Tab 17

Case Name:
Nortel Networks Corp. (Re)

IN THE MATTER OF a Plan of Compromise or Arrangement of Nortel Networks Corporation, Nortel Networks Limited, Nortel Networks Global Corporation, Nortel Networks International Corporation and Nortel Networks Technology Corporation Applicants Application under the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended
RE: IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended

[2009] O.J. No. 2166

75 C.C.P.B. 206

2009 CarswellOnt 3028

Court File No. 09-CL-7950

Ontario Superior Court of Justice
Commercial List

G.B. Morawetz J.

Heard: April 20, 2009.
Judgment: May 27, 2009.

(67 paras.)

Bankruptcy and Insolvency Law -- Companies' Creditors Arrangement Act (CCAA) matters -- Motions by various factions of Nortel's current and former employees to appoint various representative counsel allowed in part -- Koskie Minsky appointed representative counsel and motions of other proposed representative counsel dismissed -- Appropriate to exercise discretion to make representation order -- No conflict of interest between various employee groups and they had commonality of interest as unsecured creditors -- Appointment of single representative counsel most time efficient and cost effective way -- Appointment of Koskie Minsky as representative counsel was logical as willing to act on behalf of all former employees and had experience and expertise.

Civil Litigation -- Civil Procedure -- Parties -- Representation of -- Motions by various factions of Nortel's current and former employees to appoint various representative counsel allowed in part -- Koskie Minsky appointed representative counsel and motions of other proposed representative counsel dismissed -- Appropriate to exercise discretion to make representation order -- No conflict of interest between various employee groups and they had commonality of interest as unsecured creditors -- Appointment of single representative counsel most time efficient and cost effective way -- Appointment of Koskie Minsky as representative counsel was logical as willing to act on behalf of all former employees and had experience and expertise.

Motions by various factions of Nortel's current and former employees to appoint various representative counsel. In January 2009, Nortel filed for Companies' Creditors Arrangement Act protection. At the time of the filing, the Nortel group of companies ("Nortel") employed approximately 6,000 employees and had approximately 11,700 retirees or their spouses receiving pension and/or benefits from retirement plans sponsored by Nortel. Nortel continued to honour substantially all of the obligations to current employees, but upon commencement of the CCAA proceedings, they ceased making all payments to former employees of amounts that would constitute unsecured claims, including termination, severance and amounts under various retirement and retirement transition programs. The opinion of the Monitor was that it was appropriate that there be representative counsel in light of the large number of former employees and that the financial burden of multiple representative counsel would further increased the financial pressure faced by Nortel. The former employees of Nortel had an interest in the CCAA proceedings in respect of severance, termination pay, retirement allowances and other amounts owed in respect of contractual obligations and employment standards legislation. In addition, most former employees and survivors of former employees had basic entitlement to receive payment from the Nortel pension plan and some might have also been entitled to a payment from certain non-registered retirement plans, health benefits and other retirement allowances. Both the Monitor and Nortel recognized the benefits of representative counsel and Nortel consented to the appointment of one of the proposed representative counsel, but opposed the appointment of any additional representatives. The representative whose appointment Nortel consented to represented a cross-section of all former employees who were entitled to severance and termination pay and payments under some or all of the various other plans.

HELD: Motions allowed in part. Koskie Minsky appointed as representative counsel and motions of all other proposed representative counsel dismissed. It was appropriate to exercise discretion pursuant to s. 11 of the Companies' Creditors Arrangement Act to make a Rule 10 representation order. There was no real or direct conflict of interest between various employee groups and the former employees had a commonality of interest in that they all had unsecured claims against Nortel for some form of deferred compensation. The appointment of a single representative counsel was the most time efficient and cost effective way to ensure that the arguments of the employees were placed before the Court. The appointment of Koskie Minsky as representative counsel was a logical choice as they indicated a willingness to act on behalf of all former employees, they received a broad mandate from the employees, they had experience in representing large groups of retirees and employees in large scale restructurings and specialty practice in relevant areas of law.

Statutes, Regulations and Rules Cited:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended, s. 11

Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.),

Ontario Pension Benefits Act,

Rules of Civil Procedure, Rule 10.01, Rule 12.07

Counsel:

Janice Payne, Steven Levitt and Arthur O. Jacques for the Steering Committee of Recently Severed Canadian Nortel Employees.

Barry Wadsworth for the CAW-Canada and George Borosh and Debra Connor.

Lyndon Barnes and Adam Hirsh for the Board of Directors of Nortel Networks Corporation and Nortel Networks Limited.

Alan Mersky and Derrick Tay for the Applicants.

Henry Juroviesky, Eli Karp, Kevin Caspersz and Aaron Hershtal for the Steering Committee for The Nortel Terminated Canadian Employees Owed Termination and Severance Pay.

M. Starnino for the Superintendent of Financial Services or Administrator of the Pension Benefits Guarantee Fund.

Leanne Williams for Flextronics Telecom Systems Ltd.

Jay Carfagnini and Chris Armstrong for Ernst & Young Inc., Monitor.

Gail Misra for the Communication, Energy and Paperworkers Union of Canada.

J. Davis-Sydor for Brookfield Lepage Johnson Controls Facility Management Services.

Mark Zigler and S. Philpott for Certain Former Employees of Nortel.

G.H. Finlayson for Informal Nortel Noteholders Group.

(A) Kauffman for Export Development Canada.

Alex MacFarlane for the Unsecured Creditors' Committee (U.S.).

ENDORSEMENT

1 **G.B. MORAWETZ J.**:-- On May 20, 2009, I released an endorsement appointing Koskie Minsky as representative counsel with reasons to follow. The reasons are as follows.

2 This endorsement addresses five motions in which various parties seek to be appointed as representative counsel for various factions of Nortel's current and former employees (Nortel Networks Corporation, Nortel Networks Limited, Nortel Networks Global Corporation, Nortel Networks International Corporation and Nortel Networks Technology Corporation are collectively referred to as the "Applicants" or "Nortel").

3 The proposed representative counsel are:

(i) Koskie Minsky LLP ("KM") who is seeking to represent all former employees, including pensioners, of the Applicants or any person claiming an interest under or on behalf of such former employees or pensioners and surviving spouses in respect of a pension from the Applicants. Approximately 2,000 people have retained KM.
(ii) Nelligan O'Brien Payne LLP and Shibley Righton LLP (collectively "NS") who are seeking to be co-counsel to represent all former non-unionized employees, terminated either prior to or after the CCAA filing date, to whom the Applicants owe severance and/or pay in lieu of reasonable notice. In addition, in a separate motion, NS seeks to be appointed as co-counsel to the continuing employees of Nortel. Approximately 460 people have retained NS and a further 106 have retained Macleod Dixon LLP, who has agreed to work with NS.
(iii) Juroviesky and Ricci LLP ("J&R") who is seeking to represent terminated employees or any person claiming an interest under or on behalf of former employees. At the time that this motion was heard approximately 120 people had retained J&R. A subsequent affidavit was filed indicating that this number had increased to 186.
(iv) Mr. Lewis Gottheil, in-house legal counsel for the National Automobile, Aerospace, Transportation and General Workers Union of Canada ("CAW") who is seeking to represent all retirees of the Applicants who were formerly members of one of the CAW locals when they were employees. Approximately 600 people have retained Mr. Gottheil or the CAW.

4 At the outset, it is noted that all parties who seek representation orders have submitted ample evidence that establishes that the legal counsel that they seek to be appointed as representative counsel are well respected members of the profession.

5 Nortel filed for CCAA protection on January 14, 2009 (the "Filing Date"). At the Filing Date, Nortel employed approximately 6,000 employees and had approximately 11,700 retirees or their spouses receiving pension and/or benefits from retirement plans sponsored by the Applicants.

6 The Monitor reports that the Applicants have continued to honour substantially all of the obligations to active employees. However, the Applicants acknowledge that upon commencement of the CCAA proceedings, they ceased making almost all payments to former employees of amounts that would constitute unsecured claims. Included in those amounts were payments to a number of former employees for termination and severance, as well as amounts under various retirement and retirement transition programs.

7 The Monitor is of the view that it is appropriate that there be representative counsel in light of the large number of former employees of the Applicants. The Monitor is of the view that former employee claims may require a combination of legal, financial, actuarial and advisory resources in order to be advanced and that representative counsel can efficiently co-ordinate such assistance for this large number of individuals.

8 The Monitor has reported that the Applicants' financial position is under pressure. The Monitor is of the view that the financial burden of multiple representative counsel would further increase this pressure.

9 These motions give rise to the following issues:

(i) when is it appropriate for the court to make a representation and funding order?

(ii) given the completing claims for representation rights, who should be appointed as representative counsel?

Issue 1 - Representative Counsel and Funding Orders

10 The court has authority under Rule 10.01 of the *Rules of Civil Procedure* to appoint representative counsel where persons with an interest in an estate cannot be readily ascertained, found or served.

11 Alternatively, Rule 12.07 provides the court with the authority to appoint a representative defendant where numerous persons have the same interests.

12 In addition, the court has a wide discretion pursuant to s. 11 of the CCAA to appoint representatives on behalf of a group of employees in CCAA proceedings and to order legal and other professional expenses of such representatives to be paid from the estate of the debtor applicant.

13 In the KM factum, it is submitted that employees and retirees are a vulnerable group of creditors in an insolvency because they have little means to pursue a claim in complex CCAA proceedings or other related insolvency proceedings. It was further submitted that the former employees of Nortel have little means to pursue their claims in respect of pension, termination, severance, retirement payments and other benefit claims and that the former employees would benefit from an order appointing representative counsel. In addition, the granting of a representation order would provide a social benefit by assisting former employees and that representative counsel would provide a reliable resource for former employees for information about the process. The appointment of representative counsel would also have the benefit of streamlining and introducing efficiency to the process for all parties involved in Nortel's insolvency.

14 I am in agreement with these general submissions.

15 The benefits of representative counsel have also been recognized by both Nortel and by the Monitor. Nortel consents to the appointment of KM as the single representative counsel for all former employees. Nortel opposes the appointment of any additional representatives. The Monitor supports the Applicants' recommendation that KM be appointed as representative counsel. No party is opposed to the appointment of representative counsel.

16 In the circumstances of this case, I am satisfied that it is appropriate to exercise discretion pursuant to s. 11 of the CCAA to make a Rule 10 representation order.

Issue 2 - Who Should be Appointed as Representative Counsel?

17 The second issue to consider is who to appoint as representative counsel. On this issue, there are divergent views. The differences primarily centre around whether there are inherent conflicts in the positions of various categories of former employees.

18 The motion to appoint KM was brought by Messrs. Sproule, Archibald and Campbell (the "Koskie Representatives"). The Koskie Representatives seek a representation order to appoint KM as representative counsel for all former employees in Nortel's insolvency proceedings, except:

(a) any former chief executive officer or chairman of the board of directors, any non-employee members of the board of directors, or such former employees or officers that are subject to investigation and charges by the Ontario Securities Commission or the United States Securities and Exchange Commission:
(b) any former unionized employees who are represented by their former union pursuant to a Court approved representation order; and
(c) any former employee who chooses to represent himself or herself as an independent individual party to these proceedings.

19 Ms. Päula Klein and Ms. Joanne Reid, on behalf of the Recently Severed Canadian Nortel Employees ("RSCNE"), seek a representation order to appoint NS as counsel in respect of all former Nortel Canadian non-unionized employees to whom Nortel owes termination and severance pay (the "RSCNE Group").

20 Mr. Kent Felske and Mr. Dany Sylvain, on behalf of the Nortel Continuing Canadian Employees ("NCCE") seek a representative order to appoint NS as counsel in respect of all current Canadian non-unionized Nortel employees (the "NCCE Group").

21 J&R, on behalf of the Steering Committee (Mr. Michael McCorkle, Mr. Harvey Stein and Ms. Marie Lunney) for Nortel Terminated Canadian Employees ("NTCEC") owed termination and severance pay seek a representation order to appoint J&R in respect of any claim of any terminated employee arising out of the insolvency of Nortel for:

(a) unpaid termination pay;
(b) unpaid severance pay;
(c) unpaid expense reimbursements; and
(d) amounts and benefits payable pursuant to employment contracts between the Employees and Nortel

22 Mr. George Borosh and/or Ms. Debra Connor seek a representation order to represent all retirees of the Applicants who were formerly represented by the CAW (the "Retirees") or, alternatively, an order authorizing the CAW to represent the Retirees.

23 The former employees of Nortel have an interest in Nortel's CCAA proceedings in respect of their pension and employee benefit plans and in respect of severance, termination pay, retirement allowances and other amounts that the former employees consider are owed in respect of applicable contractual obligations and employment standards legislation.

24 Most former employees and survivors of former employees have basic entitlement to receive payment from the Nortel Networks Limited Managerial and Non-negotiated Pension Plan (the "Pension Plan") or from the corresponding pension plan for unionized employees.

25 Certain former employees may also be entitled to receive payment from Nortel Networks Excess Plan (the "Excess Plan") in addition to their entitlement to the Pension Plan. The Excess Plan is a non-registered retirement plan which provides benefits to plan members in excess of those permitted under the registered Pension Plan in accordance with the *Income Tax Act*.

26 Certain former employees who held executive positions may also be entitled to receive payment from the Supplementary Executive Retirement Plan ("SERP") in addition to their entitlement to the Pension Plan. The SERP is a non-registered plan.

27 As of Nortel's last formal valuation dated December 31, 2006, the Pension Plan was funded at a level of 86% on a wind-up basis. As a result of declining equity markets, it is anticipated that the Pension Plan funding levels have declined since the date of the formal valuation and that Nortel anticipates that its Pension Plan funding requirements in 2009 will increase in a very substantial and material matter.

28 At this time, Nortel continues to fund the deficit in the Pension Plan and makes payment of all current service costs associated with the benefits; however, as KM points out in its factum, there is no requirement in the Initial Order compelling Nortel to continue making those payments.

29 Many retirees and former employees of Nortel are entitled to receive health and medical benefits and other benefits such as group life insurance (the "Health Care Plan"), some of which are funded through the Nortel Networks' Health and Welfare Trust (the "HWT").

30 Many former employees are entitled to a payment in respect of the Transitional Retirement Allowance ("TRA"), a payment which provides supplemental retirement benefits for those who at the time of their retirement elect to receive such payment. Some 442 non-union retirees have ceased to receive this benefit as a result of the CCAA proceedings.

31 Former employees who have been recently terminated from Nortel are owed termination pay and severance pay. There were 277 non-union former employees owed termination pay and severance pay at the Filing Date.

32 Certain former unionized employees also have certain entitlements including:

(a) Voluntary Retirement Option ("VRO");
(b) Retirement Allowance Payment ("RAP"); and
(c) Layoff and Severance Payments

33 The Initial Order permitted Nortel to cease making payments to its former employees in respect of certain amounts owing to them and effective January 14, 2009, Nortel has ceased payment of the following:

(a) all supplementary pensions which were paid from sources other than the Registered Pension Plan, including payments in respect of the Excess Plan and the SERP;
(b) all TRA agreements where amounts were still owing to the affected former employees as at January 14, 2009;
(c) all RAP agreements where amounts were still owing to the affected former employees as at January 14, 2009;
(d) all severance and termination agreements where amounts were still owing to the affected former employees as at January 14, 2009; and
(e) all retention bonuses where amounts were still owing to affected former employees as at January 14, 2009.

34 The representatives seeking the appointment of KM are members of the Nortel Retiree and Former Employee Protection Committee ("NRPC"), a national-based group of over 2,000 former employees. Its stated mandate is to defend and protect pensions, severance, termination and retirement payments and other benefits. In the KM factum, it is stated that since its inception, the NRPC has taken steps to organize across the country and it has assembled subcommittees in major centres. The NRPC consists of 20 individuals who it claims represent all different regions and interests and that they participate in weekly teleconference meetings with legal counsel to ensure that all former employees' concerns are appropriately addressed.

35 At paragraph 49 of the KM factum, counsel submits that NRPC members are a cross-section of all former employees and include a variety of interests, including those who have an interest in and/or are entitled to:

(a) the basic Pension Plan as a deferred member or a member entitled to transfer value;
(b) the Health Care Plan;
(c) the Pension Plan and Health Care Plan as a survivor of a former employee;
(d) Supplementary Retirement Benefits from the Excess Plan and the SERP plans;
(e) severance and termination pay ; and
(f) TRA payments.

36 The representatives submit that they are well suited to represent all former employees in Nortel's CCAA proceedings in respect of all of their interests. The record (Affidavit of Mr. D. Sproule) references the considerable experience of KM in representing employee groups in large-scale restructurings.

37 With respect to the allegations of a conflict of interest as between the various employee groups (as described below), the position of the representatives seeking the appointment of KM is that all former employees have unsecured claims against Nortel in its CCAA proceedings and that there is no priority among claims in respect of Nortel's assets. Further, they submit that a number of former employees seeking severance and termination pay also have other interests, including the Pension Plan, TRA payments and the supplementary pension payments and that it would unjust and inefficient to force these individuals to hire individual counsel or to have separate counsel for separate claims.

38 Finally, they submit that there is no guarantee as to whether Nortel will emerge from the CCAA, whether it will file for bankruptcy or whether a receiver will be appointed or indeed whether even a plan of compromise will be filed. They submit that there is no actual conflict of interest at this time and that the court need not be concerned with hypothetical scenarios which may never materialize. Finally, they submit that in the unlikely event of a serious conflict in the group, such matters can be brought to the attention of the court by the representatives and their counsel on a *ex parte* basis for resolution.

39 The terminated employee groups seeking a representation order for both NS and J&R submit that separate representative counsel appointments are necessary to address the conflict between the pension group and the employee group as the two groups have separate legal, procedural, and equitable interests that will inevitably conflict during the CCAA process.

40 They submit that the pensioners under the Pension Plan are continuing to receive the full amount of the pension from the Pension Plan and as such they are not creditors of Nortel. Counsel submits that the interest of pensioners is in continuing to receive to receive their full pension and survivor benefits from the Pension Plan for the remainder of their lives and the lives of surviving spouses.

41 In the NS factum at paragraphs 44 - 58, the argument is put forward as to why the former employees to whom Nortel owes severance and termination pay should be represented separately from the pensioners. The thrust of the argument is that future events may dictate the response of the affected parties. At paragraph 51 of the factum, it is submitted that generally, the recently severed employees' primary interest is to obtain the fastest possible payout of the greatest amount of severance and/or pay in lieu of notice in order to alleviate the financial hardships they are currently experiencing. The interests of pensioners, on the other hand, is to maintain the status quo, in which they continue to receive full pension benefits as long as possible. The submission emphasizes that issues facing the pensioner group and the non-pensioner group are profoundly divergent as full monthly benefit payments for the pensioner group have continued to date while non-pensioners are receiving 86% of their lump sums on termination of employment, in accordance with the most recently filed valuation report.

42 The motion submitted by the NTCEC takes the distinction one step further. The NTCEC is opposed to the motion of NS. NS wishes to represent both the RSCNE and the NCCE. The NTCEC believes that the terminated employees who are owed unpaid wages, termination pay and/or severance should comprise their own distinct and individual class.

43 The NTCEC seek payment and fulfillment of Nortel's obligations to pay one or several of the following:

(a) TRA;
(b) 2008 bonuses; and
(c) amendments to the Nortel Pension Plan

44 Counsel to NTCEC submits that the most glaring and obvious difference between the NCCE and the NTCEC, is that NCCE are still employed and have a continuing relationship with Nortel and have a source of employment income and may only have a contingent claim. The submission goes on to suggest that, if the NCCE is granted a representation order in these proceedings, they will seek to recover the full value of their TRA claim from Nortel during the negotiation process notwithstanding that one's claim for TRA does not crystallize until retirement or termination. On the other hand, the terminated employees, represented by the NTCEC and RSCNE are also claiming lost TRA benefits and that claim has crystallized because their employment with Nortel has ceased. Counsel further submits that the contingent claim of the NCCE for TRA is distinct and separate with the crystallized claim of the NTCEC and RSCNE for TRA.

45 Counsel to NTCEC further submits that there are difficulties with the claim of NCCE which is seeking financial redress in the CCAA proceedings for damages stemming from certain changes to the Nortel Networks Limited Managerial and Non-negotiated Pension Plan effective June 1, 2008 and Nortel's decision to decrease retirees benefits. Counsel submits that, even if the NCCE claims relating to the Pension Plan amendment are quantifiable, they are so dissimilar to the claims of the RSCNE and NTCEC, that the current and former Nortel employees cannot be viewed as a single group of creditors with common interests in these proceedings, thus necessitating distinct legal representation for each group of creditors.

46 Counsel further argues that NTCEC's sole mandate is to maximize recovery of unpaid wages, termination and severance pay which, those terminated employees as a result of Nortel's CCAA filing, have lost their employment income, termination pay and/or severance pay which would otherwise be protected by statute or common law.

47 KM, on behalf of the Koskie Representatives, responded to the concerns raised by NS and by J&R in its reply factum.

48 KM submits that the conflict of interest is artificial. KM submits that all members of the Pension Plan who are owed pensions face reductions on the potential wind-up of the Pension Plan due to serious under-funding and that temporarily maintaining of status quo monthly payments at 100%, although required by statute, does not avoid future reductions due to under-funding which offset any alleged overpayments. They submit that all pension members, whether they can withdraw 86% of their funds now and transfer them a locked-in vehicle or receive them later in the form of potentially reduced pensions, face a loss and are thus creditors of Nortel for the pension shortfalls.

49 KM also states that the submission of the RSCNE that non-pensioners may put pressure on Nortel to reduce monthly payments on pensioners ignores the *Ontario Pension Benefits Act* and its applicability in conjunction with the CCAA. It further submits that issues regarding the reduction of pensions and the transfers of commuted values are not dealt with through the CCAA proceedings, but through the Superintendent of Financial Services and the Plan Administrator in their administration and application of the PBA. KM concludes that the Nortel Pension Plans are not applicants in this matter nor is there a conflict given the application of the provisions of the PBA as detailed in the factum at paragraphs 11 - 21.

50 KM further submits that over 1,500 former employees have claims in respect of other employment and retirement related benefits such as the Excess Plan, the SERP, the TRA and other benefit allowances which are claims that have "crystallized" and are payable now. Additionally, they submit that 11,000 members of the Pension Plan are entitled to benefits from the Pensioner Health Care Plan which is not pre-funded, resulting in significant claims in Nortel's CCAA proceedings for lost health care benefits.

51 Finally, in addition to the lack of any genuine conflict of interest between former employees who are pensioners and those who are non-pensioners, there is significant overlap in interest between such individuals and a number of the former employees seeking severance and termination pay have the same or similar interests in other benefit payments, including the Pension Plan, Health Care Plan, TRA, SERP and Excess Plan payments. As well, former employees who have an interest in the Pension Plan also may be entitled to severance and termination pay.

52 With respect to the motions of NS and J&R, I have not been persuaded that there is a real and direct conflict of interest. Claims under the Pension Plan, to the extent that it is funded, are not affected by the CCAA proceedings. To the extent that there is a deficiency in funding, such claims are unsecured claims against Nortel. In a sense, deficiency claims are not dissimilar from other employee benefit claims.

53 To the extent that there may be potentially a divergence of interest as between pension-based claims and terminated-employee claims, these distinctions are, at this time, hypothetical.

At this stage of the proceeding, there has been no attempt by Nortel to propose a creditor classification, let alone a plan of arrangement to its creditors. It seems to me that the primary emphasis should be placed on ensuring that the arguments of employees are placed before the court in the most time efficient and cost effective way possible. In my view, this can be accomplished by the appointment of a single representative counsel, knowledgeable and experienced in all facets of employee claims.

54 It is conceivable that there will be differences of opinion between employees at some point in the future, but if such differences of opinion or conflict arise, I am satisfied that this issue will be recognized by representative counsel and further directions can be provided.

55 A submission was also made to the effect that certain individuals or groups of individuals should not be deprived of their counsel of choice. In my view, the effect of appointing one representative counsel does not, in any way, deprive a party of their ability to be represented by the counsel of their choice. The Notice of Motion of KM provides that any former employee who does not wish to be bound by the representative order may take steps to notify KM of their decision and may thereafter appear as an independent party.

56 In the responding factum at paragraphs 28 - 30, KM submits that each former employee, whether or not entitled to an interest in the Pension Plan, has a common interest in that each one is an unsecured creditor who is owed some form of deferred compensation, being it severance pay, TRA or RAP payments, supplementary pensions, health benefits or benefits under a registered Pension Plan and that classifying former employees as one group of creditors will improve the efficiency and effectiveness of Nortel's CCAA proceedings and will facilitate the reorganization of the company. Further, in the event of a liquidation of Nortel, each former employee will seek to recover deferred compensation claims as an unsecured creditor. Thus, fragmentation of the group is undesirable. Further, all former employees also have a common legal position as unsecured creditors of Nortel in that their claims all arise out of the terms and conditions of their employment and regardless of the form of payment, unpaid severance pay and termination pay, unpaid health benefits, unpaid supplementary pension benefits and other unpaid retirement benefits are all remuneration of some form arising from former employment with Nortel.

57 The submission on behalf of KM concludes that funds in a pension plan can also be described as deferred wages. An employer who creates a pension plan agrees to provide benefits to retiring employees as a form of compensation to that employee. An underfunded pension plan reflects the employer's failure to pay the deferred wages owing to former employees.

58 In its factum, the CAW submits that the two proposed representative individuals are members of the Nortel Pension Plan applicable to unionized employees. Both individuals are former unionized employees of Nortel and were members of the CAW. Counsel submits that naming them as representatives on behalf of all retirees of Nortel who were members of the CAW will not result in a conflict with any other member of the group.

59 Counsel to the CAW also stated that in the event that the requested representation order is not granted, those 600 individuals who have retained Mr. Lewis Gottheil will still be represented by him, and the other similarly situated individuals might possibly be represented by other counsel. The retainer specifically provides that no individual who retains Mr. Gottheil shall be charged any fees nor be responsible for costs or penalties. It further provides that the retainer may be discontinued by the individual or by counsel in accordance with applicable rules.

60 Counsel further submits that the 600 members of the group for which the representation order is being sought have already retained counsel of their choice, that being Mr. Lewis Gottheil of the CAW. However, if the requested representative order is not granted, there will still be a group of 600 individual members of the Pension Plan who are represented by Mr. Gottheil. As a result, counsel acknowledges there is little to no difference that will result from granting the requested representation order in this case, except that all retirees formerly represented by the union will have one counsel, as opposed to two or several counsel if the order is not granted.

61 In view of this acknowledgement, it seems to me that there is no advantage to be gained by granting the CAW representative status. There will be no increased efficiencies, no simplification of the process, nor any real practical benefit to be gained by such an order.

62 Notwithstanding that creditor classification has yet to be proposed in this CCAA proceeding, it is useful, in my view, to make reference to some of the principles of classification. In *Re Stelco Inc.*, the Ontario Court of Appeal noted that the classification of creditors in the CCAA proceeding is to be determined based on the "commonality of interest" test. In *Re Stelco*, the Court of Appeal upheld the reasoning of Paperny J. (as she then was) in *Re Canadian Airlines Corp.* and articulated the following factors to be considered in the assessment of the "commonality of interest".

In summary, the case has established the following principles applicable to assessing commonality of interest:

1. Commonality of interest should be viewed based on the non-fragmentation test, not on an identity of interest test;
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.
3. The commonality of interests are to be viewed purposively, bearing in mind the object of the CCAA, namely to facilitate reorganizations 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.
5. Absent bad faith, the motivations of creditors to approve or disapprove [of the Plan] are irrelevant.
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.

Re Stelco Inc., 15 C.B.R. (5th) 307 (Ont. C.A.), paras 21-23; *Re Canadian Airlines Corp.* (2000) 19 C.B.R. (4th) 12 Alta. Q.B., para 31.

63 I have concluded that, at this point in the proceedings, the former employees have a "commonality of interest" and that this process can be best served by the appointment of one representative counsel.

64 As to which counsel should be appointed, all firms have established their credentials. However, KM is, in my view, the logical choice. They have indicated a willingness to act on behalf of all former employees. The choice of KM is based on the broad mandate they have received from the employees, their experience in representing groups of retirees and employees in large scale restructurings and speciality practice in the areas of pension, benefits, labour and employment, restructuring and insolvency law, as well as my decision that the process can be best served by having one firm put forth the arguments on behalf of all employees as opposed to subdividing the employee group.

65 The motion of Messrs. Sproule, Archibald and Campbell is granted and Koskie Minsky LLP is appointed as Representative Counsel. This representation order is also to cover the fees and disbursements of Koskie Minsky.

66 The motions to appoint Nelligan O'Brien Payne and Shibley Righton, Juroviesky and Ricci, and the CAW as representative counsel are dismissed.

67 I would ask that counsel prepare a form of order for my consideration.

G.B. MORAWETZ J.

cp/e/qlrpv/qlpxm/qlmxl/qlaxw/qlaxr

Tab 18

Case Name:

SemCanada Crude Company (Re)

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

[2009] A.J. No. 915

2009 ABQB 490

57 C.B.R. (5th) 205

479 A.R. 318

2009 CarswellAlta 1269

180 A.C.W.S. (3d) 374

Docket: 0801 08510

Registry: Calgary

Alberta Court of Queen's Bench
Judicial District of Calgary

B.E.C. Romaine J.

Heard: August 5, 2009.
Judgment: August 24, 2009.

(47 paras.)

Bankruptcy and insolvency law -- Companies' Creditors Arrangement Act (CCAA) matters -- Compromises and arrangements -- With class of creditors -- Proposals -- Meetings of creditors -- Application by companies under CCAA protection to file proposed plans, hold meeting with *creditors and establish single class of creditors allowed -- Applicant's affiliates were under Chapter 11 protection in United States -- Over $2.9 billion was owing -- Applicant and US companies created joint plans -- Secured creditors would receive $2.3 billion under US plan, to which applicant would contribute funds -- Only unsecured creditors received distribution under Canadian plan -- Plans were interrelated, so secured creditors entitled to meaningful participation under Canadian plan -- Fairness issues raised by unsecured creditors could be discussed at sanction hearing.*

Application by the group of companies under CCAA protection for approval to file the proposed plans, authorization to hold a meeting with creditors and the establishment of a single class of creditors. The applicant obtained CCAA protection in 2008. The applicant's US affiliates were under Chapter 11 protection in the United States. The companies' financial problems arose from failed trading strategy and the volatility of petroleum prices. More than $2.9 billion was owing to creditors. The applicant and the US companies created plans that operated jointly. Under the US plan, $2.3 billion would be distributed to secured creditors, of which the applicant would contribute $161 million in cash and $45 million in crude oil settlements. Secured lenders would be able to claim the deficiency though the litigation trust. Unsecured creditors would recover just two per cent. As the secured creditors would receive recovery under the US plan, they would be deemed to have waived their right to recovery under the Canadian plan for the most part. Distribution to unsecured creditors was expected to be four per cent of their claim. The plans were closely interrelated and each required the approval of the other. The Monitor reported that the plans were the only viable option and creditors would receive less if bankruptcy occurred. The Monitor expected the US plan to be confirmed. Certain unsecured creditors objected to the creation of a single class of creditors.

HELD: Application allowed. Classification was a key issued under the CCAA. The size and scope of the secured creditors made their participation essential. The differences in distribution and fairness issues could be raised by the unsecured creditors at the sanction hearing, but did not warrant the creation of separate classes. That the secured creditors and noteholders had a role in the US plan under which they would recover was insufficient to exclude them from voting on the Canadian plan, since the plans were interrelated. Under a litigation scenario, the secured creditors would receive nearly all the proceeds, so were entitled to meaningful consultation, which would be impossible if separate classes were created.

Statutes, Regulations and Rules Cited:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 6, s. 11(1), s. 22.2(2)

United States Bankruptcy Code, Chapter 11, s. 503(b)(9)

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Reasons for Decision

B.E.C. ROMAINE J.:--

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) 1 (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. (2d) 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 D.L.R. (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.

B.E.C. ROMAINE J.

cp/e/qlcct/qlpwb/qlmxl/qlhcs/qlcas/qlana/qljxr

Tab 19

Indexed as:

T. Eaton Co. (Re)

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, applicant

[1999] O.J. No. 5322

15 C.B.R. (4th) 311

95 A.C.W.S. (3d) 219

Court File No. 99-CL-3516

Ontario Superior Court of Justice
Commercial List

Farley J.

Heard: November 23, 1999.
Judgment: November 23, 1999.

(13 paras.)

Creditors and debtors -- Debtors' relief legislation -- Companies' creditors arrangement legislation -- Arrangement, judicial approval.

Application for approval for a plan under the Companies' Creditors Arrangement Act. The creditors and the shareholders voted overwhelmingly in favour of the plan. No one presented an alternative plan for the interested parties to vote on.

HELD: Application allowed. The criteria for Court approval were strict compliance with all statutory requirements, that all material filed and procedure carried out had to be examined to determine if anything had been done or purported to be done that was not authorized by the Act, and that the plan be fair and reasonable. Of concern was the size of the pot going to the shareholders. That was a bone of contention amongst the creditors. There was a hierarchy of interest to receive value in a liquidation or liquidation related transaction and the shareholders were at the bottom. The plan was fair and reasonable.

Statutes, Regulations and Rules Cited:

Companies' Creditors Arrangement Act, Ontario Business Corporations Act.

Counsel:

No counsel mentioned.

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1 **FARLEY J.** (endorsement):-- The criteria that a debtor company must satisfy in seeking the court's approval for a plan under the Companies' Creditors Arrangement Act ("CCAA") are well established:

(a) there must be strict compliance with all statutory requirements;
(b) all material filed and procedure carried out must be examined to determine if anything has been done or purported to be done which is not authorized by the CCAA; and
(c) the plan must be fair and reasonable.

See: Re Northland Properties Ltd. (1988), 73 C.B.R. (N.S.) 175 (B.C.S.C.) at pp. 182-3, affirmed (1989), 73 C.B.R. (N.S.) 195 (B.C.C.A.) and Re Sammi Atlas Inc. (1998), 3 C.B.R. (4th) 171 (Ont.Gen.Div.) at p. 172.

2 In exercising its discretion to approve an arrangement under the Ontario Business Corporations Act ("OBCA"), the court must be satisfied that the arrangement meets the same criteria as set out above for approving a plan under the CCAA. See Olympia & York Developments Ltd. (1993) 18 C.B.R. (3d) 176 (Ont.Gen.Div.) at p. 186.

3 It would appear to be undisputed by anyone (including myself) that items (a) and (b) have been met and complied with. That leaves the question of whether what is advanced is fair and reasonable. The majority can bind the minority in a plan provided that the purchase does not bind the minority to terms that are unfair or unconscionable. See Re Keddy Motor Inns Ltd. (1992), 13 C.B.R. (3d) 245 (N.S.C.A.) at pp. 247-8, 258.

4 In reviewing the fairness and reasonableness of a plan the court does not require perfection; nor will the court second guess the business decisions reached by the stakeholders as a body.

5 In Sammi Atlas, supra, I cited Re Campeau Corp. (1992), 10 C.B.R. (3d) 104 (Ont.Gen.Div.), Re Northland, supra, and Re Olympia & York Developments Ltd. (1993), 12 O.R. (3d) 500 (Gen.Div.) at pp. 173-4 where I observed:

> ... A Plan under the CCAA is a compromise; it cannot be expected to be perfect. It should be approved if it is fair, reasonable and equitable. Equitable treatment is not necessarily equal treatment. Equal treatment may be contrary to equitable treatment. One must look at the creditors as a whole (i.e. generally) and to the objecting creditors (specifically) and see if rights are compromised in an attempt

> to balance interests (and have the pain of the compromise equitably shared) as opposed to a confiscation of rights ...
>
> Those voting on the Plan (and I noted there was a very significant "quorum" present at the meeting) do so on a business basis. As Blair J. said at p. 510 of Olympia & York Developments Ltd.:
>
> > As the other courts have done, I observe that it is not my function to second guess the business people with respect to the "business" aspects of the Plan, descending into the negotiating arena and substituting my own view of what is a fair and reasonable compromise or arrangement for that of the business judgment of the participants. The parties themselves know best what is in their interests in those areas.
>
> The court should be appropriately reluctant to interfere with the business decisions of creditors 'reached as a body. There was no suggestion that these creditors were unsophisticated or unable to look out for their own best interests ...

6 As well there is a heavy onus on parties seeking to upset a plan that the required majority have supported. See Sammi Atlas, supra, at p. 274 citing Re Central Guaranty Trustco Ltd. (1993) 21 C.B.R. (3d) 139 (Ont.Gen.Div.) at p. 141.

7 It is also appropriate to take into consideration the fact that both classes of creditors as well as the shareholders voted overwhelmingly in favour of the Eaton's Plan. In the case of the unsecured creditors this was 99% plus in number and 94% plus in value; the landlords unanimously; and the shareholders 99.5%. This was not a scrape by the minimum requirement situation.

8 The alternative to a favourable vote would be that Eaton's would be in bankruptcy today as per the provisions of last week. Thus there would be some uncertainty as to recoveries - and whether or not a plan could arise from the ashes so as to utilize the tax loss potential. I note specifically that no one presented an alternative plan for the interested parties to vote on.

9 What is of concern is the question of the size of the pot going to the shareholders. That was a bone of contention amongst the various creditors - but as I have observed, no one advanced a competing plan. I would also like to make it clear that I have no doubt that many of the shareholders have suffered significant losses as a result of the demise of Eaton's and I know that it is painful for them. It is not my intention to increase that pain but I do think that it is important for at least future situations that in devising and considering plans persons recognize that there is a natural and legal "hierarchy of interest to receive value in a liquidation or liquidation related transaction" and that in that hierarchy the shareholders are at the bottom. See my endorsement of November 22, 1999 in Re Royal Oak Mines Ltd., [1999] O.J. No. 4848:

> Further in these particular circumstances [here I was talking of Royal Oak, but the same would appear to hold true for Eaton's], there are, in relation to the available tax losses (which is in itself a "conditional" asset), very substantial amounts of unsecured debt standing on the shareholders' shoulders. That is, the shareholders, even assuming an ongoing operation without restructuring, would have to wait a long while before their interests saw the light of day.

10 I think it appropriate to note that in Sammi Atlas, the shareholder got $1.25 million U.S.; in Cadillac Fairview Inc. nothing; and in Royal Oak it is proposed the shareholders be diluted down to 1% equity interest underneath a heavy blanket of other obligations. When viewed in contrast, the Eaton's deal would appear to be on the rich side.

11 I also think it helpful to note my observations in Re A Proposed Arrangement Involving Cadillac Fairview Inc. And Its Shareholders, [1995] O.J. No. 707, released March 7, 1995, at pp. 11-16 and especially the analysis In Re Tea Corporation Limited, Sorsbie v. Same Company, [1904] 1 Ch.D. 12 (C.A.) as well as the other cases referred to therein.

12 I trust that a forward thinking analysis of these views will be of assistance to those involved in future cases.

13 However, in the subject Eaton's case, in the circumstances here prevailing, I find the plan to be fair and reasonable, notwithstanding my concerns that it might well have been appropriately modified to get it closer to perfection. While "perfection" is an impossible goal, "closer to perfection" should always be strived for. The Eaton's plan is approved for both CCAA and OBCA purposes.

FARLEY J.

cp/s/qlala/qlalm

Tab 20

Metcalfe & Mansfield Alternative Investments II Corp. (Re)

92 O.R. (3d) 513

Court of Appeal for Ontario,

Laskin, Cronk and Blair JJ.A.

August 18, 2008

Debtor and creditor -- Companies' Creditors Arrangement Act -- Companies' Creditors Arrangement Act permitting inclusion of third-party releases in plan of compromise or arrangement to be sanctioned by court where those releases are reasonably connected to proposed restructuring -- Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

In response to a liquidity crisis which threatened the Canadian market in Asset Backed Commercial Paper ("ABCP"), a creditor-initiated Plan of Compromise and Arrangement was crafted. The Plan called for the release of third parties from any liability associated with ABCP, including, with certain narrow exceptions, liability for claims relating to fraud. The "double majority" required by s. 6 of the Companies' Creditors Arrangement Act ("CCAA") approved the Plan. The respondents sought court approval of the Plan under s. 6 of the CCAA. The application judge made the following findings: (a) the parties to be released were necessary and essential to the restructuring; (b) the claims to be released were rationally related to the purpose of the Plan and necessary for it; (c) the Plan could not succeed without the releases; (d) the parties who were to have claims against them released were contributing in a tangible and realistic way to the Plan; and (e) the Plan would benefit not only the debtor companies but creditor noteholders generally. The application judge sanctioned the Plan. The appellants were holders of ABCP notes who opposed the Plan. On appeal, they argued that the CCAA does not permit a release of claims against third parties and that the releases constitute an unconstitutional confiscation of private property that is within the exclusive domain of the provinces under s. 92 of the Constitution Act, 1867.

Held, the appeal should be dismissed.

On a proper interpretation, the CCAA permits the inclusion of third-party releases in a plan of compromise or arrangement to be sanctioned by the court where those releases are reasonably connected to the proposed restructuring. That conclusion is supported by (a) the open-ended, flexible character of the CCAA itself; (b) the broad nature of the term "compromise or arrangement" as used in the CCAA; and (c) the express statutory effect of the "double majority" vote and court sanction which render the plan binding on all creditors, including those unwilling to accept certain portions of it. The first of these signals a flexible approach to the application of the CCAA in new and evolving situations, an active judicial role in its application and interpretation, and a liberal approach to interpretation. The second provides the entrée to negotiations between the parties [page514] affected in the restructuring and furnishes them with the ability to apply the broad scope of their ingenuity to fashioning the proposal. The latter afford necessary protection to unwilling creditors who may be deprived of certain of their civil and property rights as a result of the process.

While the principle that legislation must not be construed so as to interfere with or prejudice established contractual or proprietary rights -- including the right to bring an action -- in the absence of a clear indication of legislative intention to that effect is an important one, Parliament's intention to clothe the court with authority to consider and sanction a plan that contains third-party releases is expressed with sufficient clarity in the "compromise or arrangement" language of the CCAA coupled with the statutory voting and sanctioning mechanism making the provisions of the plan binding on all creditors. This is not a situation of impermissible "gap-filling" in the case of legislation severely affecting property rights; it is a question of finding meaning in the language of the Act itself.

Interpreting the CCAA as permitting the inclusion of third-party releases in a plan of compromise or arrangement is not unconstitutional under the division-of-powers doctrine and does not contravene the rules of public order pursuant to the Civil Code of Quebec. The CCAA is valid federal legislation under the federal insolvency power, and the power to sanction a plan of compromise or arrangement that contains third-party releases is embedded in the wording of the CCAA. The fact that this may interfere with a claimant's right to pursue a civil action or trump Quebec rules of public order is constitutionally immaterial. To the extent that the provisions of the CCAA are inconsistent with provincial legislation, the federal legislation is paramount.

The application judge's findings of fact were supported by the evidence. His conclusion that the benefits of the Plan to the creditors as a whole and to the debtor companies outweighed the negative aspects of compelling the unwilling appellants to execute the releases was reasonable.

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(4th) 37, 127 O.A.C. 338, 1 B.L.R. (3d) 1, 15 C.B.R. (4th) 67, 47 C.C.L.T. (2d) 213, 93 A.C.W.S. (3d) 391 (C.A.); Pacific Coastal Airlines Ltd. v. Air Canada, [2001] B.C.J. No. 2580, 2001 BCSC 1721, 19 B.L.R. (3d) 286, 110 A.C.W.S. (3d) 259 (S.C.); Stelco Inc. (Re) (2005), 78 O.R. (3d) 241, [2005] O.J. No. 4883, 261 D.L.R. (4th) 368, 204 O.A.C. 205, 11 B.L.R. (4th) 185, 15 C.B.R. (5th) 307, 144 A.C.W.S. (3d) 15 (C.A.); Stelco Inc. (Re), [2005] O.J. No. 4814, 15 C.B.R. (5th) 297, 143 A.C.W.S. (3d) 623 (S.C.J.); Stelco Inc. (Re), [2006] O.J. No. 1996, 210 O.A.C. 129, 21 C.B.R. (5th) 157, 148 A.C.W.S. (3d) 193 (C.A.); consd

Other cases referred to

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[1998] O.J. No. 6548, 16 C.B.R. (4th) 125 (Gen. Div.); Society of Composers, Authors and Music Publishers of Canada v. Armitage (2000), 50 O.R. (3d) 688, [2000] O.J. No. 3993, 137 O.A.C. 74, 20 C.B.R. (4th) 160, 100 A.C.W.S. (3d) 530 (C.A.); T&N Ltd. and Others (No. 3) (Re), [2006] E.W.H.C. 1447, [2007] 1 All E.R. 851, [2007] 1 B.C.L.C. 563, [2006] B.P.I.R. 1283, [2006] Lloyd's Rep. I.R. 817 (Ch.)

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Constitution Act, 1867 (U.K.), 30 & 31 Victoria, c. 3, s. 92, (13), (21)

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APPEAL from the sanction order of C.L. Campbell J., [2008] O.J. No. 2265, 43 C.B.R. (5th) 269 (S.C.J.) under the Companies' Creditors Arrangement Act.

See Schedule "C" -- Counsel for list of counsel.

The judgment of the court was delivered by

BLAIR J.A.: --

A. Introduction

[1] In August 2007, a liquidity crisis suddenly threatened the Canadian market in Asset Backed Commercial Paper ("ABCP"). The crisis was triggered by a loss of confidence amongst investors stemming from the news of widespread defaults on U.S. sub-prime mortgages. The loss of confidence placed the Canadian financial market at risk generally and was reflective of an economic volatility worldwide.

[2] By agreement amongst the major Canadian participants, the $32 billion Canadian market in third-party ABCP was frozen on August 13, 2007, pending an attempt to resolve the crisis through a restructuring of that market. The Pan-Canadian Investors Committee, chaired by Purdy Crawford, C.C., Q.C., was formed and ultimately put forward the creditor-initiated Plan of Compromise and Arrangement that forms the subject-matter of these proceedings. The Plan was sanctioned by Colin L. Campbell J. on June 5, 2008.

[3] Certain creditors who opposed the Plan seek leave to appeal and, if leave is granted, appeal from that decision. They raise an important point regarding the permissible scope of a restructuring under the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 as amended ("CCAA"): can the court sanction a Plan that calls for creditors to provide releases to third parties who are themselves solvent and not creditors of the debtor company? They also argue that, if the answer to this question is yes, the [page517] application judge erred in holding that this Plan, with its particular releases (which bar some claims even in fraud), was fair and reasonable and therefore in sanctioning it under the CCAA.

Leave to appeal

[4] Because of the particular circumstances and urgency of these proceedings, the court agreed to collapse an oral hearing for leave to appeal with the hearing of the appeal itself. At the outset of

argument, we encouraged counsel to combine their submissions on both matters.

[5] The proposed appeal raises issues of considerable importance to restructuring proceedings under the CCAA Canada-wide. There are serious and arguable grounds of appeal and -- given the expedited timetable -- the appeal will not unduly delay the progress of the proceedings. I am satisfied that the criteria for granting leave to appeal in CCAA proceedings, set out in such cases as Cineplex Odeon Corp. (Re) (2001), 24 C.B.R. (4th) 201 (Ont. C.A.) and Re Country Style Food Services, [2002] O.J. No. 1377, 158 O.A.C. 30 (C.A.) are met. I would grant leave to appeal.

Appeal

[6] For the reasons that follow, however, I would dismiss the appeal.

B. Facts

The parties

[7] The appellants are holders of ABCP Notes who oppose the Plan. They do so principally on the basis that it requires them to grant releases to third-party financial institutions against whom they say they have claims for relief arising out of their purchase of ABCP Notes. Amongst them are an airline, a tour operator, a mining company, a wireless provider, a pharmaceuticals retailer and several holding companies and energy companies.

[8] Each of the appellants has large sums invested in ABCP -- in some cases, hundreds of millions of dollars. Nonetheless, the collective holdings of the appellants -- slightly over $1 billion -- represent only a small fraction of the more than $32 billion of ABCP involved in the restructuring.

[9] The lead respondent is the Pan-Canadian Investors Committee which was responsible for the creation and negotiation of the Plan on behalf of the creditors. Other respondents include various major international financial institutions, the five largest Canadian banks, several trust companies and some smaller holders of ABCP product. They participated in the market in a number of different ways. [page518]

The ABCP market

[10] Asset Backed Commercial Paper is a sophisticated and hitherto well-accepted financial instrument. It is primarily a form of short-term investment -- usually 30 to 90 days -- typically with a low-interest yield only slightly better than that available through other short-term paper from a government or bank. It is said to be "asset backed" because the cash that is used to purchase an ABCP Note is converted into a portfolio of financial assets or other asset interests that in turn provide security for the repayment of the notes.

[11] ABCP was often presented by those selling it as a safe investment, somewhat like a

guaranteed investment certificate.

[12] The Canadian market for ABCP is significant and administratively complex. As of August 2007, investors had placed over $116 billion in Canadian ABCP. Investors range from individual pensioners to large institutional bodies. On the selling and distribution end, numerous players are involved, including chartered banks, investment houses and other financial institutions. Some of these players participated in multiple ways. The Plan in this proceeding relates to approximately $32 billion of non-bank sponsored ABCP, the restructuring of which is considered essential to the preservation of the Canadian ABCP market.

[13] As I understand it, prior to August 2007, when it was frozen, the ABCP market worked as follows.

[14] Various corporations (the "Sponsors") would arrange for entities they control ("Conduits") to make ABCP Notes available to be sold to investors through "Dealers" (banks and other investment dealers). Typically, ABCP was issued by series and sometimes by classes within a series.

[15] The cash from the purchase of the ABCP Notes was used to purchase assets which were held by trustees of the Conduits ("Issuer Trustees") and which stood as security for repayment of the notes. Financial institutions that sold or provided the Conduits with the assets that secured the ABCP are known as "Asset Providers". To help ensure that investors would be able to redeem their notes, "Liquidity Providers" agreed to provide funds that could be drawn upon to meet the demands of maturing ABCP Notes in certain circumstances. Most Asset Providers were also Liquidity Providers. Many of these banks and financial institutions were also holders of ABCP Notes ("Noteholders"). The Asset and Liquidity Providers held first charges on the assets.

[16] When the market was working well, cash from the purchase of new ABCP Notes was also used to pay off maturing ABCP [page519] Notes; alternatively, Noteholders simply rolled their maturing notes over into new ones. As I will explain, however, there was a potential underlying predicament with this scheme.

The liquidity crisis

[17] The types of assets and asset interests acquired to "back" the ABCP Notes are varied and complex. They were generally long-term assets such as residential mortgages, credit card receivables, auto loans, cash collateralized debt obligations and derivative investments such as credit default swaps. Their particular characteristics do not matter for the purpose of this appeal, but they shared a common feature that proved to be the Achilles heel of the ABCP market: because of their long-term nature, there was an inherent timing mismatch between the cash they generated and the cash needed to repay maturing ABCP Notes.

[18] When uncertainty began to spread through the ABCP marketplace in the summer of 2007, investors stopped buying the ABCP product and existing Noteholders ceased to roll over their

maturing notes. There was no cash to redeem those notes. Although calls were made on the Liquidity Providers for payment, most of the Liquidity Providers declined to fund the redemption of the notes, arguing that the conditions for liquidity funding had not been met in the circumstances. Hence the "liquidity crisis" in the ABCP market.

[19] The crisis was fuelled largely by a lack of transparency in the ABCP scheme. Investors could not tell what assets were backing their notes -- partly because the ABCP Notes were often sold before or at the same time as the assets backing them were acquired; partly because of the sheer complexity of certain of the underlying assets; and partly because of assertions of confidentiality by those involved with the assets. As fears arising from the spreading U.S. sub-prime mortgage crisis mushroomed, investors became increasingly concerned that their ABCP Notes may be supported by those crumbling assets. For the reasons outlined above, however, they were unable to redeem their maturing ABCP Notes.

The Montreal Protocol

[20] The liquidity crisis could have triggered a wholesale liquidation of the assets, at depressed prices. But it did not. During the week of August 13, 2007, the ABCP market in Canada froze -- the result of a standstill arrangement orchestrated on the heels of the crisis by numerous market participants, including Asset Providers, Liquidity Providers, Noteholders and other financial industry representatives. Under the standstill agreement -- known as the Montreal Protocol -- the parties committed [page520] to restructuring the ABCP market with a view, as much as possible, to preserving the value of the assets and of the notes.

[21] The work of implementing the restructuring fell to the Pan-Canadian Investors Committee, an applicant in the proceeding and respondent in the appeal. The Committee is composed of 17 financial and investment institutions, including chartered banks, credit unions, a pension board, a Crown corporation and a university board of governors. All 17 members are themselves Noteholders; three of them also participated in the ABCP market in other capacities as well. Between them, they hold about two-thirds of the $32 billion of ABCP sought to be restructured in these proceedings.

[22] Mr. Crawford was named the Committee's chair. He thus had a unique vantage point on the work of the Committee and the restructuring process as a whole. His lengthy affidavit strongly informed the application judge's understanding of the factual context, and our own. He was not cross-examined and his evidence is unchallenged.

[23] Beginning in September 2007, the Committee worked to craft a plan that would preserve the value of the notes and assets, satisfy the various stakeholders to the extent possible and restore confidence in an important segment of the Canadian financial marketplace. In March 2008, it and the other applicants sought CCAA protection for the ABCP debtors and the approval of a Plan that had been pre-negotiated with some, but not all, of those affected by the misfortunes in the Canadian ABCP market.

The Plan

(a) Plan overview

[24] Although the ABCP market involves many different players and kinds of assets, each with their own challenges, the committee opted for a single plan. In Mr. Crawford's words, "all of the ABCP suffers from common problems that are best addressed by a common solution". The Plan the Committee developed is highly complex and involves many parties. In its essence, the Plan would convert the Noteholders' paper -- which has been frozen and therefore effectively worthless for many months -- into new, long-term notes that would trade freely, but with a discounted face value. The hope is that a strong secondary market for the notes will emerge in the long run.

[25] The Plan aims to improve transparency by providing investors with detailed information about the assets supporting their ABCP Notes. It also addresses the timing mismatch between the notes and the assets by adjusting the maturity provisions and interest rates on the new notes. Further, the Plan [page521] adjusts some of the underlying credit default swap contracts by increasing the thresholds for default triggering events; in this way, the likelihood of a forced liquidation flowing from the credit default swap holder's prior security is reduced and, in turn, the risk for ABCP investors is decreased.

[26] Under the Plan, the vast majority of the assets underlying ABCP would be pooled into two master asset vehicles (MAV1 and MAV2). The pooling is designed to increase the collateral available and thus make the notes more secure.

[27] The Plan does not apply to investors holding less than $1 million of notes. However, certain Dealers have agreed to buy the ABCP of those of their customers holding less than the $1 million threshold, and to extend financial assistance to these customers. Principal among these Dealers are National Bank and Canaccord, two of the respondent financial institutions the appellants most object to releasing. The application judge found that these developments appeared to be designed to secure votes in favour of the Plan by various Noteholders and were apparently successful in doing so. If the Plan is approved, they also provide considerable relief to the many small investors who find themselves unwittingly caught in the ABDP collapse.

(b) The releases

[28] This appeal focuses on one specific aspect of the Plan: the comprehensive series of releases of third parties provided for in art. 10.

[29] The Plan calls for the release of Canadian banks, Dealers, Noteholders, Asset Providers, Issuer Trustees, Liquidity Providers and other market participants -- in Mr. Crawford's words, "virtually all participants in the Canadian ABCP market" -- from any liability associated with ABCP, with the exception of certain narrow claims relating to fraud. For instance, under the Plan as approved, creditors will have to give up their claims against the Dealers who sold them their ABCP

Notes, including challenges to the way the Dealers characterized the ABCP and provided (or did not provide) information about the ABCP. The claims against the proposed defendants are mainly in tort: negligence, misrepresentation, negligent misrepresentation, failure to act prudently as a dealer/advisor, acting in conflict of interest and in a few cases fraud or potential fraud. There are also allegations of breach of fiduciary duty and claims for other equitable relief.

[30] The application judge found that, in general, the claims for damages include the face value of the Notes, plus interest and additional penalties and damages.

[31] The releases, in effect, are part of a quid pro quo. Generally speaking, they are designed to compensate various participants in [page522] the market for the contributions they would make to the restructuring. Those contributions under the Plan include the requirements that:

(a) Asset Providers assume an increased risk in their credit default swap contracts, disclose certain proprietary information in relation to the assets and provide below-cost financing for margin funding facilities that are designed to make the notes more secure;

(b) Sponsors -- who in addition have co-operated with the Investors' Committee throughout the process, including by sharing certain proprietary information -- give up their existing contracts;

(c) the Canadian banks provide below-cost financing for the margin funding facility; and

(d) other parties make other contributions under the Plan.

[32] According to Mr. Crawford's affidavit, the releases are part of the Plan "because certain key participants, whose participation is vital to the restructuring, have made comprehensive releases a condition for their participation".

The CCAA proceedings to date

[33] On March 17, 2008, the applicants sought and obtained an Initial Order under the CCAA staying any proceedings relating to the ABCP crisis and providing for a meeting of the Noteholders to vote on the proposed Plan. The meeting was held on April 25. The vote was overwhelmingly in support of the Plan -- 96 per cent of the Noteholders voted in favour. At the instance of certain Noteholders, and as requested by the application judge (who has supervised the proceedings from the outset), the monitor broke down the voting results according to those Noteholders who had worked on or with the Investors' Committee to develop the Plan and those Noteholders who had not. Re-calculated on this basis the results remained firmly in favour of the proposed Plan -- 99 per cent of those connected with the development of the Plan voted positively, as did 80 per cent of those Noteholders who had not been involved in its formulation.

[34] The vote thus provided the Plan with the "double majority" approval -- a majority of creditors representing two-thirds in value of the claims -- required under s. 6 of the CCAA.

[35] Following the successful vote, the applicants sought court approval of the Plan under s. 6. Hearings were held on May 12 [page523] and 13. On May 16, the application judge issued a brief endorsement in which he concluded that he did not have sufficient facts to decide whether all the releases proposed in the Plan were authorized by the CCAA. While the application judge was prepared to approve the releases of negligence claims, he was not prepared at that point to sanction the release of fraud claims. Noting the urgency of the situation and the serious consequences that would result from the Plan's failure, the application judge nevertheless directed the parties back to the bargaining table to try to work out a claims process for addressing legitimate claims of fraud.

[36] The result of this renegotiation was a "fraud carve-out" -- an amendment to the Plan excluding certain fraud claims from the Plan's releases. The carve-out did not encompass all possible claims of fraud, however. It was limited in three key respects. First, it applied only to claims against ABCP Dealers. Secondly, it applied only to cases involving an express fraudulent misrepresentation made with the intention to induce purchase and in circumstances where the person making the representation knew it to be false. Thirdly, the carve-out limited available damages to the value of the notes, minus any funds distributed as part of the Plan. The appellants argue vigorously that such a limited release respecting fraud claims is unacceptable and should not have been sanctioned by the application judge.

[37] A second sanction hearing -- this time involving the amended Plan (with the fraud carve-out) -- was held on June 3, 2008. Two days later, Campbell J. released his reasons for decision, approving and sanctioning the Plan on the basis both that he had jurisdiction to sanction a Plan calling for third-party releases and that the Plan including the third-party releases in question here was fair and reasonable.

[38] The appellants attack both of these determinations.

C. Law and Analysis

[39] There are two principal questions for determination on this appeal:

(1) As a matter of law, may a CCAA plan contain a release of claims against anyone other than the debtor company or its directors?
(2) If the answer to that question is yes, did the application judge err in the exercise of his discretion to sanction the Plan as fair and reasonable given the nature of the releases called for under it? [page524]

(1) Legal authority for the releases

[40] The standard of review on this first issue -- whether, as a matter of law, a CCAA plan may contain third-party releases -- is correctness.

[41] The appellants submit that a court has no jurisdiction or legal authority under the CCAA to sanction a plan that imposes an obligation on creditors to give releases to third parties other than the directors of the debtor company.[1] The requirement that objecting creditors release claims against third parties is illegal, they contend, because:

(a) on a proper interpretation, the CCAA does not permit such releases;
(b) the court is not entitled to "fill in the gaps" in the CCAA or rely upon its inherent jurisdiction to create such authority because to do so would be contrary to the principle that Parliament did not intend to interfere with private property rights or rights of action in the absence of clear statutory language to that effect;
(c) the releases constitute an unconstitutional confiscation of private property that is within the exclusive domain of the provinces under s. 92 of the Constitution Act, 1867;
(d) the releases are invalid under Quebec rules of public order; and because
(e) the prevailing jurisprudence supports these conclusions.

[42] I would not give effect to any of these submissions.

Interpretation, "gap filling" and inherent jurisdiction

[43] On a proper interpretation, in my view, the CCAA permits the inclusion of third-party releases in a plan of compromise or arrangement to be sanctioned by the court where those releases are reasonably connected to the proposed restructuring. I am led to this conclusion by a combination of (a) the open-ended, flexible character of the CCAA itself, (b) the broad nature of the term "compromise or arrangement" as used in the Act, and (c) the express statutory effect of the "double-majority" vote and court sanction which render the plan binding on all creditors, including [page525] those unwilling to accept certain portions of it. The first of these signals a flexible approach to the application of the Act in new and evolving situations, an active judicial role in its application and interpretation, and a liberal approach to that interpretation. The second provides the entrée to negotiations between the parties affected in the restructuring and furnishes them with the ability to apply the broad scope of their ingenuity in fashioning the proposal. The latter afford necessary protection to unwilling creditors who may be deprived of certain of their civil and property rights as a result of the process.

[44] The CCAA is skeletal in nature. It does not contain a comprehensive code that lays out all that is permitted or barred. Judges must therefore play a role in fleshing out the details of the statutory scheme. The scope of the Act and the powers of the court under it are not limitless. It is beyond controversy, however, that the CCAA is remedial legislation to be liberally construed in accordance with the modern purposive approach to statutory interpretation. It is designed to be a flexible instrument and it is that very flexibility which gives the Act its efficacy: Canadian Red Cross Society (Re), [1998] O.J. No. 3306, 5 C.B.R. (4th) 299 (Gen. Div.). As Farley J. noted in Dylex Ltd. (Re), [1995] O.J. No. 595, 31 C.B.R. (3d) 106 (Gen. Div.), at p. 111 C.B.R., "[t]he

history of CCAA law has been an evolution of judicial interpretation".

[45] Much has been said, however, about the "evolution of judicial interpretation" and there is some controversy over both the source and scope of that authority. Is the source of the court's authority statutory, discerned solely through application of the principles of statutory interpretation, for example? Or does it rest in the court's ability to "fill in the gaps" in legislation? Or in the court's inherent jurisdiction?

[46] These issues have recently been canvassed by the Honourable Georgina R. Jackson and Dr. Janis Sarra in their publication "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters",[2] and there was considerable argument on these issues before the application judge and before us. While I generally agree with the authors' suggestion that the courts should adopt a hierarchical approach in their resort to these interpretive tools -- statutory interpretation, gap-filling, discretion and inherent jurisdiction [page526] -- it is not necessary, in my view, to go beyond the general principles of statutory interpretation to resolve the issues on this appeal. Because I am satisfied that it is implicit in the language of the CCAA itself that the court has authority to sanction plans incorporating third-party releases that are reasonably related to the proposed restructuring, there is no "gap-filling" to be done and no need to fall back on inherent jurisdiction. In this respect, I take a somewhat different approach than the application judge did.

[47] The Supreme Court of Canada has affirmed generally -- and in the insolvency context particularly -- that remedial statutes are to be interpreted liberally and in accordance with Professor Driedger's modern principle of statutory interpretation. Driedger advocated that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": Rizzo & Rizzo Shoes Ltd. (Re) (1998), 36 O.R. (3d) 418, [1998] 1 S.C.R. 27, [1998] S.C.J. No. 2, at para. 21, quoting E.A. Driedger, Construction of Statutes, 2nd ed. (Toronto: Butterworths, 1983); Bell ExpressVu Ltd. Partnership v. Rex, [2002] 2 S.C.R. 559, [2002] S.C.J. No. 43, at para. 26.

[48] More broadly, I believe that the proper approach to the judicial interpretation and application of statutes -- particularly those like the CCAA that are skeletal in nature -- is succinctly and accurately summarized by Jackson and Sarra in their recent article, supra, at p. 56:

> The exercise of a statutory authority requires the statute to be construed. The plain meaning or textualist approach has given way to a search for the object and goals of the statute and the intentionalist approach. This latter approach makes use of the purposive approach and the mischief rule, including its codification under interpretation statutes that every enactment is deemed remedial, and is to be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects. This latter approach advocates reading the statute as a whole and being mindful of Driedger's "one principle", that the words of the Act are to be read in their entire context, in their

grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. It is important that courts first interpret the statute before them and exercise their authority pursuant to the statute, before reaching for other tools in the judicial toolbox. Statutory interpretation using the principles articulated above leaves room for gap-filling in the common law provinces and a consideration of purpose in Québec as a manifestation of the judge's overall task of statutory interpretation. Finally, the jurisprudence in relation to statutory interpretation demonstrates the fluidity inherent in the judge's task in seeking the objects of the statute and the intention of the legislature.

[49] I adopt these principles. [page527]

[50] The remedial purpose of the CCAA -- as its title affirms -- is to facilitate compromises or arrangements between an insolvent debtor company and its creditors. In Chef Ready Foods Ltd. v. Hongkong Bank of Canada, [1990] B.C.J. No. 2384, 4 C.B.R. (3d) 311 (C.A.), at p. 318 C.B.R., Gibbs J.A. summarized very concisely the purpose, object and scheme of the Act:

> Almost inevitably, liquidation destroyed the shareholders' investment, yielded little by way of recovery to the creditors, and exacerbated the social evil of devastating levels of unemployment. The government of the day sought, through the C.C.A.A., to create a regime whereby the principals of the company and the creditors could be brought together under the supervision of the court to attempt a reorganization or compromise or arrangement under which the company could continue in business.

[51] The CCAA was enacted in 1933 and was necessary -- as the then secretary of state noted in introducing the Bill on First Reading-- "because of the prevailing commercial and industrial depression" and the need to alleviate the effects of business bankruptcies in that context: see the statement of the Hon. C.H. Cahan, Secretary of State, House of Commons Debates (Hansard) (April 20, 1933) at 4091. One of the greatest effects of that Depression was what Gibbs J.A. described as "the social evil of devastating levels of unemployment". Since then, courts have recognized that the Act has a broader dimension than simply the direct relations between the debtor company and its creditors and that this broader public dimension must be weighed in the balance together with the interests of those most directly affected: see, for example, Elan Corp. v. Comiskey (1990), 1 O.R. (3d) 289, [1990] O.J. No. 2180 (C.A.), per Doherty J.A. in dissent; Skydome Corp. v. Ontario, [1998] O.J. No. 6548, 16 C.B.R. (4th) 125 (Gen. Div.); Anvil Range Mining Corp. (Re) (1998), 7 C.B.R. (4th) 51 (Ont. Gen. Div.).

[52] In this respect, I agree with the following statement of Doherty J.A. in Elan, supra, at pp. 306-307 O.R.:

> [T]he Act was designed to serve a "broad constituency of investors, creditors and employees".[3] Because of that "broad constituency" the court must, when

> considering applications brought under the Act, have regard not only to the individuals and organizations directly affected by the application, but also to the wider public interest.

(Emphasis added)

Application of the principles of interpretation

[53] An interpretation of the CCAA that recognizes its broader socio-economic purposes and objects is apt in this case. As the [page528] application judge pointed out, the restructuring underpins the financial viability of the Canadian ABCP market itself.

[54] The appellants argue that the application judge erred in taking this approach and in treating the Plan and the proceedings as an attempt to restructure a financial market (the ABCP market) rather than simply the affairs between the debtor corporations who caused the ABCP Notes to be issued and their creditors. The Act is designed, they say, only to effect reorganizations between a corporate debtor and its creditors and not to attempt to restructure entire marketplaces.

[55] This perspective is flawed in at least two respects, however, in my opinion. First, it reflects a view of the purpose and objects of the CCAA that is too narrow. Secondly, it overlooks the reality of the ABCP marketplace and the context of the restructuring in question here. It may be true that, in their capacity as ABCP Dealers, the releasee financial institutions are "third-parties" to the restructuring in the sense that they are not creditors of the debtor corporations. However, in their capacities as Asset Providers and Liquidity Providers, they are not only creditors but they are prior secured creditors to the Noteholders. Furthermore -- as the application judge found -- in these latter capacities they are making significant contributions to the restructuring by "foregoing immediate rights to assets and . . . providing real and tangible input for the preservation and enhancement of the Notes" (para. 76). In this context, therefore, the application judge's remark, at para. 50, that the restructuring "involves the commitment and participation of all parties" in the ABCP market makes sense, as do his earlier comments, at paras. 48-49:

> Given the nature of the ABCP market and all of its participants, it is more appropriate to consider all Noteholders as claimants and the object of the Plan to restore liquidity to the assets being the Notes themselves. The restoration of the liquidity of the market necessitates the participation (including more tangible contribution by many) of all Noteholders.
>
> In these circumstances, it is unduly technical to classify the Issuer Trustees as debtors and the claims of the Noteholders as between themselves and others as being those of third party creditors, although I recognize that the restructuring structure of the CCAA requires the corporations as the vehicles for restructuring.

(Emphasis added)

[56] The application judge did observe that "[t]he insolvency is of the ABCP market itself, the restructuring is that of the market for such paper . . ." (para. 50). He did so, however, to point out the uniqueness of the Plan before him and its industry-wide significance and not to suggest that he need have no regard to the provisions of the CCAA permitting a restructuring as between debtor [page529] and creditors. His focus was on the effect of the restructuring, a perfectly permissible perspective given the broad purpose and objects of the Act. This is apparent from his later references. For example, in balancing the arguments against approving releases that might include aspects of fraud, he responded that "what is at issue is a liquidity crisis that affects the ABCP market in Canada" (para. 125). In addition, in his reasoning on the fair-and-reasonable issue, he stated, at para. 142: "Apart from the Plan itself, there is a need to restore confidence in the financial system in Canada and this Plan is a legitimate use of the CCAA to accomplish that goal".

[57] I agree. I see no error on the part of the application judge in approaching the fairness assessment or the interpretation issue with these considerations in mind. They provide the context in which the purpose, objects and scheme of the CCAA are to be considered.

The statutory wording

[58] Keeping in mind the interpretive principles outlined above, I turn now to a consideration of the provisions of the CCAA. Where in the words of the statute is the court clothed with authority to approve a plan incorporating a requirement for third-party releases? As summarized earlier, the answer to that question, in my view, is to be found in:

(a) the skeletal nature of the CCAA;
(b) Parliament's reliance upon the broad notions of "compromise" and "arrangement" to establish the framework within which the parties may work to put forward a restructuring plan; and in
(c) the creation of the statutory mechanism binding all creditors in classes to the compromise or arrangement once it has surpassed the high "double majority" voting threshold and obtained court sanction as "fair and reasonable".

Therein lies the expression of Parliament's intention to permit the parties to negotiate and vote on, and the court to sanction, third-party releases relating to a restructuring.

[59] Sections 4 and 6 of the CCAA state:

4. Where a compromise or an arrangement is proposed between a debtor company and its unsecured creditors or any class of them, the court may, on the application in a summary way of the company, of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors, and, if

the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs. [page530]

. . . . .

6. Where a majority in number representing two-thirds in value of the creditors, or class of creditors, as the case may be, present and voting either in person or by proxy at the meeting or meetings thereof respectively held pursuant to sections 4 and 5, or either of those sections, agree to any compromise or arrangement either as proposed or as altered or modified at the meeting or meetings, the compromise or arrangement may be sanctioned by the court, and if so sanctioned is binding

(a) on all the creditors or the class of creditors, as the case may be, and on any trustee for any such class of creditors, whether secured or unsecured, as the case may be, and on the company; and

(b) in the case of a company that has made an authorized assignment or against which a bankruptcy order has been made under the Bankruptcy and Insolvency Act or is in the course of being wound up under the Winding-up and Restructuring Act, on the trustee in bankruptcy or liquidator and contributories of the company.

Compromise or arrangement

[60] While there may be little practical distinction between "compromise" and "arrangement" in many respects, the two are not necessarily the same. "Arrangement" is broader than "compromise" and would appear to include any scheme for reorganizing the affairs of the debtor: L.W. Houlden and C.H. Morawetz, Bankruptcy and Insolvency Law of Canada, looseleaf, 3rd ed., vol. 4 (Scarborough, Ont.: Carswell, 1992) at 10A-12.2, N10. It has been said to be "a very wide and indefinite [word]": Reference re Timber Regulations, [1935] A.C. 184, [1935] 2 D.L.R. 1 (P.C.), at p. 197 A.C., affg [1933] S.C.R. 616, [1933] S.C.J. No. 53. See also Guardian Assurance Co. (Re), [1917] 1 Ch. 431 (C.A.), at pp. 448, 450 Ch.; T&N Ltd. and Others (No. 3) (Re), [2007] 1 All E.R. 851, [2006] E.W.H.C. 1447 (Ch.).

[61] The CCAA is a sketch, an outline, a supporting framework for the resolution of corporate insolvencies in the public interest. Parliament wisely avoided attempting to anticipate the myriad of business deals that could evolve from the fertile and creative minds of negotiators restructuring their financial affairs. It left the shape and details of those deals to be worked out within the framework of the comprehensive and flexible concepts of a "compromise" and "arrangement". I see no reason why a release in favour of a third party, negotiated as part of a package between a debtor and creditor and reasonably relating to the proposed restructuring cannot fall within that framework.

[62] A proposal under the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 (the "BIA") is a

contract: Employers' Liability Assurance Corp. v. Ideal Petroleum (1959) Ltd., [1978] 1 S.C.R. 230, [1976] S.C.J. No. 114, at p. 239 S.C.R.; [page531] Society of Composers, Authors and Music Publishers of Canada v. Armitage (2000), 50 O.R. (3d) 688, [2000] O.J. No. 3993 (C.A.), at para. 11. In my view, a compromise or arrangement under the CCAA is directly analogous to a proposal for these purposes and, therefore, is to be treated as a contract between the debtor and its creditors. Consequently, parties are entitled to put anything into such a plan that could lawfully be incorporated into any contract. See Air Canada (Re), [2004] O.J. No. 1909, 2 C.B.R. (5th) 4 (S.C.J.), at para. 6; Olympia & York Developments Ltd. (Re) (1993), 12 O.R. (3d) 500, [1993] O.J. No. 545 (Gen. Div.), at p. 518 O.R.

[63] There is nothing to prevent a debtor and a creditor from including in a contract between them a term providing that the creditor release a third party. The term is binding as between the debtor and creditor. In the CCAA context, therefore, a plan of compromise or arrangement may propose that creditors agree to compromise claims against the debtor and to release third parties, just as any debtor and creditor might agree to such a term in a contract between them. Once the statutory mechanism regarding voter approval and court sanctioning has been complied with, the plan -- including the provision for releases -- becomes binding on all creditors (including the dissenting minority).

[64] T&N Ltd. and Others (Re), supra, is instructive in this regard. It is a rare example of a court focusing on and examining the meaning and breadth of the term "arrangement". T& N and its associated companies were engaged in the manufacture, distribution and sale of asbestos-containing products. They became the subject of many claims by former employees, who had been exposed to asbestos dust in the course of their employment, and their dependents. The T&N companies applied for protection under s. 425 of the U.K. Companies Act 1985, a provision virtually identical to the scheme of the CCAA -- including the concepts of compromise or arrangement.[4]

[65] T&N carried employers' liability insurance. However, the employers' liability insurers (the "EL insurers") denied coverage. This issue was litigated and ultimately resolved through the establishment of a multi-million pound fund against which the employees and their dependants (the EL claimants) would assert their claims. In return, T&N's former employees and dependants (the EL claimants) agreed to forego any further claims against the EL insurers. This settlement was incorporated into the plan of [page532] compromise and arrangement between the T&N companies and the EL claimants that was voted on and put forward for court sanction.

[66] Certain creditors argued that the court could not sanction the plan because it did not constitute a "compromise or arrangement" between T&N and the EL claimants since it did not purport to affect rights as between them but only the EL claimants' rights against the EL insurers. The court rejected this argument. Richards J. adopted previous jurisprudence -- cited earlier in these reasons -- to the effect that the word "arrangement" has a very broad meaning and that, while both a compromise and an arrangement involve some "give and take", an arrangement need not involve a compromise or be confined to a case of dispute or difficulty (paras. 46-51). He referred to what

would be the equivalent of a solvent arrangement under Canadian corporate legislation as an example.[5] Finally, he pointed out that the compromised rights of the EL claimants against the EL insurers were not unconnected with the EL claimants' rights against the T&N companies; the scheme of arrangement involving the EL insurers was "an integral part of a single proposal affecting all the parties" (para. 52). He concluded his reasoning with these observations (para. 53):

> In my judgment it is not a necessary element of an arrangement for the purposes of s 425 of the 1985 Act that it should alter the rights existing between the company and the creditors or members with whom it is made. No doubt in most cases it will alter those rights. But, provided that the context and content of the scheme are such as properly to constitute an arrangement between the company and the members or creditors concerned, it will fall within s 425. It is ... neither necessary nor desirable to attempt a definition of arrangement. The legislature has not done so. To insist on an alteration of rights, or a termination of rights as in the case of schemes to effect takeovers or mergers, is to impose a restriction which is neither warranted by the statutory language nor justified by the courts' approach over many years to give the term its widest meaning. Nor is an arrangement necessarily outside the section, because its effect is to alter the rights of creditors against another party or because such alteration could be achieved by a scheme of arrangement with that party.

(Emphasis added)

[67] I find Richard J.'s analysis helpful and persuasive. In effect, the claimants in T&N were being asked to release their claims against the EL insurers in exchange for a call on the fund. Here, the appellants are being required to release their claims against certain financial third parties in exchange for what is anticipated to be an improved position for all ABCP Noteholders, stemming from the contributions the financial [page533] third parties are making to the ABCP restructuring. The situations are quite comparable.

The binding mechanism

[68] Parliament's reliance on the expansive terms "compromise" or "arrangement" does not stand alone, however. Effective insolvency restructurings would not be possible without a statutory mechanism to bind an unwilling minority of creditors. Unanimity is frequently impossible in such situations. But the minority must be protected too. Parliament's solution to this quandary was to permit a wide range of proposals to be negotiated and put forward (the compromise or arrangement) and to bind all creditors by class to the terms of the plan, but to do so only where the proposal can gain the support of the requisite "double majority" of votes[6] and obtain the sanction of the court on the basis that it is fair and reasonable. In this way, the scheme of the CCAA supports the intention of Parliament to encourage a wide variety of solutions to corporate insolvencies without unjustifiably overriding the rights of dissenting creditors.

The required nexus

[69] In keeping with this scheme and purpose, I do not suggest that any and all releases between creditors of the debtor company seeking to restructure and third parties may be made the subject of a compromise or arrangement between the debtor and its creditors. Nor do I think the fact that the releases may be "necessary" in the sense that the third parties or the debtor may refuse to proceed without them, of itself, advances the argument in favour of finding jurisdiction (although it may well be relevant in terms of the fairness and reasonableness analysis).

[70] The release of the claim in question must be justified as part of the compromise or arrangement between the debtor and its creditors. In short, there must be a reasonable connection between the third-party claim being compromised in the plan and the restructuring achieved by the plan to warrant inclusion of the third-party release in the plan. This nexus exists here, in my view.

[71] In the course of his reasons, the application judge made the following findings, all of which are amply supported on the record:

(a) The parties to be released are necessary and essential to the restructuring of the debtor; [page534]
(b) the claims to be released are rationally related to the purpose of the Plan and necessary for it;
(c) the Plan cannot succeed without the releases;
(d) the parties who are to have claims against them released are contributing in a tangible and realistic way to the Plan; and
(e) the Plan will benefit not only the debtor companies but creditor Noteholders generally.

[72] Here, then -- as was the case in T&N -- there is a close connection between the claims being released and the restructuring proposal. The tort claims arise out of the sale and distribution of the ABCP Notes and their collapse in value, as do the contractual claims of the creditors against the debtor companies. The purpose of the restructuring is to stabilize and shore up the value of those notes in the long run. The third parties being released are making separate contributions to enable those results to materialize. Those contributions are identified earlier, at para. 31 of these reasons. The application judge found that the claims being released are not independent of or unrelated to the claims that the Noteholders have against the debtor companies; they are closely connected to the value of the ABCP Notes and are required for the Plan to succeed. At paras. 76-77, he said:

> I do not consider that the Plan in this case involves a change in relationship among creditors "that does not directly involve the Company." Those who support the Plan and are to be released are "directly involved in the Company" in the sense that many are foregoing immediate rights to assets and are providing real and tangible input for the preservation and enhancement of the Notes. It would be unduly restrictive to suggest that the moving parties' claims against released parties do not involve the Company, since the claims are directly related to the value of the Notes. The value of

the Notes is in this case the value of the Company.

> This Plan, as it deals with releases, doesn't change the relationship of the creditors apart from involving the Company and its Notes.

[73] I am satisfied that the wording of the CCAA -- construed in light of the purpose, objects and scheme of the Act and in accordance with the modern principles of statutory interpretation -- supports the court's jurisdiction and authority to sanction the Plan proposed here, including the contested third-party releases contained in it.

The jurisprudence

[74] Third-party releases have become a frequent feature in Canadian restructurings since the decision of the Alberta Court of Queen's [page535] Bench in Canadian Airlines Corp. (Re), [2000] A.J. No. 771, 265 A.R. 201 (Q.B.), leave to appeal refused by Resurgence Asset Management LLC v. Canadian Airlines Corp., [2000] A.J. No. 1028, 266 A.R. 131 (C.A.), and [2001] S.C.C.A. No. 60, 293 A.R. 351. In Muscletech Research and Development Inc. (Re), [2006] O.J. No. 4087, 25 C.B.R. (5th) 231 (S.C.J.), Justice Ground remarked (para. 8):

> [It] is not uncommon in CCAA proceedings, in the context of a plan of compromise and arrangement, to compromise claims against the Applicants and other parties against whom such claims or related claims are made.

[75] We were referred to at least a dozen court-approved CCAA plans from across the country that included broad third-party releases. With the exception of Canadian Airlines (Re), however, the releases in those restructurings -- including Muscletech -- were not opposed. The appellants argue that those cases are wrongly decided because the court simply does not have the authority to approve such releases.

[76] In Canadian Airlines (Re) the releases in question were opposed, however. Paperny J. (as she then was) concluded the court had jurisdiction to approve them and her decision is said to be the wellspring of the trend towards third-party releases referred to above. Based on the foregoing analysis, I agree with her conclusion although for reasons that differ from those cited by her.

[77] Justice Paperny began her analysis of the release issue with the observation, at para. 87, that "[p]rior to 1997, the CCAA did not provide for compromises of claims against anyone other than the petitioning company". It will be apparent from the analysis in these reasons that I do not accept that premise, notwithstanding the decision of the Quebec Court of Appeal in Michaud v. Steinberg,[7] of which her comment may have been reflective. Paperny J.'s reference to 1997 was a reference to the amendments of that year adding s. 5.1 to the CCAA, which provides for limited releases in favour of directors. Given the limited scope of s. 5.1, Justice Paperny was thus faced with the argument -- dealt with later in these reasons -- that Parliament must not have intended to extend the

authority to approve third-party releases beyond the scope of this section. She chose to address this contention by concluding that, although the amendments "[did] not authorize a release of claims against third parties other than directors, [they did] not prohibit such releases either" (para. 92). [page536]

[78] Respectfully, I would not adopt the interpretive principle that the CCAA permits releases because it does not expressly prohibit them. Rather, as I explain in these reasons, I believe the open-ended CCAA permits third-party releases that are reasonably related to the restructuring at issue because they are encompassed in the comprehensive terms "compromise" and "arrangement" and because of the double-voting majority and court-sanctioning statutory mechanism that makes them binding on unwilling creditors.

[79] The appellants rely on a number of authorities, which they submit support the proposition that the CCAA may not be used to compromise claims as between anyone other than the debtor company and its creditors. Principal amongst these are Michaud v. Steinberg, supra; NBD Bank, Canada v. Dofasco Inc. (1999), 46 O.R. (3d) 514, [1999] O.J. No. 4749 (C.A.); Pacific Coastal Airlines Ltd. v. Air Canada, [2001] B.C.J. No. 2580, 19 B.L.R. (3d) 286 (S.C.); and Stelco Inc. (Re) (2005), 78 O.R. (3d) 241, [2005] O.J. No. 4883 (C.A.) ("Stelco I"). I do not think these cases assist the appellants, however. With the exception of Steinberg, they do not involve third-party claims that were reasonably connected to the restructuring. As I shall explain, it is my opinion that Steinberg does not express a correct view of the law, and I decline to follow it.

[80] In Pacific Coastal Airlines, Tysoe J. made the following comment, at para. 24:

> [The purpose of the CCAA proceeding] is not to deal with disputes between a creditor of a company and a third party, even if the company was also involved in the subject matter of the dispute. While issues between the debtor company and non-creditors are sometimes dealt with in CCAA proceedings, it is not a proper use of a CCAA proceeding to determine disputes between parties other than the debtor company.

[81] This statement must be understood in its context, however. Pacific Coastal Airlines had been a regional carrier for Canadian Airlines prior to the CCAA reorganization of the latter in 2000. In the action in question, it was seeking to assert separate tort claims against Air Canada for contractual interference and inducing breach of contract in relation to certain rights it had to the use of Canadian's flight designator code prior to the CCAA proceeding. Air Canada sought to have the action dismissed on grounds of res judicata or issue estoppel because of the CCAA proceeding. Tysoe J. rejected the argument.

[82] The facts in Pacific Coastal are not analogous to the circumstances of this case, however. There is no suggestion that a resolution of Pacific Coastal's separate tort claim against Air Canada was in any way connected to the Canadian Airlines restructuring, even though Canadian -- at a contractual level -- may have had some involvement with the particular dispute. [page537] Here, however, the disputes that are the subject matter of the impugned releases are not simply "disputes

between parties other than the debtor company". They are closely connected to the disputes being resolved between the debtor companies and their creditors and to the restructuring itself.

[83] Nor is the decision of this court in the NBD Bank case dispositive. It arose out of the financial collapse of Algoma Steel, a wholly owned subsidiary of Dofasco. The bank had advanced funds to Algoma allegedly on the strength of misrepresentations by Algoma's Vice-President, James Melville. The plan of compromise and arrangement that was sanctioned by Farley J. in the Algoma CCAA restructuring contained a clause releasing Algoma from all claims creditors "may have had against Algoma or its directors, officers, employees and advisors". Mr. Melville was found liable for negligent misrepresentation in a subsequent action by the bank. On appeal, he argued that since the bank was barred from suing Algoma for misrepresentation by its officers, permitting it to pursue the same cause of action against him personally would subvert the CCAA process -- in short, he was personally protected by the CCAA release.

[84] Rosenberg J.A., writing for this court, rejected this argument. The appellants here rely particularly upon his following observations, at paras. 53-54:

> In my view, the appellant has not demonstrated that allowing the respondent to pursue its claim against him would undermine or subvert the purposes of the Act. As this court noted in Elan Corp. v. Comiskey (1990), 1 O.R. (3d) 289 at p. 297, . . . the CCAA is remedial legislation "intended to provide a structured environment for the negotiation of compromises between a debtor company and its creditors for the benefit of both". It is a means of avoiding a liquidation that may yield little for the creditors, especially unsecured creditors like the respondent, and the debtor company shareholders. However, the appellant has not shown that allowing a creditor to continue an action against an officer for negligent misrepresentation would erode the effectiveness of the Act.
>
> In fact, to refuse on policy grounds to impose liability on an officer of the corporation for negligent misrepresentation would contradict the policy of Parliament as demonstrated in recent amendments to the CCAA and the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3. Those Acts now contemplate that an arrangement or proposal may include a term for compromise of certain types of claims against directors of the company except claims that "are based on allegations of misrepresentations made by directors". L.W. Houlden and C.H. Morawetz, the editors of The 2000 Annotated Bankruptcy and Insolvency Act (Toronto: Carswell, 1999) at p. 192 are of the view that the policy behind the provision is to encourage directors of an insolvent corporation to remain in office so that the affairs of the corporation can be reorganized. I can see no similar policy interest in barring an action against an officer of the company who, prior to the insolvency, has misrepresented the financial affairs of the corporation to its creditors. It may be necessary to permit the compromise of claims

> against the debtor corporation, otherwise it may [page538] not be possible to successfully reorganize the corporation. The same considerations do not apply to individual officers. Rather, it would seem to me that it would be contrary to good policy to immunize officers from the consequences of their negligent statements which might otherwise be made in anticipation of being forgiven under a subsequent corporate proposal or arrangement.

(Footnote omitted)

[85] Once again, this statement must be assessed in context. Whether Justice Farley had the authority in the earlier Algoma CCAA proceedings to sanction a plan that included third-party releases was not under consideration at all. What the court was determining in NBD Bank was whether the release extended by its terms to protect a third party. In fact, on its face, it does not appear to do so. Justice Rosenberg concluded only that not allowing Mr. Melville to rely upon the release did not subvert the purpose of the CCAA. As the application judge here observed, "there is little factual similarity in NBD to the facts now before the Court" (para. 71). Contrary to the facts of this case, in NBD Bank the creditors had not agreed to grant a release to officers; they had not voted on such a release and the court had not assessed the fairness and reasonableness of such a release as a term of a complex arrangement involving significant contributions by the beneficiaries of the release -- as is the situation here. Thus, NBD Bank is of little assistance in determining whether the court has authority to sanction a plan that calls for third-party releases.

[86] The appellants also rely upon the decision of this court in Stelco I. There, the court was dealing with the scope of the CCAA in connection with a dispute over what were called the "Turnover Payments". Under an inter-creditor agreement, one group of creditors had subordinated their rights to another group and agreed to hold in trust and "turn over" any proceeds received from Stelco until the senior group was paid in full. On a disputed classification motion, the Subordinated Debt Holders argued that they should be in a separate class from the Senior Debt Holders. Farley J. refused to make such an order in the court below, stating:

> [Sections] 4, 5 and 6 [of the CCAA] talk of compromises or arrangements between a company and its creditors. There is no mention of this extending by statute to encompass a change of relationship among the creditors vis-à-vis the creditors themselves and not directly involving the company.

(Citations omitted; emphasis added)

See Stelco Inc. (Re), [2005] O.J. No. 4814, 15 C.B.R. (5th) 297 (S.C.J.), at para. 7.

[87] This court upheld that decision. The legal relationship between each group of creditors and Stelco was the same, albeit there were inter-creditor differences, and creditors were to be classified in accordance with their legal rights. In addition, the [page539] need for timely classification and voting decisions in the CCAA process militated against enmeshing the classification process in the

vagaries of inter-corporate disputes. In short, the issues before the court were quite different from those raised on this appeal.

[88] Indeed, the Stelco plan, as sanctioned, included third-party releases (albeit uncontested ones). This court subsequently dealt with the same inter-creditor agreement on an appeal where the Subordinated Debt Holders argued that the inter-creditor subordination provisions were beyond the reach of the CCAA and, therefore, that they were entitled to a separate civil action to determine their rights under the agreement: Stelco Inc. (Re), [2006] O.J. No. 1996, 21 C.B.R. (5th) 157 (C.A.) ("Stelco II"). The court rejected that argument and held that where the creditors' rights amongst themselves were sufficiently related to the debtor and its plan, they were properly brought within the scope of the CCAA plan. The court said (para. 11):

> In [Stelco I] -- the classification case -- the court observed that it is not a proper use of a CCAA proceeding to determine disputes between parties other than the debtor company . . . [H]owever, the present case is not simply an inter-creditor dispute that does not involve the debtor company; it is a dispute that is inextricably connected to the restructuring process.

(Emphasis added)

[89] The approach I would take to the disposition of this appeal is consistent with that view. As I have noted, the third-party releases here are very closely connected to the ABCP restructuring process.

[90] Some of the appellants -- particularly those represented by Mr. Woods -- rely heavily upon the decision of the Quebec Court of Appeal in Michaud v. Steinberg, supra. They say that it is determinative of the release issue. In Steinberg, the court held that the CCAA, as worded at the time, did not permit the release of directors of the debtor corporation and that third-party releases were not within the purview of the Act. Deschamps J.A. (as she then was) said (paras. 42, 54 and 58 -- English translation):

> Even if one can understand the extreme pressure weighing on the creditors and the respondent at the time of the sanctioning, a plan of arrangement is not the appropriate forum to settle disputes other than the claims that are the subject of the arrangement. In other words, one cannot, under the pretext of an absence of formal directives in the Act, transform an arrangement into a potpourri.
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> . . . . .
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> The Act offers the respondent a way to arrive at a compromise with is creditors. It does not go so far as to offer an umbrella to all the persons within its orbit by permitting them to shelter themselves from any recourse.

. . . . . [page540]

> The [CCAA] and the case law clearly do not permit extending the application of an arrangement to persons other than the respondent and its creditors and, consequently, the plan should not have been sanctioned as is [that is, including the releases of the directors].

[91] Justices Vallerand and Delisle, in separate judgments, agreed. Justice Vallerand summarized his view of the consequences of extending the scope of the CCAA to third-party releases in this fashion (para. 7):

> In short, the Act will have become the Companies' and Their Officers and Employees Creditors Arrangement Act -- an awful mess -- and likely not attain its purpose, which is to enable the company to survive in the face of its creditors and through their will, and not in the face of the creditors of its officers. This is why I feel, just like my colleague, that such a clause is contrary to the Act's mode of operation, contrary to its purposes and, for this reason, is to be banned.

[92] Justice Delisle, on the other hand, appears to have rejected the releases because of their broad nature -- they released directors from all claims, including those that were altogether unrelated to their corporate duties with the debtor company -- rather than because of a lack of authority to sanction under the Act. Indeed, he seems to have recognized the wide range of circumstances that could be included within the term "compromise or arrangement". He is the only one who addressed that term. At para., 90 he said:

> The CCAA is drafted in general terms. It does not specify, among other things, what must be understood by "compromise or arrangement". However, it may be inferred from the purpose of this [A]ct that these terms encompass all that should enable the person who has recourse to it to fully dispose of his debts, both those that exist on the date when he has recourse to the statute and those contingent on the insolvency in which he finds himself . . .

(Emphasis added)

[93] The decision of the court did not reflect a view that the terms of a compromise or arrangement should "encompass all that should enable the person who has recourse to [the Act] to dispose of his debts ... and those contingent on the insolvency in which he finds himself", however. On occasion, such an outlook might embrace third parties other than the debtor and its creditors in order to make the arrangement work. Nor would it be surprising that, in such circumstances, the third parties might seek the protection of releases, or that the debtor might do so on their behalf. Thus, the perspective adopted by the majority in Steinberg, in my view, is too narrow, having regard to the language, purpose and objects of the CCAA and the intention of Parliament. They made no attempt to consider and explain why a compromise or arrangement could not include

third-party releases. In addition, the decision [page541] appears to have been based, at least partly, on a rejection of the use of contract-law concepts in analyzing the Act -- an approach inconsistent with the jurisprudence referred to above.

[94] Finally, the majority in Steinberg seems to have proceeded on the basis that the CCAA cannot interfere with civil or property rights under Quebec law. Mr. Woods advanced this argument before this court in his factum, but did not press it in oral argument. Indeed, he conceded that if the Act encompasses the authority to sanction a plan containing third-party releases -- as I have concluded it does -- the provisions of the CCAA, as valid federal insolvency legislation, are paramount over provincial legislation. I shall return to the constitutional issues raised by the appellants later in these reasons.

[95] Accordingly, to the extent Steinberg stands for the proposition that the court does not have authority under the CCAA to sanction a plan that incorporates third-party releases, I do not believe it to be a correct statement of the law and I respectfully decline to follow it. The modern approach to interpretation of the Act in accordance with its nature and purpose militates against a narrow interpretation and towards one that facilitates and encourages compromises and arrangements. Had the majority in Steinberg considered the broad nature of the terms "compromise" and "arrangement" and the jurisprudence I have referred to above, they might well have come to a different conclusion.

The 1997 amendments

[96] Steinberg led to amendments to the CCAA, however. In 1997, s. 5.1 was added, dealing specifically with releases pertaining to directors of the debtor company. It states:

> 5.1(1) A compromise or arrangement made in respect of a debtor company may include in its terms provision for the compromise of claims against directors of the company that arose before the commencement of proceedings under this Act and that relate to the obligations of the company where the directors are by law liable in their capacity as directors for the payment of such obligations.
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> Exception
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> (2) A provision for the compromise of claims against directors may not include claims that
>
> (a) relate to contractual rights of one or more creditors; or
> (b) are based on allegations of misrepresentations made by directors to creditors or of wrongful or oppressive conduct by directors.

Powers of court

(3) The court may declare that a claim against directors shall not be compromised if it is satisfied that the compromise would not be fair and reasonable in the circumstances. [page542]

Resignation or removal of directors

(4) Where all of the directors have resigned or have been removed by the shareholders without replacement, any person who manages or supervises the management of the business and affairs of the debtor company shall be deemed to be a director for the purposes of this section.

[97] Perhaps the appellants' strongest argument is that these amendments confirm a prior lack of authority in the court to sanction a plan including third-party releases. If the power existed, why would Parliament feel it necessary to add an amendment specifically permitting such releases (subject to the exceptions indicated) in favour of directors? Expressio unius est exclusio alterius, is the Latin maxim sometimes relied on to articulate the principle of interpretation implied in that question: to express or include one thing implies the exclusion of the other.

[98] The maxim is not helpful in these circumstances, however. The reality is that there may be another explanation why Parliament acted as it did. As one commentator has noted:[8]

> Far from being a rule, [the maxim expressio unius] is not even lexicographically accurate, because it is simply not true, generally, that the mere express conferral of a right or privilege in one kind of situation implies the denial of the equivalent right or privilege in other kinds. Sometimes it does and sometimes its does not, and whether it does or does not depends on the particular circumstances of context. Without contextual support, therefore there is not even a mild presumption here. Accordingly, the maxim is at best a description, after the fact, of what the court has discovered from context.

[99] As I have said, the 1997 amendments to the CCAA providing for releases in favour of directors of debtor companies in limited circumstances were a response to the decision of the Quebec Court of Appeal in Steinberg. A similar amendment was made with respect to proposals in the BIA at the same time. The rationale behind these amendments was to encourage directors of an insolvent company to remain in office during a restructuring rather than resign. The assumption was that by remaining in office the directors would provide some stability while the affairs of the company were being reorganized: see Houlden and Morawetz, vol. 1, supra, at 2-144, E11A; Dans l'affaire de la proposition de: Le Royal Penfield inc. et Groupe Thibault Van Houtte et Associés

ltée), [2003] J.Q. no. 9223, [2003] R.J.Q. 2157 (C.S.), at paras. 44-46.

[100] Parliament thus had a particular focus and a particular purpose in enacting the 1997 amendments to the CCAA and the [page543] BIA. While there is some merit in the appellants' argument on this point, at the end of the day I do not accept that Parliament intended to signal by its enactment of s. 5.1 that it was depriving the court of authority to sanction plans of compromise or arrangement in all circumstances where they incorporate third-party releases in favour of anyone other than the debtor's directors. For the reasons articulated above, I am satisfied that the court does have the authority to do so. Whether it sanctions the plan is a matter for the fairness hearing.

The deprivation of proprietary rights

[101] Mr. Shapray very effectively led the appellants' argument that legislation must not be construed so as to interfere with or prejudice established contractual or proprietary rights -- including the right to bring an action -- in the absence of a clear indication of legislative intention to that effect: Halsbury's Laws of England, 4th ed. reissue, vol. 44(1) (London: Butterworths, 1995) at paras. 1438, 1464 and 1467; Driedger, 2nd ed., supra, at 183; E.A. Driedger and Ruth Sullivan, Sullivan and Driedger on the Construction of Statutes, 4th ed., (Markham, Ont.: Butterworths, 2002) at 399. I accept the importance of this principle. For the reasons I have explained, however, I am satisfied that Parliament's intention to clothe the court with authority to consider and sanction a plan that contains third-party releases is expressed with sufficient clarity in the "compromise or arrangement" language of the CCAA coupled with the statutory voting and sanctioning mechanism making the provisions of the plan binding on all creditors. This is not a situation of impermissible "gap-filling" in the case of legislation severely affecting property rights; it is a question of finding meaning in the language of the Act itself. I would therefore not give effect to the appellants' submissions in this regard.

The division of powers and paramountcy

[102] Mr. Woods and Mr. Sternberg submit that extending the reach of the CCAA process to the compromise of claims as between solvent creditors of the debtor company and solvent third parties to the proceeding is constitutionally impermissible. They say that under the guise of the federal insolvency power pursuant to s. 91(21) of the Constitution Act, 1867, this approach would improperly affect the rights of civil claimants to assert their causes of action, a provincial matter falling within s. 92(13), and contravene the rules of public order pursuant to the Civil Code of Quebec. [page544]

[103] I do not accept these submissions. It has long been established that the CCAA is valid federal legislation under the federal insolvency power: Reference re: Constitutional Creditors Arrangement Act (Canada), [1934] S.C.R. 659, [1934] S.C.J. No. 46. As the Supreme Court confirmed in that case (p. 661 S.C.R.), citing Viscount Cave L.C. in Royal Bank of Canada v. Larue, [1928] A.C. 187 (J.C.P.C.), "the exclusive legislative authority to deal with all matters within the domain of bankruptcy and insolvency is vested in Parliament". Chief Justice Duff elaborated:

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

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

Conclusion with respect to legal authority

[105] For all of the foregoing reasons, then, I conclude that the application judge had the jurisdiction and legal authority to sanction the Plan as put forward.

(2) The Plan is "fair and reasonable"

[106] The second major attack on the application judge's decision is that he erred in finding that the Plan is "fair and reasonable" and in sanctioning it on that basis. This attack is centred on the nature of the third-party releases contemplated and, in particular, on the fact that they will permit the release of some claims based in fraud.

[107] Whether a plan of compromise or arrangement is fair and reasonable is a matter of mixed fact and law, and one on which the application judge exercises a large measure of discretion. The standard of review on this issue is therefore one of deference. In [page545] the absence of a demonstrable error, an appellate court will not interfere: see Ravelston Corp. Ltd. (Re), [2007] O.J. No. 1389, 31 C.B.R. (5th) 233 (C.A.).

[108] I would not interfere with the application judge's decision in this regard. While the notion of releases in favour of third parties -- including leading Canadian financial institutions -- that extend to claims of fraud is distasteful, there is no legal impediment to the inclusion of a release for claims based in fraud in a plan of compromise or arrangement. The application judge had been living with and supervising the ABCP restructuring from its outset. He was intimately attuned to its dynamics. In the end, he concluded that the benefits of the Plan to the creditors as a whole, and to the debtor companies, outweighed the negative aspects of compelling the unwilling appellants to execute the releases as finally put forward.

[109] The application judge was concerned about the inclusion of fraud in the contemplated

releases and at the May hearing adjourned the final disposition of the sanctioning hearing in an effort to encourage the parties to negotiate a resolution. The result was the "fraud carve-out" referred to earlier in these reasons.

[110] The appellants argue that the fraud carve-out is inadequate because of its narrow scope. It (i) applies only to ABCP Dealers; (ii) limits the type of damages that may be claimed (no punitive damages, for example); (iii) defines "fraud" narrowly, excluding many rights that would be protected by common law, equity and the Quebec concept of public order; and (iv) limits claims to representations made directly to Noteholders. The appellants submit it is contrary to public policy to sanction a plan containing such a limited restriction on the type of fraud claims that may be pursued against the third parties.

[111] The law does not condone fraud. It is the most serious kind of civil claim. There is, therefore, some force to the appellants' submission. On the other hand, as noted, there is no legal impediment to granting the release of an antecedent claim in fraud, provided the claim is in the contemplation of the parties to the release at the time it is given: Fotini's Restaurant Corp. v. White Spot Ltd., [1998] B.C.J. No. 598, 38 B.L.R. (2d) 251 (S.C.), at paras. 9 and 18. There may be disputes about the scope or extent of what is released, but parties are entitled to settle allegations of fraud in civil proceedings -- the claims here all being untested allegations of fraud -- and to include releases of such claims as part of that settlement.

[112] The application judge was alive to the merits of the appellants' submissions. He was satisfied in the end, however, [page546] that the need "to avoid the potential cascade of litigation that . . . would result if a broader 'carve out' were to be allowed" (para. 113) outweighed the negative aspects of approving releases with the narrower carve-out provision. Implementation of the Plan, in his view, would work to the overall greater benefit of the Noteholders as a whole. I can find no error in principle in the exercise of his discretion in arriving at this decision. It was his call to make.

[113] At para. 71, above, I recited a number of factual findings the application judge made in concluding that approval of the Plan was within his jurisdiction under the CCAA and that it was fair and reasonable. For convenience, I reiterate them here -- with two additional findings -- because they provide an important foundation for his analysis concerning the fairness and reasonableness of the Plan. The application judge found that:

(a) The parties to be released are necessary and essential to the restructuring of the debtor;
(b) the claims to be released are rationally related to the purpose of the Plan and necessary for it;
(c) the Plan cannot succeed without the releases;
(d) the parties who are to have claims against them released are contributing in a tangible and realistic way to the Plan;

(e) the Plan will benefit not only the debtor companies but creditor Noteholders generally;
(f) the voting creditors who have approved the Plan did so with knowledge of the nature and effect of the releases; and that,
(g) the releases are fair and reasonable and not overly broad or offensive to public policy.

[114] These findings are all supported on the record. Contrary to the submission of some of the appellants, they do not constitute a new and hitherto untried "test" for the sanctioning of a plan under the CCAA. They simply represent findings of fact and inferences on the part of the application judge that underpin his conclusions on jurisdiction and fairness.

[115] The appellants all contend that the obligation to release the third parties from claims in fraud, tort, breach of fiduciary duty, etc. is confiscatory and amounts to a requirement that they -- as individual creditors -- make the equivalent of a greater financial contribution to the Plan. In his usual lively fashion, [page547] Mr. Sternberg asked us the same rhetorical question he posed to the application judge. As he put it, how could the court countenance the compromise of what in the future might turn out to be fraud perpetrated at the highest levels of Canadian and foreign banks? Several appellants complain that the proposed Plan is unfair to them because they will make very little additional recovery if the Plan goes forward, but will be required to forfeit a cause of action against third-party financial institutions that may yield them significant recovery. Others protest that they are being treated unequally because they are ineligible for relief programs that Liquidity Providers such as Canaccord have made available to other smaller investors.

[116] All of these arguments are persuasive to varying degrees when considered in isolation. The application judge did not have that luxury, however. He was required to consider the circumstances of the restructuring as a whole, including the reality that many of the financial institutions were not only acting as Dealers or brokers of the ABCP Notes (with the impugned releases relating to the financial institutions in these capacities, for the most part) but also as Asset and Liquidity Providers (with the financial institutions making significant contributions to the restructuring in these capacities).

[117] In insolvency restructuring proceedings, almost everyone loses something. To the extent that creditors are required to compromise their claims, it can always be proclaimed that their rights are being unfairly confiscated and that they are being called upon to make the equivalent of a further financial contribution to the compromise or arrangement. Judges have observed on a number of occasions that CCAA proceedings involve "a balancing of prejudices", inasmuch as everyone is adversely affected in some fashion.

[118] Here, the debtor corporations being restructured represent the issuers of the more than $32 billion in non-bank sponsored ABCP Notes. The proposed compromise and arrangement affects that entire segment of the ABCP market and the financial markets as a whole. In that respect, the

application judge was correct in adverting to the importance of the restructuring to the resolution of the ABCP liquidity crisis and to the need to restore confidence in the financial system in Canada. He was required to consider and balance the interests of all Noteholders, not just the interests of the appellants, whose notes represent only about 3 per cent of that total. That is what he did.

[119] The application judge noted, at para. 126, that the Plan represented "a reasonable balance between benefit to all Noteholders and enhanced recovery for those who can make out [page548] specific claims in fraud" within the fraud carve-out provisions of the releases. He also recognized, at para. 134, that:

> No Plan of this size and complexity could be expected to satisfy all affected by it. The size of the majority who have approved it is testament to its overall fairness. No plan to address a crisis of this magnitude can work perfect equity among all stakeholders.

[120] In my view, we ought not to interfere with his decision that the Plan is fair and reasonable in all the circumstances.

D. Disposition

[121] For the foregoing reasons, I would grant leave to appeal from the decision of Justice Campbell, but dismiss the appeal.

Appeal dismissed.

SCHEDULE "A" -- CONDUITS

Apollo Trust

Apsley Trust

Aria Trust

Aurora Trust

Comet Trust

Encore Trust

Gemini Trust

Ironstone Trust

MMAI-I Trust

Newshore Canadian Trust

Opus Trust

Planet Trust

Rocket Trust

Selkirk Funding Trust

Silverstone Trust

Slate Trust

Structured Asset Trust

Structured Investment Trust III

Symphony Trust

Whitehall Trust

SCHEDULE "B" -- APPLICANTS

ATB Financial

Caisse de dépôt et placement du Québec

Canaccord Capital Corporation [page549]

Canada Mortgage and Housing Corporation

Canada Post Corporation

Credit Union Central Alberta Limited

Credit Union Central of BC

Credit Union Central of Canada

Credit Union Central of Ontario

Credit Union Central of Saskatchewan

Desjardins Group

Magna International Inc.

National Bank of Canada/National Bank Financial Inc.

NAV Canada

Northwater Capital Management Inc.

Public Sector Pension Investment Board

The Governors of the University of Alberta

SCHEDULE "C" -- COUNSEL

(1) Benjamin Zarnett and Frederick L. Myers, for the Pan-Canadian Investors Committee
(2) Aubrey E. Kauffman and Stuart Brotman, for 4446372 Canada Inc. and 6932819 Canada Inc.
(3) Peter F.C. Howard, and Samaneh Hosseini, for Bank of America N.A.; Citibank N.A.; Citibank Canada, in its capacity as Credit Derivative Swap Counterparty and not in any other capacity; Deutsche Bank AG; HSBC Bank Canada; HSBC Bank USA, National Association; Merrill Lynch International; Merill Lynch Capital Services, Inc.; Swiss Re Financial Products Corporation; and UBS AG
(4) Kenneth T. Rosenberg, Lily Harmer, and Max Starnino, for Jura Energy Corporation and Redcorp Ventures Ltd.
(5) Craig J. Hill and Sam P. Rappos, for the Monitors (ABCP Appeals)
(6) Jeffrey C. Carhart and Joseph Marin, for Ad Hoc Committee and Pricewaterhouse Coopers Inc., in its capacity as Financial Advisor
(7) Mario J. Forte, for Caisse de Dépôt et Placement du Québec
(8) John B. Laskin, for National Bank Financial Inc. and National Bank of Canada [page550]
(9) Thomas McRae and Arthur O. Jacques, for Ad Hoc Retail Creditors Committee (Brian Hunter, et al.)
(10) Howard Shapray, Q.C. and Stephen Fitterman for Ivanhoe Mines Ltd.
(11) Kevin P. McElcheran and Heather L. Meredith for Canadian Banks, BMO, CIBC RBC, Bank of Nova Scotia and T.D. Bank
(12) Jeffrey S. Leon, for CIBC Mellon Trust Company, Computershare Trust Company of Canada and BNY Trust Company of Canada, as Indenture Trustees
(13) Usman Sheikh, for Coventree Capital Inc.
(14) Allan Sternberg and Sam R. Sasso, for Brookfield Asset Management and

Partners Ltd. and Hy Bloom Inc. and Cardacian Mortgage Services Inc.

(15) Neil C. Saxe, for Dominion Bond Rating Service

(16) James A. Woods, Sébastien Richemont and Marie-Anne Paquette, for Air Transat A.T. Inc., Transat Tours Canada Inc., The Jean Coutu Group (PJC) Inc., Aéroports de Montréal, Aéroports de Montréal Capital Inc., Pomerleau Ontario Inc., Pomerleau Inc., Labopharm Inc., Agence Métropolitaine de Transport (AMT), Giro Inc., Vêtements de sports RGR Inc., 131519 Canada Inc., Tecsys Inc., New Gold Inc. and Jazz Air LP

(17) Scott A. Turner, for Webtech Wireless Inc., Wynn Capital Corporation Inc., West Energy Ltd., Sabre Energy Ltd., Petrolifera Petroleum Ltd., Vaquero Resources Ltd., and Standard Energy Ltd.

(18) R. Graham Phoenix, for Metcalfe & Mansfield Alternative Investments II Corp., Metcalfe & Mansfield Alternative Investments III Corp., Metcalfe & Mansfield Alternative Investments V Corp., Metcalfe & Mansfield Alternative Investments XI Corp., Metcalfe & Mansfield Alternative Investments XII Corp., Quanto Financial Corporation and Metcalfe & Mansfield Capital Corp.

Notes

1 Section 5.1 of the CCAA specifically authorizes the granting of releases to directors in certain circumstances.

2 Georgina R. Jackson and Janis P. Sarra, "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters" in Sarra, ed., Annual Review of Insolvency Law, 2007 (Vancouver, B.C.: Carswell, 2007).

3 Citing Gibbs J.A. in Chef Ready Foods, supra, at pp. 319-20 C.B.R.

4 The legislative debates at the time the CCAA was introduced in Parliament in April 1933 make it clear that the CCAA is patterned after the predecessor provisions of s. 425 of the Companies Act 1985 (U.K.): see House of Commons Debates (Hansard), supra.

5 See Canada Business Corporations Act, R.S.C. 1985, c. C-44, s. 192; Ontario Business Corporations Act, R.S.O. 1990, c. B.16, s. 182.

6 A majority in number representing two-thirds in value of the creditors (s. 6).

7 Steinberg was originally reported in French: Steinberg Inc. c. Michaud, [1993] J.Q. no. 1076, [1993] R.J.Q. 1684 (C.A.). All paragraph references to Steinberg in this judgment are from the unofficial English translation available at 1993 CarswellQue 2055.

8 Reed Dickerson, The Interpretation and Application of Statutes (Boston: Little Brown and Company, 1975) at pp. 234-35, cited in Bryan A. Garner, ed., Black's Law Dictionary, 8th ed. (West Group, St. Paul, Minn., 2004) at p. 621.

Tab 21

Case Name:

Muscletech Research and Development Inc. (Re)

RE: IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended AND IN THE MATTER OF Muscletech Research and Development Inc. and those Entities Listed on Schedule "A" hereto, Applicants

[2007] O.J. No. 695

30 C.B.R. (5th) 59

156 A.C.W.S. (3d) 22

2007 CarswellOnt 1029

Court File No. 06-CL-6241

Ontario Superior Court of Justice
Commercial List - Toronto, Ontario

J.D. Ground J.

Heard: February 15, 2007.
Judgment: February 22, 2007.

(27 paras.)

Insolvency law -- Legislation -- Companies' Creditors Arrangement Act -- Application by the insolvent applicants for the sanction of a distribution plan to resolve large number of product liability and other lawsuits allowed -- Applicants complied with the Act and did nothing that was contrary to it -- Plan was fair and reasonable.

Application by certain applicants under the Companies' Creditors Arrangement Act for the sanction of their distribution plan -- Plan proposed distributions to each creditor in the General Claimants Class and each creditor in the Personal Injury Claimants Class -- Such distributions were to be funded from the contributed funds paid to the Monitor by the subject parties defined in the Plan --

Plan was not a restructuring plan but was a unique liquidation plan funded entirely by parties other than the applicants -- Purpose and goal of the applicants seeking relief under the Act was to achieve global resolution of a large number of product liability and other lawsuits that were commenced principally in the United States by numerous claimants and which related to products formerly advertised, marketed and sold by Muscletech Research and Development Inc. -- Applicants' successful restructuring depended on the resolution of the product liability claims -- HELD: Application allowed -- Applicants complied with all the requirements of Act and had adhered to previous court orders -- They were insolvent and had total claims in excess of $5 million -- Nothing was done that was not authorized by the Act -- Plan was fair and reasonable -- Applicants had no assets and no funds with which to fund a distribution to creditors -- Without the contributed funds there would be no distribution and no Plan and the applicants' only alternative would be bankruptcy -- Unsecured creditors would receive nothing in the event of a bankruptcy -- Part of the Plan was that certain affected parties to the litigation would receive releases -- Releases were necessary because without them no funds would be contributed -- If the Plan was not sanctioned the parties would continue to be mired in extensive and expensive litigation that would have no predictable outcome.

Statutes, Regulations and Rules Cited:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 2, s. 6, s. 12

Corporations Tax Act, s. 107

Excise Tax Act, s. 270

Income Tax Act, s. 159

Counsel:

Fred Myers and David Bish, for CCAA Applicants.

Derrick Tay and Randy Sutton, for Iovate Companies.

Natasha MacParland and Jay Schwartz, for the RSM Richter Inc.

Steven Gollick, for Zurich Insurance Company.

A. Kauffman, for GNC Oldco.

Sheryl Seigel, for General Nutrition Companies Inc. and other GNC Newcos.

Pamela Huff and Beth Posno for Representative Plaintiffs.

Jeff Carhart, for Ad Hoc Tort Claimants Committee.

David Molton and Steven Smith, for Brown Rudnick.

Brent McPherson, for XL Insurance America Inc.

Alex Ilchenko, for Walgreen Co.

Lisa La Horey, for E&L Associates, Inc.

ENDORSEMENT

1 **J.D. GROUND J.**:-- The motion before this court is brought by the Applicants pursuant to s. 6 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA") for the sanction of a plan (the "Plan") put forward by the Applicants for distributions to each creditor in the General Claimants Class ("GCC") and each creditor in the Personal Injury Claimants Class ("PICC"), such distributions to be funded from the contributed funds paid to the Monitor by the subject parties ("SP") as defined in the Plan.

2 The Plan is not a restructuring plan but is a unique liquidation plan funded entirely by parties other than the Applicants.

3 The purpose and goal of the Applicants in seeking relief under the CCAA is to achieve a global resolution of a large number of product liability and other lawsuits commenced principally in the United States of America by numerous claimants and which relate to products formerly advertised, marketed and sold by MuscleTech Research and Development Inc. ("MDI") and to resolve such actions as against the Applicants and Third Parties.

4 In addition to the Applicants, many of these actions named as a party defendant one or more of: (a) the directors and officers, and affiliates of the Applicants (i.e. one or more of the Iovate Companies); and/or (b) arm's length third parties such as manufacturers, researchers and retailers of MDI's products (collectively, the "Third Parties"). Many, if not all, of the Third Parties have claims for contribution or indemnity against the Applicants and/or other Third Parties relating to these actions.

The Claims Process

5 On March 3, 2006, this court granted an unopposed order (the "Call For Claims Order") that established a process for the calling of: (a) all Claims (as defined in the Call For Claims Order) in respect of the Applicants and its officers and directors; and (b) all Product Liability Claims (as defined in the Call For Claims Order) in respect of the Applicants and Third Parties.

6 The Call For Claims Order required people who wished to advance claims to file proofs of claim with the Monitor by no later than 5:00 p.m. (EST) on May 8, 2006 (the "Claims Bar Date"), failing which any and all such claims would be forever barred. The Call For Claims Order was approved by unopposed Order of the United States District Court for the Southern District of New York (the "U.S. Court") dated March 22, 2006. The Call For Claims Order set out in a comprehensive manner the types of claims being called for and established an elaborate method of giving broad notice to anyone who might have such claims.

7 Pursuant to an order dated June 8, 2006 (the "Claims Resolution Order"), this court approved a process for the resolution of the Claims and Product Liability Claims. The claims resolution process set out in the Claims Resolution Order provided for, *inter alia*: (a) a process for the review of proofs of claim filed with the Monitor; (b) a process for the acceptance, revision or dispute, by the Applicants, with the assistance of the Monitor, of Claims and/or Product Liability Claims for the purposes of voting and/or distribution under the Plan; (c) the appointment of a claims officer to resolve disputed claims; and (d) an appeal process from the determination of the claims officer. The Claims Resolution Order was recognized and given effect in the U.S. by Order of the U.S. Court dated August 1, 2006.

8 From the outset, the Applicants' successful restructuring has been openly premised on a global resolution of the Product Liability Claims and the recognition that this would be achievable primarily on a consensual basis within the structure of a plan of compromise or arrangement only if the universe of Product Liability Claims was brought forward. It was known to the Applicants that certain of the Third Parties implicated in the Product Liability Actions were agreeable in principle to contributing to the funding of a plan, provided that as a result of the restructuring process they would achieve certainty as to the resolution of all claims and prospective claims against them related to MDI products. It is fundamental to this restructuring that the Applicants have no material assets with which to fund a plan other than the contributions of such Third Parties.

9 Additionally, at the time of their filing under the CCAA, the Applicants were involved in litigation with their insurer, Zurich Insurance Company ("Zurich Canada") and Zurich America Insurance Company, regarding the scope of the Applicants' insurance coverage and liability for defence expenses incurred by the Applicants in connection with the Product Liability Actions.

10 The Applicants recognized that in order to achieve a global resolution of the Product Liability Claims, multi-party mediation was more likely to be successful in providing such resolution in a timely manner than a claims dispute process. By unopposed Order dated April 13, 2006 (the "Mediation Order"), this court approved a mediation process (the "Mediation") to advance a global resolution of the Product Liability Claims. Mediations were conducted by a Court-appointed mediator between and among groups of claimants and stakeholders, including the Applicants, the Ad Hoc Committee of MuscleTech Tort Claimants (which had previously received formal recognition by the Court and the U.S. Court), Zurich Canada and certain other Third Parties.

11 The Mediation facilitated meaningful discussions and proved to be a highly successful mechanism for the resolution of the Product Liability Claims. The vast majority of Product Liability Claims were settled by the end of July, 2006. Settlements of three other Product Liability Claims were achieved at the beginning of November, 2006. A settlement was also achieved with Zurich Canada outside the mediation. The foregoing settlements are conditional upon a successfully implemented Plan that contains the releases and injunctions set forth in the Plan.

12 As part of the Mediation, agreements in respect of the funding of the foregoing settlements were achieved by and among the Applicants, the Iovate Companies and certain Third Parties, which funding (together with other funding being contributed by Third Parties) (collectively, the "Contributed Funds") comprises the funds to be distributed to affected creditors under the Plan. The Third Party funding arrangements are likewise conditional upon a successfully implemented Plan that contains the releases and injunctions set forth in the Plan.

13 It is well settled law that, for the court to exercise its discretion pursuant to s. 6 of the CCAA and sanction a plan, the Applicants must establish that: (a) there has been strict compliance with all statutory requirements and adherence to previous orders of the court; (b) nothing has been done or purported to be done that is not authorized by the CCAA; and (c) the Plan is fair and reasonable.

14 On the evidence before this court I am fully satisfied that the first two requirements have been met. At the outset of these proceedings, Farley J. found that the Applicants met the criteria for access to the protection of the CCAA. The Applicants are insolvent within the meaning of Section 2 of the CCAA and the Applicants have total claims within the meaning of Section 12 of the CCAA in excess of $5,000,000.

15 By unopposed Order dated December 15, 2006 (the "Meeting Order"), this Court approved a process for the calling and holding of meetings of each class of creditors on January 26, 2007 (collectively, the "Meetings"), for the purpose of voting on the Plan. The Meeting Order was approved by unopposed Order of the U.S. Court dated January 9, 2007. On December 29, 2006, and in accordance with the Meeting Order, the Monitor served all creditors of the Applicants, with a copy of the Meeting Materials (as defined in the Meeting Order).

16 The Plan was filed in accordance with the Meeting Order. The Meetings were held, quorums were present and the voting was carried out in accordance with the Meeting Order. The Plan was unanimously approved by both classes of creditors satisfying the statutory requirements of the CCAA.

17 This court has made approximately 25 orders since the Initial Order in carrying out its general supervision of all steps taken by the Applicants pursuant to the Initial CCAA order and in development of the Plan. The U.S. Court has recognized each such order and the Applicants have fully complied with each such order.

<u>The Plan is Fair and Reasonable</u>

18 It has been held that in determining whether to sanction a plan, the court must exercise its equitable jurisdiction and consider the prejudice to the various parties that would flow from granting or refusing to grant approval of the plan and must consider alternatives available to the Applicants if the plan is not approved. An important factor to be considered by the court in determining whether the plan is fair and reasonable is the degree of approval given to the plan by the creditors. It has also been held that, in determining whether to approve the plan, a court should not second-guess the business aspects of the plan or substitute its views for that of the stakeholders who have approved the plan.

19 In the case at bar, all of such considerations, in my view must lead to the conclusion that the Plan is fair and reasonable. On the evidence before this court, the Applicants have no assets and no funds with which to fund a distribution to creditors. Without the Contributed Funds there would be no distribution made and no Plan to be sanctioned by this court. Without the Contributed Funds, the only alternative for the Applicants is bankruptcy and it is clear from the evidence before this court that the unsecured creditors would receive nothing in the event of bankruptcy.

20 A unique feature of this Plan is the Releases provided under the Plan to Third Parties in respect of claims against them in any way related to "the research, development, manufacture, marketing, sale, distribution, application, advertising, supply, production, use or ingestion of products sold, developed or distributed by or on behalf of" the Applicants (see Article 9.1 of the Plan). It is self-evident, and the Subject Parties have confirmed before this court, that the Contributed Funds would not be established unless such Third Party Releases are provided and accordingly, in my view it is fair and reasonable to provide such Third Party releases in order to establish a fund to provide for distributions to creditors of the Applicants. With respect to support of the Plan, in addition to unanimous approval of the Plan by the creditors represented at meetings of creditors, several other stakeholder groups support the sanctioning of the Plan, including Iovate Health Sciences Inc. and its subsidiaries (excluding the Applicants) (collectively, the "Iovate Companies"), the Ad Hoc Committee of MuscleTech Tort Claimants, GN Oldco, Inc. f/k/a General Nutrition Corporation, Zurich American Insurance Company, Zurich Insurance Company, HVL, Inc. and XL Insurance America Inc. It is particularly significant that the Monitor supports the sanctioning of the Plan.

21 With respect to balancing prejudices, if the Plan is not sanctioned, in addition to the obvious prejudice to the creditors who would receive nothing by way of distribution in respect of their claims, other stakeholders and Third Parties would continue to be mired in extensive, expensive and in some cases conflicting litigation in the United States with no predictable outcome.

22 The sanction of the Plan was opposed only by prospective representative plaintiffs in five class actions in the United States. This court has on two occasions denied class action claims in this proceeding by orders dated August 16, 2006 with respect to products containing prohormone and dated December 11, 2006 with respect to Hydroxycut products. The first of such orders was appealed to the Ontario Court of Appeal and the appeal was dismissed. The second of such orders was not appealed. In my reasons with respect to the second order, I stated as follows:

> ... This CCAA proceeding was commenced for the purpose of achieving a global resolution of all product liability and other lawsuits commenced in the United States against Muscletech. As a result of strenuous negotiation and successful court-supervised mediation through the District Court, the Applicants have succeeded in resolving virtually all of the outstanding claims with the exception of the Osborne claim and, to permit the filing of a class proof of claim at this time, would seriously disrupt and extend the CCAA proceedings and the approval of a Plan and would increase the costs and decrease the benefits to all stakeholders. There appears to have been adequate notice to potential claimants and no member of the putative class other than Osborne herself has filed a proof of claim. It would be reasonable to infer that none of the other members of the putative class is interested in filing a claim in view of the minimal amounts of their claims and of the difficulty of coming up with documentation to support their claim. In this context the comments of Rakoff, J. in *Re Ephedra Products Liability Litigation* (2005) U.S. Dist. LEXIS 16060 at page 6 are particularly apt.
>
>> Further still, allowing the consumer class actions would unreasonably waste an estate that was already grossly insufficient to pay the allowed claims of creditors who had filed timely individual proofs of claim. The Debtors and Creditors Committee estimate that the average claim of class [*10] members would be $ 30, entitling each claimant to a distribution of about $ 4.50 (figures which Barr and Lackowski do not dispute; although Cirak argues that some consumers made repeated purchases of Twinlabs steroid hormones totaling a few hundred dollars each). Presumably, each claimant would have to show some proof of purchase, such as the product bottle. Because the Debtor ceased marketing these products in 2003, many purchasers would no longer have such proof. Those who did might well find the prospect of someday recovering $ 4.50 not worth the trouble of searching for the old bottle or store receipt and filing a proof of claim. Claims of class members would likely be few and small. The only real beneficiaries of applying Rule 23 would be the lawyers representing the class. *Cf Woodward*, 205 B.R. at 376-77. The Court has discretion under Rule 9014 to find that the likely total benefit to class members would not justify the cost to the estate of defending a class action under Rule 23.
>
> [35] In addition, in the case at bar, there would appear to be substantial doubt as to whether the basis for the class action, that is the alleged false and misleading advertising, would be found to be established and substantial doubt as to whether

the class is certifiable in view of being overly broad, amorphous or vague and administratively difficult to determine. (See *Perez et al. v. Metabolife International Inc.* (2003) U.S. Dist. LEXIS 21206 at pages 3-5). The timing of the bringing of this motion in this proceeding is also problematic. The claims bar date has passed. The mediation process is virtually completed and the Osborne claim is one of the few claims not settled in mediation although counsel for the putative class were permitted to participate in the mediation process. The filing of the class action in California occurred prior to the initial CCAA Order and at no prior time has this court been asked to approve the filing of a class action proof of claim in these proceedings. The claims of the putative class members as reflected in the comments of Rakoff, J. quoted above would be limited to a refund of the purchase price for the products in question and, in the context of insolvency and restructuring proceedings, *de minimus* claims should be discouraged in that the costs and time in adjudicating such claims outweigh the potential recoveries for the claimants. The claimants have had ample opportunity to file evidence that the call for claims order or the claims process as implemented has been prejudicial or unfair to the putative class members.

23 The representative Plaintiffs opposing the sanction of the Plan do not appear to be rearguing the basis on which the class claims were disallowed. Their position on this motion appears to be that the Plan is not fair and reasonable in that, as a result of the sanction of the Plan, the members of their classes of creditors will be precluded as a result of the Third Party Releases from taking any action not only against MuscleTech but against the Third Parties who are defendants in a number of the class actions. I have some difficulty with this submission. As stated above, in my view, it must be found to be fair and reasonable to provide Third Party Releases to persons who are contributing to the Contributed Funds to provide funding for the distributions to creditors pursuant to the Plan. Not only is it fair and reasonable; it is absolutely essential. There will be no funding and no Plan if the Third Party Releases are not provided. The representative Plaintiffs and all the members of their classes had ample opportunity to submit individual proofs of claim and have chosen not to do so, except for two or three of the representative Plaintiffs who did file individual proofs of claim but withdrew them when asked to submit proof of purchase of the subject products. Not only are the claims of the representative Plaintiffs and the members of their classes now barred as a result of the Claims Bar Order, they cannot in my view take the position that the Plan is not fair and reasonable because they are not participating in the benefits of the Plan but are precluded from continuing their actions against MuscleTech and the Third Parties under the terms of the Plan. They had ample opportunity to participate in the Plan and in the benefits of the Plan, which in many cases would presumably have resulted in full reimbursement for the cost of the product and, for whatever reason, chose not to do so.

The representative Plaintiffs also appear to challenge the jurisdiction of this court to authorize the Third Party Releases as one of the terms of the Plan to be sanctioned. I remain of the view expressed in paragraphs 7-9 of my endorsement dated October 13, 2006 in this proceeding on a motion brought by certain personal injury claimants, as follows:

> With respect to the relief sought relating to Claims against Third Parties, the position of the Objecting Claimants appears to be that this court lacks jurisdiction to make any order affecting claims against third parties who are not applicants in a CCAA proceeding. I do not agree. In the case at bar, the whole plan of compromise which is being funded by Third Parties will not proceed unless the plan provides for a resolution of all claims against the Applicants and Third Parties arising out of "the development, advertising and marketing, and sale of health supplements, weight loss and sports nutrition or other products by the Applicants or any of them" as part of a global resolution of the litigation commenced in the United States. In his Endorsement of January 18, 2006, Farley J. stated:
>
>> "the Product Liability system vis-à-vis the Non-Applicants appears to be in essence derivative of claims against the Applicants and it would neither be logical nor practical/functional to have that Product Liability litigation not be dealt with on an all encompassing basis."
>
> Moreover, it is not uncommon in CCAA proceedings, in the context of a plan of compromise and arrangement, to compromise claims against the Applicants and other parties against whom such claims or related claims are made. In addition, the Claims Resolution Order, which was not appealed, clearly defines Product Liability Claims to include claims against Third Parties and all of the Objecting Claimants did file Proofs of Claim settling [sic] out in detail their claims against numerous Third Parties.
>
> It is also, in my view, significant that the claims of certain of the Third Parties who are funding the proposed settlement have against the Applicants under various indemnity provisions will be compromised by the ultimate Plan to be put forward to this court. That alone, in my view, would be a sufficient basis to include in the Plan, the settlement of claims against such Third Parties. The CCAA does not prohibit the inclusion in a Plan of the settlement of claims against Third Parties. In *Re Canadian Airlines Corp.* (2000), 20 C.B.R. (4th) Paperny J. stated at p. 92:
>
>> While it is true that section 5.2 of the CCAA does not authorize a release of claims against third parties other than directors, it does not prohibit such

> releases either. The amended terms of the release will not prevent claims from which the CCAA expressly prohibits release.

24 The representative Plaintiffs have referred to certain decisions in the United States that appear to question the jurisdiction of the courts to grant Third Party Releases. I note, however, that Judge Rakoff, who is the U.S. District Court Judge is seized of the *MuscleTech* proceeding, and Judge Drain stated in a hearing in *Re TL Administration Corporation* on July 21, 2005:

> It appears to us to be clear that this release was, indeed, essential to the settlement which underlies this plan as set forth at length on the record, including by counsel for the official claimants committee as well as by the other parties involved, and, as importantly, by our review of the settlement agreement itself, which from the start, before this particular plan in fact was filed, included a release that was not limited to class 4 claims but would extend to claims in class 5 that would include the type of claim asserted by the consumer class claims.
>
> Therefore, in contrast to the Blechman release, this release is essential to confirmation of this plan and the distributions that will be made to creditors in both classes, class 4 and class 5.
>
> Secondly, the parties who are being released here have asserted indemnification claims against the estate, and because of the active nature of the litigation against them, it appears that those claims would have a good chance, if not resolved through this plan, of actually being allowed and reducing the claims of creditors.
>
> At least there is a clear element of circularity between the third-party claims and the indemnification rights of the settling third parties, which is another very important factor recognized in the Second Circuit cases, including Manville, Drexel, Finely, Kumble and the like.
>
> The settling third parties it is undisputed are contributing by far the most assets to the settlement, and those assets are substantial in respect of this reorganization by this Chapter 11 case. They're the main assets being contributed.
>
> Again, both classes have voted overwhelmingly for confirmation of the plan, particularly in terms of the numbers of those voting. Each of those factors, although they may be weighed differently in different cases, appear in all the cases where there have been injunctions protecting third parties.

> The one factor that is sometimes cited in other cases, i.e., that the settlement will pay substantially all of the claims against the estate, we do not view to be dispositive. Obviously, substantially all of the claims against the estate are not being paid here. On the other hand, even, again, in the Second Circuit cases, that is not a dispositive factor. There have been numerous cases where plans have been confirmed over opposition with respect to third-party releases and third-party injunctions where the percentage recovery of creditors was in the range provided for under this plan.
>
> The key point is that the settlement was arrived at after arduous arm's length negotiations and that it is a substantial amount and that the key parties in interest and the court are satisfied that the settlement is fair and it is unlikely that substantially more would be obtained in negotiation.

25 The reasoning of Judge Rakoff and Judge Drain is, in my view, equally applicable to the case at bar where the facts are substantially similar.

26 It would accordingly appear that the jurisdiction of the courts to grant Third Party Releases has been recognized both in Canada and in the United States.

27 An order will issue sanctioning the Plan in the form of the order submitted to this court and appended as Schedule B to this endorsement.

J.D. GROUND J.

* * * * *

SCHEDULE "A"

HC Formulations Ltd.

CELL Formulations Ltd.

NITRO Formulations Ltd.

MESO Formulations Ltd.

ACE Formulations Ltd.

MISC Formulations Ltd.

GENERAL Formulations Ltd.

ACE US Trademark Ltd.

MT Canadian Supplement Trademark Ltd.

MT Foreign Supplement Trademark Ltd.

HC Trademark Holdings Ltd.

HC US Trademark Ltd.

1619005 Ontario Ltd. (f/k/a New HC US Trademark Ltd.)

HC Canadian Trademark Ltd.

HC Foreign Trademark Ltd.

* * * * *

SCHEDULE "B"

Court File No. 06-CL-6241

ONTARIO

SUPERIOR COURT OF JUSTICE

(COMMERCIAL LIST)

THE HONOURABLE	)	THURSDAY, THE 15TH
	)	
MR. JUSTICE GROUND	)	DAY OF FEBRUARY, 2007

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

AND IN THE MATTER OF MUSCLETECH RESEARCH AND DEVELOPMENT INC. AND THOSE ENTITIES LISTED ON SCHEDULE "A" HERETO

Applicants

SANCTION ORDER

THIS MOTION, made by MuscleTech Research and Development Inc. ("MDI") and those entities listed on Schedule "A" hereto (collectively with MDI, the "Applicants") for an order approving and sanctioning the plan of compromise or arrangement (inclusive of the schedules thereto) of the Applicants dated December 22, 2006 (the "Plan"), as approved by each class of Creditors on January 26, 2007, at the Meeting, and which Plan (without schedules) is attached as Schedule "C" to this Order, and for certain other relief, was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING: (a) the within Notice of Motion, filed; (b) the Affidavit of Terry Begley sworn January 31, 2007, filed; and (c) the Seventeenth Report of the Monitor dated February 7, 2007 (the "Seventeenth Report"), filed, and upon hearing submissions of counsel to: (a) the Applicants; (b) the Monitor; (c) Iovate Health Sciences Group Inc. and those entities listed on Schedule "B" hereto; (d) the Ad Hoc Committee of MuscleTech Tort Claimants (the "Committee"); (e) GN Oldco, Inc. f/k/a General Nutrition Companies; (f) Zurich Insurance Company; (g) GNC Corporation and other GNC newcos; and (h) certain representative plaintiffs in purported class actions involving products containing the ingredient prohormone, no one appearing for the other persons served with notice of this Motion, as duly served and listed on the Affidavit of Service of Elana Polan, sworn February 2, 2007, filed,

DEFINITIONS

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 AND MEETING OF CREDITORS

2. **THIS COURT ORDERS AND DECLARES** that there has been good and sufficient notice, service and delivery of the Plan and the Monitor's Seventeenth Report to all Creditors.
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) to all Creditors, and that the Meeting was duly convened, held and conducted, in conformity with the CCAA, the Meeting Order and all other Orders of this Court in the

CCAA Proceedings. For greater certainty, and without limiting the foregoing, the vote cast at the Meeting on behalf of Rhodrick Harden by David Molton of Brown Rudnick Berlack Israelis LLP, in its capacity as representative counsel for the Ad Hoc Committee of MuscleTech Tort Claimants, is hereby confirmed.

4. **THIS COURT ORDERS AND DECLARES** that there has been good and sufficient notice, service and delivery of the within Notice of Motion and Motion Record, and of the date and time of the hearing held by this Court to consider the within Motion, such that: (i) all Persons have had an opportunity to be present and be heard at such hearing; (ii) the within Motion is properly returnable today; and (iii) further service on any interested party is hereby dispensed with.

SANCTION OF PLAN

5. **THIS COURT ORDERS AND DECLARES** that:

   (a) the Plan has been approved by the requisite majorities of the Creditors in each class present and voting, either in person or by proxy, at the Meeting, all in conformity with the CCAA and the terms of the Meeting Order;
   (b) the Applicants have acted in good faith and with due diligence, have complied with the provisions of the CCAA, and have not done or purported to do (nor does the Plan do or purport to do) anything that is not authorized by the CCAA;
   (c) the Applicants have adhered to, and acted in accordance with, all Orders of this Court in the CCAA Proceedings; and
   (d) the Plan, together with all of the compromises, arrangements, transactions, releases, discharges, injunctions and results provided for therein and effected thereby, including but not limited to the Settlement Agreements, is both substantively and procedurally fair, reasonable and in the best interests of the Creditors and the other stakeholders of the Applicants, and does not unfairly disregard the interests of any Person (whether a Creditor or otherwise).

6. **THIS COURT ORDERS** that the Plan be and is hereby sanctioned and approved pursuant to Section 6 of the CCAA.

PLAN IMPLEMENTATION

7. **THIS COURT ORDERS** that the Applicants and the Monitor, as the case may be, are authorized and directed to take all steps and actions, and to do all things, necessary or appropriate to enter into or implement the Plan in accordance with its terms, and enter into, implement and consummate all of the steps, transactions and agreements

contemplated pursuant to the Plan.

8. **THIS COURT ORDERS** that upon the satisfaction or waiver, as applicable, of the conditions precedent set out in Section 7.1 of the Plan, the Monitor shall file with this Court and with the U.S. District Court a certificate that states that all conditions precedent set out in Section 7.1 of the Plan have been satisfied or waived, as applicable, and that, with the filing of such certificate by the Monitor, the Plan Implementation Date shall have occurred in accordance with the Plan.

9. **THIS COURT ORDERS AND DECLARES** that as of the Plan Implementation Date, the Plan, including all compromises, arrangements, transactions, releases, discharges and injunctions provided for therein, shall inure to the benefit of and be binding and effective upon the Creditors, the Subject Parties and all other Persons affected thereby, and on their respective heirs, administrators, executors, legal personal representatives, successors and assigns.

10. **THIS COURT ORDERS AND DECLARES** that, as of the Plan Implementation Date, the validity or invalidity of Claims and Product Liability Claims, as the case may be, and the quantum of all Proven Claims and Proven Product Liability Claims, accepted, determined or otherwise established in accordance with the Claims Resolution Order, and the factual and legal determinations made by the Claims Officer, this Court and the U.S. District Court in connection with all Claims and Product Liability Claims (whether Proven Claims and Proven Product Liability Claims or otherwise), in the course of the CCAA Proceedings are final and binding on the Subject Parties, the Creditors and all other Persons.

11. **THIS COURT ORDERS** that, subject to the provisions of the Plan and the performance by the Applicants and the Monitor of their respective obligations under the Plan, and effective on the Plan Implementation Date, all agreements to which the Applicants are a party shall be and remain in full force and effect, unamended, as at the Plan Implementation Date, and no Person shall, following the Plan Implementation Date, accelerate, terminate, rescind, refuse to perform or otherwise repudiate its obligations under, or enforce or exercise any right (including any right of set-off, dilution or other remedy) or make any demand under or in respect of any such agreement, by reason of:

    (a) any event that occurred on or prior to the Plan Implementation Date that would have entitled any Person thereto to enforce those rights or remedies (including defaults or events of default arising as a result of the insolvency of the Applicants);

    (b) the fact that the Applicants have: (i) sought or obtained plenary relief under the CCAA or ancillary relief in the United States of America, including pursuant to Chapter 15 of the *United States Bankruptcy Code*, or (ii) commenced or completed the CCAA Proceedings or the U.S. Proceedings;

(c) the implementation of the Plan, or the completion of any of the steps, transactions or things contemplated by the Plan; or
(d) any compromises, arrangements, transactions, releases, discharges or injunctions effected pursuant to the Plan or this Order.

12. **THIS COURT ORDERS** that, from and after the Plan Implementation Date, all Persons (other than Unaffected Creditors, and with respect to Unaffected Claims only) shall be deemed to have waived any and all defaults then existing or previously committed by the Applicants, or caused by the Applicants, or non-compliance with any covenant, warranty, representation, term, provision, condition or obligation, express or implied, in any contract, instrument, credit document, guarantee, agreement for sale, lease or other agreement, written or oral, and any and all amendments or supplements thereto (each, an "Agreement"), existing between such Person and the Applicants or any other Person and any and all notices of default and demands for payment under any Agreement shall be deemed to be of no further force or effect; provided that nothing in this paragraph shall excuse or be deemed to excuse the Applicants from performing any of their obligations subsequent to the date of the CCAA Proceedings, including, without limitation, obligations under the Plan.
13. **THIS COURT ORDERS** that, as of the Plan Implementation Date, each Creditor shall be deemed to have consented and agreed to all of the provisions of the Plan in their entirety and, in particular, each Creditor shall be deemed:

(a) to have executed and delivered to the Monitor and to the Applicants all consents, releases or agreements required to implement and carry out the Plan in its entirety; and
(b) 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 the Applicants as of the Plan Implementation Date (other than those entered into by the Applicants on or after the Filing Date) and the provisions of the Plan, the provisions of the Plan take precedence and priority and the provisions of such agreement or other arrangement shall be deemed to be amended accordingly.

14. **THIS COURT ORDERS AND DECLARES** that any distributions under the Plan and this Order shall not constitute a "distribution" for the purposes of section 159 of the *Income Tax Act* (Canada), section 270 of the *Excise Tax Act* (Canada) and section 107 of the *Corporations Tax Act* (Ontario) and the Monitor in making any such payments is not "distributing", nor shall be considered to have "distributed", such funds, and the Monitor shall not incur any liability under the above-mentioned statutes for making any

payments ordered and is hereby forever released, remised and discharged from any claims against it under section 159 of the *Income Tax Act* (Canada), section 270 of the *Excise Tax Act* (Canada) and section 107 of the *Corporations Tax Act* (Ontario) or otherwise at law, arising as a result of distributions under the Plan and this Order and any claims of this nature are hereby forever barred.

APPROVAL OF SETTLEMENT AND FUNDING AGREEMENTS

15. **THIS COURT ORDERS** that each of the Settlement Agreements be and is hereby approved.
16. **THIS COURT ORDERS** that each of the Confidential Insurance Settlement Agreement and the Mutual Release be and is hereby approved.
17. **THIS COURT ORDERS** that copies of the Settlement Agreements, the Confidential Insurance Settlement Agreement and the Mutual Release shall be sealed and shall not form part of the public record, subject to further Order of this Honourable Court; provided that any party to any of the foregoing shall have received, and is entitled to receive, a copy thereof.
18. **THIS COURT ORDERS AND DIRECTS** the Monitor to do such things and take such steps as are contemplated to be done and taken by the Monitor under the Plan and the Settlement Agreements. Without limitation: (i) the Monitor shall hold and distribute the Contributed Funds in accordance with the terms of the Plan, the Settlement Agreements and the escrow agreements referenced in Section 5.1 of the Plan; and (ii) on the Plan Implementation Date, the Monitor shall complete the distributions to or on behalf of Creditors (including, without limitation, to Creditors' legal representatives, to be held by such legal representatives in trust for such Creditors) as contemplated by, and in accordance with, the terms of the Plan, the Settlement Agreements and the escrow agreements referenced in Section 5.1 of the Plan.

RELEASES, DISCHARGES AND INJUNCTIONS

19. **THIS COURT ORDERS AND DECLARES** that the compromises, arrangements, releases, discharges and injunctions contemplated in the Plan, including those granted by and for the benefit of the Subject Parties, are integral components thereof and are necessary for, and vital to, the success of the Plan (and without which it would not be possible to complete the global resolution of the Product Liability Claims upon which the Plan and the Settlement Agreements are premised), and that, effective on the Plan Implementation Date, all such releases, discharges and injunctions are hereby sanctioned, approved and given full force and effect, subject to: (a) the rights of Creditors to receive distributions in respect of their Claims and Product Liability Claims in accordance with the Plan and the Settlement Agreements, as applicable; and (b) the rights and obligations of Creditors and/or the Subject Parties under the Plan, the Settlement Agreements, the Funding Agreements and the Mutual Release. For greater

certainty, nothing herein or in the Plan shall release or affect any rights or obligations under the Plan, the Settlement Agreements, the Funding Agreements and the Mutual Release.

20. **THIS COURT ORDERS** that, without limiting anything in this Order, including without limitation, paragraph 19 hereof, or anything in the Plan or in the Call For Claims Order, the Subject Parties and their respective representatives, predecessors, heirs, spouses, dependents, administrators, executors, subsidiaries, affiliates, related companies, franchisees, member companies, vendors, partners, distributors, brokers, retailers, officers, directors, shareholders, employees, attorneys, sureties, insurers, successors, indemnitees, servants, agents and assigns (collectively, the "Released Parties"), as applicable, be and are hereby fully, finally, irrevocably and unconditionally released and forever discharged from any and all Claims and Product Liability Claims, and any and all past, present and future claims, rights, interests, actions, liabilities, demands, duties, injuries, damages, expenses, fees (including medical and attorneys' fees and liens), costs, compensation, or causes of action of whatsoever kind or nature whether foreseen or unforeseen, known or unknown, asserted or unasserted, contingent or actual, liquidated or unliquidated, whether in tort or contract, whether statutory, at common law or in equity, based on, in connection with, arising out of, or in any way related to, in whole or in part, directly or indirectly: (A) any proof of claim filed by any Person in accordance with the Call For Claims Order (whether or not withdrawn); (B) any actual or alleged past, present or future act, omission, defect, incident, event or circumstance from the beginning of the world to the Plan Implementation Date, based on, in connection with, arising out of, or in any way related to, in whole or in part, directly or indirectly, any alleged personal, economic or other injury allegedly based on, in connection with, arising out of, or in any way related to, in whole or in part, directly or indirectly, the research, development, manufacture, marketing, sale, distribution, fabrication, advertising, supply, production, use, or ingestion of products sold, developed or distributed by or on behalf of the Applicants; or (C) the CCAA Proceedings; and no Person shall make or continue any claims or proceedings whatsoever based on, in connection with, arising out of, or in any way related to, in whole or in part, directly or indirectly, the substance of the facts giving rise to any matter herein released (including, without limitation, any action, cross-claim, counter-claim, third party action or application) against any Person who claims or might reasonably be expected to claim in any manner or forum against one or more of the Released Parties, including, without limitation, by way of contribution or indemnity, in common law, or in equity, or under the provisions of any statute or regulation, and that in the event that any of the Released Parties are added to such claim or proceeding, it will immediately discontinue any such claim or proceeding.

21. **THIS COURT ORDERS** that, without limiting anything in this Order, including without limitation, paragraph 19 hereof, or anything in the Plan or in the Call For Claims Order, all Persons (regardless of whether or not such Persons are Creditors), on

their own behalf and on behalf of their respective present or former employees, agents, officers, directors, principals, spouses, dependents, heirs, attorneys, successors, assigns and legal representatives, are permanently and forever barred, estopped, stayed and enjoined, on and after the Plan Implementation Date, with respect to Claims, Product Liability Claims, Related Claims and all claims otherwise released pursuant to the Plan and this Sanction Order, from:

(a) commencing, conducting or continuing in any manner, directly or indirectly, any action, suits, demands or other proceedings of any nature or kind whatsoever (including, without limitation, any proceeding in a judicial, arbitral, administrative or other forum) against the Released Parties or any of them;

(b) enforcing, levying, attaching, collecting or otherwise recovering or enforcing by any manner or means, directly or indirectly, any judgment, award, decree or order against the Released Parties or any of them or the property of any of the Released Parties;

(c) commencing, conducting or continuing in any manner, directly or indirectly, any action, suits or demands, including without limitation, by way of contribution or indemnity or other relief, in common law, or in equity, or under the provisions of any statute or regulation, or other proceedings of any nature or kind whatsoever (including, without limitation, any proceeding in a judicial, arbitral, administrative or other forum) against any Person who makes such a claim or might reasonably be expected to make such a claim, in any manner or forum, against one or more of the Released Parties;

(d) creating, perfecting, asserting or otherwise enforcing, directly or indirectly, any lien or encumbrance of any kind; and

(e) taking any actions to interfere with the implementation or consummation of the Plan.

DISCHARGE OF MONITOR

22. **THIS COURT ORDERS** that RSM Richter Inc. shall be discharged from its duties as Monitor of the Applicants effective as of the Plan Implementation Date; provided that the foregoing shall not apply in respect of: (i) any obligations of, or matters to be completed by, the Monitor pursuant to the Plan or the Settlement Agreements from and after the Plan Implementation Date; or (ii) matters otherwise requested by the Applicants and agreed to by the Monitor.

23. **THIS COURT ORDERS** that, subject to paragraph 22 herein, the completion of the Monitor's duties shall be evidenced, and its final discharge shall be effected by the filing by the Monitor with this Court of a certificate of discharge at, or as soon as

practicable after, the Plan Implementation Date.

24. **THIS COURT ORDERS AND DECLARES** that the actions and conduct of the Monitor in the CCAA Proceedings and as foreign representative in the U.S. Proceedings, as disclosed in its reports to the Court from time to time, including, without limitation, the Monitor's Fifteenth Report dated December 12, 2006, the Monitor's Sixteenth Report dated December 22, 2006, and the Seventeenth Report, are hereby approved and that the Monitor has satisfied all of its obligations up to and including the date of this Order, and that in addition to the protections in favour of the Monitor as set out in the Orders of this Court in the CCAA Proceedings to date, the Monitor shall not be liable for any act or omission on the part of the Monitor, including with respect to any reliance thereof, including without limitation, with respect to any information disclosed, any act or omission pertaining to the discharge of duties under the Plan or as requested by the Applicants or with respect to any other duties or obligations in respect of the implementation of the Plan, save and except for any claim or liability arising out of any gross negligence or wilful misconduct on the part of the Monitor. Subject to the foregoing, and in addition to the protections in favour of the Monitor as set out in the Orders of this Court, any claims against the Monitor in connection with the performance of its duties as Monitor are hereby released, stayed, extinguished and forever barred and the Monitor shall have no liability in respect thereof.
25. **THIS COURT ORDERS** that no action or other proceeding shall be commenced against the Monitor in any way arising from or related to its capacity or conduct as Monitor except with prior leave of this Court and on prior written notice to the Monitor and upon further order securing, as security for costs, the solicitor and his own client costs of the Monitor in connection with any proposed action or proceeding.
26. **THIS COURT ORDERS** that the Monitor, its affiliates, and their respective officers, directors, employees and agents, and counsel for the Monitor, are hereby released and discharged from any and all claims that any of the Subject Parties or their respective officers, directors, employees and agents or any other Persons may have or be entitled to assert against the Monitor, 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 date of issue of this Order in any way relating to, arising out of or in respect of the CCAA proceedings.

CLAIMS OFFICER

27. **THIS COURT ORDERS** that the appointment of The Honourable Mr. Justice Edward Saunders as Claims Officer (as defined in the Claims Resolution Order) shall automatically cease, and his roles and duties in the CCAA Proceedings and in the U.S. Proceedings shall terminate, on the Plan Implementation Date.
28. **THIS COURT ORDERS AND DECLARES** that the actions and conduct of the

Claims Officer pursuant to the Claims Resolution Order, and as disclosed in the Monitor's Reports to this Court, are hereby approved and that the Claims Officer has satisfied all of his obligations up to and including the date of this Order, and that any claims against the Claims Officer in connection with the performance of his duties as Claims Officer are hereby stayed, extinguished and forever barred.

MEDIATOR

29. **THIS COURT ORDERS** that the appointment of Mr. David Geronemus (the "Mediator") as a mediator in respect of non-binding mediation of the Product Liability Claims pursuant to the Order of this Court dated April 13, 2006 (the "Mediation Order"), in the within proceedings, shall automatically cease, and his roles and duties in the CCAA Proceedings and in the U.S. Proceedings shall terminate, on the Plan Implementation Date.
30. **THIS COURT ORDERS AND DECLARES** that the actions and conduct of the Mediator pursuant to the Mediation Order, and as disclosed in the Monitor's reports to this Court, are hereby approved, and that the Mediator has satisfied all of his obligations up to and including the date of this Order, and that any claims against the Mediator in connection with the performance of his duties as Mediator are hereby stayed, extinguished and forever barred.

ESCROW AGENT

31. **THIS COURT ORDERS** that Duane Morris LLP shall not be liable for any act or omission on its part as a result of its appointment or the fulfillment of its duties as escrow agent pursuant to the escrow agreements executed by Duane Morris LLP and the respective Settling Plaintiffs that are parties to the Settlement Agreements, excluding the Group Settlement Agreement (and which escrow agreements are attached as schedules to such Settlement Agreements), and that no action, application or other proceedings shall be taken, made or continued against Duane Morris LLP without the leave of this Court first being obtained; save and except that the foregoing shall not apply to any claim or liability arising out of any gross negligence or wilful misconduct on its part.

REPRESENTATIVE COUNSEL

32. **THIS COURT ORDERS** that Representative Counsel (as defined in the Order of this Court dated February 8, 2006 (the "Appointment Order")) shall not be liable, either prior to or subsequent to the Plan Implementation Date, for any act or omission on its part as a result of its appointment or the fulfillment of its duties in carrying out the provisions of the Appointment Order, save and except for any claim or liability arising out of any gross negligence or wilful misconduct on its part, and that no action, application or other proceedings shall be taken, made or continued against

Representative Counsel without the leave of this Court first being obtained.

CHARGES

33. **THIS COURT ORDERS** that, subject to paragraph 33 hereof, the Charges on the assets of the Applicants provided for in the Initial CCAA Order and any subsequent Orders in the CCAA Proceedings shall automatically be fully and finally terminated, discharged and released on the Plan Implementation Date.

34. **THIS COURT ORDERS that:** (i) the Monitor shall continue to hold a charge, as provided in the Administrative Charge (as defined in the Initial CCAA Order), until the fees and disbursements of the Monitor and its counsel have been paid in full; and (ii) the DIP Charge (as defined in the Initial CCAA Order) shall remain in full force and effect until all obligations and liabilities secured thereby have been repaid in full, or unless otherwise agreed by the Applicants and the DIP Lender (as defined in the Initial CCAA Order).

35. **THIS COURT ORDERS AND DECLARES** that, notwithstanding any of the terms of the Plan or this Order, the Applicants shall not be released or discharged from their obligations in respect of Unaffected Claims, including, without limitation, to pay the fees and expenses of the Monitor and its respective counsel.

STAY OF PROCEEDINGS

36. **THIS COURT ORDERS** that, subject to further order of this Court, the Stay Period established in the Initial CCAA Order, as extended, shall be and is hereby further extended until the earlier of the Plan Implementation Date and the date that is 60 Business Days after the date of this Order, or such later date as may be fixed by this Court.

37. **THIS COURT AUTHORIZES AND DIRECTS** the Monitor to apply to the U.S. District Court for a comparable extension of the Stay Period as set out in paragraph 36 hereof.

INITIAL CCAA ORDER AND OTHER ORDERS

38. **THIS COURT ORDERS** that:

    (a) except to the extent that the Initial CCAA Order has been varied by or is inconsistent with this Order or any further Order of this Court, the provisions of the Initial CCAA Order shall remain in full force and effect until the Plan Implementation Date; provided that the protections granted in favour of the Monitor shall continue in full force and effect after the Plan Implementation Date; and

    (b) all other Orders made in the CCAA Proceedings shall continue in full force and effect in accordance with their respective terms, except to the extent that such Orders are varied by, or are inconsistent with, this Order or any further Order of this Court in the CCAA Proceedings; provided that the protections granted in favour of the Monitor shall continue in full force and effect after the Plan Implementation Date.

39. **THIS COURT ORDERS AND DECLARES** that, without limiting paragraph 0 above, the Call For Claims Order, including, without limitation, the Claims Bar Date, releases, injunctions and prohibitions provided for thereunder, be and is hereby confirmed, and shall operate in addition to the provisions of this Order and the Plan, including, without limitation, the releases, injunctions and prohibitions provided for hereunder and thereunder, respectively.

APPROVAL OF THE SEVENTEENTH REPORT

40. **THIS COURT ORDERS** that the Seventeenth Report of the Monitor and the activities of the Monitor referred to therein be and are hereby approved.

FEES

41. **THIS COURT ORDERS** that the fees, disbursements and expenses of the Monitor from November 1, 2006 to January 31, 2007, in the amount of $123,819.56, plus a reserve for fees in the amount of $100,000 to complete the administration of the Monitor's mandate, be and are hereby approved and fixed.
42. **THIS COURT ORDERS** that the fees, disbursements and expenses of Monitor's legal counsel in Canada, Davies Ward Phillips & Vineberg LLP, from October 1, 2006 to January 31, 2007, in the amount of $134,109.56, plus a reserve for fees in the amount of $75,000 to complete the administration of its mandate, be and are hereby approved and fixed.
43. **THIS COURT ORDERS** that the fees, disbursements and expenses of Monitor's legal counsel in the United States, Allen & Overy LLP, from September 1, 2006 to January 31, 2007, in the amount of USD$98,219.87, plus a reserve for fees in the amount of USD$50,000 to complete the administration of its mandate, be and are hereby approved and fixed.

GENERAL

44. **THIS COURT ORDERS** that the Applicants, the Monitor or any other interested parties may apply to this Court for any directions or determination required to resolve any matter or dispute relating to, or the subject matter of or rights and benefits under, the Plan or this Order.

EFFECT, RECOGNITION, ASSISTANCE

45. **THIS COURT AUTHORIZES AND DIRECTS** the Monitor to apply to the U.S. District Court for the Sanction Recognition Order.
46. **THIS COURT ORDERS** that this Order shall have full force and effect in all provinces and territories in Canada, outside Canada and against all Persons against whom it may otherwise be enforceable.
47. **THIS COURT REQUESTS** the aid, recognition and assistance of other courts in Canada in accordance with Section 17 of the CCAA and the Initial CCAA Order, and requests that the Federal Court of Canada and the courts and judicial, regulatory and administrative bodies of or by the provinces and territories of Canada, the Parliament of Canada, the United States of America, the states and other subdivisions of the United States of America including, without limitation, the U.S. District Court, and other nations and states act in aid, recognition and assistance of, and be complementary to, this Court in carrying out the terms of this Order and any other Order in this proceeding. Each of Applicants and the Monitor shall be at liberty, and is hereby authorized and empowered, to make such further applications, motions or proceedings to or before such other court and judicial, regulatory and administrative bodies, and take such other steps, in Canada or the United States of America, as may be necessary or advisable to give effect to this Order.

cp/e/qlgxc/qlpwb

Tab 22

Indexed as:

Armbro Enterprises Inc. (Re)

Between

Re Armbro Enterprises Inc.

[1993] O.J. No. 4482

22 C.B.R. (3d) 80

Ontario Court of Justice (General Division)
(In Bankruptcy)

R.A. Blair J.

November 1, 1993.

(15 paras.)

Bankruptcy -- Proposals -- Court approval, considerations -- Approval of creditors.

Motion for an order for sanction and approval of the Plan of compromise and arrangement filed in September 24, 1993. On that date an order granted the applicants a stay of proceedings under the Companies Creditors Arrangement Act to permit them to restructure their operations and develop a plan of compromise or arrangement for presentation to their creditors. The Plan had been approved by creditors. A landlord opposed the sanctioning and approval of the Plan. It submitted that it should not have been grouped with the unsecured creditors and that since the Plan purported to terminate the tenancy, the Court had no power under the Act to sanction such a Plan. It also claimed that the new common shares to be issued under the Plan were not evenly allocated among the unsecured creditors, and that the Royal Bank of Canada, the major creditor and a secured creditor for part of its claim, was being favoured.

HELD: Motion allowed. The Plan met the relevant criteria. The Bank's co-operation was a sine-qua-non for the Plan to work and it was the only creditor continuing to advance funds to the applicants to finance the proposed re-organization. It did not seem unfair or unreasonable that it should receive some additional incentive to support the Plan. It was not inappropriate to classify the landlord as an unsecured creditor. It was not in a materially different position than other unsecured creditors. The landlord did not attend and oppose or make submissions on September 24, regarding its classification with the unsecured creditors and did not take other steps available to it. To await the sanctioning hearing was too late. The Act was to be broadly construed. Nothing in principle precluded the Court from interfering with the rights of a landlord under a lease.

Statutes, Regulations and Rules Cited:

Companies Creditors Arrangement Act, s. 6.

Counsel:

Geoffrey B. Morawetz and Craig J. Hill, for the applicants.
Irving Marks, for the opposing creditor.
Michael S.F. Watson and Lilly A. Wong, for the Royal Bank of Canada.

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1 **R.A. BLAIR J.** (endorsement):-- This is a motion by the Applicants for an Order pursuant to s. 6 of the CCAA for sanction and approval of the plan of compromise and arrangement filed by the Applicants on September 24, 1993, as amended. On that date, I made an Order granting the Applicants the protection of a stay of proceedings under the Act, in order to permit them to restructure their operations and develop a plan of compromise or arrangement for presentation to their Creditors.

2 The Plan has now been negotiated and put to meetings of the classes of creditors established under the Sept. 24th Order. With certain amendments it has been voted on and approved by creditors of sufficient numbers and in sufficient value amounts in each class to meet the requirements of s. 6 of the Act. One creditor, a landlord - 803774 Ontario Limited - opposes the sanctioning and approval of the Plan.

3 In considering whether to sanction a Plan of this sort, the Court must have regard to the following criteria, namely:

1) whether there has been complete compliance with all statutory requirements;
2) whether any material filings or procedures have been done or are purported to have been done otherwise than as authorized by the CCAA; and,
3) whether the proposed Plan is fair and reasonable.

See: Re Dairy Corp. of Canada, [1934] O.R. 436 (S.C.); Re Quintette Coal Ltd. (1992), 13 C.B.R. (3d) 146 (B.C. S.C.).

4 I am satisfied that this Plan meets the foregoing criteria. The position put forward on behalf of the opposing creditor needs to be addressed, however.

5 As I apprehend the Landlord's position, it is essentially twofold, namely

a) that the landlord ought to have been placed in a separate class of creditors, and ought not to have been grouped with the unsecured creditors, generally; and,
b) that the Plan purports to terminate the tenancy, and there is no power in the Court under the CCAA to sanction a Plan which purports to do so.

6 Counsel for the opposing creditor advanced an additional argument under the "fairness" criterion to the effect that the "new common shares" to be issued under the Plan were not evenly allocated amongst the unsecured creditors, and that Royal Bank of Canada ("RBC") - the major creditor, and also a secured creditor for part of its claim - was being favoured. I am not persuaded that there is a sufficient tilt in the allocation of these new common shares in favour of RBC to justify the Court in interfering with the business decision made by the creditor classes in approving the proposed Plan, as they have done. RBC's co-operation is a sine qua non for the Plan, or any plan, to work, and it is the only creditor continuing to advance funds to the Applicants to finance the proposed re-organization. It does not seem unfair or unreasonable to me that it should receive some additional incentive to support the Plan.

Classification

7 In the circumstances of this case, it is not, in my view, inappropriate to have classified the landlord in the same class of creditors as the unsecured creditors. The landlord's claim has two bases: it is a judgment creditor for approximately $1 million as a result of a default judgment obtained against Armbro Inc. for arrears of rent; and it has a contingent claim for unliquidated damages arising out of the termination of the lease. A landlord has a right of distraint under a lease, but I am told that this right is academic for present purposes. Thus, it seems to me that 803774 Ontario Limited is not in a materially different position than other unsecured creditors who have either a claim for liquidated damages or an unliquidated claim for damages which is contingent or which has crystallized.

8 There is, in my view, a sufficient community of interest and rights between the Landlord here objecting and the other unsecured creditors to warrant their inclusion in the same class of creditors and to avoid an unnecessary fragmentation of creditors into an unwieldy patchwork or into a patchwork which may - as it would here - give one creditor an undue advantage and influence over the negotiations. The Landlord's claim is sizeable - between $3.5 million and $4.5 million, depending on whose version prevails - but it is nonetheless relatively insignificant in an overall blanket of approximately $130 million in indebtedness. See: Sklar-Peppler Furniture Corp. v. Bank of Nova Scotia (1991), 8 C.B.R. (3d) 312 (Ont. Gen. Div.); Re Northland Properties Ltd. (sub nom. Northland Properties Ltd. v. Excelsior Life Insurance Co. of Canada) (1989), 73 C.B.R. (N.S.) 195 (B.C. C.A.); Re Woodward's Ltd. (1993), 20 C.B.R. (3d) 74 (B.C. S.C.).

9 There is another factor to be considered at this juncture, as well. The Applicants have been assiduous in their efforts to negotiate in good faith and in advance of their Application with all of their Creditor's - and the opposing creditor falls within this category. The Landlord had notice of the Application which was returnable on Sept. 24 and of the Order which was sought, including the classification of creditors into three groups: Secured, Unsecured, and RBC. It did not attend and oppose or make submissions at that time regarding its classification with the unsecured creditors. It did not avail itself of the "come back" clause within the Sept. 24th Order, to raise the issue before the creditor's meetings. It did not appeal. In my opinion, one of those avenues should have been followed. To await the sanctioning hearing is too late, unless it can be said - which it cannot, in this case - that the classification has given rise to a "substantial injustice": Re Keddy Motor Inns Ltd. (1992), 13 C.B.R. (3d) 245 (N.S. C.A.).

Termination of Leases within CCAA Proceedings

10 This brings me to the second major issue raised on behalf of the objecting creditor, namely that the Court does not have the power under the CCAA to sanction or approve a Plan which terminates leases as part of its arrangement.

11 I do not accept this submission.

12 The CCAA is broad, remedial legislation, designed to facilitate a re-organization of a debtor company's affairs in a way that is in the interests of the company, its creditors and the public. It is to be liberally construed. See: Nova Metal Products Inc. v. Comiskey (Trustee of) (sub nom. Elan Corp. v. Comiskey) (1990), 1 O.R. (3d) 289 (C.A.); Hongkong Bank of Canada v. Chef Ready Foods Ltd. (1990), 51 B.C.L.R. (2d) 84 (C.A.).

13 It is true that there is no specific provision in the CCAA which states openly that the Court has the power to sanction the termination of leases. This, I think, is what Houlden J.A. must have been contemplating when he noted, in Grafton-Fraser Inc. v. Canadian Imperial Bank of Commerce (1992), 90 D.L.R. (4th) 285 (Ont. Gen. Div.), that "[i]t is difficult to make a plan of compromise for such a company (a chain of retail clothing stores in rented premises) under the C.C.A.A., because there is no way ... to terminate leases and to limit the amount of the claims of landlords." Section 6 of the Act is discretionary, however, and provides that "the compromise or arrangement may be sanctioned by the court" - assuming the statutory requirements respecting voting have been met, as they have here. There are a number of examples where the Courts have granted their approval to arrangements which involve the repudiation, surrender and ultimate termination of leases - including, incidentally, Re Grafton-Fraser itself in its ultimate disposition. See also: Sklar-Peppler Furniture Corp. v. Bank of Nova Scotia, supra; Re Ayer's Ltd. (unreported, December 9, 1991, Nfld. T.D.); Re Inducon Development Corp. (1992), 8 C.B.R. (3d) 306 (Ont. Gen. Div.); Silcorp Ltd. v. Canadian Imperial Bank of Commerce (June 26, 1992), Doc. B152/92 (Ont. Gen. Div.) (unreported). I see nothing in principle which precludes a Court from interfering with the rights of a landlord under a lease, in the CCAA context, any more than from interfering with the rights of a secured creditor under a security document. Both may be sanctioned when the exigencies of the particular re-organization justify such balancing of the prejudices.

14 In this case the sanction and approval of the Court is warranted, for the reasons I have articulated, and an Order will issue to that effect in terms of the draft Order filed on which I have placed my fiat.

15 In addition, an Order will go directing the Registrar of Deeds to discharge and vacate the registration of certain Instruments described in a companion draft Order on which I have placed my fiat, and directing the Sheriff to withdraw certain Writs of Seizure and Sale also described therein. This Order is to issue immediately upon the filing of an Affidavit on behalf of the Applicants deposing that the conditions to implementation referred to in Article 5.3 of the Plan have been satisfied and that the Applicants are proceeding to implement the Plan. The Court office shall issue, enter and return this Order to the Applicants on the day on which the Order is presented for signing and entry.

qp/s/qlmjb

---- End of Request ----
Email Request: Current Document: 1
Time Of Request: Wednesday, December 05, 2012 11:11:58

Tab 23

Case Name:

In the matter of the Arrangement of Uniforêt inc. c. Richter & Associés

IN THE MATTER OF THE ARRANGEMENT OF: UNIFORÊT INC., UNIFORÊT SCIERIE-PÂTE INC. and FORESTERIE PORT-CARTIER INC. (collectively, Uniforêt), debtors-petitioners
and
RICHTER & ASSOCIÉS (Monitor), monitor-mis en cause
-and-
JOLINA CAPITAL INC. (Jolina), mise en cause
c.
HIGHLAND CAPITAL MANAGEMENT, L.P. (Highland), ML CBO IV (CAYMAN) LTD., PAMCO CAYMAN, LTD., HIGHLAND LEGACY, LTD., PAM CAPITAL FUNDING, L.P., PROSPECT STREET HIGH INCOME and PORTFOLIO INC. (Prospect), opposing creditors

[2003] Q.J. No. 9328

J.E. 2003-1408

43 C.B.R. (4th) 254

2003 CarswellQue 1936

No.: 500-05-064436-015

Quebec Superior Court
District of Montreal

The honourable Daniel H. Tingley J.S.C.

Heard: March 3 to March 18, 2003 and April 28 to May 9,2003.
Judgment: May 16, 2003.

(51 paras.)

Counsel:

Sylvain Rigaud, Louis Gouin and Bernard Quinn (Ogilvy, Renault), attorneys for petitioners.
Denis Ferland and Philippe Buist (Davies, Ward, Phillips & Vineberg), attorneys for the monitor.
Jean Fontaine and Simon Richard (Stikeman, Elliott), attorneys for Jolina Capital Inc.
George Hendy, Martin Desrosiers and David Tardif-Latourelle (Osler, Hoskin, Harcourt), attorneys for the Opposing Creditors.

JUDGMENT
(On a Motion to Sanction a Plan of Arrangement

THE ISSUES

1 Uniforêt asks the Court to sanction a Second Amended Plan of Arrangement (Plan) made after proof was completed on May 6, 2003 pursuant to the Companies' Creditors Arrangement Act (Act)[1]. An Amended Plan (First Plan) was approved by each of seven classes of creditors to the extent of at least 92% in number and 72% in value. Six secured creditors from a class (Class 2) of some 125 noteholders (or 4.79% of all noteholders), representing almost 28% in value of the class, oppose the sanction application, alleging amongst other things, manipulation and irregularities of the voting process[2], oppression of the minority (the Opposing Creditors) of the Class 2 creditors by the majority (Jolina), unfair and confiscatory treatment of the class 2 claims and the existence of preferential payments made to so-called "unaffected creditors" prejudicial to the mass of creditors. They add that the Plan is unreasonable, unfair and confiscatory. They conclude in their written contestation that the Court should accordingly refuse to sanction it and should instead order the sale of the assets and undertakings subject to the security[3] of Class 2 claims "as a going concern" or, subsidiarily, that the Class 2 creditors be given a single class of new notes in the aggregate amount of $100 million and 90% of the equity of Uniforêt[4], rather than the 55% that is offered as a conversion feature tied to $40 million of the new debt or B Notes[5].

2 Uniforêt denies any irregularities in the voting process or oppression of the Opposing Creditors by it or Jolina and relies on the Monitor's opinion that its Plan is both fair and reasonable. It adds that as all the classes of creditors have approved the Plan, in most cases overwhelmingly, the Court should sanction it. As to the request to sell the business as part of an orderly liquidation, Uniforêt stresses that such an alternative proposal (a) was considered and rejected by its management for lack of interest prior to the presentation of the First Plan, (b) comes far too late in the day and (c) poses a serious risk of prejudicing the implementation of the Plan and the expectations of the creditors who approved the First Plan in October, 2001.

THE FACTS

3 Uniforêt first obtained protection under the Act on April 17, 2001. It filed an amended plan of

arrangement (First Plan) with the Court on July 23, 2001 contemplating seven classes of creditors with potential claims aggregating in excess of $250,000,000. This Plan proposed the following arrangements:

Class	Description	Plan of Arrangement
1	The Municipalities of Port-Cartier and of l'Ascension (for Municipal taxes)	Pursuant to existing agreements
2	US Noteholders [which include the Opposing creditors and Jolina]	First US $25,000 cash with remaining balance, if any, exchanged for two new US Secured Notes: Note "A" 9% due on March 15, 2009; Note "B" convertible due on September 15, 2008; the whole for a total of $100,000,000 CDN
3	Holders of Capital Leases	Pursuant to existing agreements and contracts
4	Forestry Contractors	75% of proven claims
5	Unsecured Creditors	The lesser of $2,500 and the proven claim or a prorata share of a fund of $5,000,000
6	Canadian Debentureholders	Choice of receiving 8% of face value in cash or conversion into voting common shares of Uniforêt at a conversion rate of

		$6.00 per share
7	[Jolina]'s unsecured shareholder loan	Repayable on March 15, 2009 without interest

4 The Opposing Creditors, members of Class 2 holding secured U.S. Notes in the face amount of $33.5 million U.S., applied to the Court on July 17, 2001 to modify the proposed Class 2. They asked amongst other things to be placed in a separate class from Jolina, a major shareholder of Uniforêt and the holder of more than two-thirds of the other U.S. Notes. A vote on the First Plan by Class 2 creditors was suspended pending the outcome of the Opposing Creditor's application. All of the other creditors approved the First Plan at meetings of creditors duly called and held on August 15, 2001. The Opposing Creditors' application was heard by Madame Justice Zerbisias over some 20 days. She rendered a lengthy judgment on October 23, 2002 dismissing the application and:

> 2) AUTHORIZED [Uniforêt] to call a meeting of creditors concerning Class 2 (U.S. Noteholders) to submit to them the amended plan (D-1) for voting purposes;
> 3) ORDERED [Uniforêt] and the Monitor to furnish to [the Opposing Creditors] whatever information they may possess as to the names, addresses, telephone and telecopier numbers of all beneficial owners of the U.S. notes within 5 days of this Judgment;
> 4) ORDERED provisional execution [...] notwithstanding appeal; [...]

5 Leave to appeal from this judgment was sought and refused on November 21, 2002 by Mr. Justice Nuss of the Court of Appeal who observed:

> [8] The issues of fairness and reasonableness of the plan can be fully canvassed and debated at the hearing before the [Superior] Court to consider the sanctioning of the plan once the vote of all the Classes of [creditors] has taken place. Indeed, [the Opposing Creditors] acknowledge, and urged during the hearing before me, that most of the issues raised in the Motion for leave to appeal deal with the fairness and reasonableness of the plan and that the proper time for considering them will be at the hearing before the Court for the sanctioning of the plan.

6 Four days later, the Class 2 creditors voted on the Plan. The results were as follows:

Cat.	Montant total en capital des réclamations (US $)	% en nombre % en valeur

Oui Non Oui Non Oui Non 2 87,918,000.00 33,505,000.00 95.21 4.79

72.41 27.59

7 Uniforêt's Motion to Sanction the First Plan was first presented to the Court on December 11, 2002. The Opposing Creditors appeared to oppose its approval. Mr. Justice Lévesque was designated to manage the dossier and bring the matter on for hearing. He responded to requests for the production of additional documents and expertises and heard opposing counsel on a variety of pre-trial issues, including a request by Uniforêt to strike certain allegations of the amended, particularized contestation of the Opposing Creditors. As this request came shortly before the scheduled hearing, Mr. Justice Lévesque judiciously referred it, amongst other requests, to the trial judge.

8 The Motion to Strike seems intended to prevent the reventilation of matters or issues already decided by Madame Justice Zerbisias in her judgment of October 23, 2002. The Court resisted the temptation to limit the debate to new issues. It informed counsel that objections to the introduction of "old" or repeat evidence would, for the most part, be taken under reserve and the legal issues arising from the Motion to Strike would if necessary be considered by this judgment. These issues were not addressed during oral argument and accordingly they will not be considered by this judgment.

9 The Plan, as twice amended, provides in part that:

ARTICLE 2

PURPOSE AND EFFECT OF PLAN

2.1 Purpose

> The purpose of this Plan is to effect a reorganization of the liabilities, business and affairs of Uniforêt in order to enable its business to continue, in the expectation that all Persons with an interest in Uniforêt will derive a greater benefit from its continued operation than would result from the immediate forced liquidation of Uniforêt's assets and business.

2.2 Joint Plan

> As explained in Uniforêt's Petition for the issuance of the Initial Order pursuant to the [Act], most of the financing of Uniforêt's business is with Uniforêt Inc., while the operations and fixed assets are with Uniforêt Scierie-Pâte Inc. and Foresterie Port-Cartier Inc. who, in many instances, guaranteed the debts and obligations of Uniforêt Inc. Therefore, the related

operations of Petitioners justify [...] presenting a joint Plan, the whole as permitted by the CCAA and the Initial Order. None of Uniforêt's Creditors will be prejudiced by such a joint Plan.

2.3 Persons Affected

This Plan shall become effective on the Plan Implementation Date and shall, on and after the Plan Implementation Date, bind Uniforêt and all Uniforêt's Creditors affected by the Plan.

2.4 Obligations Not affected

This Plan shall not affect any Unaffected Obligations[6].

ARTICLE 3

CLASSIFICATION OF CREDITORS, VALUATION OF CLAIMS AND PROCEDURAL MATTERS

3.1 Classification of Creditors

The Claims of the Creditors shall be grouped into the following Classes, and each Creditor in a designated Class shall, to the extent provided herein, be entitled to vote on the Plan as part of such Class:

Class 1	The Cities of Port-Cartier and l'Ascension (municipal taxes);
Class 2	US Noteholders;
Class 3	Holders of Capital Leases;
Class 4	Forestry Contractors;
Class 5	Unsecured Creditors;

Class 6 Canadian Debentureholders; and

Class 7 Jolina Capital Inc.'s unsecured shareholder loan.

3.2 Creditors Meetings

Following the filing of the Plan with the Court, Uniforêt will hold the necessary Creditors Meetings to vote on the Plan, the whole in accordance with the Initial Order. [...]

3.3 Creditors Votes Required

In order that the Plan be binding on all the Creditors of Uniforêt affected by the Plan, it must first be accepted within each and every Class of Creditors as prescribed by the Plan by a majority in number of the Creditors in such Class who actually vote on the Plan (in person, by voting letter or by proxy) at the Creditors Meeting held in respect of such Class, representing two-thirds in value of the Accepted Claims for Voting Purposes of the Creditors in such Class who actually vote on the Plan (in person, by voting letter or by proxy) at such Creditors Meeting. [...]

3.4

Valuation of Claims for Voting and Distribution Purposes

Each Creditor having a Proven Claim in a Class shall be entitled to attend and to vote at the Creditors Meeting for such Class. Each Creditor of a Class who is entitled to vote shall be entitled to that number of votes at the Creditors Meeting for such Class as is equivalent to the dollar amount of its Proven Claim. In the event that the Proven Claim of a Creditor is not finally determined prior to the Creditors Meeting Date of the Creditors Meeting for any Class in accordance with this Plan and any Order of the Court, the Creditor shall be entitled to vote at the Creditors Meeting for such Class based on its Accepted Claim for Voting Purposes as determined by the Monitor, without prejudice to Uniforêt's right or the Creditor's right to require the final determination by the Court of the Creditor's Proven

Claim, which Proven Claim shall apply for all purposes in connection with the Plan, including, without limitation, the Creditor's entitlement to participate in distributions under the Plan.

3.5 Participation in Different Capacities

Creditors whose Claims are affected by this Plan may be affected in more than one capacity. Each such Creditor shall be entitled to participate hereunder separately in each such capacity, unless otherwise specified. Any action taken by a Creditor in any one capacity shall not affect the Creditor in any other capacity unless the Creditor agrees to otherwise in writing.

3.6 Confirmation of Plan by the Final Order

In the event that the Plan is approved by the required majority of Creditors provided in Section 3.3, Uniforêt will seek the Final Order for the sanction and approval of the Plan. Subject only to the Final Order being granted and the satisfaction of the conditions of the Plan described in Section 5.1, the Plan will be implemented by Uniforêt and will be binding on all Uniforêt's Creditors affected by the Plan.

ARTICLE 4

THE COMPROMISE AND ARRANGEMENT

4.1 Class 1: Treatment of the Cities of Port-Cartier and l'Ascension (municipal taxes)

Uniforêt proposes to pay to the Cities of Port-Cartier and l'Ascension the full amounts which are due to them as municipal taxes pursuant to existing agreements, or as may be agreed between them.

4.2 Class 2: Treatment of US Noteholders

Uniforêt proposes to all US Noteholders, holding US Secured Notes totalling approximately CDN $190,000,000, as final compromise and arrangement, the following:

4.2.1

Uniforêt will pay, on the Plan Implementation Date[7], to each US Noteholder the lesser of US $25,000 or the amount of the US Secured Note held by such US Noteholder; and

4.2.2

Uniforêt will exchange, on the Plan Implementation Date, all outstanding US Secured Notes, after payment of the amounts provided in Section 4.2.1 for two (2) new secured notes for each outstanding US Secured Note, namely (1) 9% Note "A" due March 15, 2009 and one (1) Convertible Note "B" due September 15, 2008, to be issued under an indenture providing for the issuance of 9% Notes "A" due March 15, 2009, in an aggregate principal amount of CDN $60,000,000, and Convertible Notes "B" due September 15, 2008, in an aggregate principal amount of CDN $40,000,000, both Notes "A" and "B" totalling an aggregate principal amount of CDN $100,000,000, to be issued under commercially acceptable terms and having similar secured rights on Uniforêt's assets as those held by the US Noteholders under the US Indenture, the whole, on a pro rata pari passu basis. These Notes "A" and "B" will be subject to the following terms and conditions:

9% Notes "A":

from the Plan Implementation Date, 9% Notes "A" will bear an annual interest rate of 9%, payable in arrears on a semi-annual basis, on March 15 and September 15 of each year, with the first interest payment date being on March 15, 2002, and will provide for annual principal repayment on March 15 of each year, commencing on March 15, 2003, always on a pro rata pari passu basis, equal to 50% of Available Cash Flow for fiscal years 2002 and 2003, and 75% of Available Cash Flow for subsequent fiscal years until the earlier of the maturity date, namely March 15, 2009, at which time the balance thereof will be fully repaid, or refinancing thereof;

furthermore, at its sole discretion, Uniforêt can make, on any interest payment date, without penalty, additional principal repayments on the 9% Notes "A" and

Convertible Notes "B":

will bear no interest until September 15, 2004 and, thereafter, will bear an annual interest rate of 7.5%, payable in arrears on a semi-annual basis, on March 15 and September 15 of each year, with the first interest payment date being on March 15, 2005, and will provide for no annual principal repayment prior to September 15, 2008 and the full repayment of the principal thereof at maturity, namely on September 15, 2008;

furthermore, Convertible Notes "B" will, from the Plan Implementation Date until September 15, 2008, be convertible at any time into Class A Subordinate Voting Shares of Uniforêt Inc. (listed on The Toronto Stock Exchange under the trading symbol UNF.A) at a conversion price of $0.50 per share, such conversion right to expire at the close of business on September 15, 2008 and to be subject to a thirty (3) days prior written conversion notice to Uniforêt, which may then offer, prior to the expiry of such thirty (30) day period, to pay in cash to the noteholder, who will not be obliged to accept any such offer, an amount equal to the Market Value of the Class A Subordinate Voting Shares of Uniforêt Inc. issuable upon conversion instead of delivering shares to the noteholders;

"Market Value" of the Class A Subordinate Voting Shares of Uniforêt Inc. shall mean the weighted average trading price of the Class A Subordinate Voting Shares of Uniforêt Inc. on the Toronto Stock Exchange during the twenty (20) consecutive trading days preceding the date on which the conversion notice is given to Uniforêt.

US Noteholders have no Claim for interest outstanding as of the Plan Implementation Date under US Secured Notes and are not entitled to participate in any other Class for Claims related, in any manner whatsoever, to US Secured Notes.

4.3 Class 3: Treatment of Holders of Capital Leases

Uniforêt proposes to pay to holders of Capital Leases the full amount which is due to them pursuant to existing agreements and contracts, or as may be agreed between them.

4.4 Class 4: Treatment of Forestry Contractors

Uniforêt proposes to pay, at the latest on the Plan Implementation Date, to each Forestry Contractor, as final compromise and arrangement of their respective Proven Claim, 75% thereof.

4.5 Class 5: Treatment of Unsecured Creditors

Uniforêt proposes to pay to Unsecured Creditors, as final compromise and arrangement of their respective Proven Claim, on the Plan Implementation Date, in accordance with their respective election, the following

4.5.1 the lesser of $2,500 or the Unsecured Creditor's Proven Claim;

or

4.5.2 a pro rata pari passu share in the Unsecured Creditors Fund for those Unsecured Creditors with Proven Claims as of the Plan Implementation Date who will not have elected to be paid in accordance with Section 4.5.1 of this Plan.

4.6 Class 6: Treatment of Canadian Debentureholders

Uniforêt proposes to Canadian Debentureholders, as final compromise and arrangement, in accordance with their respective election, the following: On the Plan Implementation Date,

4.6.1 payment of an amount equal to 8% of the outstanding balance of the Canadian 8% Convertible Unsecured Subordinated Debentures held; or

4.6.2 conversion of Canadian 8% Convertible Unsecured Subordinated Debentures held by a Canadian Debentureholder into Class A Subordinate Voting Shares of Uniforêt Inc. (listed on The Toronto Stock Exchange under the trading symbol UNF.A) at a conversion price of $6.00 per share, being a rate of 16.667 Class A Subordinate Voting Shares per $100 principal amount of Canadian 8% Convertible Unsecured Subordinated Debentures held by a Canadian Debentureholder, for those Canadian Debentureholders who have not elected to be paid in accordance with Section 4.6.1 of this Plan.

Canadian Debentureholders have no Claim for interest outstanding as of the Plan Implementation Date under Canadian 8% Convertible Unsecured Subordinated Debentures and are not entitled to participate in any other Class for Claims related, in any manner whatsoever, to Canadian 8% Convertible Unsecured Subordinated Debentures.

4.7 Class 7: Treatment of Jolina Capital Inc.'s unsecured shareholder loan

Uniforêt proposes to pay Jolina Capital Inc.'s unsecured shareholder loan in the amount of $5,405,000, as final compromise and arrangement thereof, by issuing, on the Plan Implementation Date, a promissory note for the same amount, bearing no interest and providing for the full repayment thereof on March 15, 2009.

10 Between July 23, 2001 and February 27, 2003, the Monitor produced four reports, two addressed to the creditors prior to their voting on the First Plan and two addressed to the Court in connection with the Motion to Sanction. These latter reports express the following opinions:

E) Analyse de Plan

23. L'acceptation du Plan par toutes les catégories de créanciers permettra à Uniforêt de restructurer son endettement ainsi que de poursuivre ses activités.
24. Le Contrôleur est d'avis que les Débitrices ont agi et continuent d'agir de bonne foi, avec toute la diligence voulue dans les circonstances. Aussi, le Contrôleur n'a constaté aucun fait qui nous porterait à croire que la conduite des Débitrices est ou a été répréhensible.
25. Le Contrôleur est d'avis que le Plan proposé fut préparé de façon sérieuse et diligente par Uniforêt.
26. Le Contrôleur est d'avis que le Plan d'Uniforêt est juste et raisonnable envers les créanciers en général et envers chacune des catégories de créanciers.
27. Le Contrôleur est d'avis que le Plan tient compte de la capacité financière d'Uniforêt de respecter les termes dudit Plan advenant son homologation par la Cour et sa mise en oeuvre.
28. Le Contrôleur, avec l'assistance d'autres conseillers professionnels et en se basant sur son expérience, a procédé à une analyse de la valeur probable des éléments d'actif d'Uniforêt dans un contexte de liquidation ordonnée.
29. Tel que déclaré dans le Premier Rapport du Contrôleur, le Contrôleur est d'avis que, dans un contexte de liquidation ordonnée, la valeur estimative des immobilisations d'Uniforêt pourrait se situer entre 60 000 000 $ et 80 000 000 $ après déduction des coûts de liquidation et des charges prioritaires (employés, droits de coupe impayés, etc.). Le montant ainsi réalisé ne serait suffisant pour assurer le remboursement intégral des sommes dues aux créanciers garantis qui totalisent 125 000 000 $ US (approximativement 200 000 000 $ CDN).
30. Tel que déclaré dans le Second Rapport du Contrôleur, le Contrôleur est d'avis que, dans un contexte de liquidation ordonnée, même en considérant la valeur aux livres en date du 30 septembre 2002, de l'encaisse, des comptes à recevoir, ainsi que des inventaires totalisant approximativement 43 000 000 $ la valeur des éléments d'actif d'Uniforêt ne s'est pas améliorée depuis juillet 2001. En fait, en

tenant compte de l'état actuel du marché, des conditions de l'industrie ainsi que des facteurs externes qui sont hors du contrôle d'Uniforêt, nous sommes d'avis que les chances d'obtenir la valeur nette de réalisation estimative discutée au paragraphe 29 ont diminué.

31. Le Contrôleur est d'avis que, dans le cadre d'une liquidation forcée, la valeur estimative des immobilisations d'Unifôret serait réduite de 50 %. Il semble que, dans le contexte actuel, une liquidation forcée serait plus vraisemblable.

32. Le Contrôleur est d'avis que l'acceptation du Plan est plus avantageuse pour les créanciers que la liquidation des éléments d'actif d'Uniforêt dont l'analyse se résume comme suit :

	Montant dû		Plan d'arrangement		
1	298 971 $		298 271 $	100 %	
2	195 337 500	(c)	100 000 000	51 %	
(e)					
3	5 135 924		5 135 924	100 %	(d)
4	2 534 190	(f)	1 900 642	75 %	(e)
5	24 849 498	(g)	5 700 000	23 %	(e)
6	16 554 904	(h)	1 324 392	8 %	
7					

5 405 000	(i)	1 104 858	20 %(e)

250 115 987 $

115 464 087 $ 46 %

	Liquidation ordonnée (Valeur nette de réalisation estimée (a)			Liquidation ordonnée (Valeur nette de réalisation estimée (b)	
1	300 000 $	100 %		300 000 $	100 %
2	65 000 000	33 %		30 000 000	15 %
16 000 000		8 %	(e)	16 700 000	9 %
3	5 150 000	100 %	(d)	5 100 000	100 %
4	300 000	12 %	(e)	250 000	10 %
5	3 000 000	12 %	(e)	2 500 000	10 %
6	néant	-- %		néant	-- %
7	650 000	12 %	(e)	550 000	10 %

90 400 000 $	36 %	55 400 000 $	22 %

[Note de Quicklaw : Le tableau ci-dessus est placé horizontalement sur la copie].

(a) Assumant une valeur de liquidation de 20 000 000 $ pour les comptes à recevoir et les stocks et une valeur nette de 70 000 000 $ pour les immobilisations.
(b) Assumant une valeur de liquidation de 20 000 000 $ pour l'encaisse, les comptes à recevoir et les stocks et une valeur nette de 35 000 000 $ pour les immobilisations.
(c) Excluant le montant du premier 38 500 $ (25 000 US) à être reçu par chaque Porteur de Billets Américains.
(d) En assumant que les créanciers de premier rang paient les soldes dus en vertu des Contrats de Location-Acquisition afin de libérer les actifs visés.
(e) Calculé en partageant la valeur estimée de liquidation des comptes clients et des stocks entre les créanciers des catégories 2 (perte excédentaire seulement), 4, 5 et 7, sur la base prorata et pari passu.
(f) 75 % du montant dû.
(g) Incluant un estimé des créanciers qui choisiront de recevoir le paiement comptant de 2 500 $.
(h) Assumant que la totalité de la catégorie choisit de recevoir un paiement comptant.
(i) Valeur actualisée du montant dû à un taux d'escompte de 18 %.

33. Le Contrôleur est d'avis que l'acceptation et l'homologation du Plan est plus avantageuse pour les créanciers que la liquidation des actifs d'Uniforêt.

34. Le Contrôleur est d'avis que la continuité des opérations d'Uniforêt permettra à la majorité des créanciers d'avoir l'opportunité de poursuivre des relations avec Uniforêt qui, entre autres, vont permettre également le maintien d'emplois et d'une activité économique importante pour les municipalités de Péribonka et de Port-Cartier. De plus, certaines catégories de créanciers (catégories 2 et 3) pourront bénéficier d'un rendement continu de leurs

investissements nonobstant la réduction de la valeur nominale de leur créance prévue par le Plan.

35. Le Contrôleur est d'avis qu'il est dans l'intérêt de l'ensemble des créanciers d'Uniforêt que le Plan soit homologué et approuvé par cette Cour.

11 The Monitor relied for some of its opinions upon the expertise of CIB World Markets Inc. prepared as of February 24, 2003. The key conclusions of this expertise are:

1. The current environment for selling assets in the pulp and lumber industry is poor. There are only a limited number of buyers, but numerous mills for sale.

2- With regard to the BCTMP mill, the lack of transactions at any meaningful price over the past several years is the best indicator of [...] poor market conditions - the market has spoken for itself.

3. With regard to the sawmills, even if a temporary resolution to the on-going trade dispute with the U.S. is negotiated, the economic fundamentals underlying the Canadian industry remain troubling. Once the uncertainty associated with the trade barriers is added to the oversupply situation, it is unlikely that reasonable bids could be expected for the sawmill over at least the next 12-18 months. This problem is compounded by the volume of sawmill capacity currently being offered for sale in Quebec (or deemed "non-core") by companies other than Uniforêt.

12 The Opposing Creditors retained Houlihan, Lokey Award & Zukin Financial Advisors Inc. (Houlihan) of New York to review the First Plan and the Monitor's report of July 23, 2001 and comment on the fairness of that plan to the Opposing Creditors. Houlihan concluded that the First Plan was "not fair and reasonable to the creditors in general or in relation to each other for [...] the following reasons:

. The Plan preserves the existing common equity ownership of [Uniforêt], and thereby allows common shareholders to maintain control [...] and to benefit from a significant deleveraging. [...] This is unfair to secured creditors who receive less than a 100% recovery.

. The Plan provides for substantial recoveries to unsecured creditors that have claims that rank junior in priority to the secured creditors. This is unfair to secured creditors who receive less than a 100% recovery.

- The Plan provides for 100% recoveries in cash for the Class 3 secured creditors, but the Class 2 secured creditors will receive new debt securities with a face value of $100.0 million that approximates 51.2% of the Class 2 secured creditors claims of $195.5 million. This is unfair to the Class 2 Claimholders.

- The Plan provides an inadequate amount of value to the Class 2 Claimholders because the debt securities that are being offered in satisfaction of the Class 2 Claims will trade at a significant discount to face value. This is unfair to the Class 2 Claimholders.

- The Plan provides less value to the Class 2 Claimholders than they would receive in a liquidation based on the liquidation values provided in the Monitor's Report. This is unfair to the Class 2 Claimholders.

- The Plan deprives the Class 2 Claimholders of the value of the unsecured portion of their claim. This is unfair to the Class 2 Claimholders.

- The Plan is being proposed under the assumption that the Port-Cartier pulp Mill [...] on which the Class 2 Claimholders have a first lien), will not be in operation. [This] mill is a significant asset of [Uniforêt] in which over $200. million of capital expenditures have been invested since 1988. The Plan inhibits the Class 2 Claimholders from benefiting in the value that might be created in the event that the pulp mill is restarted, converted, sold or liquidated and transfers a majority of such benefits to junior creditors and common equity holders. This is unfair to the Class 2 Claimholders.

- The Plan provides for a highly leveraged capital structure that is sub-optimal from a corporate finance perspective. As a result, it is likely that both the debt and equity securities of [Uniforêt] will trade with limited liquidity and at significant discounts to their intrinsic values. This is unfair to the Class 2 Claimholders.

- The Plan consolidates all U.S. Noteholders in Class 2 for voting purposes. The purported holder of approximately 66.9% of the Class 2 Claims (Jolina Capital) is also a holder of a majority of the Class 3 Claims, certain Class 5 Claims, 100%, 100% of the Class 7 Claims and is also the largest shareholder of [Uniforêt]. [Thus], Jolina will recover a portion of the value that the Plan transfers from the Class 2 Claimholders to holders of Class 3, Class 5 and Class 7 Claims as well as the equity. Accordingly, Jolina has a different recovery profile than other Class 2 Claimholders and an economic conflict of interest with respect to voting as a Class 2 Claimholder. This is unfair to the non-Jolina Class 2 Claimholders.

13 This report, prepared on October 8, 2001, was filed at the hearing before Madam Justice Zerbisias together with a previous report Houlihan had submitted dated May 15, 2000. Mr. Slonecker, one of their authors, spoke to them. Madam Justice Zerbisias had this to say about those parts of the Houlihan reports that concerned her:

> [72] Houlihan's first report, of May 15, 2000, assesses the value of the assets of Uniforêt at U.S. $123 to $134 million, excluding the assets of Tripap, but including the Port Cartier pulpmill whose assets are therein evaluated at U.S. $38 to 41 million. On that basis, the report and Mr. Slonecker concluded that the recovery rate relative to the face value of the notes is approximately 49 to 56%,

compared to the current market trading price between 27 to 30%.

[73] Houlihan's second report, of October 8, 2001, was prepared by Houlihan at Petitioner's request as a reply to the Report of the Monitor on the Debtor's financial affairs and on the fairness of the plan. Mr. Slonecker and the report re-evaluate the assets of Uniforêt at CND $90 million. No value whatsoever is attributed to the assets of the Port Cartier pulpmill because it was not operating. Mr. Slonecker in his report, then evaluates the new securities, redeemable or convertible at a future date being provided to the Class 2 noteholders under the plan, at CDN $56.4 million, which implies a recovery rate of 51.2% of the total face value of the Class 2 claims. After discounting for the delay in payment, he concludes that this implies a real recovery rate of only 28.9%. He adds that the trading value of the Class A notes is 74% of face value, whereas the trading value of the class B notes is 31% of face value.

[74] Jolina, as a Class 2 creditor is affected by the same determinations as to its potential recovery on its U.S. notes. In addition, Houlihan and Mr. Slonecker evaluate the trading value of Jolina's new note under the plan in payment of its claim for its shareholder loan of CND $5.4 million at 18.8% of face value, i.e. worth approximately $1 million Canadian when discounted, for the delay in payment.

[75] Thus, Houlihan and Mr. Slonecker conclude on the basis of two completely different scenarios as set forth in the two reports, that the recovery rate on the U.S. notes is approximately the same: 49 to 56% on the first report and 51.2% on the second report, without attributing any value to the Port Cartier pulpmill, absent any discount for delays in payment. Similarly, the Monitor concludes that the recovery rate for Class 2 claimants is 51% under the plan, or 33% on a forced liquidation. Thus it appears that Petitioners will gain more under the plan and less on liquidation.

14 The Opposing Creditors obtained Court permission to produce another expertise prepared by Price Waterhouse Coopers (PWC). Completed on February 7, 2003, this expertise concludes that:

141. In summary, in our view, the Plan:

(i) Does not treat secured creditors in accordance with their existing rights and priorities;
(ii) Provides significantly higher recoveries to certain unsecured

creditors than is being offered to the secured US Noteholders, including the ultimate payment of 100 cent(s) on the dollar in respect of Jolina's unsecured shareholder loan;

(iii) Requires Class 5 creditors to make an election in respect of their treatment under the Plan without being able to assess the economic impact of the alternatives available;

(iv) Provides for a recovery to Class 6 creditors, notwithstanding that such creditors have contractually subordinated themselves to all other creditors;

(v) Treats the claim of Bank of Montreal (BoM) as an Unaffected Obligation[9], with no benefit or advantage to [Uniforêt or its] arms-length creditors, but with the significant disadvantage that $4 million that would otherwise be available for the purposes of making additional payments to Affected Creditors, funding operations or servicing debt will be paid to this unsecured creditor; and;

(vi) Contrary to established practice in CCAA restructurings, leaves substantially all of the post-restructuring equity in [Uniforêt] in the hands of the existing shareholders without any additional funding or support being provided by such shareholders, with the result that the consequences of [Uniforêt's involvency] are being suffered by the creditors, while the benefits of the compromises by creditors and a successful restructuring will accrue to the existing shareholders.

142. The Plan was approved by the Class 2 creditors only as a result of Jolina, the largest shareholder of Uniforêt, voting in favour of the Plan. Based on the Monitor's records, the Plan would not have been approved if 373[10] had been included in the CCAA filing and Jolina, as a result, had been prevented from exercising its hypothecary rights over the US Notes held by 373. Furthermore, based on our experience, we believe it is unlikely that an arm's length creditor holding the majority of the Class 2 claims would have voted in favour of the Plan.

143. The sale of the business as a going concern appears to be a commercially viable alternative to the Plan that could improve overall recoveries available to creditors by approximately $26.4 million to $42.4 million,

representing an increase of approximately 31.7% to 50.6%.

144. The creditors most prejudiced by the Plan are the Class 2 creditors that would share in Notes A and Notes B, primarily Jolina and the minority US Noteholders. If the business were sold as a going concern and the proceeds distributed in the same manner as the cash payments that would be made to affected creditors under the plan, we estimate that such Class 2 creditors would recover $26.4 million to $42.4 million, more than they will recover under the Plan. These amounts would be reduced by any amount that would be needed to make a fair and reasonable distribution on account of the Class 7 Jolina shareholder loan. Under the Plan, Jolina retains its existing equity in Uniforêt while no equity is offered to the Minority US Noteholders. In these circumstances, the compromise being required of the Minority U.S. Noteholders is disproportionately large and cannot be considered reasonable.

145. As previously noted, the Monitor, in its July 23 Report, its October 28 Report and its December 11 Report, concluded that the Plan was fair and reasonable. Having given due consideration to the foregoing issues, the other matters discussed in this report, and all of the considerations outlined by Madam Justice Paperny in Re. Canadian Airlines,[11] we respectfully disagree with the conclusion of the Monitor and we have concluded that the Plan is not fair and reasonable.

15 Following completion of most of the proof on May 2nd, 2003, the Court shared with the parties and their counsel its principal preoccupation concerning the fairness of the Plan in circumstances where, as here, secured creditors are asked to reduce the face amount of their notes by almost half and to accept, eventually, reduced interest on these reduced notes. The Court asked why the Plan failed to replace what was to be taken from them by equity[12], unencumbered by a repurchase option[13]. Uniforêt responded to this enquiry on May 6, 2003 by further amending the Plan to effectively remove the repurchase option and to extend the delay during which a noteholder can exercise the conversion rights attaching to the B Notes from 2004 to 2008, coincidental with the maturity date of such notes. If exercised, the Class 2 creditors would hold 55% of the equity of Uniforêt.

16 On the same morning, the Opposing Creditors submitted a "Re-Amended Particularized Contestation" to further amend their conclusions to ask for an "Alternate Plan" in the event a "going concern sale" cannot profitably be concluded. The Alternate Plan would differ from the Plan in that:

(a) Class 2 creditors would receive one class of New Notes in an aggregate amount of $100 million having the same repayment and interest terms as Notes A under the Plan and 90% of the equity of Uniforêt following a reorganization of its capital structure pursuant to S.191 of the Canada Business Corporations Act (CBCA)[14], and

(b) Jolina's claim as a Class 3 creditor would be disallowed and put into Class 5. The Bank of Montreal claim would also be added to Class 5 and disallowed as an "unaffected obligation".

LEGAL PRINCIPLES

17 Counsel for the Opposing Creditors remind the Court that shareholders do not have an economic stake in an insolvent company seeking relief under the CCAA[15]. They add that a plan of arrangement should offer more to creditors than would be available to them under a liquidation[16]. In assessing fairness of a plan, the Court must consider alternatives to it that are commercially available[17], in particular a sale of the enterprise as a going concern. Moreover, they point to the inherent jurisdiction of the Court either to amend the plan for compelling reasons[18] or to order a sale of assets before a plan is presented to the creditors[19].

18 Counsel for Uniforêt and the Monitor acknowledged that generally, a plan of arrangement is consensual and results from negotiations leading to agreement[20]. They remind the Court that its role on a sanction hearing "is to consider whether the plan fairly balances the interests of all the stakeholders"[21] including the public interest.[22] Perfection is not required.[23] They add that there is a heavy burden upon Opposing Creditors in their quest to upset the Plan[24] and conclude that the Court should be reluctant to interfere with the business decisions of a majority of creditors "reached as a body"[25].

DISCUSSION

A. The Plan is prejudicial to the Class 2 Creditors

1. Two Fundamental Reasons

19 The Opposing Creditors and their experts criticize the First Plan on several fronts. On the one hand they assert that the First Plan treats some unsecured creditors more favourably than the Class 2 secured creditors. They point out that Jolina will receive the entire amount of both its $5.4 million shareholder loan (Class 7) and its $3.5 million advance towards the acquisition and installation of a planer in the Peribonka sawmill (Class 3) and that the forestry contractors will realize 75% of their claims (Class 4). On the other hand, they argue that the Plan is confiscatory in that the Class 2 creditors will only receive 51% of the face amount of their old U.S. notes two years later than promised at a lower interest rate while they wait to be paid and they will not receive any meaningful equity to replace what has been taken from them, nor are they entitled to recover unpaid interest accrued on the U.S. Notes.

2. Too fair to other creditors, especially Jolina

20 There is no doubt Jolina has been relatively well treated under both the First Plan and the Plan. Jolina is Uniforêt's White Knight.[26] It has been a shareholder and involved in the affairs of Uniforêt since 1994. It financed a new planer for the Péribonka sawmill in late 1999. It ultimately provided the funding to acquire the majority of the U.S. Notes in Uniforêt's initial attempt to rationalize its debt through a public offering for all the U.S. Notes at 30% of their principal amount in early 2000. This initiative attracted about 50% of the U.S. Notes at a cost of $33 million, or 53 cent(s). Jolina then acquired another 16% of the U.S. Notes in the market, enough to control the outcome of the vote by the Class 2 creditors. It helped to backstop an $11M short term or bridge loan from the Bank of Montreal to pay wages and other pressing payables. Uniforêt repaid over $6 million of this loan and shortly thereafter applied to the Court for relief under the C.C.A.A. The balance due on this loan is treated as an "unaffected obligation[27]. Accordingly, the White Knight's several claims have received generous treatment under the Plan, as well they should. After all, Jolina is Uniforêt's largest and most important creditor, quite apart from being a major shareholder. Plans of arrangement cannot hope to succeed without the approval of such a creditor. The Plan proposes, in effect, to make Jolina more or less whole, at least eventually[28].

21 For a plan of arrangement to succeed, an insolvent company must secure the approval of all classes of its creditors, even those who have subordinated their claims to all other creditors, as is the case with the debentureholders (Class 6). It does not necessarily follow that a plan generous to some creditors must therefore be unfair to others. A plan can be more generous to some creditors and still fair to all creditors[29]. A creditor like Jolina that has stepped into the breach on several occasions to keep Uniforêt afloat in the 4 years preceding the filing of the First Plan warrants special treatment.

22 The Forresters' claims, although unsecured, are another special case. The Forresters had to be encouraged to bring their equipment back into the bush after the winter thaw. Without logs, the sawmills have nothing to cut. Similarly, if government permits (stumpage duties) are not paid in one year, they will not be issued in a subsequent year[30]. This explains why the cost of permits are quite properly treated in the Plan as "unaffected obligations".

3. Unfair to Class 2 Creditors

23 The minority Class 2 creditors complain that Jolina wears too many hats in this dossier. They argue that if Jolina, like them[31], was nothing more than a holder of U.S. Notes, it would not have voted in favour of the proposed treatment for Class 2 creditors. It did so, they add, only because of the generous treatment proposed for its unsecured claims under classes 3, 5 and 7 and the fact it was already a major shareholder. This is, of course, a purely hypothetical argument that nevertheless invites an analysis of the treatment actually accorded to the Class 2 creditors.

24 The experts and Uniforêt agree that the "enterprise" or "going concern" values of the businesses of Uniforêt lie somewhere between $90 million (Houlihan in 2001) and $112 million (PWC in 2003)[32]. There is also general agreement that Uniforêt cannot support debt in excess of $60 million from its current and projected cash flows[33]. This explains why the old U.S. Notes are to be exchanged for two classes of notes, $60 million of "A" notes and $40 million of "B" notes ($100 million in the aggregate) and why there is a conversion feature into shares attached to the "B" notes.

25 Thus, Uniforêt proposes to give the Class 2 creditors its assessment of its entire enterprise value backed by the same security the U.S. noteholders enjoyed under their Trust Indenture[34]. If the workout over the next four to five years is successful, the holders of "B" notes will be able to share, to the extent of 55%, any future equity accruing to the shares of Uniforêt, in excess of $40 million. Mathematically, 55% of nothing is no different than 90% of nothing. However, a successful workout combined with improved economic conditions for the Canadian forestry industry - capital intensive, highly cyclical and beetle infested - may permit the "B" noteholders to recover something of what has been lost from the face amount of their old U.S. notes.

26 The experts further agree that the orderly liquidation values of the assets of Uniforêt in a bankruptcy scenario will not realize more than $90.4 million at best[35]. Most estimates are well below this figure, including that of PWC. The one area where the experts differ is what they think might be realized, and when, if the enterprise were offered for sale "as a going concern" while under the protection of the CCAA. The Monitor and Mr. Roberts of CIB World Markets doubt such a sale would attract a price any more favourable than what is offered in the Plan anytime sooner than 18 months, if ever. Mr. Meakin of PWC thinks a carefully orchestrated sale culminating in an auction while under the umbrella of the CCAA could result in a return to the Class 2 creditors in the next 6 months of up to $42 million more than what they are to receive under the Plan. The Monitor views any such result as entirely "illusoire, irréaliste et utopique". His views are shared by Mr. Moreau, the president and chief executive officer of Uniforêt, expressed even more succinctly. Mr. Roberts observed that ever since Uniforêt applied for relief from the Court, competitors in the industry have considered it to be "for sale", yet no serious buyer has as yet surfaced. He suggests that competitors are waiting to acquire a bargain in an industry beset with overcapacity compounded by punishing countervailing duties imposed by our southern neighbours. Worse, one such competitor holds a right of first refusal affecting a key asset.

27 Mr. Meakin's "utopian" views as to a possible outcome from a sale of the enterprise fails to account for some $19.5 million of payments due to the creditors of unaffected obligations, presupposes that (a) the payment of $6 million to the Bank of Montreal is an avoidable transaction, (b) the balance of $4 million due on its loan is a Class 5 claim and (c) omits contracts that would have to be assumed by a buyer of at least $2.3 million. This reduces a best case scenario from a sale of the business to less than a possible $10 million improvement for the Class 2 Creditors, before expenses. The Opposing Creditors' share of this theoretical sum would not exceed $2.8 million before expenses. Further, Mr. Meakin's proposal to sidestep the right of first refusal is unconvincing. This right, together with long term fiber procurement contracts, if not revoked, "would hamper significantly any kind of divestiture process" according to Mr. Meakin's partner, Mr. Leblanc.

28 There are serious risks associated with any attempted sale of an insolvent enterprise over an unspecified period of time. Employees who are key to Uniforêt's business operations but not necessarily to a buyer's operations will almost certainly begin looking for safe havens. Customers will look to other sources for their wood products. Suppliers will tighten credit facilities and look for other customers. There will almost certainly be erosion on several fronts. Added to all this, it should not be forgotten that those creditors of Uniforêt who have voted in favour of the First Plan have implicitly agreed that current management and direction should remain unchanged.

29 Given all of these factors, the Court concludes that it would be folly to attempt a sale of Uniforêt's businesses - even to test the market - almost 2 years after the First Plan was filed for so small a possible yet unlikely gain. Uniforêt has so far managed to survive under CCAA protection in weak and difficult market conditions all the while fighting this litigation. It deserves a chance to prove to its stakeholders that it can both survive and return to profitability. This is what the CCAA was designed to encourage and facilitate.

B. Who really gets hurt

30 For those Opposing Creditors who acquired their notes for 28 cent(s) in the dollar like Prospect, there will be no "haircut". Rather, the issue for them is the size of their gain and the yield on their investment to maturity. Only those U.S. noteholders who paid more in the after market for their U.S. Notes than they stand to receive from the Plan will suffer any loss under it. Jolina's average cost for the U.S. Notes it holds amounts to about 53 cent(s) in the dollar. Its haircut will be modest. Accordingly it should come as no surprise to anyone that it does not insist on equity in circumstances where it will recover almost all it had to pay for its U.S. Notes. Add to this the fact it already holds 40% of the existing equity in Uniforêt. If it converts the "B" Notes it will receive under the Plan, it will increase its equity position in Uniforêt to about 63%, allowing for dilution.

31 Highland acquired its U.S. Notes from Prospect, one of the funds it manages, at a cost of 80 cent(s), after Uniforêt had applied for relief under the CCAA. The market at the time for the U.S. Notes was in the region of 28 cent(s). Thus, Prospect has already realized a tidy gain on the sale of $3 million of the principal amount of the U.S. Notes it then held. It is left with $20 million of U.S. Notes. The explanation for this generous transaction - at a price more than twice the market price - leaves as many questions unanswered as were answered. Without any U.S. Notes, Highland would have no standing in these proceedings as a Class 2 creditor. The price Highland elected to pay for its U.S. Notes reflects what it hoped to achieve for all its clients in its forthcoming negotiations with Uniforêt. Highland believed that its group would control the claims of the U.S. noteholders in any Chapter 11 type proceedings and assumed that Jolina, being a shareholder of Uniforêt, would not be permitted to vote on any of its claims as Uniforêt's creditor. In this it was mistaken, as Highland's President, Mr. Dondero, readily conceded. Canadian rules do not prevent a shareholder of an insolvent company from voting on its claims as a creditor.

32 Thus, only four of the six Opposing Creditors will sustain a real loss if the Plan is approved. Together they hold $12.5 million of U.S. Notes purchased at prices ranging from 96 cent(s) to 66 cent(s). Highland's loss is self inflicted. It is also Prospect's initial gain. In addition, Prospect will gain from the Plan itself, having purchased its $20 million U.S. Notes for only about 28 cent(s). In the giant scheme of things, four holders of 10% of the $125 million U.S. Notes will sustain a legitimate loss if the Plan is approved. They will lose much more in a bankruptcy.

33 Arguably, the question the Court might ask is whether a Plan thought by the Monitor to be both fair and reasonable - feasible and workable - and to have been approved by the required majority of all the creditors of Uniforêt should nevertheless be sacrificed to please four speculators[36]. Of course not. Their actual losses will not exceed 45 cent(s) in the dollar[37] if the Plan succeeds, perhaps less if the conversion option is exercised. Absent bad faith, the CCAA should not be employed to permit a cranky minority creditor to frustrate a feasible and fair plan that has been blessed by an overwhelming majority of all the creditors of a debtor[38].

C. The Equity Issue

34 It became evident during the hearing that a serious bone of contention between the Opposing Creditors and Uniforêt centered on the unwillingness of the latter to give sufficient equity to the former. While the First Plan provided for a conversion option exercisable before September 15, 2004, it came with a very short fuse, or repurchase option[39]. By the amendments made to the Plan on May 6, 2003, the repurchase option has been dropped and the conversion of the "B" Notes may be exercised anytime before September 15, 2008. This puts a serious dent into the oppression argument advanced by the Opposing Creditors concerning the lack of an equity kicker for the Class 2 creditors.

35 Arguably, the issue now becomes how much equity ought to have been made available to the Class 2 creditors. Jolina accepted its share of a potential 55% of the equity subject to the repurchase option. Uniforêt has removed that option and extended the conversion period by 4 years. The shareholders of Uniforêt, qua shareholders, are not involved in the Plan. Nothing was offered to them and one consequence of the Plan is that whatever interest they now have is going to be diluted. In all the circumstances of this case, the Court concludes that the offer of equity, while perhaps not overly generous when compared to some other recently sanctioned plans[40], is nevertheless adequate and fair.

D. Bad Faith

36 The good faith of the Opposing Creditors has been called into question by Madam Justice Zerbisias[41]. The Opposing Creditors assert that Uniforêt "and its allies [...] have shown bad faith of the kind which should convince any reasonable observer that the Plan is neither fair nor reasonable". They point to the treatment accorded the Bank of Montreal $11 million loan, the repayment of part of it[42], a loan by Jolina of $1.1 million[43] repaid by Uniforêt on March 6, 2001 and Jolina's claim for the purchase of the planer (Class 3)[44].

37 Suffice it to say that there has been aggressive behaviour displayed by all the parties in the course of this affair, at least some of the time. The Court has already commented on the transactions impugned by the Opposing Creditors[45]. Absent a bankruptcy, these claims will all be resolved eventually, just like the claims of the Opposing Creditors, either in accordance with their terms or subject to the Plan. Again, absent a bankruptcy, the impugned claims don't add any value to the Petitioners' enterprise. However, had the planer never been acquired, the Peribonka mill would not have been as profitable as it was in the 18 months preceding the CCAA filing.

38 Aggressive behaviour is to be expected in proceedings of this kind[46]. The CCAA favours the survival of businesses and the jobs that go with them. Where, as here, it has been amply demonstrated that the creditors as a whole will fare much better under the Plan than in a liquidation, the solution is obvious. The issue in this case was to decide if a minority group of secured creditors has been materially oppressed by the behaviour of the majority. That case has not been made out. The U.S. noteholders are offered the entire enterprise value of Uniforêt in the form of reconstituted notes and they will receive annual yields on these notes for the next five years varying between some 10% and 17%.

E. The Alternate Plan

39 While the Court may have the authority to adopt a Plan different from that sought to be sanctioned, it should only exercise that authority if it is satisfied that the proposed Plan is unfair. Moreover, the Alternate Plan proposed by the Opposing Creditors calls for a reorganization of the capital structure of Uniforêt Inc. requiring confiscation of the rights of existing shareholders without their approval being required. The Court has qualified the Plan as both fair and reasonable. The shareholders of Uniforêt have already offered control of their company to the U.S. noteholders. That is quite enough in the circumstances of this case.

40 FOR THESE REASONS, THE COURT:

41 MAINTAINS Petitioners' Motion to Sanction a Plan of Arrangement;

42 DISMISSES the Opposing Creditors Re-Amended Particularized Contestation;

43 SANCTIONS and APPROVES the Second Amended Plan of Compromise and Arrangement (Plan);

44 PERMITS Petitioners to replace the U.S. Secured Notes, as defined in paragraph 1.1 of the Plan, by two new secured notes for each unpaid U.S. Note, a Note "A" and a Note "B" as described in paragraph 4.2 of the Plan and in virtue of two Trust Agreements previously approved by the Securities and Exchange Commissions of the United States;

45 DECLARES that the American Trust Indenture, as defined in paragraph 1.1 of the Plan, be amended and updated by the said two Trust Agreements;

46 DECLARES that all of the Executory Contracts, as defined in paragraph 1.1 of the Plan, save those terminated or repudiated by Petitioners before the "Plan Implementation Date", are in full force and effect as at the Plan Implementation Date, notwithstanding:

a) that Petitioners have obtained relief under the CCAA;
b) the effect on Petitioners of the completion of any one of the transactions contemplated by the Plan;
c) any compromises or arrangements effected pursuant to the Plan;
d) any default with respect to such a contract by Petitioners prior to the Plan Implementation Date; or
e) any automatic termination of any such contract or any purported termination thereof by any Person other than Petitioners

the whole in conformity with paragraph 6.7 of the Plan.

47 DECLARES that no party to an Executory Contract, as defined in paragraph 1.1 of the Plan, shall be entitled to accelerate the obligations of Petitioners or terminate, rescind or repudiate such other party's obligations under an Executory Contract following the Plan Implementation Date on the sole ground:

a) of any event that occurred on or prior to the Plan Implementation Date which would have entitled such party to accelerate Petitioners' obligations under such Executory Contract;
b) that Petitioners have obtained relief under the CCAA;
c) of the effect on Petitioners of the completion of any of the transactions contemplated by the Plan; or
d) of any compromises or arrangements effected pursuant to the Plan.

the whole in conformity with paragraph 6.7 of the Plan.

48 DECLARES that the date for the implementation of the Plan will be deemed to be the date specified in a Certificate to be filed in the Court record by Petitioners and the Monitor as soon as all the conditions specified in paragraph 5.1 of the Plan have been fulfilled or satisfied.

49 EXEMPTS Petitioners from furnishing any security;

50 ORDERS provisional execution of this judgment notwithstanding appeal;

51 THE WHOLE with costs against the Opposing Creditors and in favour of Petitioners, the Monitor and Jolina Capital Inc.

DANIEL H. TINGLEY J.S.C.

cp/i/qw/qlabl/qlrcr

1 R.S.C., 1985, c.C-36, section 6 which provides that: 6. [Compromises to be sanctioned by court] Where a majority in number representing two-thirds in value of the creditors, or class of creditors, as the case may be, present and voting either in person or by proxy at the meeting or meetings thereof respectively held pursuant to sections 4 and 5, or either of those sections, agree to any compromise or arrangement either as proposed or as altered or modified at the meeting or meetings, the compromise or arrangement may be sanctioned by the court, and if so sanctioned is binding (a) on all the creditors or the class of creditors, as the case may be, and on any trustee for any such class of creditors, whether secured or unsecured, as the case may be, and on the company, and (b) in the case of a company that has made an authorized assignment or against which a receiving order has been made under the Bankruptcy and Insolvency Act or is in the course of being wound up under the Winding-up and Restructuring Act, on the trustee in bankruptcy or liquidator and contributories of the company.

2 Addressed in large part in the Court's judgment of October 23, 2002 rendered by Madame Justice Zerbisias dealing primarily with classification issues.

3 Essentially all the assets and undertakings of Uniforêt's operating companies excluding receivables and inventory and specified equipment under capital leases.

4 Contemplating a reorganization of the capital structure of Uniforêt pursuant to the provisions of Section 191 of the Canada Business Corporations Act, R.S.C., 1985, c. C-44, as amended.

5 Infra, paragraph [9]. See paragraph 4.2.2 of the Plan.

6 Defined in the Plan as: a. Interim Period Debts, which shall be paid by Uniforêt in accordance with terms previously agreed upon with the respective Interim Creditors; b. Uniforêt Scierie-Pâte Inc.'s obligations towards the Municipalité Régionale de Comté de Sept-Rivières to build and maintain roads, as provided in the agreement dated April 3, 2001, and the related Hydro-Québec's claim in the amount of $5,000,000 referred to therein; c. Claims of legal, accounting and financial advisors to Uniforêt, including the Monitor and its counsel, in respect of any debt incurred or to be incurred by Uniforêt for the purposes of reorganizing Uniforêt's liabilities, business and affairs including, without limitation, pursuant to the Plan, which monies shall be paid by Uniforêt in accordance with the Initial Order; d. Claims for indemnity pursuant to the indemnities provided by Uniforêt to directors or officers of Uniforêt; e. Claims of Employee Creditors, which monies shall be paid by Uniforêt in the ordinary course of business; f. [...] g. Dues owing to the Quebec Minister of Natural

Resources pursuant to the Forests Act, R.S.Q., c. F-4.1, which shall be paid by Uniforêt in accordance with terms previously agreed upon with the Quebec Minister of Natural Resources; h. Monies, if any, owing to National Bank of Canada, Bank of Montreal and La Société d'hypothèque CIBC, which shall be paid by Uniforêt in accordance with existing agreements and contracts, or as may be agreed between each of them; i. Claims for goods on consignment, which monies shall be paid by Uniforêt in accordance with terms previously agreed upon with the Creditors of such Claims; and j. Claims for warehousing contracts, which monies shall be paid by Uniforêt in accordance with terms previously agreed upon with the Creditors of such Claims.

7 Described in the Plan as: the date on which all conditions contained in Section 5.1 of this Plan are satisfied. These conditions, save those subject to the discretion of the Court, have all been satisfied.

8 The highlighted portions represent the changes made to the First Plan on May 6, 2003. Prior to these changes, this paragraph read: furthermore, Convertible Notes "B" will, from the Plan Implementation Date until September 15, 2004, be convertible at any time into Class A Subordinate Voting Shares of Uniforêt Inc. (listed on The Toronto Stock Exchange under the trading symbol UNF.A) at a conversion price of $0.50 per share, such conversion right to expire at the close of business of September 15, 2004 and to be subject to a thirty (30) days prior written conversion notice to Uniforêt, which may then elect, prior to the expiry of such thirty (30) day period, to pay in cash to the noteholder an amount equal to the Market Value of the Class A Subordinate Voting Shares of Uniforêt Inc. issuable upon conversion instead of delivering shares to the noteholder; effectively giving to Uniforêt a repurchase option.

9 Supra, Note 6, paragraph (h).

10 Infra, see paragraph [18] below. A wholly owned subsidiary of Uniforêt Inc., 3735061 Canada Inc. (373) offered to purchase all the U.S. Notes for 30% of their principal amounts. The funds to satisfy this offer were borrowed from a bank syndicate and the syndicate loans were guaranteed by Jolina. 373 defaulted under the syndicate loans. Jolina stepped into the shoes of the bank syndicate and took the U.S. Notes acquired by 373 in lieu of payment of the syndicate loan.

11 (2000) 20 C.B.R. (4th) 1, at page 36: Where a company is insolvent, only the creditors maintain a meaningful stake in its assets. Through the mechanism of liquidation or insolvency legislation, the interests of shareholders are pushed to the bottom rung of the priority ladder. The expectations of creditors and shareholders must be viewed and measured against an altered financial and legal landscape. Shareholders cannot reasonably expect to maintain a financial interest in an insolvent company where creditors' claims are not being paid in full. It is through the lens of insolvency that the court must consider whether the acts of the company are in fact oppressive, unfairly prejudicial or unfairly disregarded. CCAA proceedings have

recognized that shareholders may not have "a true interest to be protected" because there is no reasonable prospect of economic value to be realized by the shareholders given the existing financial misfortunes of the company: Royal Oak Mines Ltd., supra, para. 4., Re Cadillac Fairview Inc. [1995] O.J. No. 707 (March 7, 1995), Doc. B28/95 (Ont. Gen. Div. [Commercial List]), and T. Eaton Company, supra. To avail itself of the protection of the CCAA, a company must be insolvent. The CCAA considers the hierarchy of interests and assesses fairness and reasonableness in that context. The court's mandate not to sanction a plan in the absence of fairness necessitates the determination as to whether the complaints of dissenting creditors and shareholders are legitimate, bearing in mind the company's financial state. The articulated purpose of the Act and the jurisprudence interpreting it, "widens the lens" to balance a broader range of interests that includes creditors and shareholders and beyond the company, the employees and the public, and tests the fairness of the plan with reference to its impact on all of its constituents. It is through the lens of insolvency legislation that the rights and interests of both shareholders and creditors must be considered. The reduction or elimination of rights of both groups is a function of the insolvency and not of oppressive conduct in the operation of the CCAA. The antithesis of oppression is fairness, the guiding test for judicial sanction. If a plan unfairly disregards or is unfairly prejudicial it will not be approved. However, the court retains the power to compromise or prejudice rights to effect a broader purpose, the restructuring of an insolvent company, provided that the plan does so in a fair manner.

12 As was done for example in Plans approved in Re Skeena Cellulose Inc., (100% of the equity offered to the secured creditors);Re Silcorp Limited, (75%); Re Pioneer Companies Inc., (57%); Re Microcell Telecommunications Inc., 500-11-019761-036; 2003-04-30 (99.9% to the creditors); Re White Rose, (94.4%); Re Royal Oak Mines Inc., 14 C.B.R. (4th) 279 (99%); Re Eagle Precision, (90.3%); Bluestar Battery, (83%); Re Algoma Steel Inc., 30 C.B.R. (4th) 1 (100%); Re McWatters Mining (2002), (75% to unsecured creditors); Re 360 Networks, (100%); Re Kmart, (50% to secured creditors). See as well Jolina's Exhibits J-28 and 29 and the Monitor's Exhibit M-1.

13 Supra, Note 8.

14 Supra, Note 4.

15 Supra, Note 11, and see Re Central Capital Corp., 38 C.B.R. (3d) 1 (Ont. C.A.), at page 37, paragraph 90 where Mr. Justice Finlayson observed that: In the case of an insolvency where the debts to creditors clearly exceed the assets of the company, the policy of federal insolvency legislation appears to be clear that shareholders do not have the right to look to the assets of the corporation until the creditors have been paid.; Re T. Eaton Co., 15 C.B.R. (4th) 311 (Ont. S.C.J.), at page 314, paragraphs 9 to 13 inclusive and Re Royal Oak Mines Inc., 14 C.B.R. (4th) 279 (Ont. S.C.J.), at page 281, paragraph 2 where Mr. Justice Farley, prior to approving a proposal contemplating the sale of a business, observed that: [...] the shareholders

would have to appreciate that, when viewed as to the hierarchy of interests to receive value in a liquidation related transaction, they are at the bottom. Further in these particular circumstances there are, in relation to the available tax losses (which is in itself a conditional asset), very substantial amounts of unsecured debt standing on the shareholders' shoulders. That is, the shareholders, even assuming an ongoing operation achieving a turnaround to profitability without restructuring, would have to wait a long while before their interests saw the light of day.

16 Supra, Note 1, at page 26, paragraph 96, where Madam Justice Paperny reminds us that: The sanction of the court of a creditor-approved plan is not to be considered as a rubber stamp process. Although the majority vote that brings the plan to a sanction hearing plays a significant role in the court's assessment, the court will consider other matters as are appropriate in light of its discretion. In the unique circumstances of this case, it is appropriate to consider a number of additional matters: a. The composition of the unsecured vote; b. What creditors would receive on liquidation or bankruptcy as compared to the Plan; c. Alternatives available to the Plan and bankruptcy; d. Oppression; e. Unfairness to Shareholders of CAC; and f. The public interest.

17 See Re T. Eaton Co., Supra, Note 15, at page 314, paragraphs 8 and 9.

18 See Ontario v. Canadian Airlines Corp., (2001) 29 C.B.R. (4th) 236 (Alb. Q.B.), at paragraph 61.

19 See Re Canadian Red Cross Society, 5 C.B.R. (4th) 299 (Ont. S.C.J.), at page 315, paragraphs 43 and 45.

20 See Algoma Steel Corp. v. Royal Bank, (1992) 11 C.B.R. (3d) 11 (Ont. C.A.), at page 14, paragraph 7.

21 Supra, Note 11, at page 5, paragraph 3, where Madam Justice Paperny adds: Faced with an insolvent organization, its role is to look forward and ask: does this plan represent a fair and reasonable compromise that will permit a viable commercial entity to emerge? It is also an exercise in assessing current reality by comparing available commercial alternatives to what is offered in the proposed plan.

22 Ibid, at pages 42 to 44 inclusive, paragraphs 171 to 177.

23 Ibid, at page 44, pages 178 and 179, citing with approval the remarks of Mr. Justice Farley in Re Sammi Atlas Inc., (1998), 3 C.B.R. (4th) 171 (Ont. Gen. Div.), at page 173: A plan under the CCAA is a compromise; it cannot be expected to be perfect. It should be approved if it is fair, reasonable and equitable. Equitable treatment is not necessarily equal treatment. Equal treatment may be contrary to equitable treatment. And see Re Quintette Coal Ltd., (1992) 13 C.B.R. (3d) 146, at page 165, paragraph 93.

24 See Re Central Guaranty Trustco Ltd., (1993), 21 C.B.R. (3d) 139, at page 141, where Mr. Justice Farley observed that: The Revised Plan of Arrangement had required that there be a vote on the proposed compromise re these Claims (with a majority in number representing three-quarters in value of the proven Claims). That vote was even more overwhelming as only FSTQ voted against. 92.54% by number (96.16%) by value) were in favour and 7.46% by number (3.84% by value) were opposed. This on either basis is well beyond the specific majority requirement of CCAA. Clearly there is a very heavy burden on parties seeking to upset a plan that the required majority have found that they could vote for; given the overwhelming majority this burden is no lighter. This vote by sophisticated lenders speaks volumes as to fairness and reasonableness. But see also Re Quintette Coal Ltd., ibid, at pages 168 and 169, paragraphs 108 to 116.

25 See Re Sammi Atlas Inc., supra, Note 23, at page 174, paragraph 5.

26 Defined in Dictionary of Finance and Investment Terms, Barron's, 1985, at p. 470 as: WHITE KNIGHT acquirer sought by the target of an unfriendly TAKEOVER to rescue it from the unwanted bidder's control. The white knight strategy is an alternative to SHARK REPELLENT tactics and is used to avert an extended or bitter fight for control.

27 Supra, Note 6 (h).

28 Ignoring any discount for projected delays in payment.

29 See Algoma Steel v. Royal Bank, Supra, Note 20, at page 9 where Mr. Justice Farley notes: What might appear on the surface to be unfair to one party when viewed in relation to all other parties may be considered to be quite appropriate.

30 See Section 7 of the Forest Act, supra, Note 6 (g).

31 That is, the proverbial "reasonable person".

32 This is the top of a range of between $90 and $112 million.

33 Or more accurately, its earnings before interest, taxes, depreciation and amortisation (EBITDA).

34 Supra, Note 3.

35 Estimated by the Monitor in paragraph 32 of his February 27, 2003 report reproduced above in paragraph [10] and based on the rosiest of assumptions.

36 That is, investors in below investment grade securities acquired in the after market.

37 In most cases, much less.

38 Supra, Note 24.

39 Supra, Note 8.

40 Supra, Note 12.

41 Supra, Note 2, at pages 29 and 30; paragraphs 95 and 96.

42 Which the Opposing Creditors say is a $6 million preferential payment.

43 Used to settle wage claims of an affiliate company for which Messrs Perron and Mercier, as directors of the affiliate, were legally liable.

44 Jolina's security position in respect of its advances to acquire the planer is in some doubt.

45 See paragraphs [19], [20], [22] and [23] above.

46 See Re T. Eaton Co., Supra, Note 15, where at page 258, paragraph 6, Mr. Justice Farley observed: "The Act clearly contemplates rough-and tumble negotiations between debtor companies desperately seeking a chance to survive and creditors willing to keep them afloat, but on the best terms they can get, [...]".

Tab 24

Bluebird Partners, L.P., Appellant, v. First Fidelity Bank, N.A., et al., Respondents, et al., Defendants. (And a Third-Party Action.) (And Another Action.)

No. 29

COURT OF APPEALS OF NEW YORK

97 N.Y.2d 456; 767 N.E.2d 672; 741 N.Y.S.2d 181; 2002 N.Y. LEXIS 551

February 14, 2002, Argued
March 26, 2002, Decided

PRIOR HISTORY: Appeal, by permission of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the First Judicial Department, entered February 6, 2001, insofar as it (1) reversed, on the law, so much of an order of the Supreme Court (Beatrice Shainswit, J.), entered in New York County, as granted a motion by plaintiff for reargument and, upon reargument, denied a motion by defendants for summary judgment, (2) granted defendants' motion for summary judgment, and (3) dismissed the complaint.

Bluebird Partners v First Fid. Bank, 279 AD2d 239, reversed.

DISPOSITION: Order reversed with costs; case remitted to the Appellate Division, First Dept..

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant partnership challenged the judgment of the Supreme Court, Appellate Division, First Division (New York), which dismissed the partnership's complaint for breach of fiduciary duties against one of several bankruptcy trustees.

OVERVIEW: On appeal, the partnership contended that the intermediate court erred in reversing the trial court because N.Y. Gen. Oblig. Law § 13-107 did not require that a transferee demonstrate its own injury in order to recover damages. The appellate court found that neither the plain language nor the legislative history of N.Y. Gen. Oblig. Law § 13-107 required that a transferee demonstrate its own injury in order to bring a claim for damages. Nowhere in the legislative history was there any mention of a requirement that the transferee itself sustain injury as a prerequisite to suit.

OUTCOME: The judgment was reversed and remitted to the intermediate court.

CORE TERMS: transferee, certificates, buyer, transferor, indenture, legislative history, summary judgment, collateral, holders, automatically, seller, vest, transfers rights, right to sue, plain language, automatic stay, fiduciary duty, standing to sue, transferee-plaintiff, bond-related, precondition, outstanding, predecessor, eminently, automatic, champerty, pursuing, wording, remit, lift

LexisNexis(R) Headnotes

Governments > Legislation > Interpretation
[HN1] In all cases requiring statutory construction, appellate courts begin with an examination of a statute's plain meaning.

Securities Law > Blue Sky Laws > Bonds & Debentures
[HN2] See N.Y. Gen. Oblig. Law § 13-107.

Securities Law > Blue Sky Laws > Bonds & Debentures
[HN3] The wording of N.Y. Gen. Oblig. Law § 13-107 makes it eminently clear that the buyer of a bond receives exactly the same claims or demands as the seller held before the transfer. Had the legislature sought to impose on the buyer any precondition to suit, it well could have done so. As the statute reads, however, there is no such requirement.

Securities Law > Blue Sky Laws > Bonds & Debentures
[HN4] N.Y. Gen. Oblig. Law § 13-107 automatically transfers rights to the buyers of bonds and, absent preemption by federal law, courts must give effect to that statute's language.

HEADNOTES

Bonds - Transfer - Rights of Transferee - Transferee Not Required to Demonstrate Its Own Injury as Condition of Suit

General Obligations Law § 13-107, which provides that in the absence of an express writing to the contrary a bond transfer vests in the transferee certain bond-related claims of the transferor, whether or not those claims were known to exist at the time of transfer, does not require that a transferee-plaintiff, before pursuing any such claim, demonstrate its own injury in addition to any harm the transferor sustained prior to the sale. Neither the plain language nor the legislative history of the statute requires that a transferee demonstrate its own injury in order to bring a claim for damages. The wording of the statute makes it eminently clear that a buyer of a bond receives exactly the same "claims or demands" as the seller held before the transfer. Had the Legislature sought to impose on the buyer any precondition to suit, it could have done so.

COUNSEL: *Kasowitz Benson Torres & Friedman LLP,* New York City (*David M. Friedman, Michael C. Harwood* and *Howard W. Schub* of counsel), and *Henry Paul Monaghan,* New York

City, for appellant. The court below improperly ignored the plain meaning of the General Obligations Law. (*Licht v Donaldson, Lufkin, & Jenrette Sec. Corp.*, 100 AD2d 987, 63 NY2d 608; *People v Quinones*, 95 NY2d 349; *Matter of Raritan Dev. Corp. v Silva*, 91 NY2d 98; *In re Nucorp Energy Sec. Litig.*, 772 F2d 1486; *Lowry v Baltimore & Ohio R.R. Co.*, 629 F Supp 532; *LNC Invs. v First Fid. Bank, N.A. N.J.*, 173 F3d 454; *Banque Arabe Et Internationale D'Investissement v Maryland Natl. Bank*, 850 F Supp 1199; *Majewski v Broadalbin-Perth Cent. School Dist.*, 91 NY2d 577; *Roth v Michelson*, 55 NY2d 278; *Finger Lakes Racing Assn. v New York State Racing & Wagering Bd.*, 45 NY2d 471.)

Wachtell, Lipton, Rosen & Katz, New York City (*Marc Wolinsky* and *Jed I. Bergman* of counsel), *LeBoeuf, Lamb, Greene & MacRae, L.L.P.*, New York City and Newark, New Jersey (*Lawrence E. Miller* and *Mark L. LoSacco* of counsel), and *Kaye Scholer LLP*, New York City (*Lester M. Kirshenbaum* and *Gregory R. Fidlon* of counsel), for respondents. I. Bluebird cannot sue the trustees because the federal rule that Trust Indenture Act claims are not automatically assigned controls in this context. (*Matter of Jacob*, 86 NY2d 651; *Kauffman & Sons Saddlery Co. v Miller*, 298 NY 38; *In re Nucorp Energy Sec. Litig.*, 772 F2d 1486; *Lowry v Baltimore & Ohio R.R. Co.*, 629 F Supp 532; *Osofsky v Zipf*, 645 F2d 107; *Murphy v Gallagher*, 761 F2d 878; *Gustafson v Alloyd Co.*, 513 US 561; *Levine v Seilon, Inc.*, 439 F2d 328; *Astor Chauffeured Limousine Co. v Runnfeldt Inv. Corp.*, 910 F2d 1540; *In re Crazy Eddie Sec. Litig.*, 948 F Supp 1154.) II. Bluebird's claims rest on speculation and fail as a matter of law. (*Zuckerman v City of New York*, 49 NY2d 557; *Gonzalez v 98 Mag Leasing Corp.*, 95 NY2d 124; *GTF Mktg. v Colonial Aluminum Sales*, 66 NY2d 965; *United States Fid. & Guar. Co. v Copfer*, 48 NY2d 871; *Lama Holding Co. v Smith Barney*, 88 NY2d 413; *Kenford Co. v County of Erie*, 67 NY2d 257; *Dress Shirt Sales v Hotel Martinique Assoc.*, 12 NY2d 339; *Phillips-Smith Specialty Retail Group II v Parker Chapin Flattau & Klimpl*, 265 AD2d 208, 94 NY2d 759; *25 Fifth Ave. Mgt. Corp. v Ivor B. Clark, Inc.*, 280 App Div 205, 304 NY 808; *Tinelli v Redl*, 199 F3d 603, 531 US 813.)

Meyer, Suozzi, English & Klein, P.C., Mineola (*Bernard S. Meyer* and *Andrew J. Turro* of counsel), for Oaktree Capital Management, LLC and others, amici curiae. Reversal is required to return meaning to General Obligations Law § 13-107 and to restore the benefits of the secondary market in distressed debt. (*Matter of Malpica-Orsini*, 36 NY2d 568; *Matter of Anonymous [St. Christopher's Home]*, 40 NY2d 96; *Bright Homes v Wright*, 8 NY2d 157; *Matter of Metropolitan Life Ins. Co. v Boland*, 281 NY 357; *Matter of Chase Natl. Bank v Guardian Realties*, 283 NY 350; *Matter of Tormey v LaGuardia*, 278 NY 450; *People ex rel. Newman v Foster*, 297 NY 27; *Matter of Hogan v Supreme Ct.*, 281 NY 572; *Pravin Banker Assoc. v Banco Popular del Peru*, 895 F Supp 660, 109 F3d 850; *Zack Metal Co. v International Nav. Corp. of Monrovia*, 112 AD2d 865, 67 NY2d 892.)

James D. McLaughlin, New York City, and *Roberta Kotkin* for American Bankers Association and another, amici curiae. I. Reversal of the opinion below would have dire consequences to the indenture trustee business, its customers and the public. II. The opinion below is consistent with federal law structure of an indenture trustee's duties, obligations and liabilities. (*Meckel v*

Continental Resources Co., 758 F2d 811; *Elliott Assoc. v J. Henry Schroder Bank & Trust Co.,* 838 F2d 66.) III. A construction of the General Obligations Law at odds with the Trust Indenture Act would compel the preemption of state law. (*McCulloch v Maryland,* 4 Wheat [17 US] 316; *Fidelity Fed. Sav. & Loan Assn. v De la Cuesta,* 458 US 141; *Jones v Rath Packing Co.,* 430 US 519; *Hines v Davidowitz,* 312 US 52.)

JUDGES: Opinion by Judge Rosenblatt. Chief Judge Kaye and Judges Smith, Levine, Ciparick, Wesley and Graffeo concur.

OPINION BY: ROSENBLATT

OPINION

[*458] [*182] [**673]** Rosenblatt, J.

This appeal involves the proper interpretation of General Obligations Law § 13-107. That section provides that in the absence of an express writing to the contrary, a bond transfer vests in the transferee certain bond-related claims of the transferor, whether or not those claims were known to exist at the time of transfer. The question before us is whether, before pursuing any such claim, a transferee-plaintiff must demonstrate *its own* injury in addition to any harm the transferor sustained prior to the sale. Because the Appellate Division erroneously inserted such a requirement into the statute, we reverse and remit the matter for further proceedings consistent with this Opinion.

[*459] I.

In March 1987, Continental Airlines and four defendant trustees entered into a Secured Equipment Indenture and Lease Agreement, pursuant to which Continental issued a $ 350 million debt offering secured by collateral in the form of jet aircraft and spare engines. The offering consisted of three series of certificates, with first series holders having priority over the second series holders, who in turn had priority over the third series holders. The holders of each series were represented by a separate trustee, and another trustee monitored the overall interest in the collateral.

In December 1990, Continental filed for chapter 11 bankruptcy protection. At the time, the outstanding obligation on the certificates was over $ 180 million. As a result of a decline in the value of the collateral, the trustees sought "adequate protection" payments under section 363 (e) of the Bankruptcy Code (11 USC § 363 [e]) and later sought to lift the automatic stay (*see* 11 USC § 362). The Bankruptcy Court denied the trustees' motions (*see Matter of Continental Airlines, Inc.,* 146 BR 536 [Bankr D Del 1992]; *Matter of Continental Airlines, Inc.,* 154 BR 176 [Bankr D Del 1993]).

In December 1991, Gabriel Capital, an investment-related limited partnership and predecessor to plaintiff Bluebird Partners, began accumulating Continental's first series certificates. In all, Gabriel and its affiliates acquired some $ 70 million worth of first series certificates for approximately $ 26 million, a discount that reflected Continental's financial woes.

In January 1994, Gabriel formed Bluebird and transferred to it all of the Continental first series certificates. Further, between January 1994 and June 1996, Bluebird purchased an additional $ 40,295,000 worth of Continental second series certificates, presumably to improve **[***183]** **[**674]** its litigation position and make a profit (*see Bluebird Partners v First Fid. Bank,* 94 NY2d 726, 737-738 [2000]). Bluebird paid only $ 644,625 for these certificates.

In February 1994, Bluebird commenced the first of several actions. In that complaint, brought in the United States District Court for the Southern District of New York, Bluebird asserted that the trustees breached their fiduciary duty under state law and under the Trust Indenture Act of 1939 (15 USC § 77aaa *et seq.* [TIA]) by failing to protect the value of the collateral during the bankruptcy proceedings. The District Court dismissed Bluebird's complaint, ruling that with respect to **[*460]** claims asserted under the TIA, a bond transfer does not carry with it the rights of the transferor (including the right to sue an indenture trustee) (*Bluebird Partners, L.P. v First Fid. Bank,* 896 F Supp 152, 156-157 [SD NY 1995], *affd* 85 F3d 970 [2d Cir 1996]). The court determined that Bluebird lacked standing to sue because, having acquired the bonds at a reduced price after the bankruptcy and alleged breach, it was not injured. Further, the court declined to exercise pendent jurisdiction over Bluebird's state law claims.

In March 1997, Bluebird commenced the instant action against the trustees and their respective law firms. Relying on General Obligations Law § 13-107, Bluebird asserted that the trustees' delay in moving for adequate protection and in failing to move to lift the automatic stay constituted fiduciary dereliction. United Jersey Bank (UJB), one of the trustees, moved to dismiss the complaint contending that Bluebird's acquisitions were champertous. Supreme Court denied the motion, but the Appellate Division reversed on champerty grounds and dismissed Bluebird's complaint against UJB.

Based on the Appellate Division's decision, Supreme Court awarded summary judgment to the other trustees. However, in concluding that the champerty allegations raised questions of fact, this Court subsequently reversed the Appellate Division's grant of summary judgment to UJB and reinstated Bluebird's complaint (*Bluebird Partners v First Fid. Bank,* 94 NY2d at 738-739). Following our decision, Supreme Court granted Bluebird's motion for reargument and denied the trustees' motions for summary judgment, enabling Bluebird to pursue its claim that the trustees violated their fiduciary duty. The trustees appealed from Supreme Court's decision.

The Appellate Division reversed and dismissed Bluebird's complaint (279 AD2d 239 [2001]). The court held that General Obligations Law § 13-107 requires that a transferee demonstrate its own injury in order to recover damages and because Bluebird failed to do so, it could not sue the trustees. We now reverse.

II.

Contrary to the conclusion reached by the Appellate Division, neither the plain language nor the legislative history of General Obligations Law § 13-107 requires that a transferee demonstrate its own injury in order to bring a claim for damages. Initially, as [HN1] in all cases requiring statutory construction, we begin with an examination of the statute's plain meaning **[*461]** (*see Palmer v Van Santvoord,* 153 NY 612, 615-616 [1897]; *see also Majewski v Broadalbin-Perth Cent. School Dist.,* 91 NY2d 577, 583 [1998]). [HN2] General Obligations Law § 13-107 states, in relevant part: "Unless expressly reserved in writing, a transfer of any bond shall vest in the **[***184] [**675]** transferee all claims or demands of the transferrer [*sic*], whether or not such claims or demands are known to exist, * * * (b) for damages against the trustee or depositary under any indenture under which such bond was issued or outstanding." (Subd [1].)

[HN3] The wording of General Obligations Law § 13-107 makes it eminently clear that the buyer of a bond receives exactly the same "claims or demands" as the seller held before the transfer. Had the Legislature sought to impose on the buyer any precondition to suit (such as the independent injury requirement interposed by the Appellate Division) it well could have done so. As the statute reads, however, there is no such requirement. Gabriel had standing to sue the trustees before it sold the bonds to Bluebird. General Obligations Law § 13-107 provides that Bluebird, as buyer of those bonds, acquired Gabriel's rights, including the right to sue the trustees.

The legislative history of General Obligations Law § 13-107 supports this conclusion. The Legislature adopted the predecessor to General Obligations Law § 13-107 in 1950 to effect a major change in New York law. Before that, a transfer of bonds did not automatically carry with it existing claims for damages against a trustee; an express agreement was required to transfer those claims (*see Smith v Continental Bank & Trust Co.,* 292 NY 275 [1944]). In enacting the new law, the Legislature sought to bring New York in line with other jurisdictions, including the federal courts, which contemplated the automatic transfer of rights (*see* 1950 Report of NY Law Rev Commn; *Phelan v Middle States Oil Corp.,* 154 F2d 978 [2d Cir 1946]). * Nowhere in the legislative history is there any mention of a requirement that the transferee itself sustain **[*462]** injury as a prerequisite to suit. Given this history, we conclude that the Legislature intended that under General Obligations Law § 13-107 transferees such as Bluebird be allowed to assert the claims that the transferor could have asserted, whether or not the transferees themselves suffered any actual injuries.

* Federal courts in the last 50 years have declined to apply *Phelan*'s automatic assignment of claims rule outside the context of "ensuring the integrity of a court-appointed receiver" (*Bluebird Partners, L.P. v First Fid. Bank,* 85 F3d 970, 975 [2d Cir 1996]). Those courts no longer treat claims as automatically assigned to buyers of bonds (*see id.* at 974-975). Thus, New York's attempt to bring its rule into conformity with other jurisdictions has ironically achieved the opposite result. Whether New York wants to make another attempt at conforming its rule to other jurisdictions or retain it in its present form is a decision for the [HN4] Legislature. General Obligations Law § 13-107 automatically transfers rights to the buyers of bonds and, absent preemption by federal law, we must give effect to that statute's language.

III.

The trustees concede that, contrary to the Appellate Division holding, General Obligations Law § 13-107 does not require plaintiffs to assert any injury independent of the injury to the previous bondholder. They nevertheless argue that they should be granted summary judgment for two other reasons. First, they assert that General Obligations Law § 13-101 directs that General Obligations Law § 13-107 be interpreted to conform to the Trust Indenture Act, and thereby reflect the federal "public policy" of having the claims remain with the bond seller. Second, they argue that the TIA preempts General Obligations Law § 13-107.

The Appellate Division did not address either of these arguments and we decline to decide them in the first instance. In **[***185]** **[**676]** light of our conclusion that a transferee need not demonstrate its own injury to invoke General Obligations Law § 13-107, we remit the matter to the Appellate Division for its consideration of those two issues and any other issue raised but not decided below.

Accordingly, the order of the Appellate Division should be reversed, with costs, and the matter remitted to the Appellate Division, First Department, for further proceedings in accordance with this Opinion.

Chief Judge Kaye and Judges Smith, Levine, Ciparick, Wesley and Graffeo concur.

Order reversed, etc.

Tab 25

Indexed as:

Olympia & York Developments Ltd. (Re)

IN THE MATTER OF the Bankruptcy of Olympia & York Developments Limited, a corporation incorporated under the laws of the Province of Ontario and having its principal place of business in the City of Toronto, in the Municipality of Metropolitan Toronto

[1998] O.J. No. 2114

66 O.T.C. 290

3 C.B.R. (4th) 304

79 A.C.W.S. (3d) 879

Court File No. 97-BK-00161

Ontario Court of Justice (General Division)
In Bankruptcy

Registrar Ferron

May 21, 1998.

(13 pp.)

Company law -- Nature of corporations -- Distinct legal personality -- Lifting the corporate veil -- Contracts by companies -- Bankruptcy -- Claims provable -- Double proof.

This was an appeal by Lyonnais and Deloitte from the disallowance of their claims in the bankruptcy of Olympia & York Developments. Olympia & York Resources was a wholly owned subsidiary of Olympia & York Developments. Both Olympias had gone into bankruptcy. After the bankruptcy of Olympia & York Developments and its subsidiary, Abitibi sold the shares of Abitibi-Price and Gulf that had been pledged to it as security. The trustee disallowed the appellants' on the ground that they were reflections of the single indebtedness of Olympia & York to Abitibi and that therefore to admit both claims would constitute double recovery.

HELD: The appeal was allowed. If Olympia & York Developments were to pay Abitibi under the guarantee, it would not affect its obligation to Olympia & York Resources Credit Corporation under the promissory note. Similarly, if Olympia & York Developments discharged its obligations under the promissory note, the obligation under the guarantee would subsist. Since one payment could not discharge both debts, the claims of Lyonnais and Deloitte did not constitute double claims. There was nothing in this case that would allow the court to disregard Olympia & York Resources Credit Corporation's separate existence from Olympia & York Developments. There was no evidence that Abitibi was misled in loaning funds to the former. The claims of Olympia & York Resources Credit Corporation and Abitibi were separate and distinct. Any debt recovery realized by Abitibi from the sale of shares held as security did not reduce Olympia & York Developments' indebtedness to Olympia & York Resources Credit Corporation.

Statutes, Regulations and Rules Cited:

Corporate Creditors Arrangement Act.

Counsel:

Geoffrey B. Morawetz, for Coopers & Lybrand Limited, trustees of the Estate of Olympia & York Developments Limited.
B. Zarnett, for unsecured creditors of Olympia & York Developments Limited.
R. Chartrand & J. Macdonald, for Credit Lyonnais Canada in its capacity as security agent for Abitibi and Gulf Lenders.

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1 REGISTRAR FERRRON:-- Credit Lyonnais acting as security agent for Abitibi and Gulf Lenders ("A&G") and Deloitte & Touche as trustee of the estate of Olympia & York Resources Credit Corporation ("OYRCC:) appeal the disallowances of their claims in the estate of Olympia & York Developments Limited, ("OYDL"). The disallowances are in the following terms:

> The A&G Disallowance.
>
> "Based on the documents and information provided to the trustee, the claim appears to be based on the same loan transaction and is in respect of the same indebtedness as the claim of Deloitte & Touche Inc., in its capacity as trustee in bankruptcy of Olympia & York Resources Credit Corporation. As such, the claim constitutes a double proof against the estate.
>
> OYRCC Disallowance.
>
> "Based on the documents and information provided to the trustee, the claim appears to be based on the same loan transaction and is in respect of the same indebtedness as the claim of Credit Lyonnais Canada, acting as security agent for the A&G Lenders. As such, the claim constitutes a double proof against the estate and the claim is disallowed in full."

> "In the alternative, if the claimant has a claim, by the Order of Mr. Justice Farley, dated February 13, 1997, and April 14, 1997, the claimant must account for payments received on the realization of assets held as security in the sum of U.S. $1,281,281,018.00. Accordingly, the claimants claim will be disallowed, in part, to the extent of the realization on security."

2 The trustee is prepared to allow one claim, that is the claim of the principal creditor A&G Lenders, in an amount limited by the deduction order of Farley, J. referred to in the trustee's disallowance. OYRCC is the wholly-owned subsidiary of OYDL. Both OYRCC and OYDL are in bankruptcy. OYDL commenced negotiations with the A&G Lenders in 1988 for credit facilities. In connection therewith the corporate holdings of OYDL were re-organized resulting in the corporate structure described in the closing agenda documents (Exhibit A to the affidavit of Irwin Berl Nadler sworn February 26, 1982.) The re-organization was completed in or about March 1989 and the loans referred to resulting from the negotiations in 1988 were advanced in March 1989. The credit facility was in the amount of 2.5 billion dollars US and was made available not to OYDL but to OYRCC its subsidiary. I think that there is now no serious dispute that all the funds under the terms of the loan agreements were made available to OYRCC and were so paid either directly to it or indirectly to OYDL on its instructions.

3 In the re-structuring of the OYDL family of companies OYRCC became the sole shareholder of all the shares of O & Y Resources Corporation which, in turn, held all the shares of O & Y Energy Holdings Limited and O & Y Forest Products Holdings Limited. O & Y Energy Holdings Limited owned the majority (70%) of the issued and outstanding shares of Gulf Canada Resources Limited and O & Y Forest Products Holdings Limited owned 79% of the issued and outstanding shares of Abitibi-Price Incorporated. In passing it should be noted that the corporate profile was again altered by the plan implemented under the Companies Creditors Arrangement Act in 1993.

4 In order to secure the advance of funds under the loan agreements by A&G Lenders to OYRCC the latter company delivered to A&G Lenders the following:

1. A Pledge Agreement granting the security agent, Credit Lyonnais, (the Appellant) the first security interest in all the shares of O & Y Resources Corporation;
2. Guarantees from O & Y Resources Corporation guaranteeing the advances by A&G Lenders to OYRCC;
3. An agreement from O & Y Resources Corporation pledging to A&G Lenders its interest in the shares of O & Y Energy Holdings Limited and O & Y Forest Products Holdings Limited; and
4. Four separate guarantees of OYDL with respect to the four advances to OYRCC made by A&G Lenders. Each guarantee contained, inter alia, a clause relieving A&G Lenders of the necessity of exhausting its remedies against OYRCC before being entitled to payment by OYDL in the event of default and a clause which strictly limited OYDL's right of subrogation.

5 After the bankruptcy of OYDL and OYRCC, A&G Lenders sold the shares in Abitibi-Price Incorporated pledged to it and certain of the Gulf Canada Resources Limited shares and applied the proceeds to its indebtedness. The issue of whether the proceeds from the disposition of those shares and the recovery from other assets by A&G could be deducted from A&G Lenders' claim against the estate of OYDL is pending before the Court of Appeal. The same issue arises in this appeal in respect of the claim of OYRCC against OYDL. The trustee of OYDL argues that the same reasoning which led to the orders of April 13 and 14, 1997, should apply to OYCC's and claim that the claim of that company should be reduced regardless of the issue of double proof.

6 The advances by A&G Lenders to OYRCC totalling 2.5 billion dollars were subsequently on-loaned by the subsidiary to its parent OYDL. Whether a resulting genuine debtor/creditor relationship between OYDL and OYRCC in fact exists or whether, having regard to the close corporate relationship which existed between the parent and the subsidiary, the circumstances surrounding the genesis of the credit facility, the terms of re-payment and the evidence of the loan, such a relationship could not have arisen is the central issue in this appeal.

7 The evidence of the indebtedness put forward in the claim by OYRCC in the estate of OYDL consists of:

1. A Promissory Note for $2.5 billions dollars U.S;
2. Repayment agreement; and
3. A note in the January 31, 1991 financial statement of OYRCC which, after reciting the credit facility extended to it by A&G Lenders stated,

> "The proceeds were invested in a note receivable from Olympia & York Developments Limited maturing on the same date as the loan and bearing interest at all times equal to the aggregate of ...".

8 The wording of the note is interesting. The word "invested" suggests more than just a passing on of funds through a conduit pipe, and the fact that the loan to OYDL is so connected to the loan of the A&G Lenders to OYRCC, might be considered to give some credence to the suggestion that both loans are one and the same debt.

9 The claim of OYRCC is, as mentioned, founded on a promissory note given by OYDL to OYRCC and that of A&G Lenders on a guarantee of the OYRCC liability by OYDL. No one has questioned the formal validity of these instruments and no one has denied their respective claims. That is, in respect of the claim of OYRCC, the trustee does not say that its claim does not exist but that its alleged indebtedness is a mere reflection of the indebtedness of OYDL to the A&G Lenders and that because of this it is not entitled to a dividend based on its claim. In other words, the trustee of OYDL alleges that, notwithstanding the claims of OYRCC and the A&G Lenders are evidence by different instruments they are in reality the same debt and to admit both claims would constitute a double proof.

10 The rule against double proof developed from the law of suretyship and, in its fundamental form, holds that a guarantor's claim against the principal debtor for indemnity is the same debt as that of the unpaid principal creditor and that to allow both to claim in the estate of the principal debtor would result in the payment of two dividends on the same debt and accordingly, contravene the central tenet of all bankruptcy law, that is, equality among creditors of the same class.

11 Clearly, the situation in the case before me is not a surety situation in the sense used in the cases dealing with double proof, notwithstanding that all the actors, that is, surety, principal debtor and principal creditor, are present. In Barclays Bank Limited v. TOSG Trust Fund Limited [1984] 1

All. E.R. 268, Oliver, L.J., suggested a test for discovering whether the rule has been contravened. He said at page 637:

> "Now, if, as in my judgment these cases show, the true rule is that there are not to be two dividends in respect of what is in substance the same debt, I can see no logical justification for seeking to fix the position at the commencement of the insolvency. One has, as it seems to me, to look at the position at the point at which the dividend is actually about to be paid and to ask the question then whether two payments are being sought for a liability which if the company were solvent, could be discharged as regards both claimants by one payment."

12 The application of that test in the case before me does not result in an affirmative answer. If OYDL were to pay the A&G Lenders under the guarantee this could not affect the loan due to OYRCC under its note. Similarly, if OYDL were to pay OYRCC and thus discharge the Promissory Note, the obligation under the guarantee would still exist and be enforceable. One payment would not discharge both claimants debts against OYDL and, accordingly, on the test suggested by Oliver, L.J. the rule is not offended.

13 It seems to me then, that in order for the trustee of OYDL to be able to say that both claims in issue are but different sides of the same debt, it must be shown that OYRCC has no separate corporate existence. In this respect it is true OYRCC is very closely connected with OYDL, that it has the same Board of Directors as its parent, that its income is derived principally from the interest paid by OYDL under the Promissory Note and that it has few creditors. Yet as Robert Walker, J. pointed out in re: Polly Peck International PLC [1996] 2 All. E.R. 433, at 447 quoting from Adams v. Cape Industries PLC, "save in cases which turn on the wording of particular statutes or contracts the court is not free to disregard the principal of Salomon v. Salomon & Co. Ltd., merely because it considers that justice so requires."

14 The case of Polly Peck International PLC (supra) deals with a fact situation remarkably similar to the facts of the case before me. There the court considered in great detail the points raised in this appeal. It was argued in various forms that because of the closeness of the parent and subsidiary and the fact that the on-lending by the subsidiary and the parent was so much a part of the principal loan arrangements which in fact funded the on-lending, that the subsidiary should be considered to lack a separate corporate personality and the loan by the lenders to the subsidiary should be considered to be a loan directly to the principal.

15 It was put this way at p. 441.

> "Having investigated PPIF's claim (the subsidiary) in the scheme, the supervisors have become concerned that, due to what appeared to them to be the lack of separate corporate personality on the part of PPIF, the court might hold that the corporate veil should be lifted so preventing PPIF from maintaining a claim separate from the bond holders' claims against PPIF (the parent company). Alternatively, even if PPIF is entitled to a separate claim, such claim might be held to arise out of what is, in substance, the same debt (being the debt to the bond holders), so that PPIF would be barred from receiving a dividend in addition to that payable to the bond holders by the rule against double proof."

16 The court carefully considered the factors mentioned and concluded that their existence could not justify the court in disregarding the separate corporate existence of subsidiary."

17 There is nothing in the case before me which would, similarly, allow me to disregard the separate corporate existence of OYRCC. If one acceded to the position taken by the trustee of OYDL and concluded that OYRCC's loan to its parent company was of no significance, the transaction involving the loan from A&G Lenders would have to be seen as something of a sham and that A&G Lenders were misled in loaning funds to OYRCC which until this point no one denied. Had a corporate existence separate and distinct from its parent including the capacity to borrow and loan funds.

18 Finally, the court in the Polly Peck case, quoted from McEntire v. Crossley Bros. Ltd. [1895] A.C. 457, where the court said:

> "The substance of the agreement must ultimately be found in the language of the contract itself. The duty of the court is to examine every part of the agreement, every stipulation which it contains, and to consider their mutual bearing upon each other; but it is entirely beyond the function of the court to disregard the plain meaning of any term of the agreement unless there can be found within its four corners other language and other stipulations which necessarily deprive such term of its primary significance."

19 I have examined agreements between the various parties and in my opinion it is clear that OYRCC has a claim based upon a Promissory Note distinct and separate from the claim of the A&G Lenders on its guarantees. There is nothing in the documentation or the dealings between the parties should lead me to conclude that OYRCC is not a separate and distinct entity which on loaned its own funds to OYDL on the strength of a Promissory Note for which it is now entitled to claim payment. Accordingly, both claims which are the subject of these appeals should be admitted in the estate of OYDL. Moreover, the claim of OYRCC being quite separate and distinct from the claim of A&G Lenders must be admitted as filed. The funds received by A&G Lenders in its realization procedures from, among other sources, the pledge of shares taken in connection with its loan cannot be considered in order to reduce the claim of OYRCC.

20 I need hardly point out that the claim of A&G Lenders while admitted must be in the reduced amount pending the determination of the quantum issue before that court.

21 Costs may be spoken to.

REGISTRAR FERRON

qp/s/alp

Indexed as:

Olympia & York Developments (Re)

IN THE MATTER OF the Bankruptcy of Olympia & York Developments Limited, a corporation incorporated under the laws of the Province of Ontario and having its principal place of business in the City of Toronto, in the Municipality of Metropolitan Toronto

[1998] O.J. No. 4903

80 O.T.C. 369

4 C.B.R. (4th) 189

84 A.C.W.S. (3d) 15

Court File No. 97-CL-000161

Ontario Court of Justice (General Division)
In Bankruptcy

Blair J.

November 26, 1998.

(30 pp.)

[Ed. note: A Corrigendum was released by the Court December 17, 1998 and the correction has been made to the text.]

Bankruptcy -- Claims provable -- What constitutes -- Creditors -- Rights, effect of bankruptcy of debtor -- Claims -- Severability -- Practice -- Evidence and proof -- Appeals -- From registrar's decision, nature of appeal -- Double proof.

Appeal by the Trustee in Bankruptcy of Olympia and York Developments Limited from a decision by the Registrar that a claim by York's creditor, A&G Lenders, and the claim of the Olympia and York Resources Credit Corporation did not constitute a double proof. Both of these claims arose out of a jumbo loan transaction. Resources had been incorporated for the sole intent of giving effect to the Jumbo Loan. The Registrar found that Resources had a separate corporate existence from York, that a genuine debtor and creditor relationship did exist between York and Resources, and that one payment would not discharge both claimants' claims against York. The Trustee argued that allowing both claims amounted to a double proof. It was admitted that the A&G Lenders comprised substantially all of the creditors of Resources. However, the Trustee for Resources had filed a proof of claim in the York bankruptcy. York's Trustee was prepared to acknowledge one claim, either by Resources or the A&G Lenders, and argued that there was in substance only one debt. The respondents argued that the claim by Resources on the York debt and the claim of the A&G Lenders on the guarantee of the Resources debt were not claims in relation to the same debt.

HELD: Appeal allowed. The order of the Registrar was set aside. An order was granted directing that the claims of the A& G Lenders and of Resources against the estate of York constituted a double proof against the estate. There was a declaration that the A&G Lenders and Resources were entitled to rank for payment of one dividend out of the estate of York. The loan from the A&G Lenders to Resources and the continuing loans of the same funds from Resources to York were in substance the same debt. There was an inseparable nexus between the obligation of Resources to pay the A&G Lenders and the obligation of York to make payments to Resources. The Registrar erred in law by finding that the existence of a separate corporate entity and a debtor and creditor relationship between the parent and the subsidiary meant that the same-debt-in-substance test could not be met.

Statutes, Regulations and Rules Cited:

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

Counsel:

Geoffrey B. Morawetz and Benjamin T. Glustein, for Pricewater-house Coopers Inc. (formerly Coopers & Lybrand Limited), in its capacity as the trustee in bankruptcy of Olympia & York Developments Limited.
Benjamin Zarnett, PricewaterhouseCoopers Inc., (fomerly Coopers & Lybrand Limited, in its capacity as the trustee in bankruptcy of Olympia & York Developments Limited.
John A. MacDonald and Arthur Peltomaa, for Credit Lyonnais Canada, in its capacity as security agent for the A&G Lenders, and Deloitte & Touche, in its capacity as trustee in bankruptcy of Olympia & York Resources Credit Corporation.

BLAIR J.:--

I. OVERVIEW AND BACKGROUND

Overview

1 The issues on this appeal turn on what is known as the rule against double proof in bankruptcy matters.

2 Olympia & York Developments Limited ("OYDL") and Olympia & York Resources Credit Corporation ("OYRCC") are bankrupt corporations.[1] OYRCC is a wholly owned subsidiary of OYDL created for the single purpose of receiving the sum of US $2.5 billion by way of what was termed a "Jumbo Loan" from a syndicate of lenders known as the "A&G Lenders". Immediately upon receipt, the monies were advanced by OYRCC to OYDL, which gave back a Promissory Note and entered into a Repayment Agreement with OYRCC. OYDL also guaranteed the OYRCC indebtedness to the A&G Lenders.

3 It is admitted that the A&G Lenders comprise substantially all of the creditors of OYRCC. In fact, they are the only creditors who have filed proofs of claim in the OYRCC bankruptcy. All of the inspectors in that bankruptcy are representatives of the A&G Lenders.

4 Deloitte & Touche, the trustee in bankruptcy for OYRCC, has filed a proof of claim in the OYDL bankruptcy for the principal amount of the loan -- which remained outstanding in full at the time of the insolvency proceedings -- together with interest. At the same time, the A&G Lenders have also filed a proof of claim in the OYDL bankruptcy, based upon the OYDL guarantee of the OYRCC indebtedness, together with interest.

5 OYDL's Trustee disallowed the claims on the ground that they constitute a double proof of claim against the estate for the same debt. It was, and is, prepared to acknowledge one claim, by either OYRCC or the A&G Lenders. The amount the Trustee is prepared to acknowledge is the sum of $1,759,108,979 (Cdn), representing the outstanding principal on the Jumbo Loan less the sum of $1,281,281,018 (Cdn) recovered by the A&G Lenders on security pledged to it to guarantee the Jumbo Loan by certain OYRCC subsidiaries.[2]

6 Both the A&G Lenders and the Trustee in Bankruptcy of OYRCC appealed the disallowances to the Registrar in Bankruptcy. On May 21, 1998, Registrar Ferron allowed the appeals, Re Olympia and York Developments Ltd., [1998] O.J. No. 2114. OYDL's Trustee now appeals from the decision of Registrar Ferron, and seeks,

(a) an Order setting aside the decision of the Registrar;
(b) an Order that the claims of the A&G Lenders and of OYRCC against the estate of OYDL ("the Claims") constitute a double proof against the estate;
(c) a declaration that the A&G Lenders and OYRCC may rank for payment of one dividend out of the estate of OYDL based on a claim in the sum of $1,759,108,979 (Cdn); and,
(d) costs.

Background

7 In December 1988, OYDL and the A&G Lenders began negotiations in respect of what was to become the $2.5 billion (U.S.) loan facility. A commitment letter from Credit Lyonnais to OYDL, dated December 1988, set out the initially proposed terms. The borrower for purposes of the loan facility was to be a wholly owned subsidiary of OYDL and OYDL was to guarantee the Loan. The proposal was that the Loan Agreement and other documents would contain covenants and other provisions "as are usual in Olympia & York loan agreements". The commitment letter concluded by saying that Credit Lyonnais was "very pleased to have this opportunity to provide this facility to Olympia & York and [looked] forward to the continuation of [their] mutually beneficial relations".

8 The negotiations eventually ripened into the Jumbo Loan transaction -- or, more accurately, series of transactions.[3] Except for US $500 million which was remitted directly to OYDL by one of the lenders upon the direction of OYRCC, the funds were advanced by the A&G Lenders to

OYRCC. OYRCC, in turn and on the same day, "onloaned" the monies to OYDL. At the end of the day, OYDL had a loan facility of US $2.5 billion.

9 In exchange, OYDL (a) gave its guarantee of the OYRCC indebtedness to the A&G Lenders (the "OYDL Guarantee") not just as guarantor but also as principal debtor, (b) agreed to maintain a current value net worth of at least US $2.5 billion throughout the life of the facility, (c) executed a Promissory Note in the principal amount of US $2.5 billion in favour of OYRCC, and (d) entered into a Repayment Agreement in that regard with OYRCC. Apart from the OYDL Guarantee, the central underlying security which the A&G Lenders received from the Jumbo Loan consisted of a pledge of the shares that OYDL held (indirectly through subsidiaries) in Abitibi Price Inc. ("Abitibi") and in Gulf Canada Resources Limited ("Gulf").

10 The Jumbo Loan arrangements were somewhat complex, and had their business and tax driven aspects. For a schematic representation of the transaction, reference may be made to the diagram which is attached as Schedule "A" to these Reasons. In narrative terms, the specific arrangements were as follows:[4]

(a) the shares of Abitibi and Gulf, formerly held by a number of corporations in the O&Y Group would be transferred to Olympia & York Forest Holding Limited ("Forest") and Olympia & York Energy Holdings Limited ("Energy"), respectively;
(b) the shares of Forest and of Energy would be wholly owned by A&G Resources Corporation ("A&G Resources");
(c) the shares of A&G Resources would be wholly owned by OYRCC;
(d) the shares of OYRCC would be wholly owned by OYDL;
(e) all existing loans secured prior to that date by Abitibi and Gulf shares owned by the O & Y Group would be repaid in an amount sufficient to release those shares from existing security;
(f) the A&G Lenders would advance the Jumbo Loan;
(g) the A&G Lenders would take indirect security over the Abitibi and Gulf shares by taking a pledge of the shares of A&G Resources from OYRCC;
(h) A&G Resources would (i) guarantee OYRCC's obligations to the A&G Lenders, (ii) provide a negative pledge in respect of the Abitibi and Gulf shares held by Forest and Energy respectively, and (iii) pledge the shares of Forest and Energy in favour of the A&G Lenders;
(i) OYDL would obtain the use of the funds advanced; and,
(j) OYDL would guarantee the obligations of OYRCC to the A&G Lenders.

11 In accordance with the agreements, OYRCC and its wholly owned subsidiary, A&G Resources, and its wholly owned subsidiaries, Forest and Energy, were all incorporated under the Business Corporations Act (Ontario). OYRCC is a single purpose subsidiary of OYDL, incorporated for the sole intent of giving effect to the Jumbo Loan. It has no source of income other than a 1/16th percentage spread on the interest rate paid by OYRCC to the A&G Lenders. Its only asset, apart from the shares of A&G Resources (which were pledged to the A&G Lenders as security for the Jumbo Loan), is its claim against OYDL. The A&G Lenders, as I have already noted, are substantially the only creditors of OYRCC.

12 The terms of the Jumbo Loan, as between OYRCC and the A&G Lenders are set out in four separate Term Loan Agreements (one for each applicable lender or syndicate of lenders), and, symmetrically, OYDL provided four separate guarantees of OYRCC's obligations under the Jumbo Loan (collectively, "the OYDL Guarantee"). As between OYRCC and OYDL, the transactions are evidenced by the Promissory Note and the Repayment Agreement.

13 The Term Loan Agreements reflect the loan transaction as between the Borrower, OYRCC, and the particular lender or syndicate of lenders in question. They do not refer specifically to the back-to-back loan from OYRCC to OYDL. However, their provisions do reflect a connection with the OYDL Guarantee and with the security afforded by the pledge of the A&G Resources shares (and, indirectly, the pledge of the Abitibi and Gulf shares). These provisions include,

* cross-default clauses (a default under the OYDL Guarantee is a default under the Term Loan Agreements; the insolvency of OYDL is a default under the Terms Loan Agreements);
* a term that the Lenders must consent in writing to any amendment or waiver of any provision not only of the Term Loan Agreements but also of any document referred to therein (e.g., the OYDL Guarantee) and, in addition, must consent in writing to "any departure by the Borrower or any other O&Y Corporation"[5] which is a party to such a document from the terms of such a document; and, in this latter connection specifically, includes,
* a clause requiring written Lender consent to any agreement "to a reduction in the Required Net Worth (as that term is defined in the [OYDL] Guarantee").

14 The "Required Net Worth (as that term is defined in the [OYDL] Guarantee") is a reference to the covenant of OYDL that its net worth would not fall below US $2.5 billion, i.e. the amount of the Jumbo Loan advance.

15 The contractual arrangements between OYRCC and OYDL reflect an integration with the Term Loan Agreements. The Repayment Agreement, the Promissory Note and the Term Loan Agreements are all dated on March 21, 1989, the same day the back-to-back loans were advanced. A reading of the Repayment Agreement and the Promissory Note together demonstrates that payments by OYDL under the Promissory Note and payments by OYRCC under the Term Loan Agreements are interrelated. For instance, the preamble to the Repayment Agreement states:

> AND WHEREAS it is the intention of OYDL and [OYRCC] that the unpaid principal amount of the Note shall at all relevant times be equal to the aggregate unpaid principal amounts of the Reference Tranches (as defined in the Note)[6].

16 The Promissory Note provides that the interest rates payable and the timing of the interest payments by OYDL, to OYRCC under the Promissory Note are a function of the interest rates payable by OYRCC under the Term Loan Agreements. The interest rate payable by OYDL to OYRCC is 1/16th% greater than the rate payable by OYRCC to the A&G Lenders. Moreover, the Note also stipulates that OYDL is obligated to pay additional sums to OYRCC that OYRCC itself may be required to pay under the Term Loan Agreements for such things as additional interest owing on account of late payments of principal or amounts owing with respect to an indemnity given to the A&G Lenders by OYRCC for costs incurred as a result of default.

17 Most significantly for purposes of the Appellant's argument here, sections 3 and 4 of the Repayment Agreement specify that:

> 3. If it becomes known to [OYRCC] that the whole or any part of the principal amount of any Reference Tranche will be paid by it or will become or has become due and payable by it pursuant to [certain provisions in the Term Loan Agreements], then [OYRCC] shall so notify OYDL to the extent that notice of the particulars of such event has not already been given by it pursuant to [another provision of the Term Loan Agreement].
> 4. OYDL shall make payments of principal under the Note to [OYRCC] at such time or times and in such amounts as payments of principal are made by [OYRCC] under the Term Loan Agreements. (emphasis added)

The Registrar's Decision

18 Registrar Ferron held that the two claims did not constitute a double proof. In doing so, he focussed on the following factors as of particular importance (with the results indicated):

> (a) whether "a resulting genuine debtor/creditor relationship between OYDL and OYRCC in fact exist[ed] or whether, having regard to the close corporate relationship which existed between the parent and the subsidiary, the circumstances surrounding the genesis of the credit facility, the terms of repayment and the evidence of the loan, such a relationship could not have arisen" (the Registrar found that a genuine debtor/creditor relationship did exist);
> (b) whether one payment would discharge both claimants' debts against OYDL (he held it would not);
> (c) whether OYRCC had a separate corporate existence (he found that it did).

19 With respect to his finding on the last factor, the Registrar relied on an English decision, Re Polly Peck International plc (in administration) [1996], 2 All E.R. 433 (Ch. Div.) ("Polly Peck"), a case with facts similar to the case at bar.

Positions of the Parties

20 The Respondents argue that the interrelationship which OYDL and OYRCC have set up between the Repayment Agreement, the Promissory Note and the Term Loan Agreements is irrelevant to the proof of claim issue and of no Concern to the A&G Lenders. They contend that there were two separate loans and thus, there are two separate debts. They argue that the Registrar correctly applied the rule against double proof in bankruptcies by concluding that the rule did not apply because the claim of OYRCC (on the OYDL debt) and the claim of the A&G Lenders (on the guarantee of the OYRCC debt) are not claims in relation to the same debt. Furthermore, he properly relied upon and applied the principles set out in Polly Peck.

21 The Trustee of OYDL submits that the Registrar erred in concluding that the OYRCC claim and the A&G claim did not amount to claims for the same debt twice over, thereby constituting a double proof. He says the Registrar misconstrued or failed to consider the constating documents relating to the Jumbo Loan and in particular, the provisions of the Promissory Note and the Repayment Agreement cited earlier in these Reasons. The Registrar erred in requiring a finding that OYRCC had no real separate corporate existence or that there was no genuine debtor/creditor relationship between OYDL and OYRCC before he could find that the claims were based on the same debt. The Trustee states that the substance of the transaction, not the form counts and here there is in substance only one debt, namely the US $2.5 billion Jumbo Loan.

II. LAW AND ANALYSIS

Standard of Review

22 An appeal from the Registrar in Bankruptcy is a true appeal, and not a hearing de novo. The appellant must satisfy this Court that the Registrar arrived at an incorrect result in law. Rosenberg J. summarized this standard of review in the following fashion, in Re Kenny (1997), 149 D.L.R. (4th) 508 (Ont. Gen. Div.), at pp. 514-515:

> An appeal under s. 192(4) of the BIA from an "order" of a Registrar is a true appeal and not a hearing de novo. Accordingly, the appellant must satisfy the court that the Registrar erred in principle or in law in the way he has applied or exercised his discretion or that he omitted the consideration of, or misconstrued some fact (citations omitted).

The Rule Against Double Proof

23 The rule against double proof in bankruptcy matters prohibits two proofs of claim in the same estate for the same debt. That the two claims may be based on separate contracts is of no matter, provided they are in respect of the same debt. Sir G. Mellish L.J. put the concept very succinctly in Re Oriental Commercial Bank; Ex parte European Bank (1871), 7 L.R. Ch. App. 99, where he stated (at pp. 103-104):

> [T]he true principle is, that there is only to be one dividend in respect of what is in substance the same debt, although there may be two separate contracts. (Emphasis added)

24 See also, Barclays Bank Ltd. v. TOSG Trust Fund Ltd., [1984] 1 All E.R. 628 (C.A.), at pp. 636-637, affirmed on different grounds [1984] 1 All E.R. 1060 (H.L.); Houlden & Morawetz, Bankruptcy and Insolvency Law of Canada 3rd ed., at paragraph G-40; Re Melton; Milk v. Towers [1918] 1 Ch 37, at p. 47.

25 There is a reason for this rule. It was developed to ensure the pari passu distribution of the assets of the bankrupt on a pro rata basis amongst the unsecured creditors -- the central tenet of bankruptcy legislation.[7] In the words of Oliver L.J. in Barclays Bank, supra, at p. 653:

> p. 653 ... The purpose of the rule is, of course, to ensure pari passu distribution of the assets comprised in the estate of an insolvent in pro rata discharge of his liabilities. The payment of more than one dividend in respect of what is in substance the same debt would give the relevant proving creditors a share of the available assets larger than the share properly attributable to the debt in question.

26 The Parties do not disagree as to the foregoing statement of the rule against double proof, or as to the rationale underlying it. They simply disagree as to its application in the circumstances of this case.

The Authorities

27 Whether or not a "double proof" has been lodged with respect to what is in substance the same debt is a matter to be determined on the facts of each individual case. From my understanding of the authorities, the underlying principles which should frame this analysis in group corporate insolvency situations may be summarized as follows. First, where the interests of different creditors of the various corporate entities come into play, the courts should be careful to respect the axiom regarding separate corporate existence enunciated by the House of Lords in Salomon v. Salomon [1897] A.C. 22. At the same time, however, the courts should strive to give effect to the ethic of pari passu distribution and to the fundamental underlying principle of justice as between all creditors. Balancing these sometimes competing principles calls for a consideration of the true nature of the transaction, and the relationship between, and the presumed common intention of the parties. Finally, in seeking a just solution in novel situations the court may engage in an analysis which, while not ignoring the separate corporate being of the members of the corporate group, nonetheless transcends the mere legal fact of that existence. See in particular, as to the foregoing summary, Ford & Carter Ltd. v. Midland Bank Ltd. (1979) 129 NLJ 543, per Lord Wilberforce at p. 544; Polly Peck, supra, at pp. 444-445; and Barclays Bank, supra, per Kerr L.J., at pp. 645 and 647-648, and per Oliver L.J. at pp. 636 and 640.

28 In insolvency cases -- as in, for example, tax cases -- the court will not allow technicalities to obscure the essence of the transaction. This includes, in my opinion, not being either too dazzled or too immobilized by intricate corporate footwork which is designed to accomplish legitimate business and tax purposes, but which may not be as directly dispositive in resolving insolvency cases. This point was emphasized by Oliver L.J. in Barclays Bank at pp. 640 and 636:

> p. 640: This argument is perfectly intelligible, and indeed almost unanswerable if one regards the payment of those customers who were paid to TOSG as an entirely separate transaction isolated from any other arrangement made with the agency, but to my mind it ignores the reality. If one is to look for analogies, it is, I think, essential first to analyse what the total effect of the arrangements was and the reasoning behind them. All the cases stress that in relation to the rule against double proofs it is the substance and not the form that is to be regarded (see eg Re Melton, Milk v. Towers [1918] 1 Ch 37, at 60, [1916-17] All ER Rep 672 at 683, Re Oriental Commercial Bank (1871) LR 7 Ch App 99). (emphasis added)
>
> p. 636: I accept the submission of counsel for TOSG and the agency that the rule ought more properly to be styled the rule against double dividends, for its object is to absolve the liquidator from paying out two dividends on what is essentially the same debt ... (emphasis added)
>
> Second, it is, I think, a fallacy to argue ... that, because overlapping liabilities result from separate and independent contracts with the debtor, that, by itself, is determinative of whether the rule can apply. The tests is in my judgment a much broader one which transcends a close jurisprudential analysis of the per-

sons by and to whom the duties are owed. It is simply whether the two competing claims are, in substance, claims for payment of the same debt twice over. (Italics in original; underlining added)

Application of the Rule in the Circumstances of this Case

29 To adopt the language of Oliver L.J., then, what is "the total effect of the arrangements ... and the reasoning behind them" in the circumstances of this case? In my view, a careful reading of all of the documentation including in particular, the Repayment Agreement, supports the conclusion that the "loan" from the A&G Lenders to OYRCC and the "on-loaning" of the same funds from OYRCC to OYDL are in substance the same debt.

30 Notwithstanding the complex structure of the arrangement from a commercial/corporate/tax perspective, the economic and financial reality of the Jumbo Loan deal -- its substance, if you will -- is simple and clear: a US $2.5 billion loan facility was lent by the A&G Lenders to OYDL on the strength of (a) the OYDL covenant and, (b) the security of the Abitibi and Gulf shares. In my opinion, in the particular circumstances of this case, the legal substance of the transaction is to he same effect[8].

31 The documents in this case demonstrate that, from the perspective of the A&G Lenders, the loan facility was backed by the OYDL covenant and by the security of the Abitibi and Gulf shares. Moreover, while the funds were being advanced, technically, to OYRCC, it is clear from the Credit Lyonnais commitment letter that the lenders were providing the facility to OYDL. The A&G Lenders were not privy to the internal fashion in which the Olympia & York corporations structured the deal. Nevertheless, the structure suggests a closely intended connection between the obligation of OYDL to make payments to OYRCC and the obligation of OYRCC to make payments to the A&G Lenders.

32 In this latter regard, particular reference may be made to the requirement in the Repayment Agreement that payments of principal under the Note are to be made "at such time or times and in such amounts as payments of principal are made by [OYRCC] under the Term Loan Agreements". Furthermore,

* The funds were initially advanced by the A&G Lenders and "on-loaned" to OYDL on the same date that the Term Loan Agreements, the Promissory Note, the Repayment Agreement were executed;

* OYRCC was incorporated for the sole purpose of receiving the funds from the A&G Lenders and forwarding those funds to OYDL, and, apart from the receipt of the 1/16th% spread on the interest rate, OYRCC did not transact any other business;

* the timing and rate of interest payments under the Promissory Note were directly tied to the interest payments to be paid by OYRCC under the Term Loan Agreements;

* OYDL agreed under the Promissory Note to pay additional sums to OYRCC that may be payable by OYRCC to the A&G Lenders in certain circumstances such as default in interest; and, finally,

* the Repayment Agreement states in its recitals that it was the intention of OYDL and OYRCC that the unpaid principal amount of the Promissory Note would be equal to the aggregate unpaid principal amounts under the Term Loan Agreements.

33 There is thus an "inseparable nexus"[9] between the obligation of OYRCC to pay the A&G Lenders and the obligation of OYDL to make payments to OYRCC. The agreements contemplate the former will occur before the latter are called for. The circle is closed, it seems to me, with OYDL's agreement to be bound as principal debtor and by the fact that, for all practical purposes, the A&G Lenders are the only creditors of OYRCC.

34 To my mind these circumstances lead to the inescapable inference that the parties intended that there would be a single US $2.5 billion loan facility made available to OYDL on the strength of the OYDL covenant and the security of the Abitibi and Gulf shares, and that the A&G Lenders would look to OYDL ultimately and primarily, if not solely, for payment. It was not the common intention of the parties that in the event of the bankruptcy of both OYDL and OYRCC, the A&G Lenders would be able to recover a dividend based upon 200% of their claim, which would be the effect if the claims put forward by ARCH and the A&G Lenders are both allowed to stand.

The Registrar's Decision and the "Genuine Debtor-Creditor", "Separate Corporate Existence", and "Group Enterprise" Issues

35 Registrar Ferron concluded that there existed a genuine debtor-creditor relationship between OYDL and OYRCC and that there was nothing in the circumstances which would allow him to disregard the separate corporate existence of OYRCC. In my view, these conclusions are simply mirror images of each other. Registrar Ferron said:

> If one acceded to the position taken by the trustee of OYDL and concluded that OYRCC's loan to its parent company was of no significance, the transaction involving the loan from the A&G Lenders would have to be seen as something of a sham and that [the] A&G Lenders were misled in loaning funds to OYRCC which until this point no one denied. [OYRCC] had a corporate existence separate and distinct from its parent including the capacity to borrow and loan funds.

36 While the latter observation is accurate, it is not conclusive; and, in my respectful view, the learned Registrar erred in law in deciding that once he found the existence of a separate corporate entity and a debtor-creditor relationship between parent and subsidiary, the same-debt-in-substance test could not be met. The case law illustrates that the existence of separate and distinct claims or liabilities is not determinative of the double proof issue. The crucial question is whether or not the separate and distinct claims relate in substance to the same debt. For the reasons that I have outlined, I am satisfied that they do.

37 In concluding that a separate corporate existence was dispositive of the double proof issue, the Registrar relied heavily upon the decision of the English Court of Chancery in Polly Peck. This decision warrants careful consideration, although in the end I am satisfied that it is distinguishable from the circumstances of this case and, in any event, not dispositive or the issues to be determined.

38 The factual situation in Polly Peck, on the surface, is remarkably similar to this case. It involved a large multi-national group of companies (the "PPI Group"), the use of a special purpose subsidiary as a financial vehicle for the raising of funds for the Group ("PPIF"), a resulting intra-corporate indebtedness with the initial loan to the special purpose subsidiary being guaranteed by the parent ("PPI") and the funds being "on-loaned" to the parent by the subsidiary. It also involved the insolvency of both the parent company and the special purpose subsidiary. Robert Walker J. reviewed all of the arguments which have been put forward in this case. He rejected the argument that the special purpose subsidiary had no separate corporate existence and was in effect an agent or nominee of the parent, or, that it was a mere façade, on the basis of the well-known principles of separate legal identity established in Salomon v. Salomon, supra. He also rejected the argument that in circumstances such as these, a closely-integrated group of companies should be considered as a single economic unit -- saying that he found those submissions of counsel "most persuasive", but concluding that he was "not ultimately persuaded by them": supra, p. 447. His reasons in this regard are carefully considered, and I quote them in full (supra, pp. 447-448):

> The arguments for considering a closely-integrated group of companies as a single economic unit were fully considered (principally in the context of corporate presence as founding jurisdiction) in Adams v. Cape Industries plc [1991] 1 All ER 929 at 965, [1990] Ch 433 at 476-477, both by Scott J and, with a full citation of authority, in the judgment of the Court of Appeal (see [1991] All ER 929 at 1016-1020, [1990] Ch 433 at 532-537). Both passages merit careful study. The Court of Appeal concluded that --
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>> 'save in cases which turn on the wording of particular statutes or contracts, the court is not free to disregard the principle of Salomon v. Salomon & Co Ltd, [1897] AC 22, [1895-9] All ER Rep 33 merely because it considers that justice so requires.' (See [1991] 1 All ER 929 at 1019, [1990] Ch 433 at 536.
>
> Mr. Kosmin seeks to add to these exceptions (turning on particular statutes or contracts) a further exception where a rule of law founded in public policy (the rule against double proof) would be frustrated by ignoring the economic reality of the single group. In that submission Mr. Kosmin can and does call in aid the words of Oliver LJ in Barclays Bank Ltd. v. TOSG Trust Fund Ltd [1984] 1 All ER 628 at 636-7, [1984] AC 626 at 636 that the test is 'a much broader one which transcends a close jurisprudential analysis of the persons by and to whom the duties are owed'.
>
> Nevertheless I am not persuaded by the argument. I can accept that as a matter of economic reality the bondholders (whose presumed intentions may be material) must have intended to rely on the credit-rating and covenant of PPI, whether as guarantor or (after substitution) as principal obligor. It is doubtful whether even the most farsighted of them can have calculated that in the event of a crash, PPIF might have fewer unsecured creditors than PPI, and a claim against PPI on the loan. It was perfectly possible, consistently with each prospectus, that the proceeds of some or all of the bond issues would be loaned on, not to PPI, but

to other group subsidiaries. It is also possible, though less likely, to imagine a situation in which PPIF lent on to another subsidiary, with PPI guaranteeing that borrowing also, and the second subsidiary then lending on to PPI. Each of those sequences of events would be likely to produce a different result in the event of a crash of the whole group, whether or not the rule against double proof has any application. The possibility of there being subsidiaries which were not wholly owned subsidiaries adds to the range of imaginable variations.

Were I to accede to Mr. Kosmin's submission it would create a new exception unrecognised by the Court of Appeal in Adams v. Cape Industries plc and that is not open to me. Moreover I think that Mr. Kosmin is in one sense assuming what he seeks to prove, since the unjust or inequitable result which he asserts does not occur unless the group is recognised as being in substance a single economic entity, whose constituent members' internal rights and obligations are to be disregarded. But the authorities to which I have already referred show that substance means legal substance, not economic substance (if different), and that legal existence of group companies is particularly important when creditors become involved. Injustice may be in the eye of the beholder, but I do not perceive any obvious injustice -- certainly not such as the court can remedy -- the unpredictable consequences that may follow from the unforeseen insolvency of a large international group of companies such as the Polly Peck group.

39 Polly Peck is distinguishable from this case in a number of ways, however. In Polly Peck, Robert Walker J. specifically noted the exception alluded to in Adams v. Cape Industries plc, supra, involving "cases which turn on the wording of particular statutes or contract". In that case, there was no evidence of an inseparable legal nexus between the two loans in the structure of the transaction. Thus, the parent's obligation to pay under the "onloaned" transaction was not dependent upon the subsidiary's payments being made under the underlying transaction structured between the lender and the subsidiary, which is the situation in this case. Additionally, while in Polly Peck the parent had the option of substituting itself as a principal obligor, it was not obliged to do so. Here OYDL had committed itself as a principal obligor in the Jumbo Loan, and accordingly, as a matter of law it had become a "full-fledged principal debtor with all of the duties and obligations that term implies": Manulife Bank of Canada v. Carlin, supra, pp. 436-437. Finally -- and significantly -- the lenders in Polly Peck were not the only substantial creditors of the subsidiary corporation, PPIF, whereas in this case, under the structure of the transaction, the A&G Lenders would only ever be the substantial creditors of OYRCC.

40 In my view, it is not necessary to be overly concerned in this case about "piercing the corporate veil", "separate corporate entity", or whether concepts such as a "group enterprise theory" or a "single economic unit" theory should be considered. The case does not fall to be decided on any of these bases. It falls squarely into one of the recognized exceptions to the principle of Salomon v. Salomon. It is a case which turns on the wording of a particular contract, or contracts.

41 Moreover, the reality flowing from the fact that the A&G Lenders are the only creditors of OYRCC for these purposes (and for practical purposes would only ever be) is that the A&G Lenders will recover a dividend in the OYDL bankruptcy on the basis of 200% of the debt owing to them whereas other creditors of OYDL will be obliged to accept solace on the basis of only the amount of their claims. This result is fundamentally contrary to the foremost underlying principal of bankruptcy legislation, and should be resisted. It is in reality, a double proof, and accordingly cannot be allowed.

42 Notwithstanding that this motion may be determined on the particular wording of the overall governing contractual documentation, I do not hesitate to say that in my view it is appropriate for the Court to have regard to the intra-corporate group aspects of the Jumbo Loan for purposes of assessing the overall nature of the transaction from a legal perspective. This is not a case of piercing the corporate veil, of arguing agency or sham, or of denying the existence of separate corporate vehicles in the same group enterprise. It is not a question of attempting to fasten some corporate entity with a liability attributable on Salomon v. Salomon principles to some other corporate entity simply because they both belong to the same enterprise of economic unit. It is simply a question of looking at the total picture in order to determine "total effect of the arrangements", or, to put it another way, to determine the legal substance of the transaction.

43 This approach is well accepted, for instance, in tax cases, where it is necessary for the Court to sort out what is the essence of a transaction: see, for example, De Salaberry Realties Ltd. v. Minister of National Revenue (1974), 46 D.L.R. (3d) 100 (Fed.Ct., T.D.); Alberta Gas Ethylene Co. v. R. (1988), 41 B.L.R. 117 (Fed.Ct., T.D.). In the latter case, where the facts were strikingly similar to those here, Reed J., in refusing to ignore the separate corporate entity of a subsidiary made the following observation:

> ... I do not interpret the jurisprudence as ignoring the existence of subsidiary corporations per se. Rather, it seems to me that the jurisprudence proceeds on the basis that in certain circumstances, consequences will be drawn despite the legal existence of separate subsidiary corporations. (Emphasis added)

44 I agree. Here, at least for purposes of assessing proofs of claim in the parent company's bankruptcy, the consequences of the circumstances as they exist -- the "total effect of the arrangements" -- are that the Jumbo Loan is a same debt transaction "despite the legal existence" of the separate subsidiary, OYRCC.

Other Issues

One Payment for Discharge of Both Debts

45 In Barclays Bank, supra, Oliver L.J. postulated, as a test for determining whether there was a double proof, "the question whether two payments are being sought for a liability which, if the company were solvent, could be discharged as regards both claimants by one payment". (Emphasis added)

46 Registrar Ferron considered this test for determining whether the rule against double proof had been contravened, and concluded that the test was not met on the facts of this case. He said:

> If OYDL were to pay the A&G Lenders under the guarantee this could not affect the loan due to OYRCC under its note. Similarly, if OYDL were to pay OYRCC and thus discharge the Promissory Note, the obligation under the guarantee would still exist and be enforceable. One payment would not discharge both claimants' debts against OYDL and accordingly, on the test suggested by Oliver, L.J. the rule is not offended.

47 I respectfully disagree. The Registrar's conclusion flows from a misunderstanding of the constating documents which frame the Jumbo Loan deal. Suppose, for example, that OYDL remained solvent, but that OYRCC had become insolvent and unable to pay the A&G Lenders. One payment by OYDL to the A&G Lenders would satisfy its liability on the OYDL Guarantee, and would eliminate the liability as between the A&G Lenders and OYRCC. There would accordingly be no further payments to be made by OYRCC under the Term Loan Agreements; and, since OYDL's obligation under the Note is to pay interest on the principal at the times provided in the Term Loan Agreements, and under the Repayment Agreement is "to make payments of principal under the Note to [OYRCC] under the Term Loan Agreements", OYDL could have no more liability to OYRCC under the Promissory Note. Thus, one payment would discharge both debts, having regard to the total contractual framework of the arrangement.

48 Working the single payment analysis from the other direction, namely by means of a payment by OYDL to OYRCC on the Note is a little less clear and more cumbersome. From a practical point of view, however, the effect would have been the same. No payment of principal was called for by OYDL to OYRCC until, and to the extent that, OYRCC had made payments on the loan. Accordingly, the liability of OYDL to the A&G Lenders on the OYDL Guarantee would have been reduced in the same amount. Even though OYDL technically had the right to prepay OYRCC under the terms of the Promissory Note and there is nothing specific in the agreements requiring OYRCC to remit payment to the A&G Lenders in return in such event, one payment would unquestionably discharge all debts if made by OYDL via the A&G Lender route, as I have indicated, and that, in my view, is sufficient to meet the "same debt" test. I see nothing in the decision in Barclays Bank mandating a contrary conclusion.

Creating a 'Double Proof' in the OYRCC Bankruptcy?

49 The Respondents argue that to accede to the "double proof' submissions of OYDL's Trustee would be to sanction a double proof situation in the OYRCC bankruptcy. This would be so because OYDL would in effect be receiving full credit for its indebtedness down to its subsidiary, OYRCC. This would deprive OYRCC's creditors (including those other than the A&G Lenders) of a right to share in that asset of OYRCC; and, at the same time, it would unjustifiably advantage OYDL's creditors by providing more money for them at the parent level.

50 The short answer to this submission is that it is premised on the proposition OYRCC had or might have had other creditors. However, that is not the case. The A&G Lenders are the only creditors of OYRCC, for these purposes. Given the contractual framework established for the Jumbo Loan, there would never be any other creditors of OYRCC with claims of any significance relative to those of the A&G Lenders, since OYRCC was limited in its ability to create further indebtedness which would exceed 1% of the Jumbo Loan. Thus, in the circumstances of this case, the "double proof" lies in the OYDL estate and not in the OYRCC estate.

Reduction of Claims on Account of Recoveries from Third Parties

51 The A&G Lenders have recovered the sum of $1,281,281,018 (Cdn) through their efforts to realize on the security pledged in relation to the Abitibi and Gulf shares. On a motion for directions which resulted in orders made on February 13 and April 14, 1997, Farley J. required the A&G Lenders to deduct such amounts from their claims on the OYDL Guarantee. His orders were affirmed on appeal. It is therefore accepted that these sums must be deducted from the A&G Lenders side of the claim in the OYDL bankruptcy.

52 The Respondents submit, however, that if the claim of OYRCC in the OYDL estate is permitted to proceed -- even if the A&G Lender claim on the OYDL Guarantee is not -- it should be permitted to proceed without any similar deduction being made. This result might well follow, I think, if the view to be taken of the matter were that expressed by the learned Registrar. For the reasons I have outlined above, however, I am respectfully of the opinion that the view of the Registrar constituted an error in law and reflected a misapprehension of the factual and contractual basis underlying this case.

53 Because the amount still owing to the A&G Lenders has been reduced by the amount of the recovery on its other security, OYRCC's obligations to the A&G Lenders have been reduced by a similar amount. Under the Repayment Agreement, OYRCC is only able to call upon OYDL to make payments under the Promissory Note when, and to the extent that, it has itself made payments under the Jumbo Loan. In the circumstances now existing, it cannot be called upon to make payments which have already been made in the form of recovery on other security. Thus, it cannot have a claim against OYDL for more than what remains as the outstanding amount of the Jumbo Loan.

54 Therefore, in my view, to the extent that the OYRCC Claim in the OYDL bankruptcy is put forward it must be reduced by the amounts recovered by the A&G Lenders on their other security.

III. CONCLUSION

54a Accordingly,

a) the order of the Registrar is set aside;
b) an order is granted directing that claims of A&G Lenders and of OYRCC against the estate of OYDL constitute a double proof against the estate;
c) a declaration is granted that the A&G Lenders and OYRCC may rank for payment of one dividend out of the estate of OYDL based on a claim in the sum of $1,759,108,979.00 (Cdn.); and,
d) the Appellant is entitled to its costs of the appeal and of the proceeding before the Registrar.

[The Court did not number this paragraph. QL has assigned the number 54a.]

BLAIR J.

[Editor's note: Schedule "A" could not be reproduced online.]

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1 The bankruptcies followed an earlier re-structuring of OYDL and some 28 of its directly and indirectly owned subsidiaries, under the Companies' Creditors Arrangement Act (the "CCAA").

2 In separate proceedings and by Orders dated February 13 and April 14, 1997, Farley J. held that the A&G Lenders were required to deduct the sums recovered on such security from the amount of their claim. His Orders were upheld by the Court of Appeal in a decision released

on September 1, 1998, Olympia & York Developments Ltd. (trustee of) v. National Bank of Canada, [1998] O.J. No. 3482 (C.A.).

3 The lending syndicate was comprised of the following lenders, to the extent of the following advances: Credit Lyonnais and other European lenders (US $1.25 billion); Hongkong and Shanghai Banking Corporation (US $ 750 million); Dai-Ichi Kango Bank, Ltd. (US $250 million); Royal Bank of Canada (US 250 million).

4 Summary taken from the admitted recitation of facts in the Appellant's factum.

5 A defined term in the Term Loan Agreement, meaning OYDL, or any of its subsidiaries, or any successor guarantors (or their subsidiaries).

6 Reference Tranches" as defined in the Note are portions of the advances made under the Term Loan Agreements.

7 As contemplated in section 141 of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, as amended (the "BIA").

8 See, Polly Peck, supra, at p. 444 and Tokyo Ltd. v. Karoon [1986] 3 All ER 468 at p. 486, for the general proposition that courts are concerned the law and not with economics when looking at the substance of matters.

9 To borrow a phrase used by Gonthier J. in Husky Oil Operations Ltd. v. M.N.R. [1995] 3 S.C.R. 453, at p. 491, albeit in a slightly different context. Husky Oil was a constitutional case, but Gonthier J. drew upon "double proof" concepts in considering the claims of a creditor and a statutory surety, who had made payments to the creditor on behalf of the debtor, against the estate of a principal debtor. The particular question he addressed was whether the statutory suretyship created a joint and several liability as between the debtor and the statutory surety for the debt (he concluded it did not).