditor in respect of its Landlord Guarantee Creditor Base Claim Amount) with a Proven Claim an amount equal to such Affected Creditor's respective Pro Rata Share of the Cash in the TCC Cash Pool Account (subsequent to effecting the payments in Section 5.11(a)) by cheque sent by prepaid ordinary mail to the address for such Affected Creditor as set out in its Proof of Claim (or, at the election of TCC, by wire transfer in accordance with the wire transfer instructions provided by the applicable Affected Creditor).

5.12 Final Distribution

On the Final Distribution Date, once TCC has effected all distributions pursuant to Section 5.11 and there are no remaining Disputed Claims, and following the deposits into the TCC Cash Pool Account set out in Sections 5.3(b)(iv), 5.3(c), and 5.6(c)(iii):

(a) TCC, on behalf of the Target Canada Entities, shall pay any final Administrative Reserve Costs;

(b) thereafter, TCC shall contribute any balance remaining in the Administrative Reserve Account and the TCC Disputed Claims Reserve Account to the TCC Cash Pool Account;

(c) thereafter, TCC shall distribute to the Affected Creditors (other than Convenience Class Creditors and Landlord Guarantee Creditors in respect of their Landlord Guarantee Creditor Base Claim Amounts) with Proven Claims an

amount equal to such Affected Creditor's respective Pro Rata Share of any Cash in the TCC Cash Pool Account; and

(d) thereafter, TCC shall provide written notice to the Monitor that it has completed its duties to effect all distributions, disbursements and payments in accordance with the Plan.

5.13 Treatment of Undeliverable Distributions

If any Affected Creditor's, Propco Unaffected Creditor's or Property LP Unaffected Creditor's distribution is returned as undeliverable or is not cashed, no further distributions to such Creditor shall be made unless and until the Monitor is notified by such Creditor of its current address or wire particulars, at which time all such distributions shall be made to such Creditor without interest. All claims for undeliverable or un-cashed distributions in respect of Proven Claims, Propco Unaffected Claims or Property LP Unaffected Claims must be made on or before the deadline specified in the Notice of Final Distribution, after which date the Claims of such Creditor or successor or assign of such Creditor with respect to such unclaimed or un-cashed distributions shall be forever discharged and forever barred, without any compensation therefor, notwithstanding any Applicable Law to the contrary, at which time the Cash amount held by TCC in relation to such Claim shall be returned to the TCC Cash Pool Account or the Propco Cash Pool Account. Nothing in the Plan or Sanction and Vesting Order shall require the Monitor or TCC to attempt to locate the holder of any Proven Claim, Propco Unaffected Claim or Property LP Unaffected Claim.

If any Landlord Guarantee Creditor's distribution from the Landlord Guarantee Enhancement Cash Pool or any Landlord Non-Guarantee Creditor's distribution from the Landlord Non-Guarantee Creditor Equalization Cash Pool is returned as undeliverable or is not cashed, no further distributions to such Landlord shall be made unless and until the Monitor is notified by such Landlord of its current address or wire particulars, at which time all such distributions shall be made to such Landlord without interest. All claims for undeliverable or un-cashed distributions in respect of Landlord Guarantee Enhancement Amounts and Landlord Non-Guarantee Creditor Equalization Amounts must be made on or before the deadline specified in the Notice of Final Distribution, after which date the claims of such Landlord or successor or assign of such Landlord with respect to such unclaimed or un-cashed distributions shall be forever discharged and forever barred, without any compensation therefor, notwithstanding any Applicable Law to the contrary, at which time: (a) in the case of a Landlord Guarantee Enhancement Amount, (i) the percentage of the Cash amount held by TCC in relation to such Landlord Guarantee Enhancement Amount equal to *$25,451* million divided by the total amount of the Landlord Guarantee Enhancement Cash Pool as at the Plan Implementation Date shall be returned to the Plan Sponsor in accordance with the wire transfer instructions to be provided by the Plan Sponsor to TCC, and (ii) the balance of the Cash amount held by TCC in relation to such Landlord Guarantee Enhancement Amount shall be returned to the TCC Cash Pool Account, and (b) in the case of a Landlord Non-Guarantee Equalization Amount, the Cash amount held by TCC in relation to such Landlord Non-Guarantee Creditor Equalization Amount shall be returned to the Plan Sponsor in accordance with the wire transfer instructions to be provided by the Plan Sponsor to TCC.

5.14 Assignment of Claims for Voting and Distribution Purposes Prior to the Creditors' Meeting

An Affected Creditor, a Propco Unaffected Creditor or a Property LP Unaffected Creditor may transfer or assign the whole of its Claim prior to the Creditors' Meeting, provided that neither the Target Canada Entities nor the Monitor shall be obligated to give notice to or otherwise deal with the transferee or assignee of such Claim as an Affected Creditor, a Propco Unaffected Creditor or a Property LP Unaffected Creditor in respect thereof, including allowing such transferee or assignee of an Affected Claim 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 and acknowledged by the Monitor in writing no later than 5:00 p.m. on the date that is seven (7) days prior to the Creditors' Meeting. Thereafter such transferee or assignee shall, for all purposes in accordance with the Claims Procedure Order and the Meeting Order, constitute an Affected Creditor, a Propco Unaffected Creditor or a Property LP Unaffected Creditor, as applicable, and shall be bound by any and all notices previously given to the transferor or assignor and any and all steps taken in respect of such Claim.

Where a Claim has been transferred or assigned in part, the transferor or assignor shall retain the right to vote at the Creditors' Meeting in respect of the full amount of the Claim, and the transferee or assignee shall have no voting rights at the Creditors Meeting in respect of such Claim.

For greater certainty, after the execution of the Landlord Guarantee Creditor Settlement Agreement or a Landlord Non-Guarantee Creditor Consent and Support Agreement, as applicable, a Landlord Guarantee Creditor or a Landlord Non-Guarantee Creditor may only assign any Claim in accordance with the terms of the Landlord Guarantee Creditor

Settlement Agreement or a Landlord Non-Guarantee Creditor Consent and Support Agreement, as applicable.

5.15 Assignment of Claims for Distribution Purposes After the Creditors' Meeting

An Affected Creditor (other than a Convenience Class Creditor), a Propco Unaffected Creditor or a Property LP Unaffected Creditor may transfer or assign the whole of its Claim for distribution purposes after the Creditors' Meeting provided that TCC shall not be obliged to make distributions to any such transferee or assignee or otherwise deal with such transferee or assignee as an Affected Creditor, a Propco Unaffected Creditor or a Property LP Unaffected Creditor 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 and acknowledged by the Monitor in writing; thereafter, such transferee or assignee shall, for all purposes in accordance with the Claims Procedure Order, the Meeting Order and the Plan, constitute an Affected Creditor, a Propco Unaffected Creditor or a Property LP Unaffected Creditor, as applicable, and shall be bound by any and all notices previously given to the transferor or assignor and any and all steps taken in respect of such Claim.
For greater certainty, after the execution of the Landlord Guarantee Creditor Settlement Agreement or a Landlord Non-Guarantee Creditor Consent and Support Agreement, as applicable, a Landlord Guarantee Creditor or a Landlord Non-Guarantee Creditor may only assign any Claim for distribution purposes in accordance with the terms of the Landlord Guarantee Creditor Settlement Agreement or a Landlord Non-Guarantee Creditor Consent and Support Agreement, as applicable.

5.16 Tax Matters

(a) Any terms and conditions of any Affected Claims, any Propco Unaffected Claims or any Property LP Unaffected Claims which purport to deal with the ordering of or grant of priority of payment of principal, interest, penalties or other amounts shall be deemed to be void and ineffective.

(b) Notwithstanding any provisions of the Plan, each Person that receives a distribution, disbursement or other payment pursuant to the Plan shall have sole and exclusive responsibility for the satisfaction and payment of any Tax Obligations imposed on such Person by any Taxing Authority on account of such distribution, disbursement or payment.

(c) Any payor shall be entitled to deduct and withhold and remit from any distribution, payment or consideration otherwise payable to any Person pursuant to the Plan such amounts as are required (a *"Withholding Obligation"*) to be deducted and withheld with respect to such payment under the IT A, or any provision of federal, provincial, territorial, state, local or foreign tax law, in each case, as amended or succeeded. For greater certainty, no distribution, payment or other consideration shall be made to or on behalf of a Person until such Person has delivered to the Monitor and TCC such documentation prescribed by Applicable Law or otherwise reasonably required by TCC as will enable TCC to determine whether or not, and to what extent, such distribution, payment or consideration to such Person is subject to any Withholding Obligation imposed by any Taxing Authority.

(d) All distributions made by TCC on behalf of the Target Canada Entities pursuant to the Plan shall be first in satisfaction of the portion of Affected Claims, Propco Unaffected Claims or Property LP Unaffected Claims, as the case may be, that are not subject to any Withholding Obligation.

(e) To the extent that amounts are withheld or deducted and paid over to the applicable Taxing Authority, such withheld or deducted amounts shall be treated for all purposes of the Plan as having been paid to such Person as the remainder of the payment in respect of which such withholding and deduction were made.

(f) For the avoidance of doubt, it is expressly acknowledged and agreed that the Monitor and any Director or Officer will not hold any assets hereunder, including Cash, or make distributions, payments or disbursements, and no provision hereof shall be construed to have such effect.

5.17 Input Tax Credits

If the Plan Sponsor (or a subsidiary thereof other than the Target Canada Entities) has paid or pays GST/HST on amounts in respect of a Landlord Guarantee Claim for which only the Target Canada Entities will receive Input Tax Credits (*"Plan*

Sponsor GST/HST Contribution Amounts"), then in order to reimburse the Plan Sponsor (or a subsidiary thereof other than the Target Canada Entities) for the Plan Sponsor GST/HST Contribution Amounts:

(a) The Plan Sponsor shall provide TCC and the Monitor with satisfactory evidence of the Plan Sponsor GST/HST Contribution Amounts;

(b) All Input Tax Credits (whether or not in respect of payments made by the Plan Sponsor or a subsidiary thereof other than the Target Canada Entities) actually paid to TCC shall be held by TCC in trust in a segregated interest-bearing account for the benefit of Plan Sponsor, and shall be paid to the Plan Sponsor from time to time, until such time as the Plan Sponsor has been fully reimbursed for all Plan Sponsor GST/HST Contribution Amounts; and

(c) Once the Plan Sponsor GST/HST Contribution Amounts have been paid in full, subsequent Input Tax Credits actually paid to TCC shall be contributed by TCC to the TCC Cash Pool Account.

Article 6 Plan Implementation

6.1 Corporate Authorizations

The adoption, execution, delivery, implementation and consummation of all matters contemplated under the Plan involving any corporate action of any of the Target Canada Entities will occur and be effective as of the Plan Implementation Date as set out in Section 6.3, and will be authorized and approved under the Plan and by the Court, where appropriate, as part of the Sanction and Vesting Order, in all respects and for all purposes without any requirement of further action by shareholders, partners, Directors or Officers of such Target Canada Entity. All necessary approvals to take actions shall be deemed to have been obtained from the Directors or shareholders or partners of the Target Canada Entity, as applicable.

6.2 Pre-Plan Implementation Date Transactions

The following transactions shall be effected prior to the implementation of the Plan:

(a) *Landlord Guarantee Creditor Enhancement Amounts*: The Plan Sponsor shall deliver *$25,451 million* to TCC in accordance with Section 4.3; and

(b) *Landlord Non-Guarantee Creditor Equalization Amounts*: The Plan Sponsor shall deliver *$7,521 million* to TCC in accordance with Section 4.8.

6.3 Plan Implementation Date Transactions

The following transactions, steps, offsets, distributions, payments, disbursements, compromises, releases, discharges to be effected in the implementation of the Plan (the *"Plan Transactions*") shall occur on or after the Plan Implementation Date:

(a) *Delivery of Cash to TCC*: The Target Canada Entities (other than TCC) shall deliver to TCC the aggregate of all of their Cash in accordance with Article 4;

(b) *Establishment of Accounts and Reserves*: TCC, with the supervision of the Monitor, shall establish the accounts and reserves in accordance with Article 4;

(c) *Subordinations of Intercompany Claims*:

(i) In addition to the prior subordination of the NE1 Intercompany Claim, the Subordinated Intercompany Claims shall be and shall be deemed to be subordinated as against all Creditors, in accordance with Section 2.4;

(ii) The amount of the Property LP (Propco) Intercompany Claim equal to the Contributed Claim Amount shall be and shall be deemed to be subordinated as against and in favour of the proven Claims of all Propco Creditors, in accordance with Section 5.1;

(iii) The Plan Sponsor (Propco) Intercompany Claim shall be and shall be deemed to be subordinated as against and in favour of all Propco Unaffected Creditors and the Contributed Claim Amount, in accordance with Section 5.1;

(iv) The TCC (Pre-filing Propco) Intercompany Claim and the TCC (Post-filing Propco) Intercompany Claim shall be and shall be deemed to be subordinated as against and in favour of the Claims of all Propco Unaffected Creditors and the Contributed Claim Amount, in accordance with Section 5.1;

(v) For greater certainty, no other Intercompany Claims (other than those identified in clauses (i) to (iv) above) shall be deemed to be subordinated;

(d) *Landlord Guarantee Creditor Enhancement Amount*: TCC shall deposit the Landlord Guarantee Enhancement Amount received from the Plan Sponsor into the Landlord Guarantee Enhancement Cash Pool Account in accordance with Section 4.3;

(e) *Landlord Non-Guarantee Creditor Equalization Amounts*: TCC shall deposit the Landlord Non-Guarantee Creditor Equalization Amounts received from the Plan Sponsor into the Landlord Non-Guarantee Creditor Equalization Cash Pool Account in accordance with Section 4.8;

(f) *Payments by TCC*: TCC, on behalf of the Target Canada Entities, shall pay the following Administrative Reserve Costs from the Administrative Reserve Account on or after the Plan Implementation Date pursuant to the Sanction and Vesting Order and the CCAA:

(i) all fees and disbursements owing as at the Plan Implementation Date to counsel to the Target Canada Entities, the Monitor, counsel to the Monitor, counsel to the Directors and the Employee Representative Counsel;

(ii) all fees and disbursements owing as at the Plan Implementation Date to Northwest;

(iii) all amounts on account of Government Priority Claims;

(iv) all amounts on account of Employee Priority Claims, to the extent such amounts have not been satisfied from the Employee Trust;

(v) all amounts on account of proven TCC Secured Construction Lien Claims;

(vi) all amounts on account of Cash Management Lender Claims;

(vii) all amounts on account of the Post-Filing Trade Payables;

(viii) all amounts owing to Persons on account of their KERP Claims;

(ix) all fees owing to third-parties on account of the administration of distributions, disbursements and payments under the Plan, including without limitation Bank of America; and

(x) such amounts as may be necessary to fund any final minor adjustments to the Cash pools after establishment thereof in accordance with Section 6.3(b);

(g) *Release of CCAA Charges; Continuation of Administration Charge*: The Financial Advisor Subordinated Charge, the DIP Lender's Charge, the Liquidation Agent's Charge and Security Interest and the KERP Charge shall be discharged and the Administration Charge and the Directors' Charge shall continue and shall attach solely against the Propco Cash Pool, the TCC Cash Pool, and the Cash Reserves from and after the Plan Implementation Date pursuant to and in accordance with the Sanction and Vesting Order;

(h) *Directors and Officers*: On the Plan Implementation Date, the Directors and Officers of the Target Canada Entities (other than the current Directors of TCC and Target Canada Pharmacy (Ontario) Corp.) shall and shall be deemed to resign without the requirement of further action on the part of such Directors and Officers, unless any one of them

affirmatively elects to remain as a Director or Officer, as applicable, in order to facilitate any Plan Transaction Steps in connection with the wind-down of the Target Canada Entities; for the avoidance of doubt, any deemed resignation pursuant to this Section 6.3(h) or the Sanction and Vesting Order will not disentitle, or otherwise negatively affect, the entitlements of any Directors and Officers pursuant to the terms of any existing employment or retention agreements, which agreements shall continue subject to the terms and conditions thereof;

(i) *Distributions from the Propco Cash Pool and the Propco Disputed Claims Reserve*: Once TCC, in consultation with the Monitor, has determined that all requisite consents, declarations, certificates or approvals of or by any Governmental Authority as may be considered necessary by TCC or the Monitor in respect of any such distribution have been obtained, TCC shall make distributions from the Propco Cash Pool Account and the Propco Disputed Claims Reserve Account in accordance with Sections 5.2, 5.3, 5.4 and 5.5;

(j) *Intercompany Distributions from the Propco Cash Pool*: TCC shall deposit, and each of Property LP and the Plan Sponsor shall and shall be deemed to direct that TCC shall deposit, any distributions to be received from TCC out of the Propco Cash Pool Account to the Landlord Guarantee Enhancement Cash Pool Account, the Plan Sponsor Propco Recovery Limit Reserve Account and the TCC Cash Pool Account in the order and in the amounts set out in Section 5.3;

(k) *Distributions from the Plan Sponsor Propco Recovery Limit Reserve:* TCC shall make distributions from the Plan Sponsor Propco Recovery Limit Reserve Account to the Plan Sponsor in accordance with Section 5.6;

(l) *Distributions from the TCC Cash Pool and the TCC Disputed Claims Reserve*: Once TCC, in consultation with the Monitor, has determined that all requisite consents, declarations, certificates or approvals of or by any Governmental Authority as may be considered necessary by TCC or the Monitor in respect of any such distribution have been obtained, TCC shall make distributions from the TCC Cash Pool Account and the TCC Disputed Claims Reserve Account in accordance with Sections 5.7, 5.11 and 5.12;

(m) *Disbursement of Landlord Non-Guarantee Creditor Equalization Amounts*: On the Initial Distribution Date, TCC, on behalf of the Plan Sponsor, shall fully and finally disburse the Landlord Non-Guarantee Creditor Equalization Amounts in accordance with Section 5.8;

(n) *Disbursement of Landlord Guarantee Creditor Base Claim Amounts:* On the Initial Distribution Date, TCC, on behalf of the Target Canada Entities, shall fully and finally disburse the Landlord Guarantee Creditor Base Claim Amounts in accordance with Section 5.9;

(o) *Disbursement of Landlord Guarantee Enhancement Amounts*: On the Initial Distribution Date, TCC, on behalf of the Plan Sponsor, shall fully and finally disburse the Landlord Guarantee Enhancement Amounts in accordance with Section 5.10;

(p) *Compromise. Satisfaction and Release*: The compromises with the Affected Creditors, the full and final satisfaction of the Propco Unaffected Claims and the Property LP Unaffected Claims and the release of the Released Parties referred to herein shall become effective in accordance with Article 7 of the Plan, and Propco and Property LP shall be deemed to have no claims against the Landlords, including without limitation arising out of the Plan Sponsor Guarantees;

(q) *IP Assets*: On the Plan Implementation Date, in partial consideration for the Plan Sponsor contributing to the Landlord Guarantee Enhancement Cash Pool and the Plan Sponsor's subordination of the Subordinated Intercompany Claims and the re-contribution of the Property LP (Propco) Intercompany Claim in excess of the Contributed Claim Amount, the IP Assets shall be transferred and shall vest absolutely in the Plan Sponsor (or its designee) free and clear of all Encumbrances pursuant to and in accordance with the Sanction and Vesting Order;

(r) *Pharmacy Shares:* On the Plan Implementation Date, upon the delivery of the Monitor's certificate as set out in the Pharmacy Share Sale Approval and Vesting Order, the Pharmacy Shares shall be transferred and shall vest absolutely in the Pharmacy Purchaser free and clear of all Encumbrances pursuant to and in accordance with the Pharmacy Share Sale Approval and Vesting Order and the Directors of Target Canada Pharmacy (Ontario) Corp. shall and shall be deemed to resign immediately prior to the closing of such transaction without the requirement of further action;

(s) *Disposition of Remaining Assets and Collection of Receivables*: The Monitor shall be authorized to collect any

outstanding receivables and to market and sell any remaining assets of the Target Canada Entities, and if the sale price for such assets is greater than *$250,000*, such sale shall be approved pursuant to Court Order. Subject to Section 5.17, the proceeds of any such sales or receivables shall be deposited to the TCC Cash Pool Account;

(t) *Maintenance of Target Canada Entities:* If necessary to effect the sale of the shares of one or more of the Target Canada Entities, the Monitor shall file all necessary annual information forms or returns under Applicable Law in order to maintain such Target Canada Entities in good standing;

(u) *Dissolutions*: Immediately prior to the delivery by the Monitor of the Monitor's Plan Completion Certificate, and with the Target Canada Entities' and the Plan Sponsor's consent, steps shall be taken to dissolve any remaining Target Canada Entities in a tax efficient and orderly manner;

(v) *Termination of the Employee Trust*: Upon delivery of a certificate from the Employee Trust Trustee to the Monitor in the form attached as Schedule "F" (the *"Employee Trust Termination Certificate"*) certifying that all outstanding disputes by employee claimants in respect of their entitlements, if any, under the Employee Trust have been fully and finally resolved pursuant to and in accordance with the Employee Trust Claims Resolution Order:

(i) the Employee Trust shall be and shall be deemed to be terminated;

(ii) any remaining Trustee Fees, Trustee Expenses, Administrator Fees and Administrator Expenses (each as defined in the Employee Trust Agreement) shall be paid from any remaining Employee Trust Property to the Employee Trust Trustee and the Employee Trust Administrator, as applicable;

(iii) the Employee Trust Trustee shall satisfy any commitments to pay Eligible Employee Claims (as defined in the Employee Trust Agreement) made under Article 2 of the Employee Trust Agreement with the assistance of the Employee Trust Administrator;

(iv) the Employee Trust Trustee and the Employee Trust Administrator shall deliver an irrevocable joint direction to The Royal Bank of Canada in the form attached as Schedule "G" (the *"Employee Trust Property Joint Direction"*) to remit the balance of the Employee Trust Property, net of the payments set out in Sections 6.3(v)(ii) and 6.3(v)(iii), in each case net of any applicable Withholding Obligations, to the Plan Sponsor or its designee in accordance with the written directions to be delivered by the Plan Sponsor to the Employee Trust Trustee and the Employee Trust Administrator one (1) Business Day prior to the date of delivery of the Employee Trust Property Joint Direction, provided however that the Employee Trust Trustee and the Employee Trust Administrator shall not be required to deliver such direction until all requisite consents, declarations, certificates or approvals of or by any Governmental Authority as may be considered necessary by the Employee Trust Trustee and the Employee Trust Administrator have been obtained; and

(v) the Employee Trust Trustee and the Employee Trust Administrator shall be and shall be deemed to be fully and finally released and discharged from all of their respective obligations under the Employee Trust Agreement.

Article 7 Releases

7.1 Plan Releases

(a) On the Plan Implementation Date, each of the Target Canada Entities, NE1 and their respective Directors, Officers, current and former employees, advisors, legal counsel and agents, including the Liquidation Agent, Lazard and Northwest (being referred to individually as a *"Target Canada Released Party"*) shall be released and discharged from any and all demands, claims, actions, applications, 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, Encumbrances and other recoveries on account of any liability, obligation, demand or cause of action of whatever nature which any Creditor, Affected Creditor, Propco Unaffected Creditor, Property LP Unaffected Creditor or other Person may be entitled to assert, including any and all Claims in respect of the payment

and receipt of proceeds, statutory liabilities of the Directors, Officers and employees of the Target Canada Released Parties and any alleged fiduciary or other duty (whether such employees are acting as a Director, Officer or employee), whether known or unknown, matured or unmatured, foreseen or unforeseen, existing or hereafter arising, based in whole or in part on any omission, transaction, duty, responsibility, indebtedness, liability, obligation, dealing or other occurrence existing or taking place on or prior to the later of the Plan Implementation Date and the date on which actions are taken to implement the Plan that are in any way relating to, arising out of or in connection with the Claims, the Business whenever or however conducted, the Plan, the CCAA Proceedings, or any Claim that has been barred or extinguished by the Claims Procedure Order and all claims arising out of such actions or omissions shall be forever waived and released (other than the right to enforce the Target Canada Entities' obligations under the Plan or any related document), all to the full extent permitted by Applicable Law, provided that nothing herein shall release or discharge (i) any Target Canada Released Party if such Target Canada Released Party is judged by the expressed terms of a judgment rendered on a final determination on the merits to have committed criminal, fraudulent or other wilful misconduct or (ii) the Directors with respect to matters set out in section 5.1(2) of the CCAA.

(b) On the Plan Implementation Date, the Monitor, A&M, and their respective current and former directors, officers and employees, counsel to the Directors, Pharmacists' Representative Counsel, the Consultative Committee Members and all of their respective advisors, legal counsel and agents (being referred to individually as a *"Third Party Released Party"*) shall be released and discharged from any and all demands, claims, actions, applications, 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, Encumbrances and other recoveries on account of any liability, obligation, demand or cause of action of whatever nature which any Creditor, Affected Creditor, Propco Unaffected Creditor, Property LP Unaffected Creditor or other Person may be entitled to assert, whether known or unknown, matured or unmatured, foreseen or unforeseen, existing or hereafter arising, based in whole or in part on any omission, transaction, duty, responsibility, indebtedness, liability, obligation, dealing or other occurrence existing or taking place on or prior to the later of the Plan Implementation Date and the date on which actions are taken to implement the Plan that are in any way relating to, arising out of or in connection with the Claims, the Business whenever or however conducted, the Plan, the CCAA Proceedings, or any Claim that has been barred or extinguished by the Claims Procedure Order and all claims arising out of such actions or omissions shall be forever waived and released (other than the right to enforce the Monitor's obligations under the Plan or any related document), all to the full extent permitted by Applicable Law, provided that nothing herein shall release or discharge any Third Party Released Party if such Third Party Released Party is judged by the expressed terms of a judgment rendered on a final determination on the merits to have committed criminal, fraudulent or other wilful misconduct.

(c) On the Plan Implementation Date, the Plan Sponsor, the Plan Sponsor Subsidiaries, the HBC Entities and their current and former directors, officers and employees and their respective advisors, legal counsel and agents (being referred to individually as a *"Plan Sponsor Released Party"*):

(i) shall not be released hereunder from Landlord Guarantee Claims; and

(ii) shall be released and discharged from any and all demands, claims, actions, applications, 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, Encumbrances and other recoveries on account of any liability, obligation, demand or cause of action of whatever nature which any Creditor, Affected Creditor, Propco Unaffected Creditor, Property LP Unaffected Creditor or other Person (excluding a Landlord Guarantee Creditor in respect of its Landlord Guarantee Claim) may be entitled to assert, whether known or unknown, matured or unmatured, foreseen or unforeseen, existing or hereafter arising, based in whole or in part on any omission, transaction, duty, responsibility, indebtedness, liability, obligation, dealing or other occurrence existing or taking place on or prior to the later of the Plan Implementation Date and the date on which actions are taken to implement the Plan that are in any way relating to, arising out of or in connection with the Claims, the Business whenever or however conducted, the Plan, the CCAA Proceedings, or any Claim that has been barred or extinguished by the Claims Procedure Order and all claims arising out of such actions or omissions shall be forever waived and released (other than the right to enforce the Plan Sponsor's obligations under the Plan or any related document), all to the full extent permitted by Applicable Law, provided that nothing herein shall release or discharge any Plan Sponsor Released Party if such Plan Sponsor Released Party is judged by the expressed terms of a judgment rendered on a final determination on the merits to have committed criminal, fraudulent or other wilful

misconduct.

For greater certainty, the Plan Sponsor shall not be released from any indemnity or guarantee provided by the Plan Sponsor in favour of any Director, Officer or employee.

(d) Immediately upon the delivery of the Employee Trust Termination Certificate, the Employee Trust Administrator and its current and former directors, officers and employees, the Employee Trust Trustee, Employee Representative Counsel, the Employee Representatives and all of their respective advisors, legal counsel and agents (being referred to individually as an *"Employee Trust Released Party"*, and collectively together with each of the Target Canada Released Parties, the Third Party Released Parties and the Plan Sponsor Released Parties, the "Released Parties") shall be released and discharged from any and all demands, claims, actions, applications, 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, Encumbrances and other recoveries on account of any liability, obligation, demand or cause of action of whatever nature which any Creditor, Affected Creditor, Propco Unaffected Creditor, Property LP Unaffected Creditor or other Person may be entitled to assert, whether known or unknown, matured or unmatured, foreseen or unforeseen, existing or hereafter arising, based in whole or in part on any omission, transaction, duty, responsibility, indebtedness, liability, obligation, dealing or other occurrence existing or taking place on or prior to the later of the Plan Implementation Date and the date on which actions are taken to implement the Plan that are in any way relating to, arising out of or in connection with the Claims, the Business whenever or however conducted, the Plan, the CCAA Proceedings, or any Claim that has been barred or extinguished by the Claims Procedure Order or the Employee Trust Claims Resolution Order and all Claims arising out of such actions or omissions shall be forever waived and released (other than the right to enforce the Employee Trust Trustee's and the Employee Trust Administrator's obligations under the Plan or any related document), all to the full extent permitted by Applicable Law, provided that nothing herein shall release or discharge any Employee Trust Released Party if such Employee Trust Released Party is judged by the expressed terms of a judgment rendered on a final determination on the merits to have committed criminal, fraudulent or other wilful misconduct.

(e) The Sanction and Vesting Order will enjoin the prosecution, whether directly, derivatively or otherwise, of any Claim, Propco Unaffected Claim, Property LP Unaffected Claim, obligation, suit, judgment, damage, demand, debt, right, cause of action, liability or interest released, discharged, compromised or terminated pursuant to the Plan.

(f) Nothing in the Plan shall be interpreted as restricting the application of Section 21 of the CCAA.

Article 8 Court Sanction, Conditions Precedent and Implementation

8.1 Application for Sanction and Vesting Order

If the Required Majority of the Affected Creditors approves the Plan, the Target Canada Entities shall apply for the Sanction and Vesting Order on or before the date set in the Meeting Order for the hearing of the Sanction and Vesting Order or such later date as the Court may set.

8.2 Sanction and Vesting Order

The Sanction and Vesting Order will have effect from and after the Effective Time on the Plan Implementation Date, and shall, among other things:

(a) declare that (i) the Plan has been approved by the Required Majority of Affected Creditors with Proven Claims in conformity with the CCAA; (ii) the Target Canada Entities have complied with the provisions of the CCAA and the Orders of the Court made in these CCAA Proceedings in all respects; (iii) the Court is satisfied that the Target Canada Entities have not done or purported to do anything that is not authorized by the CCAA; and (iv) the Plan and the Plan Transaction Steps contemplated thereby are fair and reasonable;

(b) declare that the Plan and all associated steps, compromises, transactions, arrangements, releases and reorganizations effected thereby are approved, binding and effective on the Target Canada Entities, the Plan Sponsor, all Affected

Creditors, the Released Parties and all other Persons and parties affected by the Plan as of the Effective Time;

(c) authorize and direct the Employee Trust Trustee and the Employee Trust Administrator to remit the balance of the Employee Trust Property, net of the payments set out in Sections 6.3(v)(ii) and 6.3(v)(iii) and any applicable Withholding Obligations, to the Plan Sponsor or its designee upon delivery by the Employee Trust Trustee and the Employee Trust Administrator of the Employee Trust Property Joint Direction to The Royal Bank of Canada pursuant to and in accordance with the Plan;

(d) grant to the Monitor, in addition to its rights and obligations under the CCAA, the powers, duties and protections contemplated by and required under the Plan and authorize and direct the Monitor to perform its duties and fulfil its obligations under the Plan to facilitate the implementation thereof;

(e) authorize the Monitor to take all such actions to market and sell any remaining assets and pursue any outstanding accounts receivable owing to any of the Target Canada Entities, or to assist the Target Canada Entities with respect thereto;

(f) declare that all right, title and interest in and to the IP Assets have vested absolutely in the Plan Sponsor (or its designee), free and clear of all Encumbrances;

(g) direct the Plan Sponsor to maintain the books and records of the Target Canada Entities for purposes of assisting the Monitor in the completion of the resolution of Disputed Claims and Claims of the Propco Creditors and the Property LP Creditors and the orderly wind-down of the Target Canada Entities;

(h) confirm the releases of the Released Parties as set out in Section 7.1;

(i) declare that any Affected Claim, any Propco Unaffected Claim and any Property LP Unaffected Claim for which a Proof of Claim has not been filed by the Claims Bar Date in accordance with the Claims Procedure Order shall be forever barred and extinguished;

(j) declare that the stays of proceedings in favour of the Landlords pursuant to the Orders of the Court set out in Schedule "H" (the *"Co-Tenancy Stay Schedule"*) shall have terminated on the dates set out in the Co-Tenancy Stay Schedule;

(k) deem the remaining Directors and Officers of the Target Canada Entities (other than the current Directors of TCC or Target Canada Pharmacy (Ontario) Corp.) to have resigned without replacement on the Effective Time on the Plan Implementation Date, unless such Persons affirmatively elect to remain as a Director or Officer in order to facilitate any Plan Transaction Steps in connection with the wind-down of any of the Target Canada Entities;

(l) deem the Directors of Target Canada Pharmacy (Ontario) Corp. to have resigned in accordance with Section 6.3(r);

(m) declare that all distributions or payments by TCC, in each case on behalf of the Target Canada Entities, to the Affected Creditors with Proven Claims, to Propco Unaffected Creditors and to the Property LP Unaffected Creditors under the Plan are for the account of the Target Canada Entities and the fulfillment of their respective obligations under the Plan;

(n) declare that in no circumstance will the Monitor have any liability for any of the Target Canada Entities' tax liabilities regardless of how or when such liability may have arisen;

(o) declare that TCC shall be authorized, in connection with the making of any payment or distribution, and TCC and the Monitor shall be authorized, in connection with the taking of any step or transaction or performance of any function under or in connection with the Plan, to apply to any Governmental Authority for any consent, authorization, certificate or approval in connection therewith;

(p) declare that, in carrying out the terms of the Sanction and Vesting Order and the Plan, (i) the Monitor shall benefit from all the protections given to it by the CCAA, the Initial Order and any other Order in the CCAA Proceedings, and as an officer of the Court, including the Stay of Proceedings in its favour; (ii) the Monitor shall incur no liability or

obligation as a result of carrying out the provisions of the Sanction and Vesting Order and/or the Plan; and (iii) the Monitor shall be entitled to rely on the books and records of the Target Canada Entities and any information provided by any of the Target Canada Entities without independent investigation and shall not be liable for any claims or damages resulting from any errors or omissions in such books, records or information;

(q) provide for discharge of the CCAA Charges (other than the Administration Charge and the Directors' Charge) and the continuation of the Administration Charge and the Directors' Charge which shall survive the Plan Implementation Date;

(r) approve the Monitor's form of Notice of Final Distribution;

(s) authorize the Target Canada Entities (at their sole election) to seek an order of any court of competent jurisdiction to recognize the Plan and the Sanction and Vesting Order and to confirm the Plan and the Sanction and Vesting Order as binding and effective in any appropriate foreign jurisdiction;

(t) declare that the Target Canada Entities and the Monitor may apply to the Court from time to time for advice and direction in respect of any matters arising from or under the Plan;

(u) approve the form of the Employee Trust Termination Certificate, and declare that upon the delivery thereof, the Monitor shall file the Employee Trust Termination Certificate with the Court and, immediately upon such filing:

(i) the Employee Trust Trustee shall be deemed to be discharged from its duties as Employee Trust Trustee and released of all claims relating to its activities as Employee Trust Trustee; and

(ii) the Employee Trust Administrator shall be deemed to be discharged from its duties as Employee Trust Administrator and released of all claims relating to its activities as Employee Trust Trustee; and

(v) approve the form of the Monitor's Plan Completion Certificate, and declare that the Monitor, in its capacity as Monitor, following written notice from TCC pursuant to Section 5.12(d) that TCC has completed its duties to effect distributions, disbursements and payments in accordance with the Plan, shall file with the Court the Monitor's Plan Completion Certificate stating that all of its duties and the Target Canada Entities' duties under the Plan and the Orders have been completed, and thereafter the Monitor shall seek an Order, *inter alia*, discharging and releasing the Monitor from its duties as Monitor in the CCAA Proceedings, releasing the Target Canada Entities and any Directors and Officers holding such office following the Plan Implementation Date and their advisors, from all claims relating to the implementation of the Plan and releasing the Administration Charge and the Directors' Charge.

8.3 Conditions Precedent to Implementation of the Plan

The implementation of the Plan shall be conditional upon the fulfilment or waiver, where applicable, of the following conditions precedent by the date specified therefor, provided however that any waiver of any such conditions precedent shall require the consent of the Plan Sponsor and the Monitor acting reasonably:

(a) each of the Landlord Guarantee Creditors and the Plan Sponsor shall have executed and delivered the Landlord Guarantee Creditor Settlement Agreement and each of the Landlord Non-Guarantee Creditors and TCC shall have executed and delivered a Landlord Non-Guarantee Creditor Consent and Support Agreement(s), which agreements shall be in full force and effect;

(b) the Meeting Order shall have been granted by the Court on or before April 21, 2016, or such later date as shall be acceptable to TCC in consultation with the Monitor, and shall have become a Final Order;

(c) the Creditors' Meeting to consider and vote on the Plan shall have been convened by the date set by the Meeting Order or such later date and shall be acceptable to TCC in consultation with the Monitor;

(d) the Target Canada Entities shall have satisfied their respective Post-Filing Trade Payables in the ordinary course or

provision shall have been made in respect thereof in the Administrative Reserve to the satisfaction of the Monitor;

(e) all material consents, declarations, rulings, certificates or approvals of or by any Governmental Authority as may be considered necessary by the Target Canada Entities, the Plan Sponsor and the Monitor in respect of the Plan Transaction Steps shall have been obtained;

(f) the Plan shall have been approved by the Required Majority of the Affected Creditors forming the Unsecured Creditors' Class at the Creditors' Meeting;

(g) the Sanction and Vesting Order shall have been granted by the Court by June 6, 2016, or such later date as shall be acceptable to TCC, in consultation with the Monitor, in form satisfactory to the Target Canada Entities, the Plan Sponsor and the Monitor, and shall have become a Final Order; and

(h) the Plan Implementation Date shall have occurred by the date that is seven (7) days from the date on which the Sanction and Vesting Order becomes a Final Order, which in no event shall be later than July 29, 2016.

8.4 Monitor's Certificate

Upon delivery of written notice from the Target Canada Entities and the Plan Sponsor of the fulfilment or waiver of the conditions precedent to implementation of the Plan as set out in Section 8.3 of the Plan, the Monitor shall deliver the Monitor's Plan Implementation Certificate to the Target Canada Entities. Following the Plan Implementation Date, the Monitor shall file such certificate with the Court and shall post a copy of same on the Website.

Article 9 General

9.1 Binding Effect

On the Plan Implementation Date, or as otherwise provided in the Plan:

(a) the Plan will become effective at the Effective Time and the Plan Transaction Steps will be implemented;

(b) the treatment of Affected Claims, Propco Unaffected Claims, Property LP Unaffected Claims and the TCC Secured Construction Lien Claims under the Plan shall be final and binding for all purposes and enure to the benefit of the Target Canada Entities, the Plan Sponsor, all Affected Creditors, the Propco Unaffected Creditors, the Property LP Unaffected Creditors, the holders of TCC Secured Construction Lien Claims, the Released Parties and all other Persons and parties named or referred to in, or subject to, the Plan and their respective heirs, executors, administrators and other legal representatives, successors and assigns;

(c) all Affected Claims shall be and shall be deemed to be forever discharged and released, and all Propco Unaffected Claims, Property LP Unaffected Claims and TCC Secured Construction Lien Claims shall be and shall be deemed to be fully satisfied, discharged and released, excepting only the obligations to make distributions in respect of such Affected Claims, Propco Unaffected Claims, Property LP Unaffected Claims and TCC Secured Construction Lien Claims in the manner and to the extent provided for in the Plan; provided, however, that the Subordinated Intercompany Claims shall be discharged and released in a manner determined by the Plan Sponsor and the Target Canada Entities on or prior to the Plan Implementation Date;

(d) each Person named or referred to in, or subject to, the Plan shall be deemed to have consented and agreed to all of the provisions of the Plan, in its entirety;

(e) each Person named or referred to in, or subject to, the Plan shall be deemed to have executed and delivered to the Target Canada Entities and the Plan Sponsor all consents, releases, directions, assignments and waivers, statutory or otherwise, required to implement and carry out the Plan in its entirety; and

(f) each Person named or referred to in, or subject to, the Plan shall be deemed to have received from the Target Canada Entities and the Plan Sponsor all statements, notices, declarations and notifications, statutory or otherwise, required to

implement and carry out the Plan in its entirety.

9.2 Claims Bar Date

Nothing in this Plan extends or shall be interpreted as extending or amending the Claims Bar Date, or gives or shall be interpreted as giving any rights to any Person in respect of Claims that have been barred or extinguished pursuant to the Claims Procedure Order.

9.3 Deeming Provisions

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

9.4 Interest and Fees

Interest shall not accrue or be paid on Affected Claims after the Filing Date, and no holder of an Affected Claim shall be entitled to interest accruing nor to fees and expenses incurred in respect of an Affected Claim on or after the Filing Date and any Claims in respect of interest accruing or fees and expenses incurred on or after the Filing Date shall be deemed to be forever extinguished and released. For greater certainty, interest (if any) shall continue to accrue on Propco Unaffected Claims and Property LP Unaffected Claims in accordance with the terms of the applicable contract.

9.5 Non-Consummation

The Target Canada Entities reserve the right to revoke or withdraw the Plan at any time prior to the Plan Sanction Date with the consent of the Plan Sponsor. If the Target Canada Entities revoke or withdraw the Plan, or if the Sanction and Vesting Order is not issued or if the Plan Implementation Date does not occur, (a) the Plan (including all Plan Transaction Steps) shall be null and void in all respects, (b) any settlement or compromise embodied in the Plan (including the subordinations and/or re-contributions of any Intercompany Claims set out herein), or any document or agreement executed pursuant to or in connection with the Plan shall be deemed to be null and void, and (c) nothing contained in the Plan, and no acts taken in preparation for consummation of the Plan, shall (i) constitute or be deemed to constitute a waiver or release of any Claims, Propco Unaffected Claims or Property LP Unaffected Claims by or against any of the Target Canada Entities or any other Person, (ii) prejudice in any manner the rights of the Target Canada Entities, the Plan Sponsor or any other Person in any further proceedings involving any of the Target Canada Entities or Intercompany Claims or (iii) constitute an admission of any sort by any of the Target Canada Entities, the Plan Sponsor or any other Person.

9.6 Modification of the Plan

(a) The Target Canada Entities reserve the right, at any time and from time to time, with the consent of the Monitor and the Plan Sponsor, both prior to and during the Creditors' Meeting or after the Creditors' Meeting, to amend, restate, modify and/or supplement the Plan; provided (i) if made prior to or at the Creditors' Meeting, such amendment, restatement, modification or supplement shall be communicated to Affected Creditors in the manner required by the Meeting Order and (ii) if made following the Creditors' Meeting, such amendment, restatement, modification or supplement shall be approved by the Court following notice to the Affected Creditors.

(b) Notwithstanding Section 9.6(a), any amendment, restatement, modification or supplement to the Plan may be made by the Target Canada Entities, with the consent of the Monitor and the Plan Sponsor or pursuant to an Order of the Court, at any time and from time to time, provided that it concerns a matter which (i) is of an administrative nature required to better give effect to the implementation of the Plan and the Sanction and Vesting Order or (ii) to cure any errors, omissions or ambiguities, and in either case is not materially adverse to the financial or economic interests of the Affected Creditors.

(c) Any amended, restated, modified or supplementary Plan or Plans filed with the Court and, if required by this Section, approved by the Court shall, for all purposes, be and be deemed to be a part of, and incorporated in, the Plan.

9.7 Paramountcy

Except with respect to the Unaffected Claims, from and after the Effective Time on the Plan Implementation Date, any conflict between:

(a) the Plan; and

(b) the covenants, warranties, representations, terms, conditions, provisions or obligations, expressed or implied, of any contract, mortgage, security agreement, indenture, trust indenture, loan agreement, commitment letter, agreement for sale, bylaws of the Target Canada Entities, lease or other agreement, written or oral and any and all amendments or supplements thereto existing between any Person and the Target Canada Entities as at the Plan Implementation Date;

will be deemed to be governed by the terms, conditions and provisions of the Plan and the Sanction and Vesting Order, which shall take precedence and priority.

9.8 Severability of Plan Provisions

If, prior to the Plan Sanction Date, any term or provision of the Plan is held by the Court to be invalid, void or unenforceable, the Court, at the request of the Target Canada Entities and with the consent of the Monitor and the Plan Sponsor, shall have the power to either (a) sever such term or provision from the balance of the Plan and provide the Target Canada Entities with the option to proceed with the implementation of the balance of the 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 applied as altered or interpreted. Notwithstanding any such holding, alteration or interpretation, and provided that the Target Canada Entities proceed with the implementation of the Plan, the remainder of the terms and provisions of the Plan shall remain in full force and effect and shall in no way be affected, impaired or invalidated by such holding, alteration or interpretation.

9.9 Responsibilities of the Monitor

The Monitor is acting and will continue to act in all respects in its capacity as Monitor in the CCAA Proceedings with respect to the Target Canada Entities and not in its personal or corporate capacity, including without limitation supervising the establishment and administration of the TCC Cash Pool, the Propco Cash Pool, the Landlord Guarantee Creditor Base Claim Cash Pool, the Landlord Guarantee Enhancement Cash Pool, the Landlord Non-Guarantee Creditor Equalization Cash Pool, the Plan Sponsor Propco Recovery Limit Reserve and the Cash Reserves (including any adjustments with respect to same) and establishing any of the Distribution Dates, Effective Time or the timing or sequence of the Plan Transaction Steps. The Monitor will not be responsible or liable whatsoever for any obligations of the Target Canada Entities or the Plan Sponsor. The Monitor will have the powers and protections granted to it by the Plan, the CCAA, the Initial Order, the Meeting Order, the Sanction and Vesting Order and any other Order made in the CCAA Proceedings.

9.10 Different Capacities

Persons who are affected by the Plan may be affected in more than one capacity. Unless expressly provided herein to the contrary, a Person will be entitled to participate hereunder in each such capacity. Any action taken by a Person in one capacity will not affect such Person in any other capacity, unless expressly agreed by a Person in writing or unless its Claims overlap or are otherwise duplicative.

9.11 Notices

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

(a) If to the Target Canada Entities:

Target Canada Co.

c/o Osier, Hoskin & Harcourt LLP

Box 50, 1 First Canadian Place

100 King Street West

Toronto, ON M5X 1B8

Attention: Aaron Alt

Email: aaron.alt@target.com

with a copy to:

Osier, Hoskin & Harcourt LLP

Box 50, 1 First Canadian Place

100 King Street West

Toronto, ON M5X 1B8

Attention: Tracy C. Sandler

Email: tsandler@osler.com

(b) If to the Plan Sponsor:

Target Corporation

1000 Nicollet Mall

TPS-3155

Minneapolis, MN 55403

Attention: Corey Haaland

Email: corey.haaland@target.com

with a copy to:

Faegre Baker Daniels LLP

2200 Wells Fargo Center

90 S. Seventh Street

Minneapolis, MN 55402

Attention: Dennis M. Ryan

Email: dennis.ryan@faegrebd.com

with a copy to:

Davies Ward Phillips & Vineberg LLP

155 Wellington Street West

Toronto, ON M5V 3J7

Attention: Jay A. Swartz

Email: jswartz@dwpv.com

(c) If to the Monitor or the Employee Trust Administrator:

Alvarez & Marsal Canada Inc.

Royal Bank Plaza, South Tower

200 Bay Street, Suite 2900

PO Box 22

Toronto, ON M5J 2J1

Attention: Douglas R. Mcintosh / Alan J. Hutchens

Email: dmcintosh@alvarezandmarsal.com / ahutchens@alvarezandmarsal.com

with a copy to:

Goodmans LLP

Bay Adelaide Centre

333 Bay Street, Suite 3400

Toronto, ON M5H 2S7

Attention: Jay A. Carfagnini / Melaney Wagner

Email: jcarfagnini@goodmans.ca / mwagner@goodmans.ca

(d) If to the Employee Trust Trustee:

Hon. John D. Ground

Amicus Chambers

141 Adelaide Street West

11th Floor

Toronto, ON M5H 3L5

Email: jground@NeesonChambers.com

with a copy to:

Lax O'Sullivan Lisus Gottlieb LLP

145 King Street West, Suite 2750

Toronto, ON M5H 1J8

Attention: Terrence O'Sullivan

Email: tosullivan@counsel-toronto.cora

or to such other address as any party may from time to time notify the others in accordance with this Section. 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 sending by means of recorded electronic communication, provided that such day in either event is a Business Day and the communication is so delivered 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.

9.12 Further Assurances

Each of the Persons named or referred to in, or subject to, the 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 the Plan and to give effect to the transactions contemplated herein.

DATED as of the 19th day of May, 2016.

Schedule "A"

Intercompany Claims[1]

Claim #	*Original Claimant*	*Debtor Company*	*Currency*	*Claim ($)*	*Proposed Adjustment*	*Recalculated Claim*	*Comingent Claim*	*Defined Plan Term*	*Plan treatment*
Intercompany Claim									
Claim #1	NE1	TCC	CAD	3,068,729,438	-	3,068,729,438		NE1 Intercompany Claim	Fully subordinated
Claim #2									
2A	TBI	TCC	USD	23,573,542	(4,786,473)	18,787,069		N/A	Distribution from TCC Cash Pool as Affected Creditor
2B	TBI	TCC	USD	37,502,539	(37,502,539)	-		N/A	N/A
Claim #3	TCSI	TCC	USD	2,778,278	(613,869)	2,164,409		N/A	Distribution from TCC Cash Pool as Affected Creditor
Claim #4									
4A	TC	Prop LLC	USD	89,079,107	-	89,079,107		Plan Sponsor (Propco) Intercompany Claim	Recovery limited (distribution up to Plan Sponsor Propco Recovery Limit in accordance with Section 5.6)
4B	TC	TCC	USD	541,404	(36,585)	504,818		N/A	Distribution from TCC Cash Pool as Affected Creditor
4C	TC	TCC	USD	559,373	(559,373)	-		N/A	N/A

Leasehold Arrangements Claims									
Claim #5									
5A	Prop LP	Prop LLC	CAD	1,449,577,927		1,449,577,927		Property LP (Propco) Intercompany Claim	Partially subordinated (see Section 5.3 of the Plan)
5B	Prop LP	TCC	CAD	87,748,817	(4,886,996)	82,861,821		Property LP (TCC) Intercompany Claim	Distribution from TCC Cash Pool as Affected Creditor
5C	Prop LP	Prop LLC					Contingent	N/A	N/A
5D	Prop LP	TCC					Contingent	N/A	N/A
Claim #6									
6A	Prop LLC	TCC	CAD	27,254,109 (after netting claim 7A, being 46,873,620 on a gross basis)	6,978,418	34,232,528 (after netting claim 7A, being 45,852,897 on a gross basis)		Propco (Pre-filing TCC) Intercompany Claim	Fully subordinated
6B	Prop LLC	TCC	CAD	1,911,494,242	(554,738,191)	1,356,756,051		Propco Intercompany Claim	Fully subordinated
6C	Prop LLC	TCC	CAD	37,347,552 (after netting claim 7B, being 43,651,173 on a gross basis)	(787,729)	36,559,823 (after netting claim 7B, being 43,526,186 on a gross basis)		Propco (Post-filing TCC) Intercompany Claim	Fully subordinated
Claim #7									
7A	TCC	Prop LLC	CAD	19,619,511	(7,999,142)	11,620,369	Contingent	TCC (Pre-filing Propco) Intercompany Claim	Partially subordinated (see Section 5.3 of the Plan)
7B	TCC	Prop LLC	CAD	6,303,621	662,742	6,966,363	Contingent	TCC (Post-filing Propco) Intercompany Claim	Partially subordinated (see Section 5.3 of the Plan)
7C	TCC	Prop LP	CAD	528,730	-	528,730	Contingent	N/A	Netted against Intercompany Claim 5B

Schedule ”B”

Domain Names

alliesforconsumerdigitalsafety.ca
avaandviv.ca
avaviv.ca
brightspotmobile.ca
brightspotphone.ca
bullseyemobilesolutions.ca
bullseyepharmacy.ca
bullseyeshoprequests.ca
bullseyespecialrequests.ca
bullseyesubscription.ca
bullseyesubscriptions.ca
bullseyeticket.ca
bullseyetickets.ca
canadapartnersonline.ca
consumerdigitalsafetyallies.ca
consumerdigitalsafetyconsortium.ca
digitalsafetyallies.ca
dites-le-nous-target.ca
domaniedelarcher.ca
expectmorepayless.ca
garde-marche.ca
hopethop.ca
larchermaraicher.ca
marchefute.ca
moretaylor.ca
mybrightspot.ca
partenairescanadiensenligne.ca
partnersonlinecanada.ca
pharmacyevents.ca
redperk.ca
redperks.ca
reellementessentiel.ca
savoreveryday.ca
savoureveryday.ca
smith-hawken.ca
smithhawken.ca
smithnhawken.ca
suttonanddodge.ca
takechargeofeducation.ca
target-ceo.ca
targetcartwheel.ca
targetceo.ca
targetexpress.ca
targetget.ca
targetlocation.ca
targetspoton.ca
targetsubscription.ca
targetsubscriptions.ca
tellbullseye.ca
telltarget.ca
telltgt.ca
tevolio.ca

trouvezmieuxpayezmoins.ca
upandup.ca
upandupbrand.ca
upup.ca
upupbrand.ca
wellbeingdreams.ca
winecube.ca
yourtarget.ca

Schedule "C"

Meeting Order

ONTARIO SUPERIOR COURT OF JUSTICE COMMERCIAL LIST

THE HONOURABLE	)	WEDNESDAY, THE 13{ TH}
	)	
REGIONAL SENIOR JUSTICE MORAWETZ	)	DAY OF APRIL, 2016
	)	

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 TARGET CANADA CO., TARGET CANADA HEALTH CO., TARGET CANADA MOBILE GP CO., TARGET CANADA PHARMACY (BC) CORP., TARGET CANADA PHARMACY (ONTARIO) CORP., TARGET CANADA PHARMACY CORP., TARGET CANADA PHARMACY (SK) CORP., and TARGET CANADA PROPERTY LLC (collectively the *"Applicants"*)

Meeting Order

THIS MOTION, made by the Applicants and the partnerships listed on Schedule "A" hereto (together with the Applicants, the *"Target Canada Entities"*) pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. c-36, as amended (the *"CCAA"*) for an order, *inter alia*, (a) accepting the filing of an Amended and Restated Joint Plan of Compromise and Arrangement pursuant to the CCAA filed by the Target Canada Entities dated April 6, 2016 (the *"Plan"*), (b) authorizing the Target Canada Entities to establish one class of Affected Creditors for the purpose of considering and voting on the Plan, (c) authorizing the Target Canada Entities to call, hold and conduct a meeting of the Affected Creditors (the *"Creditors' Meeting"*) to consider and vote on a resolution to approve the Plan; (d) approving the procedures to be followed with respect to the calling and conduct of the Creditors' Meeting; and (e) setting the date for the hearing of the Target Canada Entities' motion seeking sanction of the Plan, was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the Affidavit of Mark J. Wong sworn April 6, 2016 (the *"Wong Affidavit"*), and the exhibits thereto and the Twenty-Sixth Report of the Monitor, and on hearing the submissions of respective counsel for the Target Canada Entities, the Monitor, and such other counsel as were present, and on being advised that the Service List was served with the Motion Record herein:

Service

1. THIS COURT ORDERS that the time for service of the Notice of Motion and the Motion Record herein is hereby abridged and validated so that this Motion is properly returnable today and that service thereof upon any interested party other than the persons served with the Motion Record is hereby dispensed with.

2. THIS COURT ORDERS that any capitalized terms not otherwise defined in this Meeting Order shall have the meanings ascribed to them in the Plan.

Amended and Restated Joint Plan of Compromise and Arrangement

3. THIS COURT ORDERS that the Plan is hereby accepted for filing, and the Target Canada Entities are hereby authorized to seek approval of the Plan from the Affected Creditors in the manner set forth herein.

4. THIS COURT ORDERS that the Target Canada Entities, with the consent of the Plan Sponsor and the Monitor, be and they are hereby authorized to make and to file a modification or restatement of, or amendment or supplement to, the Plan (each a *"Plan Modification"*) prior to or at the Creditors' Meeting, in which case any such Plan Modification shall, for all purposes, be and be deemed to form part of and be incorporated into the Plan. The Target Canada Entities shall give notice of

any such Plan Modification at the Creditors' Meeting prior to the vote being taken to approve the Plan. The Target Canada Entities may give notice of any such Plan Modification at or before the Creditors' Meeting by notice which shall be sufficient if, in the case of notice at the Creditors' Meeting, given to those Affected Creditors present at such meeting in person or by Proxy and, in the case of notice before the Creditors' Meeting, provided to those Persons listed on the service list posted on the Website (as amended from time to time, the *"Service List"*). The Monitor shall forthwith post on the Website any such Plan Modification, with notice of such posting forthwith provided to the Service List.

5. THIS COURT ORDERS that after the Creditors' Meeting (and both prior to and subsequent to the obtaining of any Sanction and Vesting Order), the Target Canada Entities may at any time and from time to time, with the consent of the Plan Sponsor and the Monitor effect a Plan Modification (a) pursuant to an Order of the Court or (b) where such Plan Modification concerns a matter which, in the opinion of the Target Canada Entities and the Monitor, is of an administrative nature required to better give effect to the implementation of the Plan and the Sanction and Vesting Order or to cure any errors, omissions or ambiguities, and in either circumstance is not materially adverse to the financial or economic interests of the Affected Creditors. The Monitor shall forthwith post on the Website any such Plan Modification, with notice of such posting forthwith provided to the Service List.

Forms of Documents

6. THIS COURT ORDERS that the Notice of Creditors' Meeting substantially in the form attached hereto as Schedule "B" (the *"Notice of Creditors' Meeting"*), the Proxy substantially in the form attached hereto as Schedule "C" (the *"Proxy"*), the Convenience Class Claim Election substantially in the form attached hereto as Schedule "D" (the *"Convenience Class Claim Election"*) and the form of Resolution substantially in the form attached as Schedule "E" (the *"Resolution"*) are each hereby approved and the Target Canada Entities with the consent of the Monitor are authorized and directed to make such changes to such forms of documents as they consider necessary or desirable to conform the content thereof to the terms of the Plan or this Meeting Order.

Classification of Creditors

7. THIS COURT ORDERS that for the purposes of considering and voting on the Plan, the Affected Creditors shall constitute a single class, the "Unsecured Creditors' Class".

Notice of Creditors' Meeting

8. THIS COURT ORDERS that the Monitor shall cause to be sent by regular pre-paid mail, courier, fax or e-mail copies of the Notice of Creditors' Meeting, the Proxy, the Convenience Class Claim Election, the Resolution, the Plan, the Letter to Creditors attached as Exhibit "B" to the Wong Affidavit and a copy of this Meeting Order (collectively, the *"Meeting Materials"*) as soon as practicable after the granting of this Meeting Order and, in any event, no later than April 21, 2016 to each Affected Creditor at the address for such Affected Creditor set out in such Affected Creditor's Proof of Claim or to such other address subsequently provided to the Monitor by such Affected Creditor.

9. THIS COURT ORDERS that the Monitor shall forthwith post an electronic copy of the Meeting Materials on the Website, send a copy of the Meeting Materials to the Service List and shall provide a written copy to any Affected Creditor upon request by such Affected Creditor.

10. THIS COURT ORDERS that on or before April 27, 2016 the Monitor shall cause the Notice of Creditors' Meeting to be published for a period of two (2) Business Days in *The Globe and Mail* (National Edition), *La Presse* and *The Wall Street Journal*.

11. THIS COURT ORDERS that the delivery of the Meeting Materials in the manner set out in paragraph 8 hereof, posting of the Meeting Materials on the Website in accordance with paragraph 8 hereof, and the publication of the Notice of Creditors' Meeting in accordance with paragraph 9 hereof shall constitute good and sufficient service of this Meeting Order and of the Plan, and good and sufficient notice of the Creditors' Meeting on all Persons who may be entitled to receive notice thereof of these proceedings or who may wish to be present in person or by Proxy at the Creditors' Meeting or who may wish to appear in these proceedings, and no other form of notice or service need be made on such Persons.

12. THIS COURT ORDERS that on or before May 11, 2016, the Monitor shall serve a report regarding the Plan on the Service List and promptly thereafter post such report on the Website.

Conduct at the Creditors' Meeting

13. THIS COURT ORDERS that the Target Canada Entities are hereby authorized to call, hold and conduct the Creditors' Meeting on May 25, 2016 at 10:00 a.m. at the Toronto Region Board of Trade, 77 Adelaide Street West in Toronto, Ontario for the purpose of considering, and if deemed advisable by the Unsecured Creditors' Class, voting in favour of, with or without variation, the Resolution to approve the Plan.
14. THIS COURT ORDERS that a representative of the Monitor, designated by the Monitor, shall preside as the chair of the Creditors' Meeting (the *"Chair"*) and, subject to any further Order of this Court, shall decide all matters relating to the conduct of the Creditors' Meeting.
15. THIS COURT ORDERS that the Chair is authorized to accept and rely upon Proxies or such other forms as may be acceptable to the Chair.
16. THIS COURT ORDERS that the quorum required at the Creditors' Meeting shall be one (1) Affected Creditor with a Voting Claim present at such meeting in person or by Proxy.
17. THIS COURT ORDERS that the Monitor may appoint scrutineers for the supervision and tabulation of the attendance at, quorum at and votes cast at the Creditors' Meeting. A Person designated by the Monitor shall act as secretary at the Creditors' Meeting.
18. THIS COURT ORDERS that if (a) the requisite quorum is not present at the Creditors' Meeting, or (b) the Creditors' Meeting is postponed by the vote of the majority in value of Affected Creditors holding Voting Claims in person or by Proxy at the Creditors' Meeting, then the Creditors' Meeting shall be adjourned by the Chair to such time and place as the Chair deems necessary or desirable.
19. THIS COURT ORDERS that the Chair be, and he or she is hereby, authorized to adjourn, postpone or otherwise reschedule the Creditors' Meeting on one or more occasions to such time(s), date(s) and place(s) as the Chair deems necessary or desirable (without the need to first convene such Creditors' Meeting for the purpose of any adjournment, postponement or other rescheduling thereof). None of the Target Canada Entities, the Chair or the Monitor shall be required to deliver any notice of the adjournment of the Creditors' Meeting or adjourned Creditors' Meeting, provided that the Monitor shall: (a) announce the adjournment of the Creditors' Meeting or adjourned Creditors' Meeting, as applicable; (b) post notice of the adjournment at the originally designated time and location of the Creditors' Meeting or adjourned Creditors' Meeting, as applicable; (c) forthwith post notice of the adjournment on the Website; and (d) provide notice of the adjournment to the Service List forthwith. Any Proxies validly delivered in connection with the Creditors' Meeting shall be accepted as Proxies in respect of any adjourned Creditors' Meeting.
20. THIS COURT ORDERS that the only Persons entitled to attend and speak at the Creditors' Meeting are representatives of the Target Canada Entities and the Plan Sponsor and their respective legal counsel and advisors, the Monitor and its legal counsel and advisors, Pharmacists' Representative Counsel, Employee Representative Counsel, the Employee Trust Trustee and his legal counsel and all other Persons, including the holders of Proxies, entitled to vote at the Creditors' Meeting and their respective legal counsel and advisors. Any other Person may be admitted to the Creditors' Meeting on invitation of the Chair.

Voting Procedure at the Creditors' Meeting

21. THIS COURT ORDERS that the Chair shall direct a vote on the Resolution to approve the Plan and any amendments or variations thereto made in accordance with the Plan and this Meeting Order.
22. THIS COURT ORDERS that any Proxy in respect of the Creditors' Meeting (or any adjournment, postponement or other rescheduling thereof) must be (a) received by the Monitor by 10:00 a.m. on May 24, 2016, or 24 hours (excluding Saturdays, Sundays and statutory holidays) prior to any adjourned, postponed or rescheduled Creditors' Meeting, or (b) deposited with the Chair at the Creditors' Meeting (or any adjournment, postponement or other rescheduling thereof) immediately prior to the vote at the time specified by the Chair (the *"Election/Proxy Deadline"*).
23. THIS COURT ORDERS that, in the absence of instruction to vote for or against the approval of the Resolution in a duly signed and returned Proxy, the Proxy shall be deemed to include instructions to vote for the approval of the Resolution, provided the Proxy holder does not otherwise exercise its right to vote at the Creditors' Meeting.
24. THIS COURT ORDERS that each Affected Creditor with a Voting Claim shall be entitled to one vote equal to the dollar value of its Affected Claim determined as a Voting Claim in accordance with the Claims Procedure Order and paragraph(s) 30 and 30 of this Meeting Order.
25. THIS COURT ORDERS that each Convenience Class Creditor shall be deemed to have voted in favour of the Plan.
26. THIS COURT ORDERS that (a) holders of Intercompany Claims shall not be entitled to vote on the Plan and (b) the Plan Sponsor shall not be entitled to vote on the Plan in respect of (i) its Plan Sponsor Subrogated Claims, (ii) any amounts to be contributed to the Landlord Guarantee Enhancement Cash Pool and to the Landlord Non-Guarantee Creditor Equalization Cash Pool under the Plan, or (iii) any Cash Management Lender Claims.

27. THIS COURT ORDERS that an Affected Creditor's Voting Claim shall not include fractional numbers and Voting Claims shall be rounded down to the nearest whole Canadian Dollar amount.
28. THIS COURT ORDERS that an Affected Creditor, a Propco Unaffected Creditor or a Property LP Unaffected Creditor may transfer or assign the whole of its Claim prior to the Creditors' Meeting, provided that neither the Target Canada Entities nor the Monitor shall be obligated to give notice to or otherwise deal with the transferee or assignee of such Claim as an Affected Creditor, a Propco Unaffected Creditor or a Property LP Unaffected Creditor in respect thereof, including allowing such transferee or assignee of an Affected Claim 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 and acknowledged by the Monitor in writing no later than 5:00 p.m. on the date that is seven (7) days prior to the Creditors' Meeting. Thereafter such transferee or assignee shall, for all purposes in accordance with the Claims Procedure Order and this Meeting Order, constitute an Affected Creditor, a Propco Unaffected Creditor or a Property LP Unaffected Creditor, as applicable, and shall be bound by any and all notices previously given to the transferor or assignor and steps taken in respect of such Claim. Such transferee or assignee shall not be entitled to set-off, apply, merge, consolidate or combine any Claims assigned or transferred to it against or on account or in reduction of any amounts owing by such transferee or assignee to any of the Target Canada Entities. Where a Claim has been transferred or assigned in part, the transferor or assignor shall retain the right to vote at the Creditors' Meeting in respect of the full amount of the Claim as determined for voting purposes in accordance with this Meeting Order, and the transferee or assignee shall have no voting rights at the Creditors' Meeting in respect of such Claim.
29. THIS COURT ORDERS that an Affected Creditor (other than a Convenience Class Creditor), a Propco Unaffected Creditor or a Property LP Unaffected Creditor may transfer or assign the whole of its Claim after the Creditors' Meeting provided that the Target Canada Entities shall not be obligated to make any distributions to any such transferee or assignee or otherwise deal with such transferee or assignee as an Affected Creditor, a Propco Unaffected Creditor or a Property LP Unaffected Creditor 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 and acknowledged by the Monitor in writing. Thereafter, such transferee or assignee shall, for all purposes in accordance with the Claims Procedure Order, this Meeting Order and the Plan, constitute an Affected Creditor, a Propco Unaffected Creditor or a Property LP Unaffected Creditor, as applicable, and shall be bound by any and all notices previously given to the transferor or assignor and steps taken in respect of such Claim.

Disputed Claims

30. THIS COURT ORDERS that the Canada Revenue Agency shall have one vote in respect of its Disputed Claims, the dollar value of which shall be equal to $1, without prejudice to the determination of the dollar value of such Disputed Claims for distribution purposes in accordance with the Claims Procedure Order.
31. THIS COURT ORDERS that the dollar value of a Disputed Claim of an Affected Creditor (other than the Disputed Claims of the Canada Revenue Agency) for voting purposes at the Creditors' Meeting shall be the dollar value of such Disputed Claim as set out in such Affected Creditor's Notice of Revision or Disallowance previously delivered by the Monitor pursuant to the Claims Procedure Order, without prejudice to the determination of the dollar value of such Affected Creditor's Disputed Claim for distribution purposes in accordance with the Claims Procedure Order.
32. THIS COURT ORDERS that the Monitor shall keep a separate record of votes cast by Affected Creditors holding Disputed Claims and shall report to the Court with respect thereto at the Sanction Motion.

Convenience Class Claim Election

33. THIS COURT ORDERS that any Affected Creditor with one or more Proven Claims in an amount in excess of Cdn$25,000 shall be entitled to elect to receive only the Cash Elected Amount and be deemed to vote in favour of the Plan in accordance with paragraph 24 hereof by returning an executed Convenience Class Claim Election to the Monitor prior to the Election/Proxy Deadline.

Approval of the Plan

34. THIS COURT ORDERS that in order to be approved, the Plan must receive an affirmative vote by the Required Majority.
35. THIS COURT ORDERS that following the vote at the Creditors' Meeting, the Monitor shall tally the votes and determine whether the Plan has been approved by the Required Majority.
36. THIS COURT ORDERS that the results of and all votes provided at the Creditors' Meeting shall be binding on all

Affected Creditors, whether or not any such Affected Creditor is present or voting at the Creditors' Meeting.

Sanction Hearing

37. THIS COURT ORDERS that the Monitor shall provide a report to the Court as soon as practicable after the Creditors' Meeting (the *"Monitor's Report Regarding the Creditors' Meeting"*) with respect to:

(a) the results of voting at the Creditors' Meeting on the Resolution;

(b) whether the Required Majority has approved the Plan;

(c) the separate tabulation for Disputed Claims required by paragraph 32 herein; and

(d) in its discretion, any other matter relating to the Target Canada Entities' motion seeking sanction of the Plan.

38. THIS COURT ORDERS that an electronic copy of the Monitor's Report Regarding the Creditors' Meeting, the Plan, including any Plan Modifications, and a copy of the motion seeking the Sanction and Vesting Order in respect of the Plan (the *"Sanction Motion"*) shall be posted on the Website prior to the Sanction Motion.
39. THIS COURT ORDERS that in the event the Plan has been approved by the Required Majority, the Target Canada Entities may bring the Sanction Motion before this Court on June 2, 2016, or such later date as shall be acceptable to the Target Canada Entities, the Plan Sponsor and the Monitor as set by this Court upon motion by the Target Canada Entities, seeking the Sanction and Vesting Order.
40. THIS COURT ORDERS that service of this Meeting Order by the Target Canada Entities to the parties on the Service List, the delivery of the Meeting Materials in accordance with paragraph 8 hereof, posting of the Meeting Materials on the Website in accordance with paragraph 8 hereof, and the publication of the Notice of Creditors' Meeting in accordance with paragraph 9 hereof shall constitute good and sufficient service and notice of the Sanction Motion.
41. THIS COURT ORDERS that any Person intending to oppose the Sanction Motion shall (i) file or have filed with the Court a Notice of Appearance and serve such Notice of Appearance on the Service List at least seven (7) days before the date set for the Sanction Motion; and (ii) serve on the Service List a notice setting out the basis for such opposition and a copy of the materials to be used to oppose the Sanction Motion that are available by at least seven (7) days before the date set for the Sanction Motion, or such shorter time as the Court, by Order, may allow.
42. THIS COURT ORDERS that in the event that the Sanction Motion is adjourned, only those Persons appearing on the Service List as of the date of service shall be served with notice of the adjourned date.
43. THIS COURT ORDERS that, subject to any further Order of the Court, in the event of any conflict, inconsistency, ambiguity or difference between the provisions of the Plan and this Meeting Order, the terms, conditions and provisions of the Plan shall govern and be paramount, and any such provision of this Meeting Order shall be deemed to be amended to the extent necessary to eliminate any such conflict, inconsistency, ambiguity or difference.

Extension of Stay Period

44. THIS COURT ORDERS that the Stay Period (as defined in paragraph 17 of the Initial Order) is hereby extended until and including June 6, 2016.

Extension of Notice of Objection Bar Date

45. THIS COURT ORDERS that the definition of "Notice of Objection Bar Date" set out at paragraph 3(aa) of the Claims Procedure Order (issued by Regional Senior Justice Morawetz on June 11, 2015, as amended) is hereby amended to extend the Notice of Objection Bar Date to 28 days following June 6, 2016 or such later date as this Court may Order.

General Provisions
46. THIS COURT ORDERS that the Monitor, in addition to its prescribed rights and obligations under the CCAA and the Initial Order, shall assist the Target Canada Entities in connection with the matters described herein, and is hereby authorized and directed to take such other actions and fulfill such other roles as are contemplated by this Meeting Order.
47. THIS COURT ORDERS that the Target Canada Entities and the Monitor shall use reasonable discretion as to the adequacy of compliance with respect to the manner in which any forms hereunder are completed and executed and the time in which they are submitted and may waive strict compliance with the requirements of this Meeting Order including with

respect to the completion, execution and time of delivery of required forms.
48. THIS COURT ORDERS that the Monitor may, if necessary, apply to this Court for directions regarding its obligations under this Meeting Order.
49. THIS COURT ORDERS that any notice or other communication to be given under this Meeting Order by a Creditor to the Monitor or the Target Canada Entities shall be in writing in the substantially the form, if any, provided for in this Meeting Order and will be sufficiently given only if given by prepaid ordinary mail, registered mail, courier, personal delivery, facsimile transmission or e-mail addressed to:

Target Canada Entities' Counsel:	Osier, Hoskin & Harcourt LLP P.O. Box 50, 1 First Canadian Place 100 King Street West Toronto, ON M5X 1B8 Attention: Tracy C. Sandler / Jeremy E. Dacks E-mail: tsandler@osler.com / jdacks@osler.com Fax: (416) 862-6666
The Monitor:	Alvarez & Marsal Canada Inc., Target Canada Monitor 200 Bay Street, Suite 2900 P.O. Box 22 Toronto, ON M5J 2J1 Attention: Alan J. Hutchens E-mail: ahutchens@alvarezandmarsal.com Fax: (416) 847-5201
With a copy to Monitor's Counsel:	Goodmans LLP Bay Adelaide Centre 333 Bay Street, Suite 3400 Toronto, ON M5H 2S7 Attention: Jay A. Carfagnini / Melaney J. Wagner E-mail: jcarfagnini@goodmans.ca / mwagner@goodmans.ca Fax: (416) 979-1234

50. THIS COURT ORDERS that any such notice or other communication shall be deemed to have been received: (a) if sent by prepaid ordinary mail or registered mail, on the third Business Day after mailing in Ontario, the fifth Business Day after mailing within Canada (other than within Ontario), and the tenth Business Day after mailing internationally; (b) if sent by courier or personal delivery, on the next Business Day following dispatch; and (c) if delivered by facsimile transmission or e-mail by 5:00 p.m. on a Business Day, on such Business Day and if delivered after 5:00 p.m. or other than on a Business Day, on the following Business Day.
51. THIS COURT ORDERS that, in the event that the day on which any notice or communication required to be delivered pursuant to this Meeting Order is not a Business Day, then such notice or communication shall be required to be delivered on the next Business Day.
52. THIS COURT ORDERS that if, during any period during which notices or other communications are being given pursuant to this Meeting Order, a postal strike or postal work stoppage of general application should occur, such notices or other communications sent by ordinary or registered mail and then not received shall not, absent further Order of this Court, be effective and notices and other communications given hereunder during the course of any such postal strike or work stoppage of general application shall only be effective if given by courier, personal delivery, facsimile transmission or e-mail in accordance with this Order.
53. THIS COURT ORDERS that all references to time in this Meeting Order shall mean prevailing local time in Toronto, Ontario and any references to an event occurring on a Business Day shall mean prior to 5:00 p.m. on the Business Day unless otherwise indicated.
54. THIS COURT ORDERS that references to the singular shall include the plural, references to the plural shall include the singular and to any gender shall include the other gender.
55. THIS COURT HEREBY REQUESTS the aid and recognition of any court, tribunal, regulatory or administrative bodies, having jurisdiction in Canada or in the United States of America, to give effect to this Meeting Order and to assist the Target Canada Entities, the Monitor and their respective agents in carrying out the terms of this Meeting Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Target Canada Entities and to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to

this Order, to grant representative status to the Monitor in any foreign proceeding, or to assist the Target Canada Entities and the Monitor and their respective agents in carrying out the terms of this Order.

Schedule "A"

Partnerships

Target Canada Pharmacy Franchising LP
Target Canada Mobile LP
Target Canada Property LP

Schedule "B"

Notice of Creditors' Meeting

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 THE TARGET CANADA ENTITIES AMENDED AND RESTATED JOINT PLAN OF COMPROMISE AND ARRANGEMENT

Notice of Creditors' Meeting

TO: The Affected Creditors of Target Canada Co., Target Canada Health Co., Target Canada Mobile GP Co., Target Canada Pharmacy (BC) Corp., Target Canada Pharmacy (Ontario) Corp., Target Canada Pharmacy Corp., Target Canada Pharmacy (SK) Corp., Target Canada Property LLC, Target Canada Pharmacy Franchising LP, Target Canada Mobile LP and Target Canada Property LP (collectively, the *"Target Canada Entities"*)
NOTICE IS HEREBY GIVEN that a meeting of the Affected Creditors of the Target Canada Entities will be held on May 25, 2016 at 10:00 a.m. at the Toronto Region Board of Trade, 77 Adelaide Street West, Toronto, ON M5X 1C1 (the *"Creditors' Meeting"*) for the following purposes:

1. to consider and, if deemed advisable, to pass, with or without variation, a resolution (the *"Resolution"*) approving the Amended and Restated Joint Plan of Compromise and Arrangement of the Target Canada Entities pursuant to the *Companies' Creditors Arrangement Act* (Canada) (the "CCAA") dated April •, 2016 (as amended, restated, modified and/or supplemented from time to time in accordance with the terms thereof, the *"Plan"*); and

2. to transact such other business as may properly come before the Creditors' Meeting or any adjournment or postponement thereof.

The Creditors' Meeting is being held pursuant to an order (the *"Meeting Order"*) of the Ontario Superior Court of Justice (Commercial List) (the *"Court"*) made on April *[13]*, 2016.
Capitalized terms used and not otherwise defined in this Notice have the respective meanings given to them in the Plan.
The Plan contemplates the compromise of Claims of the Affected Creditors. Quorum for the Creditors' Meeting has been set by the Meeting Order as the presence, in person or by Proxy, at the Creditors' Meeting of one Affected Creditor with a Voting Claim.
In order for the Plan to be approved and binding in accordance with the CCAA, the Resolution must be approved by that number of Affected Creditors representing at least a majority in number of Voting Claims, whose Affected Claims represent at least two-thirds in value of the Voting Claims of Affected Creditors who validly vote (in person or by Proxy) on the Resolution at the Creditors' Meeting or were deemed to vote on the Resolution as provided for in the Meeting Order (the *"Required Majority"*). Each Affected Creditor will be entitled to one vote at the Creditors' Meeting, which vote will have the value of such person's Voting Claim as determined in accordance with the Claims Procedure Order and the Meeting Order. If approved by the Required Majority, the Plan must also be sanctioned by the Court under the CCAA. Subject to the satisfaction of the other conditions precedent to implementation of the Plan, all Affected Creditors will then receive the treatment set forth in the Plan.

Deemed Voting in Favour of the Plan

Convenience Class Creditors will be deemed to vote in favour of the Plan.

Forms and Proxies

Convenience Class Claim Election

Affected Creditors with one or more Proven Claims in an amount in excess of Cdn$25,000 may file with the Monitor a Convenience Class Claim Election, pursuant to which such Affected Creditor may elect to be treated as a Convenience Class Creditor and receive only the Cash Elected Amount of Cdn$25,000 and shall be deemed thereby to vote in favour of the Plan, prior to 10:00 a.m. (Toronto Time) on May 24, 2016, or 24 hours (excluding Saturdays, Sundays and statutory holidays) prior to any adjourned, postponed or rescheduled Creditors' Meeting, or deposit such Convenience Class Claim Election with the Chair at the Creditors' Meeting (or any adjournment, postponement or other rescheduling thereof) immediately prior to the vote at the time specified by the Chair (the *"Election/Proxy Deadline"*).

Proxy Form

An Affected Creditor may attend at the Creditors' Meeting in person or may appoint another person as its proxyholder by inserting the name of such person in the space provided in the form of Proxy provided to Affected Creditors by the Monitor, or by completing another valid form of Proxy. Persons appointed as proxyholders need not be Affected Creditors.
In order to be effective, proxies must be received by the Monitor at Alvarez & Marsal Canada Inc., 200 Bay Street, Suite 2900, P.O. Box 22, Toronto, ON M5J 2J1 (Attention: Steven Glustein), facsimile: (416) 847-5201, e-mail: targetcanadamonitor@alvarezandmarsal.com, prior to the Election/Proxy Deadline.
If an Affected Creditor (other than those who are deemed to vote in favour of the Plan as set out above) specifies a choice with respect to voting on the Resolution on a Proxy, the Proxy will be voted in accordance with the specification so made. *In absence of such specification, a Proxy will be voted FOR the Resolution provided that the proxyholder does not otherwise exercise its right to vote at the Creditors'. Meeting.*
NOTICE IS ALSO HEREBY GIVEN that if the Plan is approved by the Required Majority at the Creditors' Meeting, the Target Canada Entities intend to bring a motion before the Court on June 2, 2016 at 9:30 a.m. (Toronto time) at the Court located at 330 University Avenue, Toronto, Ontario M5G 1R8. The motion will be seeking the granting of the Sanction and Vesting Order sanctioning the Plan under the CCAA and for ancillary relief consequent upon such sanction. Any Affected Creditor that wishes to appear or be represented, and to present evidence or arguments, at such Court hearing must file with the Court a Notice of Appearance and serve such Notice of Appearance on the Service List at least seven (7) days before such Court hearing. Any Affected Creditor that wishes to oppose the relief sought at such Court hearing shall serve on the Service List a notice setting out the basis for such opposition and a copy of the materials to be used at such hearing at least seven (7) days before the date set for such hearing, or such shorter time as the Court, by Order, may allow. A copy of the Service List may be obtained by contacting the Monitor at the particulars set out above or from the Monitor's website set out below.
This Notice is given by the Target Canada Entities pursuant to the Meeting Order.
You may view copies of the documents relating to this process on the Monitor's website at www.alvarezandmarsal.com/targetcanada.
DATED this • day of •, •.

Schedule "C"

Form of Proxy

PROXY AND INSTRUCTIONS FOR AFFECTED CREDITORS IN THE MATTER OF THE PROPOSED AMENDED AND RESTATED JOINT PLAN OF COMPROMISE AND ARRANGEMENT OF THE TARGET CANADA ENTITIES

Meeting of Affected Creditors

to be held pursuant to an Order of the Ontario Superior Court of Justice (Commercial List) (the *"Court"*) made on April *[13]*, 2016 (the *"Meeting Order"*) in connection with the Amended and Restated Joint Plan of Compromise and Arrangement of the Target Canada Entities dated April •, 2016 (as amended, restated, modified and/or supplemented from time to time, the *"Plan"*)

on May 25, 2016 at 10:00 a.m. (Toronto time) at

Toronto Region Board of Trade

77 Adelaide Street West

Toronto, ON M5X 1C1

and at any adjournment, postponement or other rescheduling thereof (the *"Creditors' Meeting"*)

PLEASE COMPLETE, SIGN AND DATE THIS PROXY AND (I) RETURN IT TO ALVAREZ & MARSAL CANADA INC. BY 10:00 A.M. (TORONTO TIME) ON MAY 24, 2016, OR 24 HOURS (EXCLUDING SATURDAYS, SUNDAYS AND STATUTORY HOLIDAYS) PRIOR TO ANY ADJOURNED, POSTPONED OR RESCHEDULED CREDITORS' MEETING, OR (II) DEPOSIT THIS PROXY WITH THE CHAIR AT THE CREDITORS' MEETING (OR ANY ADJOURNMENT, POSTPONEMENT OR OTHER RESCHEDULING THEREOF) IMMEDIATELY PRIOR TO THE VOTE AT THE TIME SPECIFIED BY THE CHAIR (THE *"ELECTION/PROXY DEADLINE"*). PLEASE RETURN OR DEPOSIT YOUR ORIGINAL PROXY SO THAT IT IS ACTUALLY RECEIVED BY THE MONITOR OR THE CHAIR ON OR BEFORE THE ELECTION/PROXY DEADLINE.

Please use this Proxy form if you do not wish to attend the Creditors' Meeting to vote in person but wish to appoint a proxyholder to attend the Creditors' Meeting, vote your Voting Claim to accept or reject the Plan and otherwise act for and on your behalf at the Creditors' Meeting and any adjournment(s), postponement(s) or rescheduling(s) thereof.

The Plan is included in the Meeting Materials delivered by the Monitor to all Affected Creditors, copies of which you have received. All capitalized terms used but not defined in this Proxy shall have the meanings ascribed to such terms in the Plan.

You should review the Plan before you vote. In addition, on April *[13]*, 2016, the Court issued the Meeting Order establishing certain procedures for the conduct of the Creditors' Meeting, a copy of which is included in the Meeting Materials. The Meeting Order contains important information regarding the voting process. Please read the Meeting Order and the instructions sent with this Proxy prior to submitting this Proxy.

If the Plan is approved by the Required Majority and is sanctioned by the Court, it will be binding on you whether or not you vote.

Convenience Class Creditors do not need to complete or return a Proxy as they are deemed to vote in favour of the Plan pursuant to the Meeting Order and the Plan.

Appointment of Proxyholder and Vote

By checking one of the two boxes below, the undersigned Affected Creditor hereby revokes all proxies previously given and nominates, constitutes and appoints either *{ if no box is checked, the Monitor will act as your proxyholder):*

- _____, or

- a representative of *Alvarez & Marsal Canada Inc.* in its capacity as Monitor of the Target Canada Entities

as proxyholder, with full power of substitution, to attend, vote and otherwise act for and on behalf of the undersigned at the Creditors' Meeting and at adjournment(s), postponement(s) and rescheduling(s) thereof, and to vote the amount of the Affected Creditors' Voting Claim. Without limiting the generality of the power hereby conferred, the person named as proxyholder is specifically directed to vote as shown below. The person named as proxyholder is also directed to vote at the proxyholder's discretion and otherwise act for and on behalf of the undersigned with respect to any amendments or variations to the Plan and to any matters that may come before the Creditors' Meeting or at any adjournment, postponement or rescheduling thereof and to vote the amount of the Affected Creditor's Voting Claim as follows *{ mark only one):*

- Vote *FOR* the approval of the Plan, or

- Vote *AGAINST* the approval of the Plan

Please note that if no specification is made above, the Affected Creditor will be deemed to have voted FOR approval of the Plan at the Creditors' Meeting provided the Affected Creditor does not otherwise exercise its right to vote at the Creditors' Meeting.

DATED at _____ this _____ day of _____, 20 _____.

AFFECTED CREDITOR'S SIGNATURE:

_____

(Print Legal Name of Affected Creditor)

_____
(Print Legal Name of Assignee, if applicable)

_____
(Signature of the Affected Creditor/Assignee or an Authorized Signing Officer of the Affected Creditor/Assignee)

_____
(Print Name and Title of Authorized Signing Officer of the Affected Creditor/Assignee, if applicable)

_____
(Mailing Address of the Affected Creditor/Assignee)

_____
(Telephone Number and E-mail of the Affected Creditor/Assignee or Authorized Signing Officer of the Affected Creditor/Assignee)

YOUR PROXY MUST BE RECEIVED (I) BY THE MONITOR AT THE ADDRESS LISTED BELOW OR (II) BY THE CHAIR AT THE CREDITORS' MEETING BEFORE THE ELECTION/PROXY DEADLINE.
ALVAREZ & MARSAL CANADA INC. MONITOR OF THE TARGET CANADA ENTITIES
200 Bay Street
Suite 2900
P.O. Box 22
Toronto, ON
M5J 2J1
Attention: Steven Glustein
Facsimile: (416) 847-5201
E-mail: targetcanadamonitor@alvarezandmarsal.com
IF YOU HAVE ANY QUESTIONS REGARDING THIS PROXY OR THE VOTING PROCEDURES, OR IF YOU NEED AN ADDITIONAL COPY OR ADDITIONAL COPIES OF THE ENCLOSED MATERIALS, PLEASE CONTACT THE MONITOR AT targetcanadamonitor@alvarezandmarsal.com OR VISIT THE MONITOR'S WEBSITE AT www.alvarezandmarsal.com/targetcanada

Instructions for Completion of Proxy

1. All capitalized terms used but not defined in this Proxy shall have the meanings ascribed to such terms in the Amended and Restated Joint Plan of Compromise and Arrangement of the Target Canada Entities dated April •, 2016 (the *"Plan"*), a copy of which you have received.
2. Please read and follow these instructions carefully. Your Proxy must actually be received (i) by the Monitor at Alvarez & Marsal Canada Inc., Monitor of the Target Canada Entities, 200 Bay Street, Suite 2900, P.O. Box 22, Toronto, ON M5J 2J1 (Attention: Steven Glustein), facsimile: (416) 847-5201, e-mail: targetcanadamonitor@alvarezandmarsal.com prior to 10:00 a.m. (Toronto time) on May 24, 2016 or 24 hours (excluding Saturdays, Sundays and statutory holidays) prior to the time of any adjournment, postponement or rescheduling of the Creditors' Meeting or (ii) by the Chair at the Creditors' Meeting (or any adjournment, postponement or rescheduling thereof) immediately prior to the vote at the time specified by the Chair (the *"Election/Proxy Deadline"*). If your Proxy is not received by the Election/Proxy Deadline, unless such time is extended, your Proxy will not be counted.
3. The aggregate amount of your Claim in respect of which you are entitled to vote (your *"Voting Claim"*) shall be your Proven Claim, or with respect to a Disputed Claim, the amount as determined by the Monitor to be your Voting Claim in accordance the Claims Procedure Order and the Meeting Order.
4. Each Affected Creditor who has a right to vote at the Creditors' Meeting has the right to appoint a person (who need not be an Affected Creditor) to attend, act and vote for and on behalf of the Affected Creditor and such right may be exercised by inserting in the space provided the name of the person to be appointed, or to select a representative of the Monitor as its proxyholder. If no proxyholder is selected, the Affected Creditor will be deemed to have appointed any officer of Alvarez & Marsal Canada Inc., in its capacity as Monitor, or such other person as Alvarez & Marsal Canada Inc. may designate, as proxyholder of the Affected Creditor, with power of substitution, to attend on behalf of and act for the Affected Creditor at the Creditors' Meeting to be held in connection with the Plan and at any and all adjournments, postponements or other rescheduling thereof.
5. Check the appropriate box to vote for or against the Plan. If you do not check either box, you will be deemed to have voted FOR approval of the Plan provided you do not otherwise exercise your right to vote at the Creditors' Meeting.
6. Sign the Proxy - your original signature is required on the Proxy to appoint a proxyholder and vote at the Creditors' Meeting. If you are completing the proxy as a duly authorized representative of a corporation or other entity, indicate your

relationship with such corporation or other entity and the capacity in which you are signing, and if subsequently requested, provide proof of your authorization to so sign. In addition, please provide your name, mailing address, telephone number and e-mail address.
7. Return the completed Proxy to the Monitor at Alvarez & Marsal Canada Inc., Monitor of the Target Canada Entities, 200 Bay Street, Suite 2900, P.O. Box 22, Toronto, ON M5J 2J1 (Attention: Steven Glustein), facsimile: (416) 847-5201, e-mail: *targetcanadamonitor@alvarezandmarsal.com*. so that it is actually received by no later than the Election/Proxy Deadline.
8. If you need additional Proxies, please immediately contact the Monitor.
9. If multiple Proxies are received from the same person with respect to the same Claims prior to the Election/Proxy Deadline, the latest dated, validly executed Proxy timely received will supersede and revoke any earlier received Proxy. However, if a holder of Claims casts Proxies received by the Monitor dated with the same date, but which are voted inconsistently, such Proxies will not be counted. If a Proxy is not dated in the space provided, it shall be deemed dated as of the date it is received by the Monitor.
10. If an Affected Creditor (other than a Convenience Class Creditor) validly submits a Proxy to the Monitor and subsequently attends the Creditors' Meeting and votes in person inconsistently, such Affected Creditor's vote at the Creditors' Meeting will supersede and revoke the earlier received Proxy.
11. Proxies may be accepted for purposes of an adjourned, postponed or other rescheduled Creditors' Meeting if received by the Monitor by the Election/Proxy Deadline.
12. Any Proxy that is illegible or contains insufficient information to permit the identification of the claimant will not be counted.
13. After the Election/Proxy Deadline, no Proxy may be withdrawn or modified, except by an Affected Creditor voting in person at the Creditors' Meeting, without the prior consent of the Monitor and the Target Canada Entities.
14. If you are an Affected Creditor with one or more Proven Claims in an amount in excess of Cdn$25,000, you may elect to receive the Cash Elected Amount in full and final satisfaction of your Affected Claims by completing the Convenience Class Claim Election contained in the Meeting Materials you received from the Monitor. If you elect to receive the Cash Elected Amount, you will be deemed to have voted in favour of the Plan and do not need to complete this Proxy.
IF YOU HAVE ANY QUESTIONS REGARDING THIS PROXY OR THE VOTING PROCEDURES, OR IF YOU NEED AN ADDITIONAL COPY OR ADDITIONAL COPIES OF THE ENCLOSED MATERIALS, PLEASE CONTACT THE MONITOR AT targetcanadamonitor@alvarezandmarsal.com OR VISIT THE MONITOR'S WEBSITE AT www.alvarezandmarsal.com/targetcanada

Schedule "D"

Form of Convenience Class Claim Election

TO: ALVAREZ & MARSAL CANADA INC., in its capacity as Monitor of the Target Canada Entities
In connection with the Amended and Restated Joint Plan of Compromise and Arrangement of the Target Canada Entities pursuant to the *Companies' Creditors Arrangement Act* (Canada) dated April •, 2016 (as amended, restated, modified and/or supplemented from time to time, the *"Plan"*), the undersigned hereby elects to be treated as a Convenience Class Creditor and thereby to receive the Cash Elected Amount, of Cdn$25,000 in full and final satisfaction of the Proven Claim(s) of the undersigned, and hereby acknowledges that the undersigned shall be deemed to vote its Voting Claim(s) in favour of the Plan at the Creditors' Meeting.
For the purposes of this election, terms not defined herein shall have the meanings ascribed thereto in the Plan.
DATED at _____ this _____ day of _____, 20 _____.
AFFECTED CREDITOR'S SIGNATURE:

_____
(Print Legal Name of Affected Creditor)

_____
(Print Legal Name of Assignee, if applicable)

_____
(Signature of the Affected Creditor/Assignee or an Authorized Signing Officer of the Affected Creditor/Assignee)

_____
(Print Name and Title of Authorized Signing Officer of the Affected Creditor/Assignee, if applicable)

_____
(Mailing Address of the Affected Creditor/Assignee)

_____

(Telephone Number and E-mail of the Affected Creditor/Assignee or Authorized Signing Officer of the Affected Creditor/Assignee)

Schedule "E"

Form of Resolution
BE IT RESOLVED THAT:

1. The Amended and Restated Joint Plan of Compromise and Arrangement of Target Canada Co., Target Canada Health Co., Target Canada Mobile GP Co., Target Canada Pharmacy (BC) Corp., Target Canada Pharmacy (Ontario) Corp., Target Canada Pharmacy Corp., Target Canada Pharmacy (SK) Corp., Target Canada Property LLC, Target Canada Pharmacy Franchising LP, Target Canada Mobile LP, and Target Canada Property LP (collectively, the *"Target Canada Entities"*) pursuant to the *Companies' Creditors Arrangement Act* (Canada) dated April •, 2016 (the *"Plan*"), which Plan has been presented to this meeting and which is substantially in the form attached as Exhibit "•" to the Affidavit of Mark J. Wong sworn •, 2016 (as such Plan may be amended, restated, supplemented and/or modified as provided for in the Plan) be and it is hereby accepted, approved, agreed to and authorized; and

2. any director or officer of each of the Target Canada Entities be and is hereby authorized and directed, for and on behalf of each of the Target Canada Entities, respectively (whether under its respective corporate seal or otherwise), to execute and deliver, or cause to be executed and delivered, any and all documents and instruments and to take or cause to be taken such other actions as he or she may deem necessary or desirable to implement this resolution and the matters authorized hereby, including the transactions required by the Plan, such determination to be conclusively evidenced by the execution and delivery of such documents or other instruments or the taking of any such actions.

Schedule "D"

Landlord Guarantee Creditors

NO.	*LANDLORD GROUP*	*LANDLORD/CLAIMANT*	*STORE #*	*LOCATION*
1.	20 Vic Management Inc. (manager)	HOOPP Realty Inc.	3708	Devonshire Mall
2.	ADMNS Meadowlands Investment Corporation	ADMNS Meadowlands Investment Corporation	3628	Meadowlands Shopping Center
3.	Bentall Kennedy	Penretail Management Ltd.	3510	Westmount Shopping Centre
4.	Bentall Kennedy	Hazeldean Mall LP	3511	Hazeldean Mall
5.	Bentall Kennedy (manager)	bcIMC Realty Corporation	3624	Bower Place
6.	Bentall Kennedy	2725312 Canada Inc. and 2973758 Canada Inc.	3690	Willowbrook Shopping Centre
7.	Bentall Kennedy (manager)	bcIMC Realty Corporation	3715	Cloverdale Mall
8.	Bentall Kennedy	PCM Sheridan Inc.	3669	Sheridan Mall
9.	Calloway REIT	Calloway REIT (Laurentian) Inc.	3642	Laurentian Power Centre
10.	Calloway REIT	Calloway Reit (Hopedale) Inc.	3670	Hopedale Mall
11.	Centrecorp Management Services Ltd.	Faubourg Boisbriand Shopping Centre Holdings Inc.	3765	Faubourg Boisbriand
12.	Cominar Real Estate Investment Trust	9130-1093 Quebec Inc. as nominee for Cominar Real Estate Investment Trust	3576	Carrefour St Georges
13.	Cominar Real Estate Investment Trust	Cominar Real Estate Investment Trust	3592	Les Rivieres Shopping Centre
14.	Crombie Real Estate Investment Trust	Crombie Property Holdings Limited	3630	1899 Algonquin Avenue
15.	Davpart Inc.	Lindsay Square Mall Inc.	3560	Lindsay Square Mall
16.	Doral Holdings Limited	Doral Holdings Limited and 430635 Ontario Inc.	3645	Seaway Mall
17.	Kingsett	Place Vertu Holdings Inc.	3769	Place Vertu

18.	Mcintosh Properties Ltd.	Mcintosh Properties Ltd.	3698	Orchard Park Plaza
19.	Montez Corporation	Montez (Corner Brook) Inc.	3650	Corner Brook
20.	Morguard Investments Limited	Revenue Properties Company Limited and Morguard Real Estate Investment Trust	3574	Prairie Mall
21.	Morguard Investments Limited	2046459 Ontario Inc.	3575	Cottonwood Mall
22.	Morguard Investments Limited	3934390 Canada Inc.	3577	The Mall at Lawson Heights
23.	Morguard Investments Limited	Morguard Real Estate Investment Trust	3608	Cambridge Centre
24.	Morguard Investments Limited	Morguard Corporation and Bramalea City Centre Equities Inc.	3623	Bramalea City Centre
25.	Morguard Investments Limited	Bonnie Doon Shopping Centre (Holdings) Ltd.	3710	Bonnie Doon
26.	Morguard Investments Limited	Revenue Properties Company Limited	3742	East York Town Centre
27.	Morguard Investments Limited	Morguard Real Estate Investment Trust	3763	Shoppers Mall
28.	Primaris	Kildonan Place Ltd.	3644	Kildonan Place Shopping Centre
29.	Primaris	McAllister Place Holdings Inc.	3655	McAllister Place
30.	Primaris	St. Albert Centre Holdings Inc.	3694	St. Albert Centre
31.	SunLife Assurance Company of Canada	Sun Life Assurance Company of Canada	3538	Forest Lawn Shopping Centre
32.	Triovest Realty Advisors Inc. (manager)	Barton Centre LP	3753	Centre Mall
33.	Triovest Realty Advisors Inc. (manager)	7902484 Canada Inc.	3767	Taunton Road Power Centre
34.	Valiant Rental Properties Ltd	Valiant Rental Inc.	3757	Clarington Town Centre
35.	Westcliff Management Ltd. (manager)	Carrefour Richelieu Realties Ltd.	3657	Carrefour Du Nord
36.	Westcliff Management Ltd. (manager)	Carrefour Richelieu Realties Ltd.	3516	Carrefour Richelieu
37.	Westcliff Management Ltd. (manager)	Carrefour Richelieu Realties Ltd.	3595	Carrefour Angrignon

Schedule ”E”

Landlord Non-Guarantee Creditors

NO.	*LANDLORD GROUP*	*LANDLORD/CLAIMANT*	*STORE #*	*LOCATION*
1.	20 Vic Management, Inc.	OPB Realty Inc.	3663	Pickering Town Centre
2.	Beauward Shopping Centre, Ltd.	Beauwood Shopping Centre, Ltd.	3693	Carrefour St-Eustache
3.	Beauward Shopping Centre, Ltd.	Beauwood Shopping Centre, Ltd.	3718	Les Galeries Joliette
4.	Bridlewood Mall Management	Bridlewood Mall Management Inc.	3667	Bridlewood Mall
5.	Cogir Management Corporation	Halifax 1658 Bedford Highway Inc.	3731	Bedford Place
6.	Cominar Real Estate Investment Trust	9090-7155 Quebec Inc.	3702	Place Longueuil
7.	Cominar Real Estate Investment Trust	Cominar NF Real Estate Holdings Inc.	3732	Cabot Square
8.	Cominar Real Estate Investment Trust	2226009 Ontario Inc.	7000	Centre Laval

9.	Crombie Developments Limited	Crombie Developments Ltd	3530	Sydney Shopping Centre
10.	Crombie Developments Limited	Crombie Developments Ltd	3550	Uptown Centre
11.	Effort Trust Company	60 Martindale Crescent (Hamilton) Limited	3671	Meadowland Power centre
12.	First Capital Corporation	First Capital (Stoney Creek) Corporation	3524	Zellers Plaza-Stoney Creek
13.	First Capital Corporation	Corporation FCHT Holdings (Quebec) Inc.	3634	Place Portobello
14.	Fishman Holdings North America, Inc.	2058790 Ontario Ltd.	3707	Woodbine Centre
15.	Northwest Realty, Inc.	Discovery Harbour Shopping Centre Ltd.	3508	Discovery Harbour Shopping Centre
16.	Primaris	Sherwood Park Portfolio Inc.	3564	Sherwood Park Mall
17.	Primaris	Medicine Hat Mall Inc.	3614	Medicine Hat Mall
18.	Primaris	Sunridge Mall Holdings Inc.	3713	Sunridge Mall
19.	Primaris	Place D'Orleans Holdings Inc.	3764	Place D'Orleans
20.	RioCan	RioCan Holdings Inc.	3519	South Hamilton Square
21.	RioCan	RioCan Holdings Inc.	3522	County Fair Mall
22.	RioCan	RioCan Holdings Inc.	3526	Lawrence Square
23.	RioCan	RioCan Holdings (Five Points) Inc.	3559	Five Points Mall
24.	RioCan	RioKim Holdings (PEI) Inc.	3637	Charlottetown Mall
25.	RioCan	151516 Canada Inc.	3639	Durham Centre
26.	RioCan	RioCan Holdings Inc.	3665	Orillia Square
27.	RioCan	1388688 Ontario Limited	3668	Shoppers World Brampton
28.	RioCan	RioKim Holdings (Quebec II) Inc.	3695	Mega Centre Autoroute 13
29.	RioCan	RioCan Holdings Inc.	3699	Stratford Mall
30.	RioCan	RK (Burlington Mall) Inc.	3738	Burlington Mall
31.	RioCan	RioKim Holdings (Ontario II) Inc.	3751	Gates of Fergus
32.	RioCan	RioCan Holdings Inc. & Canada Mortgage and Housing Corp.	3761	Millcroft Centre
33.	RioCan	RioCan PS Inc.	3762	Flamborough Power Centre
34.	RioCan	2076031 Ontario Limited	3768	Eglinton and Warden
35.	RioCan	MillWoods Centre Inc.	3770	Mill Woods Town Centre
36.	RioCan	RioTrin Properties (Brampton) Inc.	3773	Trinity Common
37.	RioCan	RioTrin Properties (Weston) Inc. & 2176905 Ontario Ltd.	7002	Stockyards
38.	RioCan	RioCan Holdings Inc.	7001	RioCan Niagara Falls
39.	46{ th} Avenue Investments	46{ th} Avenue Investments Limited	7327	Warehouse Space
40.	Bentall Kennedy	bcIMC Realty Corporation	7417	Ottawa Office
41.	Triovest	Big Bend Equities Inc.	7328	Warehouse Space
42.	Complexe Lebourgneuf 2	Complexe Lebourgneuf Phase II Inc.	7416	Quebec City Office
43.	CREIT Management LP	Canadian Property Holdings (Alberta) Inc.	7326	Warehouse Space
44.	Cominar Real Estate Investment Trust	Cominar REIT	7413	Montreal Office

45.	HOOPP Realty Inc.	Menkes Property Management Services Ltd. as agent for HOOPP Realty Inc.	7400	Mississauga Office
46.	HOOPP Realty Inc.	Menkes Property Management Services Ltd. as agent for HOOPP Realty Inc.	9730	Headquarters
47.	HOOPP Realty Inc.	Menkes Property Management Services Ltd. as agent for HOOPP Realty Inc.	9731	Headquarters
48.	Ivanhoe Cambridge	Oshawa Centre Holdings Inc.	7403	Oshawa Office
49.	Redstone Equities	Park Place IV Limited	7418	Dartmouth Office
50.	Morguard Investments Limited	Pensionfund Realty Limited	7412	Winnipeg Office
51.	Strategic Group	Macleod Place Ltd.	7411	Calgary Office
52.	Bentall Kennedy	391102 B.C. Ltd.	7407	Burnaby Office

Schedule ”F”

Employee Trust Termination Certificate

TO: ALVAREZ & MARSAL CANADA INC., in its capacity as the Court-appointed Monitor of the Target Canada Entities and not in its personal capacity
RE: Termination of the Trust Agreement between Target Corporation, Alvarez & Marsal Canada Inc., in its capacity as the Court-appointed Monitor of Target Canada Co. and certain of its subsidiaries and not in its personal capacity, and the Hon. John D. Ground dated January 15, 2015 (as amended, restated, supplemented and/or modified from time to time, the *”Employee Trust Agreement”*)
The undersigned, in his capacity as the Trustee under the Employee Trust Agreement, does hereby certify that all outstanding disputes by employee claimants in respect of their entitlements, if any, under the Employee Trust Agreement have been fully and finally resolved pursuant to and in accordance with the Employee Trust Claims Procedure Order issued by the Ontario Superior Court of Justice (Commercial List) dated October 21, 2015 (Court File No. CV-15-10832-00CL).
[Remainder of Page Intentionally Left Blank]
DATED _____, *[2016].*
HON. JOHN D. GROUND, in his capacity as Trustee under the Employee Trust Agreement and not in his personal capacity
_____

Schedule ”G”

Employee Trust Property Joint Direction

TO: THE ROYAL BANK OF CANADA (”RBC”)
RE: Trust Agreement between Target Corporation (the “Plan Sponsor”), Alvarez &
Marsal Canada Inc., in its capacity as the Court-appointed Monitor of Target Canada Co. and certain of its subsidiaries and not in its personal capacity, and the Hon. John D. Ground dated January 15, 2015 (as amended, restated, supplemented and/or modified from time to time, the *”Employee Trust Agreement”*)
AND RE: Account Number [•] (the *”Account”*)
The undersigned hereby direct RBC to remit all funds on deposit in the Account, which amount totals $•, to the *[Plan Sponsor/or [Insert designee]]* in accordance with the payment instructions contained on Schedule “A” hereto.
And for so doing this shall be your good, sufficient and irrevocable authority.
[Remainder of Page Intentionally Left Blank]
DATED _____, *[2016].*
HON. JOHN D. GROUND, in his capacity as Trustee under the Employee Trust Agreement and not in his personal capacity
_____
ALVAREZ & MARSAL CANADA INC., in its capacity as the Administrator under the Employee Trust Agreement and not in its personal capacity
By: _____
Name:
Title:

Schedule "H"

Co-Tenancy Stays

This schedule sets out the outside dates for the expiry of the co-tenancy stays that have been ordered in this proceeding:

Order	*Para.*	*Date Granted*	*Length*	*Date Stay Expires*
Initial Order	18	January 15, 2015	During the Stay Period	With the Stay Period
Canadian Tire	11	May 19, 2015	6 months	November 19, 2015
Cadillac Fairview	9	May 19, 2015	6 months	November 19, 2015
Lowe's	11	May 20, 2015	6 months	November 20, 2015
Wal-Mart	12	May 21, 2015	8 months	January 21, 2016
Erin Mills	11	July 17, 2015	8 months	March 17, 2016

Schedule "C"

Form of Monitor's Plan Implementation Date Certificate

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 TARGET CANADA CO., TARGET CANADA HEALTH CO., TARGET CANADA MOBILE GP CO., TARGET CANADA PHARMACY (BC) CORP., TARGET CANADA PHARMACY (ONTARIO) CORP., TARGET CANADA PHARMACY CORP., TARGET CANADA PHARMACY (SK) CORP., and TARGET CANADA PROPERTY LLC (collectively the *"Applicants"*)

Monitor's Certificate (Plan Implementation)

All capitalized terms not otherwise defined herein shall have the meanings ascribed thereto in the Order of the Honourable Regional Senior Justice Morawetz made in these proceedings on June 2, 2016 (the *"Sanction and Vesting Order"*).
Pursuant to paragraph 8 of the Sanction and Vesting Order, Alvarez & Marsal Canada Inc. in its capacity as Court-appointed Monitor of the Target Canada Entities (the *"Monitor"*) delivers to the Target Canada Entities this certificate and hereby certifies that it has been informed in writing by the Target Canada Entities and the Plan Sponsor that all of the conditions precedent set out in section 8.3 of the Plan have been satisfied or waived, as applicable, in accordance with the terms of the Plan and that the Plan Implementation Date has occurred and the Plan is effective in accordance with its terms and the terms of the Sanction and Vesting Order. This Certificate will be filed with the Court and posted on the Website.
DATED at the City of Toronto, in the Province of Ontario, this • day of •, 2016 at • *[a.m. / p.m]*.
ALVAREZ & MARSAL CANADA INC., in its
capacity as Court-appointed Monitor of Target Canada Co., *et al.* and not in its personal or corporate capacity
By: _____
Name:
Title:

Schedule "D"

IP Assets Vested in 3293849 Nova Scotia Company

alliesforconsumerdigitalsafety.ca
avaandviv.ca
avaviv.ca
brightspotmobile.ca
brightspotphone.ca
bullseyemobilesolutions.ca
bullseyepharmacy.ca
bullseyeshoprequests.ca
bullseyespecialrequests.ca
bullseyesubscription.ca
bullseyesubscriptions.ca
bullseyeticket.ca

bullseyetickets.ca
canadapartnersonline.ca
consumerdigitalsafetyallies.ca
consumerdigitalsafetyconsortium.ca
digitalsafetyallies.ca
dites-le-nous-target.ca
domaniedelarcher.ca
garde-marche.ca
hopethop.ca
larchermaraicher.ca
marchefute.ca
moretaylor.ca
mybrightspot.ca
partenairescanadiensenligne.ca
partnersonlinecanada.ca
pharmacyevents.ca
redperk.ca
redperks.ca
reellementessentiel.ca
savoreveryday.ca
savoureveryday.ca
tellbullseye.ca
telltgt.ca
tevolio.ca
wellbeingdreams.ca

Schedule ”E”

IP Assets Vested in Target Brands Inc.

expectmorepayless.ca
smith-hawken.ca
smithhawken.ca
smithnhawken.ca
suttonanddodge.ca
takechargeofeducation.ca
target-ceo.ca
targetcartwheel.ca
targetceo.ca
targetexpress.ca
targetget.ca
targetlocation.ca
targetspoton.ca
targetsubscription.ca
targetsubscriptions.ca
telltarget.ca
trouvezmieuxpayezmoins.ca
upandup.ca
upandupbrand.ca
upup.ca
upupbrand.ca
winecube.ca
yourtarget.ca

Schedule ”F”

Form of Monitor’s Notice of Final Distribution

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 TARGET CANADA CO., TARGET CANADA HEALTH CO., TARGET CANADA MOBILE GP CO., TARGET CANADA PHARMACY (BC) CORP., TARGET CANADA PHARMACY (ONTARIO) CORP., TARGET CANADA PHARMACY CORP., TARGET CANADA PHARMACY (SK) CORP., and TARGET CANADA PROPERTY LLC (collectively the *"Applicants"*)

Notice of Final Distribution

All capitalized terms not otherwise defined in this Notice shall have the meanings ascribed thereto in the Second Amended and Restated Joint Plan of Compromise and Arrangement of the Applicants pursuant to the *Companies' Creditors Arrangement Act* dated May 19, 2016 (as further amended, restated, supplemented and/or modified in accordance with its terms, the *"Plan*"), a copy of which is available at www.alvarezandmarsal.com/targetcanada.
TAKE NOTICE THAT Target Canada Co. shall effect a final distribution under the Plan on [•] (the *"Final Distribution Date"*) pursuant to and in accordance with the terms of the Plan and the Sanction and Vesting Order issued by the Ontario Superior Court of Justice (Commercial List) on June 2, 2016.
AND TAKE NOTICE THAT the Plan provides that if any Affected Creditor's, Propco Unaffected Creditor's, Property LP Unaffected Creditor's, Landlord Guarantee Creditor's or Landlord Non-Guarantee Creditor's distribution is returned as undeliverable or is not cashed, no further distributions to such Creditor or Landlord shall be made unless and until the Monitor is notified by such creditor of its current address or wire particulars, at which time all distributions shall be made to such Creditor or Landlord without interest.
AND TAKE NOTICE THAT all Affected Creditors, Propco Unaffected Creditors, Property LP Unaffected Creditors, Landlord Guarantee Creditors and Landlord Non-Guarantee Creditors who have not received a distribution in respect of their Proven Claims, Propco Unaffected Claims, Property LP Unaffected Claims, Landlord Guarantee Enhancement Amounts or Landlord Guarantee Non-Creditor Equalization Amounts, as applicable, must contact the Monitor, Alvarez & Marsal Canada Inc., at 200 Bay Street, Suite 2900, P.O. Box 22, Toronto, ON M5J 2J1 (Attention: Steven Glustein), facsimile number: (416) 847-5201 or email: targetcanadamonitor@alvarezandmarsal.com on or before 5:00 p.m. (Toronto time) on • (the *"Distribution Deadline"*).
AND TAKE NOTICE THAT, after the Distribution Deadline:

(a) all claims for undeliverable or un-cashed distributions in respect of Proven Claims, Propco Unaffected Claims and Property LP Unaffected Claims of any Affected Creditor, Propco Unaffected Creditor or Property LP Unaffected Creditor, as applicable, or the successor or assign of such Affected Creditor, Propco Unaffected Creditor or Property LP Unaffected Creditor, as applicable, shall be forever discharged and forever barred, without any compensation therefor, notwithstanding any Applicable Laws to the contrary, at which time the Cash amount held by TCC in relation to such Proven Claim, Propco Unaffected Claim or Property LP Unaffected Claim shall be returned to the TCC Cash Pool Account or the Propco Cash Pool Account, as applicable, pursuant to and in accordance with the Plan; and

(b) all claims for undeliverable or un-cashed distributions in respect of Landlord Guarantee Enhancement Amounts and Landlord Non-Guarantee Creditor Equalization Amounts of any Landlord, or the successor or assign of such Landlord, shall be forever discharged and forever barred, without any compensation therefor and shall be dealt with in accordance with the Plan.

DATED at the City of Toronto in the Province of Ontario this • day of •, •.

Schedule "G"

Form of Monitor's Plan Completion Certificate

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 TARGET CANADA CO., TARGET CANADA HEALTH CO., TARGET CANADA MOBILE GP CO., TARGET CANADA PHARMACY (BC) CORP., TARGET CANADA PHARMACY (ONTARIO) CORP., TARGET CANADA PHARMACY CORP., TARGET CANADA PHARMACY (SK) CORP., and TARGET CANADA PROPERTY LLC (collectively the *"Applicants"*)

Monitor's Certificate (Plan Completion)

All capitalized terms not otherwise defined herein shall have the meanings ascribed thereto in the Order of the Honourable Regional Senior Justice Morawetz made in these proceedings on June 2, 2016 (the *"Sanction and Vesting Order"*).
Pursuant to paragraph 41 of the Sanction and Vesting Order, Alvarez & Marsal Canada Inc. in its capacity as Court-appointed Monitor of the Target Canada Entities (the *"Monitor"*) delivers to the Target Canada Entities this certificate and hereby certifies that it has been informed in writing by TCC that TCC has completed its duties to effect distributions, disbursements and payments in accordance with the Plan and that all of the Monitor's duties and the Target Canada Entities' duties under the Plan and the Orders have been completed.
DATED at the City of Toronto, in the Province of Ontario, this • day of •, 2016 at • *[a.m. / p.m.]*.
ALVAREZ & MARSAL CANADA INC., in its capacity as Court-appointed Monitor of Target Canada Co., *et al.* and not in its personal or corporate capacity
By: _____
Name:
Title:

Footnotes

1 Intercompany Claims information is derived from the Intercompany Claims Report. Amounts set out herein are exclusive of applicable GST/HST or provincial sales tax.

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 JUST ENERGY GROUP INC. *et al.*

Court of Appeal File No. M53250
Court File No. CV-21-00658423-00CL

COURT OF APPEAL FOR ONTARIO

PROCEEDING COMMENCED AT
TORONTO

BOOK OF AUTHORITIES OF THE RESPONDENT DIP LENDERS

MOTION FOR LEAVE TO APPEAL
(ORDER OF JUSTICE MCEWEN DATED FEBRUARY 9, 2022)

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

Alan Merskey LSO #: 413771
Tel: 416.860.2948
amerskey@cassels.com

John M. Picone LSO #: 58406N
Tel: 416.640.6041
jpicone@cassels.com

Christopher Selby LSO #: 65702T
Tel: 416.860.5223
cselby@cassels.com

Lawyers for the Respondent DIP Lenders