Court File No. _____

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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

AND IN THE MATTER OF A PLAN OF COMPROMISE AND ARRANGEMENT OF CLINE MINING CORPORATION, NEW ELK COAL COMPANY LLC AND NORTH CENTRAL ENERGY COMPANY

Applicants

BOOK OF AUTHORITIES OF THE APPLICANTS

(Claims Procedure Order and Meetings Order)

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SkyLink Aviation Inc., Re

2013 CarswellOnt 2785, 2013 ONSC 1500, 226 A.C.W.S. (3d) 641

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 and Arrangement of Skylink Aviation Inc. Applicant

Morawetz J.

Heard: March 8, 2013
Judgment: March 12, 2013
Docket: CV-13-1003300CL

Counsel: Robert Chadwick, Logan Willis for Applicant
S.R. Orzy, Sean H. Zweig for Noteholders
M.P. Gottlieb for Proposed Monitor, Duff & Phelps Canada Restructuring Inc.
C. Prophet for Royal Bank of Canada
R.S. Kukulowicz for Directors and Officers

Subject: Insolvency; Civil Practice and Procedure

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Approval by court — "Fair and reasonable"

Debtors were related companies providing global aviation transportation and logistics services — Any disruption to debtors' ability to provide either core services or ancillary life-supporting functions could put safety and security of deployed personnel at risk — Debtors experienced financial challenge — Consensual going-concern recapitalization transaction was developed for implementation pursuant to plan of compromise and arrangement under Companies' Creditors Arrangement Act — Debtors brought application for protection under Act — Application granted — It was appropriate to authorize certain pre-filing payments to be made — Granting of various charges including debtor-in-possession lenders' charge was appropriate — It was appropriate to appoint monitor as foreign representative of debtors — Postponement of annual shareholders' meeting was reasonable — Sealing order was granted for certain financial information — Claims procedure order and meetings order were granted in order to effectuate recapitalization on expeditious basis since proposed restructuring appeared to have achieved significant support.

Table of Authorities

Cases considered by *Morawetz J.*:

Sierra Club of Canada v. Canada (Minister of Finance) (2002), 287 N.R. 203, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 18 C.P.R. (4th) 1, 44 C.E.L.R. (N.S.) 161, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 211 D.L.R. (4th) 193, 223 F.T.R. 137 (note), 20 C.P.C. (5th) 1, 40 Admin. L.R. (3d) 1, 2002 SCC 41, 2002 CarswellNat 822, 2002 CarswellNat 823, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 93 C.R.R. (2d) 219, [2002] 2 S.C.R. 522 (S.C.C.) — followed

2013 ONSC 1500, 2013 CarswellOnt 2785, 226 A.C.W.S. (3d) 641

Statutes considered:

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

APPLICATION by debtors for protection.

***Morawetz J.*:**

1 SkyLink Aviation Inc. ("SkyLink Aviation", the "Company" or the "Applicant"), together with the SkyLink Subsidiaries (collectively, "SkyLink"), is a provider of global aviation transportation and logistics services (the "SkyLink Business"). SkyLink specializes in providing non-combatant aviation services and supporting activities in conflict-associated regions around the world. The customers who rely on SkyLink's services include governmental agencies, intergovernmental agencies, commercial organizations and humanitarian relief organizations.

2 SkyLink is responsible for providing non-combat life-supporting functions to both its own personnel and those of its suppliers and clients in high-risk areas. Any disruption to SkyLink's ability to provide either its core services or its ancillary life-supporting functions to deployed personnel, could put the safety and security of those personnel at risk, including by potentially leaving them without life-supporting services in conflict zones.

3 As set out in the affidavit of Jan Ottens and, as summarized in the comprehensive factum filed by the Applicant, it is apparent that SkyLink Aviation has experienced financial challenges that have necessitated a recapitalization of the company. SkyLink has chosen to do this under the *Companies' Creditors Arrangement Act* ("CCAA").

4 At this time, SkyLink Aviation's secured debts significantly exceed the value of the SkyLink Business. SkyLink is in default of its first lien secured credit facility (the "Credit Facility") in favour of the first lien lenders (the "First Lien Lenders") and the Indenture in respect of its senior secured second lien notes (the "Secured Notes"). The indenture trustee in respect of the Secured Notes (the "Trustee") has accelerated all amounts owing under the Secured Notes and has issued a demand for payment by SkyLink Aviation and SkyLink Aviation USA II.

5 After an extended period of extensive negotiations with representatives of the Company's secured creditors regarding a recapitalization of the Company, a consensual going-concern recapitalization transaction (the "Recapitalization") has been developed for implementation pursuant to a plan of compromise and arrangement under the CCAA (the "Plan").

6 The Applicant takes the position that the Recapitalization is a positive development for the Company and its stakeholders. The Recapitalization involves:

> (i) the refinancing of the Company's first lien debt;
>
> (ii) the cancellation of the Secured Notes in exchange for the issuance by the Company of consideration that includes new common shares and new debt; and
>
> (iii) the compromise of certain unsecured liabilities, including the portion of the Noteholders' claims that is to be treated as unsecured under the Plan.

7 The Company also contends that if implemented, the Recapitalization would result in SkyLink Aviation having an improved capital structure, stable working capital liquidity and enhanced flexibility to respond to volatility in the industry.

8 The terms of the Recapitalization are supported by a significant majority of the creditors who have an economic interest in the Company. In particular, the First Lien Lenders have affirmed their support, and the holders of approximately 64% of the value of the outstanding Secured Notes (the "Initial Consenting Noteholders") have signed the Support Agreement pursuant to which they have agreed to support the Recapitalization and to vote in favour of the Plan.

9 The remaining Noteholders will be entitled to sign a joinder to the Support Agreement following the commencement of these proceedings. SkyLink Aviation anticipates that additional Noteholders will execute a joinder to the Support Agreement.

10 It is noted that support of the First Lien Lenders and the Initial Consenting Noteholders is conditional upon the completion of the Recapitalization under the CCAA prior to April 23, 2013.

11 A detailed summary of the salient facts is set out at paragraphs 11-42 of the factum.

12 SkyLink Aviation is a privately held corporation under the laws of Ontario, with a registered head office located in Toronto, Ontario. Its central administrative functions are carried out at its Toronto headquarters.

13 SkyLink Aviation is the direct or indirect parent company of a number of subsidiaries as detailed in the organization chart attached to Mr. Ottens' affidavit.

14 The SkyLink Subsidiaries are non-applicants. However, SkyLink Aviation seeks to have a stay of proceedings under the Initial Order and certain other relief extended to those SkyLink Subsidiaries that are also party to contracts with SkyLink Aviation (the "Subsidiary Counterparties") so as to maintain the stability of the enterprise.

15 SkyLink Aviation's liabilities amount to approximately $149.42 million which includes the First Lien Indebtedness of $14.749 million, Secured Notes in the aggregate principal amount of $110 million, together with accrued but unpaid interest of approximately $6.4 million, and amounts owing to Noteholders under the Interest Payment Support Agreement totalling approximately $6.6 million.

16 Material claims against the Company of which SkyLink Aviation is aware of include:

> (i) approximately $3.45 million in respect of the exercise of various warrants and options issued to several members of the senior management team in May 2012; and
>
> (ii) six pending litigation claims against the Company that collectively allege approximately $16.6 million in contingent claims or damages.

17 As of March 6, 2013, SkyLink Aviation owed approximately $7.7 million in accounts payable relating to ordinary course trade and employee obligations.

18 As a result of the existing Events of Default, the First Lien Lenders are now in a position to terminate the Credit Facility and proceed to enforce their rights and remedies against SkyLink Aviation and Loan Guarantors, including the acceleration of all amounts owing under the Credit Facility. In addition, the Company does not have the funds required to make payments now due to the Participating Noteholders under the Interest Payment Support Agreement.

19 In light of its financial circumstances, SkyLink Aviation contends that it is not able to obtain additional or alternative financing and there is no reasonable expectation that the Company, in the near term, will be able to generate sufficient cash flow through its operations to support its existing debt obligations. In addition, the Company contends that as further evidenced by the valuation performed by Duff & Phelps Valuations, the aggregate value of the Company's assets, property and undertaking, taken at fair value, is not sufficient to enable payment of all of its obligations, due and accruing due. Consequently, the Applicant takes the position that it is insolvent.

20 The Applicant requests a stay of proceedings.

21 The Applicant also requests authorization to make payments in the ordinary course in respect of employee compensation, rent, procurement, utility services and other supplier obligations, all with a view to maintaining operations.

22 The Company has also negotiated for a DIP Loan and the concurrent granting of a DIP Lenders' Charge. Details in respect of the DIP Loan and the DIP Lenders' Charge are set out at paragraphs 29-32 of the factum. A proposed Monitor and

Administration Charge as well as a Directors' and Officers' Charge is also requested. These requests are set out at paragraphs 33-37 of the factum. A KERP and a KERP Charge is also contemplated and the reasons for this are detailed at paragraphs 38 and 39 of the factum. There is no opposition to this requested relief.

23 The Applicant also seeks the appointment of the Monitor as the Foreign Representative, should recognition of these proceedings in the United States pursuant to Chapter 15 of the United States Bankruptcy Code, become necessary.

24 Having reviewed the record and hearing submissions, I am satisfied that the Applicant is a "debtor company" to which the CCAA applies. The basis for this finding is set out at paragraphs 43-52 of the factum.

25 For the reasons set out at paragraphs 56-60 of the factum, I have been persuaded that it is appropriate in this application to include a stay of proceedings in favour of the Subsidiary Companies.

26 I am also satisfied for the reasons set forth at paragraphs 61-65 of the factum that it is appropriate to authorize certain pre-filing payments to be made.

27 The basis for the granting of the DIP Lenders' Charge, the Administration Charge, Directors' Charge and KERP Charge is set out at paragraphs 66-84 of the factum. I have been persuaded that, in the circumstances, the granting of these charges on the terms set out is appropriate.

28 I have also been satisfied that it is appropriate to the appoint the Monitor as the Foreign Representative of the Applicant, for the reasons set out at paragraphs 85-87.

29 The Applicant also requests a postponement of the Annual Shareholders' Meeting. For the reasons set out at paragraphs 88-91 of the factum, I am in agreement that this request is reasonable in the circumstances.

30 The Applicant has requested that the "Confidential Supplement" to the Monitor's Prefiling Report be sealed. This Confidential Supplement contains copies of:

> (i) the financial statements of SkyLink containing the confidential financial information of SkyLink;
>
> (ii) the Duff & Phelps Valuation Report (the "Valuation Report") which the Company contends contains sensitive competitive and confidential information of the Applicant; and
>
> (iii) the KERP letters containing individually identifiable information and confidential information of eligible employees.

31 With respect to the financial information, I am satisfied that adequate information is contained in the public record that would enable the affected parties to make an informed decision as to the financial circumstances facing the Company.

32 For the reasons set out at paragraphs 92-100 of the factum, I have been persuaded that it is appropriate to issue a sealing order at this time. In arriving at this determination, I have taken into account the principals set out in *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41 (S.C.C.).

33 For the above reasons, I have been persuaded that an Initial Order should be granted in respect of the Applicant.

34 SkyLink also brought a motion for the Claims Procedure Order and Meetings Order. The Company is seeking these orders at this time because it wishes to effectuate the Recapitalization on an expeditious basis. The basis for the request for these two orders is set out in the second factum submitted by the Applicant. The basis for the requested relief is set out at paragraphs 11- 34 of the factum.

35 The legal basis for proceeding with the motion for the Claims Procedure Order and the Meetings Order is set out at the factum commencing at paragraph 43. I recognize that it is unusual to request such relief at this stage of the proceeding. However, in the circumstances of this case, and considering the significant support that the proposed restructuring appears to

have achieved, I accept the submissions and grant the requested relief. In doing so, I am mindful that a full come-back hearing has been scheduled for March 20, 2013, at which time these issues can be revisited.

36 The motions for the Claims Procedure Order and Meetings Order are granted and the orders have been signed.

Application granted.

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1990 CarswellOnt 139
Ontario Court of Appeal

Nova Metal Products Inc. v. Comiskey (Trustee of)

1990 CarswellOnt 139, 1 C.B.R. (3d) 101, 1 O.R. (3d) 289, 23 A.C.W.S. (3d) 1192, 41 O.A.C. 282

ELAN CORPORATION et al. v. COMISKEY (TRUSTEE OF) et al.

Finlayson, Krever and Doherty JJ.A.

Heard: October 30 and 31, 1990
Judgment: November 2, 1990
Docket: Doc. Nos. CA 684/90 and CA 685/90

Counsel: *F.J.C. Newbould*, Q.C., and *G.B. Morawetz*, for appellant The Bank of Nova Scotia.
John Little, for respondents Elan Corporation and Nova Metal Products Inc.
Michael B. Rotsztain, for RoyNat Inc.
Kim Twohig and *Mel Olanow*, for Ontario Development Corp.
K.P. McElcheran, for monitor Ernst & Young.

Subject: Corporate and Commercial; Insolvency

Headnote

Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangements Act

Corporations — Arrangements and compromises — Court having discretion when ordering creditors' meeting under s. 5 of Companies' Creditors Arrangement Act to consider equities between debtor company and secured creditors and to consider possible success of plan of arrangement — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 5.

Corporations — Arrangements and compromises — Opposing commercial and legal interests requiring secured creditors to be in separate classes — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

Corporations — Arrangements and compromises — Where receiver-manager having been appointed, corporation not entitled to issue debentures and trust deeds or to bring application for relief under Companies' Creditors Arrangement Act — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 3.

The applicants were two related companies. The bank was the lender to the companies and was owed over $2,300,000. R Inc. was also a secured creditor of the companies, and was owed approximately $12 million. By agreement, the bank had a first registered charge on the companies' accounts receivable and inventory and a second registered charge on land, buildings and equipment, while R Inc. had a second registered charge on the accounts receivable and inventory and a first registered charge on the land, buildings and equipment. The security agreements with the bank prohibited the companies from encumbering their assets without the bank's consent. The bank also had s. 178 *Bank Act* security. The Ontario Development Corporation ("ODC") guaranteed part of the companies' debt to R. Inc. and held as security a debenture from one of the companies ranking third to the bank and R Inc. Two municipalities had first priority liens on the companies' lands for unpaid municipal taxes.

The bank demanded payment of its outstanding loans and on August 27, 1990, appointed a receiver-manager pursuant to the security agreements. When the companies refused to allow the receiver-manager access to the premises, the Court

made an interim order authorizing the receiver-manager access to monitor the companies' business, and permitting the companies to remain in possession and carry on business in the ordinary course. The bank was restrained from selling the assets and from notifying account debtors to collect receivables, but could apply accounts receivable that were collected by the companies to the bank loans. On August 29, 1990, the companies each issued debentures to a friend and to the wife of the companies' principal, pursuant to trust deeds. The debentures conveyed personal property to a trustee as security. No consent was obtained from either the bank or the receiver-manager. It was conceded that the debentures were issued for the sole purpose of qualifying each company as a "debtor company" within the meaning of s. 3 of the *Companies' Creditors Arrangement Act*, ("CCAA").

The companies applied under s. 5 of the CCAA for an order directing the meeting of secured creditors to vote on a plan of arrangement. The plan of arrangement filed provided that the companies would carry on business for 3 months, the secured creditors would be paid and could take no action on their security for 3 months, and the accounts receivable assigned to the bank could be utilized by the companies for their day-to-day operations. No compromise was proposed. At the hearing of the application, orders were granted which set dates for presenting the plan to the secured creditors and for holding the meeting of the secured creditors. The companies were permitted, for 3 months, to spend the accounts receivable collected in accordance with cash flow projections. Proceedings by the bank, acting on its security or paying down the loan from the accounts receivable were stayed. An order was granted that created two classes of creditors for purposes of voting at the meeting of secured creditors. The classes were: (a) the bank, R Inc., ODC and the municipalities; and (b) the principal's wife and friend, who had acquired the debentures to enable the companies to apply under the CCAA. The bank appealed.

Held:

The appeal was allowed, Doherty J.A. dissenting in part; the application was dismissed.

Per Finlayson J.A. (Krever J.A. concurring): — Since the CCAA was intended to provide a structured environment for the negotiation of compromises between the debtor company and its creditors for the benefit of both, which could have significant benefits for the company, its shareholders and employees, debtor corporations were entitled to a broad and liberal interpretation of the jurisdiction of the Court under the CCAA. However, it did not follow that in exercising its discretion to order a meeting of creditors under s. 5 of the CCAA, a Court should not consider the equities as they related to the debtor company and to its secured creditors. Any discretion exercised by the Judge in this instance was not reflected in his reasons. Therefore, the appellate Court could examine the uncontested chronology of these proceedings and exercise its own discretion.

The significant date was August 27, 1990. The effect of the appointment of the receiver-manager was to disentitle the companies to issue the debentures and bring the application under the CCAA. Neither company had the power to create further indebtedness, and thus to interfere with the ability of the receiver-manager to manage the two companies. The interim order granting the receiver-manager access to the premises restricted its powers, but did not divest the receiver-manager of all its managerial powers. The issue of the debentures to the friend and wife was outside the companies' jurisdiction to carry on business in the ordinary course. Rather, the residual power to take such initiatives to gain relief under the CCAA rested with the receiver-manager. The issuance and registration of the trust deeds required a court order.

The probability of the meeting of secured creditors achieving some measure of success was another relevant consideration. Had there been a proper classification of creditors, the meeting would not have been productive. It was improper to create one class of creditors comprised of all secured creditors except the debenture creditors. There was no true community of interest among the former. The bank should have been classified in its own class. The companies had clearly intended to avoid having the bank designated as a separate class, because the companies knew that no plan of arrangement would succeed without the approval of the bank. The bank and R Inc. had opposing interests. It was in the commercial interest of the bank to collect and retain the accounts receivable while it was in R Inc.'s commercial interest to preserve the cash flow

of the businesses and sell the businesses as going concerns. To have placed the bank and R Inc. in the same class would have enabled R Inc. to vote with the ODC to defeat the bank's prior claim.

There was no reason why the bank's legal interest in the receivables should be overriden by R Inc. as the second security holder in the receivables.

For the foregoing reasons, the application under the CCAA should be dismissed.

Per Doherty J.A. (dissenting in part): — The debentures and "instant" trust deeds sufficed to bring the companies within the requirements of s. 3 of the CCAA even if, in issuing those debentures, the companies breached a prior agreement with the bank. Section 3 merely required that at the time of an application by the debtor company, an outstanding debenture or bond be issued under a trust deed. However, where a bond or debenture did not reflect a transaction which actually occurred and did not create a real debt owed by the company, such bond or debenture would not suffice for the purposes of s. 3. The statute should only be used for the purpose of attempting a legitimate reorganization. Where the application was brought for an improper purpose or the company acted in bad faith, the Court had means available to it, entirely apart from s. 3 of the CCAA, to prevent misuse of the Act. The contravention of the security agreement in creating the debentures without the bank's consent did not affect the status of the debentures for the purposes of s. 3, but could play a role in the Court's determination of what additional orders should be made under the statute.

The interim order regarding the receiver-manager effectively rendered the receiver-manager a monitor with rights of access but no further authority. Therefore, in light of the terms of the interim order, the existence of the receiver-manager installed by the bank did not preclude the application under s. 3 of the CCAA.

The Judge properly exercised his discretion in directing that a meeting of creditors should be held pursuant to s. 5 of the CCAA. Even though the chances of a successful reorganization were not good, the benefits flowing from the s. 5 order exceeded the risk inherent in the order. However, the bank and R Inc., as the two principal creditors, should not have been placed in the same class of secured creditors for the purposes of ss. 5 and 6 of the statute. Their interests were not only different, but opposed. The classification scheme created by the Judge effectively denied the bank any control over any plan of reorganization.

Table of Authorities

Cases considered:

Per Finlayson J.A. (Krever J.A. concurring)

Alberta Treasury Branches v. Hat Development Ltd. (1988), 71 C.B.R. (N.S.) 264, 64 Alta. L.R. (2d) 17 (Q.B.), aff'd (1989), 65 Alta. L.R. (2d) 374 (C.A.) — *applied*

Northland Properties Ltd., Re (1988), 73 C.B.R. (N.S.) 166, 31 B.C.L.R. (2d) 35 (S.C.), aff'd (16 September 1988), Doc. No. Vancouver CA009772, Taggart, Lambert and Locke JJ.A. (B.C. C.A.) — *considered*

Northland Properties Ltd., Re (1988), 73 C.B.R. (N.S.) 175 (S.C.), aff'd 73 C.B.R. (N.S.) 195, [1989] 3 W.W.R. 363, 34 B.C.L.R. (2d) 122 (C.A.) — *referred to*

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

Sovereign Life Assurance Co. v. Dodd, [1892] 2 Q.B. 573, [1891-4] All E.R. 246 (C.A.) — *applied*

Wellington Building Corp., Re, [1934] O.R. 653, 16 C.B.R. 48, [1934] 4 D.L.R. 626, [1934] O.W.N. 562 (S.C.) — *applied*

Per Doherty J.A. (dissenting in part)

Alberta Treasury Branches v. Hat Development Ltd. (1988), 71 C.B.R. (N.S.) 264, 64 Alta. L.R. (2d) 17 (Q.B.), aff'd (1989), 65 Alta. L.R. (2d) 374 (C.A.) — *considered*

Avery Construction Co., Re, 24 C.B.R. 17, [1942] 4 D.L.R. 558 (Ont. S.C.) — *referred to*

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

Icor Oil & Gas Co. v. Canadian Imperial Bank of Commerce (1989), 102 A.R. 161 (Q.B.) — *referred to*

Meridian Developments Inc. v. Toronto-Dominion Bank; Meridian Developments Inc. v. Nu-West Ltd., 52 C.B.R. (N.S.) 109, [1984] 5 W.W.R. 215, 32 Alta. L.R. (2d) 150, 11 D.L.R. (4th) 576, 53 A.R. 39 (Q.B.) — *referred to*

Metals & Alloys Co., Re (16 February 1990), Houlden J.A. (Ont. C.A.) [unreported] — *considered*

Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd. (1988), 72 C.B.R. (N.S.) 1, 63 Alta. L.R. (2d) 361, 92 A.R. 81 (Q.B.) — *referred to*

Northland Properties Ltd., Re (1988), 73 C.B.R. (N.S.) 175 (S.C.), aff'd 73 C.B.R. (N.S.) 195, [1989] 3 W.W.R. 363, 34 B.C.L.R. (2d) 122 (C.A.) — *referred to*

Quintette Coal Ltd. v. Nippon Steel Corp. (1990), 47 B.C.L.R. (2d) 193 (S.C.) — *referred to*

Reference re Residential Tenancies Act (Ontario), [1981] 1 S.C.R. 714, 123 D.L.R. (3d) 554, 37 N.R. 158 — *referred to*

Stephanie's Fashions Ltd., Re (1990), 1 C.B.R. (3d) 248 (B.C.S.C.) — *considered*

United Maritime Fishermen Co-op., Re (1988), 67 C.B.R. (N.S.) 44, 84 N.B.R. (2d) 415, 214 A.P.R. 415 (Q.B.), varied on reconsideration (1988), 68 C.B.R. (N.S.) 170, 87 N.B.R. (2d) 333, 221 A.P.R. 333 (Q.B.), rev'd (1988), 69 C.B.R. (N.S.) 161, 51 D.L.R. (4th) 618, 88 N.B.R. (2d) 253, 224 A.P.R. 253 (C.A.) — *considered*

Statutes considered:

Bank Act, R.S.C. 1985, c. B-1 —

s. 178, as am. R.S.C. 1985 (3d Supp.), c. 25, s. 26

Companies' Creditors Arrangement Act, S.C. 1932-33, c. 36 —

s. 3, en. as s. 2A, S.C. 1952-53, c. 3, s. 2

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

s. 3

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s. 6(a)

s. 11

s. 14(2)

Courts of Justice Act, 1984, S.O. 1984, c. 11 —

s. 144(1)

Interpretation Act, R.S.C. 1985, c. I-21 —

s. 12

Municipal Act, R.S.O. 1980, c. 302 —

s. 369

APPEAL from order of Hoolihan J. dated September 11, 1990, allowing application under *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36.

***FINLAYSON J.A. (KREVER J.A.* concurring) (orally):**

1 This is an appeal by the Bank of Nova Scotia (the "bank") from orders made by Mr. Justice Hoolihan [(11 September 1990), Doc. Nos. Toronto RE 1993/90 and RE 1994/90 (Ont. Gen. Div.)] as hereinafter described. The Bank of Nova Scotia was the lender to two related companies, namely, Elan Corporation ("Elan") and Nova Metal Products Inc. ("Nova"), which commenced proceedings under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "CCAA"), for the purposes of having a plan of arrangement put to a meeting of secured creditors of those companies.

2 The orders appealed from are:

(i) An order of September 11, 1990, which directed a meeting of the secured creditors of Elan and Nova to consider the plan of arrangement filed, or other suitable plan. The order further provided that for 3 days until September 14, 1990, the bank be prevented from acting on any of its security or paying down any of its loans from accounts receivable collected by Elan and Nova, and that Elan and Nova could spend the accounts receivable assigned to the bank that would be received.

(ii) An order dated September 14, 1990, extending the terms of the order of September 11, 1990, to remain in effect until the plan of arrangement was presented to the Court no later than October 24, 1990. This order continued the stay against the bank and the power of Elan and Nova to spend the accounts receivable assigned to the bank. Further orders dated September 27, 1990, and October 18, 1990, have extended the stay, and the power of Elan and Nova to spend the accounts receivable that have been assigned to the bank. The date of the meetings of creditors has been extended to November 9, 1990. The application to sanction the plan of arrangement must be heard by November 14, 1990.

(iii) An order dated October 18, 1990, directing that there be two classes of secured creditors for the purposes of voting at the meeting of secured creditors. The first class is to be comprised of the bank, RoyNat Inc. ("RoyNat"), the Ontario Development Corporation ("O.D.C."), the city of Chatham and the village of Glencoe. The second class is to be comprised of persons related to Elan and Nova that acquired debentures to enable the companies to apply under the CCAA.

3 There is very little dispute about the facts in this matter, but the chronology of events is important and I am setting it out in some detail.

4 The bank has been the banker to Elan and Nova. At the time of the application in August 1990, it was owed approximately $1,900,000. With interest and costs, including receivers' fees, it is now owed in excess of $2,300,000. It has a first registered charge on the accounts receivable and inventory of Elan and Nova, and a second registered charge on the land, buildings and equipment. It also has security under s. 178 of the *Bank Act*, R.S.C. 1985, c. B-1, as am. R.S.C. 1985 (3rd Supp.), c. 25, s. 26. The terms of credit between the bank and Elan as set out in a commitment agreement provide that Elan and Nova may not encumber their assets without the consent of the bank.

5 RoyNat is also a secured creditor of Elan and Nova, and it is owed approximately $12 million. It holds a second registered charge on the accounts receivable and inventory of Elan and Nova, and a first registered charge on the land, buildings and equipment. The bank and RoyNat entered into a priority agreement to define with certainty the priority which each holds over the assets of Elan and Nova.

6 The O.D.C. guaranteed payment of $500,000 to RoyNat for that amount lent by RoyNat to Elan. The O.D.C. holds debenture security from Elan and secure the guarantee which it gave to RoyNat. That security ranks third to the bank and RoyNat. The O.D.C. has not been called upon by RoyNat to pay under its guarantee. O.D.C. has not lent any money directly to Elan or Nova.

7 Elan owes approximately $77,000 to the City of Chatham for unpaid municipal taxes. Nova owes approximately $18,000 to the Village of Glencoe for unpaid municipal taxes. Both municipalities have a lien on the real property of the respective companies in priority to every claim except the Crown under s. 369 of the *Municipal Act*, R.S.O. 1980, c. 302.

8 On May 8, 1990, the bank demanded payment of all outstanding loans owing by Elan and Nova to be made by June 1, 1990. Extensions of time were granted and negotiations directed to the settlement of the debt took place thereafter. On August 27, 1990, the bank appointed Coopers & Lybrand Limited as receiver and manager of the assets of Elan and Nova, and as agent under the bank's security to realize upon the security. Elan and Nova refused to allow the receiver and manager to have access to their premises, on the basis that insufficient notice had been provided by the bank before demanding payment.

9 Later on August 27, 1990, the bank brought a motion in an action against Elan and Nova (Court File No. 54033/90) for an order granting possession of the premises of Elan and Nova to Coopers & Lybrand. On the evening of August 27, 1990, at approximately 9 p.m., Mr. Justice Saunders made an order adjourning the motion on certain conditions. The order authorized Coopers & Lybrand access to the premises to monitor Elan's business, and permitted Elan to remain in possession and carry on its business in the ordinary course. The bank was restrained in the order, until the motion could be heard, from selling inventory, land, equipment or buildings or from notifying account debtors to collect receivables, but was not restrained from applying accounts receivable that were collected against outstanding bank loans.

10 On Wednesday, August 29, 1990, Elan and Nova each issued a debenture for $10,000 to a friend of the principals of the companies, Joseph Comiskey, through his brother Michael Comiskey as trustee, pursuant to a trust deed executed the same day. The terms were not commercial and it does not appear that repayment was expected. It is conceded by counsel for Elan that the sole purpose of issuing the debentures was to qualify as a "debtor company" within the meaning of s. 3 of the CCAA. Section 3 reads as follows:

> 3. This Act does not apply in respect of a debtor company unless
>
> (a) the debtor company has outstanding an issue of secured or unsecured bonds of the debtor company or of a predecessor in title of the debtor company issued under a trust deed or other instrument running in favour of a trustee; and
>
> (b) the compromise or arrangement that is proposed under section 4 or 5 in respect of the debtor company includes a compromise or an arrangement between the debtor company and the holders of an issue referred to in paragraph (a).

11 The debentures conveyed the personal property of Elan and Nova as security to Michael Comiskey as trustee. No consent was obtained from the bank as required by the loan agreements, nor was any consent obtained from the receiver. Cheques for $10,000 each, representing the loans secured in the debentures, were given to Elan and Nova on Wednesday, August 29, 1990, but not deposited until 6 days later on September 4, 1990, after an interim order had been made by Mr. Justice Farley in favour of Elan and Nova staying the bank from taking proceedings.

12 On August 30, 1990 Elan and Nova applied under s. 5 of the CCAA for an order directing a meeting of secured creditors to vote on a plan of arrangement. Section 5 provides:

> 5. Where a compromise or an arrangement is proposed between a debtor company and its secured creditors or any class of them, the court may, on the application in a summary way of the company or 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.

13 The application was heard by Farley J. on Friday, August 31, 1990, at 8 a.m. Farley J. dismissed the application on the grounds that the CCAA required that there be more than one debenture issued by each company. Later on the same say, August 31, 1990, Elan and Nova each issued two debentures for $500 to the wife of the principal of Elan through her sister as trustee. The debentures provided for payment of interest to commence on August 31, 1992. Cheques for $500 were delivered that day to the companies but not deposited in the bank account until September 4, 1990. These debentures conveyed the personal property in the assets of Elan and Nova to the trustee as security. Once again it is conceded that the debentures were issued for the sole purpose of meeting the requirements of s. 3 of the CCAA. No consent was obtained from the bank as required by the loan terms, nor was any consent obtained from the receiver.

14 On August 31, 1990, following the creation of the trust deeds and the issuance of the debentures, Elan and Nova commenced new applications under the CCAA which were heard late in the day by Farley J. He adjourned the applications to September 10, 1990, on certain terms, including a stay preventing the bank from acting on its security and allowing Elan to spend up to $321,000 from accounts receivable collected by it.

15 The plan of arrangement filed with the application provided that Elan and Nova would carry on business for 3 months, that secured creditors would not be paid and could take no action on their security for 3 months, and that the accounts receivable of Elan and Nova assigned to the bank could be utilized by Elan and Nova for purposes of its day-to-day operations. No compromise of any sort was proposed.

16 On September 11, 1990, Hoolihan J. ordered that a meeting of the secured creditors of Elan and Nova be held no later than October 22, 1990, to consider the plan of arrangement that had been filed, or other suitable plan. He ordered that the plan of arrangement be presented to the secured creditors no later than September 27, 1990. He made further orders effective for 3 days until September 14, 1990, including orders:

> (i) that the companies could spend the accounts receivable assigned to the bank that would be collected in accordance with a cash flow forecast filed with the Court providing for $1,387,000 to be spent by September 30, 1990; and
>
> (ii) a stay of proceedings against the bank acting on any of its security or paying down any of its loans from accounts receivable collected by Elan and Nova.

17 On September 14, 1990, Hoolihan J. extended the terms of his order of September 11, 1990, to remain in effect until the plan of arrangement was presented to the Court no later than October 24, 1990 for final approval. This order continued the power of Elan and Nova to spend up to $1,387,000 of the accounts receivable assigned to the bank in accordance with the projected cash flow to September 30, 1990, and to spend a further amount to October 24, 1990, in accordance with a cash flow to be approved by Hoolihan J. prior to October 1, 1990. Further orders dated September 27 and October 18 have extended the power to spend the accounts receivable to November 14, 1990.

18 On September 14, 1990, the bank requested Hoolihan J. to restrict his order so that Elan and Nova could use the accounts receivable assigned to the bank only so long as they continued to operate within the borrowing guidelines contained in the terms of the loan agreements with the bank. These guidelines require a certain ratio to exist between bank loans and the book value of the accounts receivable and inventory assigned to the bank, and are designed in normal circumstances to ensure that there is sufficient value in the security assigned to the bank. Hoolihan J. refused to make the order.

19 On October 18, 1990, Hoolihan J. ordered that the composition of the classes of secured creditors for the purposes of voting at the meeting of secured creditors shall be as follows:

(a) The bank, RoyNat, O.D.C., the City of Chatham and the Village of Glencoe shall comprise one class.

(b) The parties related to the principal of Elan that acquired their debentures to enable the companies to apply under the CCAA shall comprise a second class.

20 On October 18, 1990, at the request of counsel for Elan and Nova, Hoolihan J. further ordered that the date for the meeting of creditors of Elan and Nova be extended to November 9, 1990, in order to allow a new plan of arrangement to be sent to all creditors, including unsecured creditors of those companies. Elan and Nova now plan to offer a plan of compromise or arrangement to the unsecured creditors of Elan and Nova as well as to the secured creditors.

21 There are five issues in this appeal.

(1) Are the debentures issued by Elan and Nova for the purpose of permitting the companies to qualify as applicants under the CCAA debentures within the meaning of s. 3 of the CCAA?

(2) Did the issue of the debentures contravene the provisions of the loan agreements between Elan and Nova and the bank? If so, what are the consequences for CCAA purposes?

(3) Did Elan and Nova have the power to issue the debentures and make application under the CCAA after the bank had appointed a receiver and after the order of Saunders J.?

(4) Did Hoolihan J. have the power under s. 11 of the CCAA to make the interim orders that he made with respect to the accounts receivable?

(5) Was Hoolihan J. correct in ordering that the bank vote on the proposed plan of arrangement in a class with RoyNat and the other secured creditors?

22 It is well established that the CCAA is intended to provide a structured environment for the negotiation of compromises between a debtor company and its creditors for the benefit of both. Such a resolution can have significant benefits for the company, its shareholders and employees. For this reason the debtor companies, Elan and Nova, are entitled to a broad and liberal interpretation of the jurisdiction of the Court under the CCAA. Having said that, it does not follow that in exercising its discretion to order a meeting of creditors under s. 5 of the CCAA that the Court should not consider the equities in this case as they relate to these companies and to one of its principal secured creditors, the bank.

23 The issues before Hoolihan J. and this Court were argued on a technical basis. Hoolihan J. did not give effect to the argument that the debentures described above were a "sham" and could not be used for the purposes of asserting jurisdiction. Unfortunately, he did not address any of the other arguments presented to him on the threshold issue of the availability of the CCAA. He appears to have acted on the premise that if the CCAA can be made available, it should be utilized.

24 If Hoolihan J. did exercise any discretion overall, it is not reflected in his reasons. I believe, therefore, that we are in a position to look at the uncontested chronology of these proceedings and exercise our own discretion. To me, the significant date is August 27, 1990 when the bank appointed Coopers & Lybrand Limited as receiver and manager of the undertaking, property and assets mortgaged and charged under the demand debenture and of the collateral under the general security agreement, both

dated June 20, 1979. On the same date, it appointed the same company as receiver and manager for Nova under a general security agreement dated December 5, 1988. The effect of this appointment is to divest the companies and their boards of directors of their power to deal with the property comprised in the appointment: Raymond Walton, *Kerr on the Law and Practice as to Receivers*, 16th ed. (London: Sweet & Maxwell, 1983), p. 292. Neither Elan nor Nova had the power to create further indebtedness, and thus to interfere with the ability of the receiver to manage the two companies: *Alberta Treasury Branches v. Hat Development Ltd.* (1988), 71 C.B.R. (N.S.) 264, 64 Alta. L.R. (2d) 17 (Q.B.), aff'd (1989), 65 Alta. L.R. (2d) 374 (C.A.).

25 Counsel for the debtor companies submitted that the management powers of the receiver were stripped from the receiver by Saunders J. in his interim order, when he allowed the receiver access to the companies' properties but would not permit it to realize on the security of the bank until further order. He pointed out that the order also provided that the companies were entitled to remain in possession and "to carry on business in the ordinary course" until further order.

26 I do not agree with counsel's submission covering the effect of the order. It certainly restricted what the receiver could do on an interim basis, but it imposed restrictions on the companies as well. The issue of these disputed debentures in support of an application for relief as insolvent companies under the CCAA does not comply with the order of Saunders J. This is not carrying on business in the ordinary course. The residual power to take all of these initiatives for relief under the CCAA remained with the receiver, and if trust deeds were to be issued, an order of the Court in Action 54033/90 was required permitting their issuance and registration.

27 There is another feature which, in my opinion, affects the exercise of discretion, and that is the probability of the meeting achieving some measure of success. Hoolihan J. considered the calling of the meeting at one hearing, as he was asked to do, and determined the respective classes of creditors at another. This latter classification is necessary because of the provisions of s. 6(a) of the CCAA, which reads as follows:

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

28 If both matters had been considered at the same time, as in my view they should have been, and if what I regard as a proper classification of the creditors had taken place, I think it is obvious that the meeting would not be a productive one. It was improper, in my opinion, to create one class of creditors made up of all the secured creditors save the so-called "sham" creditors. There is no true community of interest among them, and the motivation of Elan and Nova in striving to create a single class is clearly designed to avoid the classification of the bank as a separate class.

29 It is apparent that the only secured creditors with a significant interest in the proceeding under the CCAA are the bank and RoyNat. The two municipalities have total claims for arrears of taxes of less than $100,000. They have first priority in the lands of the companies. They are in no jeopardy whatsoever. The O.D.C. has a potential liability in that it can be called upon by RoyNat under its guarantee to a maximum of $500,000, and this will trigger default under its debentures with the companies, but its interests lie with RoyNat.

30 As to RoyNat, it is the largest creditor with a debt of some $12 million. It will dominate any class it is in because, under s. 6 of the CCAA, the majority in a class must represent three-quarters in value of that class. It will always have a veto by reason of the size of its claim, but requires at least one creditor to vote for it to give it a majority in number (I am ignoring the municipalities). It needs the O.D.C.

31 I do not base my opinion solely on commercial self-interest, but also on the differences in legal interest. The bank has first priority on the receivables referred to as the "quick assets", and RoyNat ranks second in priority. RoyNat has first priority on the buildings and realty, the "fixed assets", and the bank has second priority.

32 It is in the commercial interests of the bank, with its smaller claim and more readily realizable assets, to collect and retain the accounts receivable. It is in the commercial interests of RoyNat to preserve the cash flow of the business and sell the enterprise as a going concern. It can only do that by overriding the prior claim of the bank to these receivables. If it can vote with the O.D.C. in the same class as the bank, it can achieve that goal and extinguish the prior claim of the bank to realize on the receivables. This it can do, despite having acknowledged its legal relationship to the bank in the priority agreement signed by the two. I can think of no reason why the legal interest of the bank as the holder of the first security on the receivables should be overridden by RoyNat as holder of the second security.

33 The classic statement on classes of creditors is that of Lord Esher M.R. in *Sovereign Life Assurance Co. v. Dodd*, [1892] 2 Q.B. 573, [1891-4] All E.R. 246 (C.A.), at pp. 579-580 [Q.B.]:

> The Act [*Joint Stock Companies Arrangement Act, 1870*] says that the persons to be summoned to the meeting (all of whom, be it said in passing, are creditors) are persons who can be divided into different classes — classes which the Act of Parliament recognises, though it does not define them. This, therefore, must be done: they must be divided into different classes. What is the reason for such a course? It is because the creditors composing the different classes have different interests; and, therefore, if we find a different state of facts existing among different creditors which may differently affect their minds and their judgment, they must be divided into different classes.

34 The *Sovereign Life* case was quoted with approval by Kingstone J. in *Re Wellington Building Corp.*, [1934] O.R. 653, 16 C.B.R. 48, [1934] 4 D.L.R. 626, [1934] O.W.N. 562 (S.C.), at p. 659 [O.R.]. He also quoted another English authority at p. 658:

> In *In re Alabama, New Orleans, Texas and Pacific Junction Ry. Co.*, [1891] 1 Ch. 213, a scheme and arrangement under the Joint Stock Companies Arrangement Act (1870), was submitted to the Court for approval. Lord Justice Bowen, at p. 243, says:
>
> > Now, I have no doubt at all that it would be improper for the Court to allow an arrangement to be forced on any class of creditors, if the arrangement cannot reasonably be supposed by sensible business people to be for the benefit of that class as such, otherwise the sanction of the Court would be a sanction to what would be a scheme of confiscation. The object of this section is not confiscation ... Its object is to enable compromises to be made which are for the common benefit of the creditors as creditors, or for the common benefit of some class of creditors as such.

35 Kingstone J. set aside a meeting where three classes of creditors were permitted to vote together. He said at p. 660:

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

36 We have been referred to more modern cases, including two decisions of Trainor J. of the British Columbia Supreme Court, both entitled *Re Northland Properties Ltd.* One case is reported in (1988), 73 C.B.R. (N.S.) 166, 31 B.C.L.R. (2d) 35, and the other in the same volume at p. 175 [C.B.R.]. Trainor J. was upheld on appeal on both judgments. The first judgment of the British Columbia Court of Appeal is unreported (16 September, 1988) [Doc. No. Vancouver CA009772, Taggart, Lambert and Locke JJ.A.]. The judgment in the second appeal is reported at 73 C.B.R. (N.S.) 195, [1989] 3 W.W.R. 363, 34 B.C.L.R. (2d) 122.

37 In the first *Northland* case, Trainor J. held that the difference in the terms of parties to and priority of different bonds meant that they should be placed in separate classes. He relied upon *Re Wellington Building Corp.*, supra. In the second *Northland* case, he dealt with 15 mortgagees who were equal in priority but held different parcels of land as security. Trainor J. held that their relative security positions were the same, notwithstanding that the mortgages were for the most part secured by charges against separate properties. The nature of the debt was the same, the nature of the security was the same, the remedies for default were the same, and in all cases they were corporate loans by sophisticated lenders. In specifically accepting the reasoning of Trainor J., the Court of Appeal held that the concern of the various mortgagees as to the quality of their individual securities

was "a variable cause arising not by any difference in legal interests, but rather as a consequence of bad lending, or market values, or both" (p. 203).

38 In *Re NsC Diesel Power Inc.* (1990), 79 C.B.R. (N.S.) 1, 97 N.S.R. (2d) 295, 258 A.P.R. 295 (T.D.), the Court stressed that a class should be made up of persons "'whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest'" (p. 8 [of C.B.R.]).

39 My assessment of these secured creditors is that the bank should be in its own class. This being so, it is obvious that no plan of arrangement can succeed without its approval. There is no useful purpose to be served in putting a plan of arrangement to a meeting of creditors if it is known in advance that it cannot succeed. This is another cogent reason for the Court declining to exercise its discretion in favour of the debtor companies.

40 For all the reasons given above, the application under the CCAA should have been dismissed. I do not think that I have to give definitive answers to the individual issues numbered (1) and (2). They can be addressed in a later case, where the answers could be dispositive of an application under the CCAA. The answer to (3) is that the combined effect of the receivership and the order of Saunders J. disentitled the companies to issue the debentures and bring the application under the CCAA. It is not necessary to answer issue (4), and the answer to (5) is no.

41 Accordingly, I would allow the appeal, set aside the three orders of Hoolihan J., and, in their place, issue an order dismissing the application under the CCAA. The bank should receive its costs of this appeal, the applications for leave to appeal, and the proceedings before Farley and Hoolihan JJ., to be paid by Elan, Nova and RoyNat.

42 Ernst & Young were appointed monitor in the order of Hoolihan J. dated September 14, 1990, to monitor the operations of Elan and Nova and give effect to and supervise the terms and conditions of the stay of proceedings in accordance with Appendix "C" appended to the order. The monitor should be entitled to be paid for all services performed to date, including whatever is necessary to complete its reports for past work, as called for in Appendix "C".

DOHERTY J.A. **(dissenting in part):**

I Background

43 On November 2, 1990, this Court allowed the appeal brought by the Bank of Nova Scotia (the "bank") and vacated several orders made by Hoolihan J. Finlayson J.A. delivered oral reasons on behalf of the majority. At the same time, I delivered brief oral reasons dissenting in part from the conclusion reached by the majority and undertook to provide further written reasons. These are those reasons.

44 The events relevant to the disposition of this appeal are set out in some detail in the oral reasons of Finlayson J.A. I will not repeat that chronology, but will refer to certain additional background facts before turning to the legal issues.

45 Elan Corporation ("Elan") owns the shares of Nova Metal Products Inc. ("Nova Inc."). Both companies have been actively involved in the manufacture of automobile parts for a number of years. As of March 1990, the companies had total annual sales of about $30 million, and employed some 220 people in plants located in Chatham and Glencoe, Ontario. The operation of these companies no doubt plays a significant role in the economy of these two small communities.

46 In the 4 years prior to 1989, the companies had operated at a profit ranging from $287,000 (1987) to $1,500,000 (1986). In 1989, several factors, including large capital expenditures and a downturn in the market, combined to produce an operational loss of about $1,333,000. It is anticipated that the loss for the year ending June 30, 1990, will be about $2.3 million. As of August 1, 1990, the companies continued in full operation, and those in control anticipated that the financial picture would improve significantly later in 1990, when the companies would be busy filling several contracts which had been obtained earlier in 1990.

47 The bank has provided credit to the companies for several years. In January 1989, the bank extended an operating line of credit to the companies. The line of credit was by way of a demand loan that was secured in the manner described by Finlayson J.A. Beginning in May 1989, and from time to time after that, the companies were in default under the terms of the

loan advanced by the bank. On each occasion, the bank and the companies managed to work out some agreement so that the bank continued as lender and the companies continued to operate their plants.

48 Late in 1989, the companies arranged for a $500,000 operating loan from RoyNat Inc. It was hoped that this loan, combined with the operating line of $2.5 million from the bank, would permit the company to weather its fiscal storm. In March 1990, the bank took the position that the companies were in breach of certain requirements under their loan agreements, and warned that if the difficulties were not rectified the bank would not continue as the company's lender. Mr. Patrick Johnson, the president of both companies, attempted to respond to these concerns in a detailed letter to the bank dated March 15, 1990. The response did not placate the bank. In May 1990, the bank called its loan and made a demand for immediate payment. Mr. Spencer, for the bank, wrote: "We consider your financial condition continues to be critical and we are not prepared to delay further making formal demand." He went on to indicate that, subject to further deterioration in the companies' fiscal position, the bank was prepared to delay acting on its security until June 1, 1990.

49 As of May 1990, Mr. Johnson, to the bank's knowledge, was actively seeking alternative funding to replace the bank. At the same time, he was trying to convince the union which represented the workers employed at both plants to assist in a co-operative effort to keep the plants operational during the hard times. The union had agreed to discuss amendment of the collective bargaining agreement to facilitate the continued operation of the companies.

50 The June 1, 1990 deadline set by the bank passed without incident. Mr. Johnson continued to search for new financing. A potential lender was introduced to Mr. Spencer of the bank on August 13, 1990, and it appeared that the bank, through Mr. Spencer, was favourably impressed with this potential lender. However, on August 27, 1990, the bank decided to take action to protect its position. Coopers & Lybrand was appointed by the bank as receiver-manager under the terms of the security agreements with the companies. The companies denied the receiver access to their plants. The bank then moved before the Honourable Mr. Justice E. Saunders for an order giving the receiver possession of the premises occupied by the companies. On August 27, 1990, after hearing argument from counsel for the bank and the companies, Mr. Justice Saunders refused to install the receivers and made the following interim order:

> 1. THIS COURT ORDERS that the receiver be allowed access to the property to monitor the operations of the defendants but shall not take steps to realize on the security of The Bank of Nova Scotia until further Order of the Court.
>
> 2. THIS COURT ORDERS that the defendants shall be entitled to remain in possession and to carry on business in the ordinary course until further Order of this Court.
>
> 3. THIS COURT ORDERS that until further order the Bank of Nova Scotia shall not take steps to notify account debtors of the defendants for the purpose of collecting outstanding accounts receivable. This Order does not restrict The Bank of Nova Scotia from dealing with accounts receivable of the defendants received by it.
>
> 4. THIS COURT ORDERS that the motion is otherwise adjourned to a date to be fixed.

51 The notice of motion placed before Saunders J. by the bank referred to "an intended action" by the bank. It does not appear that the bank took any further steps in connection with this "intended action."

52 Having resisted the bank's efforts to assume control of the affairs of the companies on August 27, 1990, and realizing that their operations could cease within a matter of days, the companies turned to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "Act"), in an effort to hold the bank at bay while attempting to reorganize their finances. Finlayson J.A. has described the companies' efforts to qualify under that Act, the two appearances before the Honourable Mr. Justice Farley on August 31, 1990, and the appearances before the Honourable Mr. Justice Hoolihan in September and October 1990, which resulted in the orders challenged on this appeal.

II The Issues

53 The dispute between the bank and the companies when this application came before Hoolihan J. was a straightforward one. The bank had determined that its best interests would be served by the immediate execution of the rights it had under its various agreements with the companies. The bank's best interest was not met by the continued operation of the companies as going concerns. The companies and their other two substantial secured creditors considered that their interests required that the companies continue to operate, at least for a period which would enable the companies to place a plan of reorganization before its creditors.

54 All parties were pursuing what they perceived to be their commercial interests. To the bank, these interests entailed the "death" of the companies as operating entities. To the companies, these interests required "life support" for the companies through the provisions of the Act to permit a "last ditch" effort to save the companies and keep them in operation.

55 The issues raised on this appeal can be summarized as follows:

(i) Did Hoolihan J. err in holding that the companies were entitled to invoke the Act?

(ii) Did Hoolihan J. err in exercising his discretion in directing that a meeting of creditors should be held under the Act?

(iii) Did Hoolihan J. err in directing that the bank and RoyNat Inc. should be placed in the same class of creditors for the purposes of the Act?

(iv) Did Hoolihan J. err in the terms of the interim orders he made pending the meeting of creditors and the submission to the court of a plan of reorganization?

III The Purpose and Scheme of the Act

56 Before turning to these issues, it is necessary to understand the purpose of the Act, and the scheme established by the Act for achieving that purpose. The Act first appeared in the midst of the Great Depression (S.C. 1932-33, c. 36). The Act was intended to provide a means whereby insolvent companies could avoid bankruptcy and continue as ongoing concerns through a reorganization of their financial obligations. The reorganization contemplated required the cooperation of the debtor companies' creditors and shareholders: *Re Avery Construction Co.*, 24 C.B.R. 17, [1942] 4 D.L.R. 558 (Ont. S.C.); Stanley E. Edwards, "Reorganizations under the Companies' Creditors Arrangement Act" (1947) 25 Can. Bar Rev. 587, at pp. 592-593; David H. Goldman, "Reorganizations Under the Companies' Creditors Arrangement Act (Canada)" (1985) 55 C.B.R. (N.S.) 36, at pp. 37-39.

57 The legislation is remedial in the purest sense in that it provides a means whereby the devastating social and economic effects of bankruptcy- or creditor-initiated termination of ongoing business operations can be avoided while a court-supervised attempt to reorganize the financial affairs of the debtor company is made.

58 The purpose of the Act was artfully put by Gibbs J.A., speaking for the British Columbia Court of Appeal, in *Hongkong Bank of Canada v. Chef Ready Foods Ltd.*, an unreported judgment released October 29, 1990 [Doc. No. Vancouver CA12944, Carrothers, Cumming and Gibbs JJ.A., now reported [1991] 2 W.W.R. 136, 51 B.C.L.R. (2d) 84], at pp. 11 and 6 [unreported, pp. 91 and 88 B.C.L.R.]. In referring to the purpose for which the Act was initially proclaimed, he said:

> 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. ['the Act'], 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.

59 In an earlier passage, His Lordship had said:

> The purpose of the C.C.A.A. is to facilitate the making of a compromise or arrangement between an insolvent debtor company and its creditors to the end that the company is able to continue in business.

60 Gibbs J.A. also observed (at p. 13) that the Act was designed to serve a "broad constituency of investors, creditors and employees." 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. That interest is generally, but not always, served by permitting an attempt at reorganization: see S.E. Edwards, "Reorganizations Under the Companies' Creditors Arrangement Act," at p. 593.

61 The Act must be given a wide and liberal construction so as to enable it to effectively serve this remedial purpose: *Interpretation Act*, R.S.C. 1985, c. I-21, s. 12; *Hongkong Bank of Canada v. Chef Ready Foods Ltd.*, supra, at p. 14 [unreported, p. 92 B.C.L.R.].

62 The Act is available to all insolvent companies, provided the requirements of s. 3 of the Act are met. That section provides:

> 3. This Act does not apply in respect of a debtor company unless
>
> (a) the debtor company has outstanding an issue of secured or unsecured bonds of the debtor company or of a predecessor in title of the debtor company issued under a trust deed or other instrument running in favour of a trustee; and
>
> (b) the compromise or arrangement that is proposed under section 4 or 5 in respect of the debtor company includes a compromise or an arrangement between the debtor company and the holders of an issue referred to in paragraph (a).

63 A debtor company, or a creditor of that company, invokes the Act by way of summary application to the Court under s. 4 or s. 5 of the Act. For present purposes, s. 5 is the relevant section:

> 5. Where a compromise or an arrangement is proposed between a debtor company and its secured creditors or any class of them, the court may, on the application in a summary way of the company or 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.

64 Section 5 does not require that the Court direct a meeting of creditors to consider a proposed plan. The Court's power to do so is discretionary. There will no doubt be cases where no order will be made, even though the debtor company qualifies under s. 3 of the Act.

65 If the Court determines that a meeting should be called, the creditors must be placed into classes for the purpose of that meeting. The significance of this classification process is made apparent by s. 6 of the Act:

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

66 If the plan of reorganization is approved by the creditors as required by s. 6, it must then be presented to the Court. Once again, the Court must exercise a discretion, and determine whether it will ap prove the plan of reorganization. In exercising that

discretion, the Court is concerned not only with whether the appropriate majority has approved the plan at a meeting held in accordance with the Act and the order of the Court, but also with whether the plan is a fair and reasonable one: *Re Northland Properties Ltd.* (1988), 73 C.B.R. (N.S.) 175 at 182-185 (S.C.), aff'd 73 C.B.R. (N.S.) 195, [1989] 3 W.W.R. 363, 34 B.C.L.R. (2d) 122 (C.A.).

67 If the Court chooses to exercise its discretion in favour of calling a meeting of creditors for the purpose of considering a plan of reorganization, the Act provides that the rights and remedies available to creditors, the debtor company, and others during the period between the making of the initial order and the consideration of the proposed plan may be suspended or otherwise controlled by the Court.

68 Section 11 gives a court wide powers to make any interim orders:

> 11. Notwithstanding anything in the *Bankruptcy Act* or the *Winding-up Act*, whenever an application has been made under this Act in respect of any company, the court, on the application of any person interested in the matter, may, on notice to any other person or without notice as it may see fit,
>
> (a) make an order staying, until such time as the court may prescribe or until any further order, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy Act* and the *Winding-up Act* or either of them;
>
> (b) restrain further proceedings in any action, suit or proceeding against the company on such terms as the court sees fit; and
>
> (c) make an order that no suit, action or other proceeding shall be proceeded with or commenced against the company except with the leave of the court and subject to such terms as the court imposes.

69 Viewed in its totality, the Act gives the Court control over the initial decision to put the reorganization plan before the creditors, the classification of creditors for the purpose of considering the plan, conduct affecting the debtor company pending consideration of that plan, and the ultimate acceptability of any plan agreed upon by the creditors. The Act envisions that the rights and remedies of individual creditors, the debtor company and others may be sacrificed, at least temporarily, in an effort to serve the greater good by arriving at some acceptable reorganization which allows the debtor company to continue in operation: *Icor Oil & Gas Co. v. Canadian Imperial Bank of Commerce* (1989), 102 A.R. 161 at p. 165 (Q.B.).

IV Did Hoolihan J. Err in Holding that the Debtor Companies were Entitled to Invoke the Act?

70 The appellant advances three arguments in support of its contention that Elan and Nova Inc. were not entitled to seek relief under the Act. It argues first that the debentures issued by the companies after August 27, 1990, were "shams" and did not fulfil the requirements of s. 3 of the Act. The appellant next contends that the issuing of the debentures by the companies contravened their agreements with the bank, in which they undertook not to further encumber the assets of the companies without the consent of the bank. Lastly, the appellant maintains that once the bank had appointed a receiver-manager over the affairs of the companies on August 27, 1990, the companies had no power to create further indebtedness by way of debentures or to bring an application on behalf of the companies under the Act.

(i) Section 3 and "Instant" Trust Deeds

71 The debentures issued in August 1990, after the bank had moved to install a receiver-manager, were issued solely and expressly for the purpose of meeting the requirements of s. 3 of the Act. Indeed, it took the companies two attempts to meet those requirements. The debentures had no commercial purpose. The transactions did, however, involve true loans in the sense that moneys were advanced and debt was created. Appropriate and valid trust deeds were also issued.

72 In my view, it is inappropriate to refer to these transactions as "shams." They are neither false nor counterfeit, but rather are exactly what they appear to be, transactions made to meet jurisdictional requirements of the Act so as to permit an application for reorganization under the Act. Such transactions are apparently well known to the commercial Bar: B. O'Leary, "A Review of the Companies' Creditors Arrangement Act" (1987) 4 Nat. Insolvency Rev. 38, at p. 39; C. Ham, " 'Instant' Trust Deeds Under the C.C.A.A." (1988) 2 Commercial Insolvency Reporter 25; G.B. Morawetz, "Emerging Trends in the Use of the

Companies' Creditors Arrangement Act" (1990) Proceedings, First Annual General Meeting and Conference of the Insolvency Institute of Canada.

73 Mr. Ham writes, at pp. 25 and 30:

> Consequently, some companies have recently sought to bring themselves within the ambit of the C.C.A.A. by creating 'in stant' trust deeds, i.e., trust deeds which are created solely for the purpose of enabling them to take advantage of the C.C.A.A.

74 Applications under the Act involving the use of "instant" trust deeds have been before the Courts on a number of occasions. In no case has any court held that a company cannot gain access to the Act by creating a debt which meets the requirements of s. 3 for the express purpose of qualifying under the Act. In most cases, the use of these "instant" trust deeds has been acknowledged without comment.

75 The decision of Chief Justice Richard in *Re United Maritime Fishermen Co-op.* (1988), 67 C.B.R. (N.S.) 44, 84 N.B.R. (2d) 415, 214 A.P.R. 415 (Q.B.), varied on reconsideration (1988), 68 C.B.R. (N.S.) 170, 87 N.B.R. (2d) 333, 221 A.P.R. 333 (Q.B.), at 55-56 [67 C.B.R.], speaks directly to the use of "instant" trust deeds. The Chief Justice refused to read any words into s. 3 of the Act which would limit the availability of the Act depending on the point at which, or the purpose for which, the debenture or bond and accompanying trust deed were created. He accepted [at p. 56 C.B.R.] the debtor company's argument that the Act:

> does not impose any time restraints on the creation of the conditions as set out in s. 3 of the Act, nor does it contain any prohibition against the creation of the conditions set out in s. 3 for the purpose of obtaining jurisdiction.

76 It should, however, be noted that in *Re United Maritime Fishermen Co-op.*, supra, the debt itself was not created for the purpose of qualifying under the Act. The bond and the trust deed, however, were created for that purpose. The case is therefore factually distinguishable from the case at Bar.

77 The Court of Appeal reversed the ruling of the Chief Justice ((1988), 69 C.B.R. (N.S.) 161, 51 D.L.R. (4th) 618, 88 N.B.R. (2d) 253, 224 A.P.R. 253) on the basis that the bonds required by s. 3 of the Act had not been issued when the application was made, so that on a precise reading of the words of s. 3 the company did not qualify. The Court did not go on to consider whether, had the bonds been properly issued, the company would have been entitled to invoke the Act. Hoyt J.A., for the majority, did, however, observe without comment that the trust deeds had been created specifically for the purpose of bringing an application under the Act.

78 The judgment of MacKinnon J. in *Re Stephanie's Fashions Ltd.*, unreported, Doc. No. Vancouver A893427, released January 24, 1990 (B.C. S.C.) [now reported 1 C.B.R. (3d) 248], is factually on all fours with the present case. In that case, as in this one, it was acknowledged that the sole purpose for creating the debt was to effect compliance with s. 3 of the Act. After considering the judgment of Chief Justice Richard in *Re United Maritime Fishermen Co-op.*, supra, MacKinnon J. held, at p. 251:

> The reason for creating the trust deed is not for the usual purposes of securing a debt but, when one reads it, on its face, it does that. I find that it is a genuine trust deed and not a fraud, and that the petitioners have complied with s. 3 of the statute.

79 *Re Metals & Alloys Co.* (16 February 1990) is a recent example of a case in this jurisdiction in which "instant" trust deeds were successfully used to bring a company within the Act. The company issued debentures for the purpose of permitting the company to qualify under the Act, so as to provide it with an opportunity to prepare and submit a reorganization plan. The company then applied for an order, seeking, inter alia, a declaration that the debtor company was a corporation within the meaning of the Act. Houlden J.A., hearing the matter at first instance, granted the declaration request in an order dated February 16, 1990. No reasons were given. It does not appear that the company's qualifications were challenged before Houlden J.A.; however, the nature of the debentures issued and the purpose for their issue was fully disclosed in the material before him. The requirements of s. 3 of the Act are jurisdictional in nature, and the consent of the parties cannot vest a court with jurisdiction

it does not have. One must conclude that Houlden J.A. was satisfied that "instant" trust deeds suffice for the purposes of s. 3 of the Act.

80 A similar conclusion is implicit in the reasons of the British Columbia Court of Appeal in *Hongkong Bank of Canada v. Chef Ready Foods Ltd.*. In that case, a debt of $50, with an accompanying debenture and trust deed, was created specifically to enable the company to make application under the Act. The Court noted that the debt was created solely for that purpose in an effort to forestall an attempt by the bank to liquidate the assets of the debtor company. The Court went on to deal with the merits, and to dismiss an appeal from an order granting a stay pending a reorganization meeting. The Court could not have reached the merits without first concluding that the $50 debt created by the company met the requirements of s. 3 of the Act.

81 The weight of authority is against the appellant. Counsel for the appellant attempts to counter that authority by reference to the remarks of the Minister of Justice when s. 3 was introduced as an amendment to the Act in the 1952-53 sittings of Parliament (House of Commons Debates, 1-2 Eliz. II (1952-53), vol. II, pp. 1268-1269). The interpretation of words found in a statute, by reference to speeches made in Parliament at the time legislation is introduced, has never found favour in our Courts: *Reference Re Residential Tenancies Act (Ontario)*, [1981] 1 S.C.R. 714, 123 D.L.R. (3d) 554, 37 N.R. 138, at 721 [S.C.R.], 561 [D.L.R.]. Nor, with respect to Mr. Newbould's able argument, do I find the words of the Minister of Justice at the time the present s. 3 was introduced to be particularly illuminating. He indicated that the amendment to the Act left companies with complex financial structures free to resort to the Act, but that it excluded companies which had only unsecured mercantile creditors. The Minister does not comment on the intended effect of the amendment on the myriad situations between those two extremes. This case is one such situation. These debtor companies had complex secured debt structures, but those debts were not, prior to the issuing of the debentures in August 1990, in the form contemplated by s. 3 of the Act. Like Richard C.J.Q.B. in *Re United Maritime Fishermen Co-op.*, supra, at pp. 52-53, I am not persuaded that the comments of the Minister of Justice assist in interpreting s. 3 of the Act in this situation.

82 The words of s. 3 are straightforward. They require that the debtor company have, at the time an application is made, an outstanding debenture or bond issued under a trust deed. No more is needed. Attempts to qualify those words are not only contrary to the wide reading the Act deserves, but can raise intractable problems as to what qualifications or modifications should be read into the Act. Where there is a legitimate debt which fits the criteria set out in s. 3, I see no purpose in denying a debtor company resort to the Act because the debt and the accompanying documentation was created for the specific purpose of bringing the application. It must be remembered that qualification under s. 3 entitles the debtor company to nothing more than consideration under the Act. Qualification under s. 3 does not mean that relief under the Act will be granted. The circumstances surrounding the creation of the debt needed to meet the s. 3 requirement may well have a bearing on how a court exercises its discretion at various stages of the application, but they do not alone interdict resort to the Act.

83 In holding that "instant" trust deeds can satisfy the requirements of s. 3 of the Act, I should not be taken as concluding that debentures or bonds which are truly shams, in that they do not reflect a transaction which actually occurred and do not create a real debt owed by the company, will suffice. Clearly, they will not. I do not, however, equate the two. One is a tactical device used to gain the potential advantages of the Act. The other is a fraud.

84 Nor does my conclusion that "instant" trust deeds can bring a debtor company within the Act exclude considerations of the good faith of the debtor company in seeking the protection of the Act. A debtor company should not be allowed to use the Act for any purpose other than to attempt a legitimate reorganization. If the purpose of the application is to advantage one creditor over another, to defeat the legitimate interests of creditors, to delay the inevitable failure of the debtor company, or for some other improper purpose, the Court has the means available to it, apart entirely from s. 3 of the Act, to prevent misuse of the Act. In cases where the debtor company acts in bad faith, the Court may refuse to order a meeting of creditors, it may deny interim protection, it may vary interim protection initially given when the bad faith is shown, or it may refuse to sanction any plan which emanates from the meeting of the creditors: see Lawrence J. Crozier, "Good Faith and the Companies' Creditors Arrangement Act" (1989) 15 Can. Bus. L.J. 89.

(ii) Section 3 and the Prior Agreement with the Bank Limiting Creation of New Debt

85 The appellant also argues that the debentures did not meet the requirements of s. 3 of the Act because they were issued in contravention of a security agreement made between the companies and the bank. Assuming that the debentures were issued in contravention of that agreement, I do not understand how that contravention affects the status of the debentures for the purposes of s. 3 of the Act. The bank may well have an action against the debtor company for issuing the debentures, and it may have remedies against the holders of the debentures if they attempted to collect on their debt or enforce their security. Neither possibility, however, negates the existence of the debentures and the related trust deeds. Section 3 does not contemplate an inquiry into the effectiveness or enforceability of the s. 3 debentures, as against other creditors, as a condition precedent to qualification under the Act. Such inquiries may play a role in a judge's determination as to what orders, if any, should be made under the Act.

(iii) Section 3 and the Appointment of a Receiver-Manager

86 The third argument made by the bank relies on its installation of a receiver-manager in both companies prior to the issue of the debentures. I agree with Finlayson J.A. that the placement of a receiver, either by operation of the terms of an agreement or by court order, effectively removes those formerly in control of the company from that position, and vests that control in the receiver-manager: *Alberta Treasury Branches v. Hat Development Ltd.* (1988), 71 C.B.R. (N.S.) 264, 64 Alta. L.R. (2d) 17 (Q.B.), aff'd without deciding this point (1989), 65 Alta. L.R. (2d) 374 (C.A.). I cannot, however, agree with his interpretation of the order of Saunders J. I read that order as effectively turning the receiver into a monitor with rights of access, but with no authority beyond that. The operation of the business is specifically returned to the companies. The situation created by the order of Saunders J. can usefully be compared to that which existed when the application was made in *Hat Development Ltd.* Forsyth J., at p. 268 C.B.R., states:

> The receiver-manager in this case and indeed in almost all cases is charged by the court with the responsibility of managing the affairs of a corporation. It is true that it is appointed pursuant, in this case, to the existence of secured indebtedness and at the behest of a secured creditor to realize on its security and retire the indebtedness. Nonetheless, this receiver-manager was court-appointed and not by virtue of an instrument. As a court-appointed receiver it owed the obligation and the duty to the court to account from time to time and to come before the court for the purposes of having some of its decisions ratified or for receiving advice and direction. *It is empowered by the court to manage the affairs of the company and it is completely inconsistent with that function to suggest that some residual power lies in the hands of the directors of the company to create further indebtedness of the company and thus interfere, however slightly, with the receiver-manager's ability to manage*.

[Emphasis added.]

87 After the order of Saunders J., the receiver-manager in this case was not obligated to manage the companies. Indeed, it was forbidden from doing so. The creation of the "instant" trust deeds and the application under the Act did not interfere in any way with any power or authority the receiver-manager had after the order of Saunders J. was made.

88 I also find it somewhat artificial to suggest that the presence of a receiver-manager served to vitiate the orders of Hoolihan J. Unlike many applications under s. 5 of the Act, the proceedings before Hoolihan J. were not ex parte and he was fully aware of the existence of the receiver-manager, the order of Saunders J., and the arguments based on the presence of the receiver-manager. Clearly, Hoolihan J. considered it appropriate to proceed with a plan of reorganization despite the presence of the receiver-manager and the order of Saunders J. Indeed, in his initial order he provided that the order of Saunders J. "remains extant." Hoolihan J. did not, as I do not, see that order as an impediment to the application or the granting of relief under the Act. Had he considered that the receiver-manager was in control of the affairs of the company, he could have varied the order of Saunders J. to permit the applications under the Act to be made by the companies: *Hat Development Ltd.*, at pp. 268-269 C.B.R. It is clear to me that he would have done so had he felt it necessary. If the installation of the receiver-manager is to be viewed as a bar to an application under this Act, and if the orders of Hoolihan J. were otherwise appropriate, I would order that the order of Saunders J. should be varied to permit the creation of the debentures and the trust deeds and the bringing of

this application by the companies. I take this power to exist by the combined effect of s. 14(2) of the Act and s. 144(1) of the *Courts of Justice Act*, 1984, S.O. 1984, c. 11.

89 In my opinion, the debentures and "instant" trust deeds created in August 1990 sufficed to bring the company within the requirements of s. 3 of the Act, even if in issuing those debentures the companies breached a prior agreement with the bank. I am also satisfied that, given the terms of the order of Saunders J., the existence of a receiver-manager installed by the bank did not preclude the application under s. 3 of the Act.

V Did Hoolihan J. Err in Exercising his Discretion in Favour of Directing that a Creditors' Meeting be Held to Consider the Proposed Plan of Reorganization?

90 As indicated earlier, the Act provides a number of points at which the Court must exercise its discretion. I am concerned with the initial exercise of discretion contemplated by s. 5 of the Act, by which the Court may order a meeting of creditors for purposes of considering a plan of reorganization. Hoolihan J. exercised that discretion in favour of the debtor companies. The factors relevant to the exercise of that discretion are as variable as the fact situations which may give rise to the application. Finlayson J.A. has concentrated on one such factor, the chance that the plan, if put before a properly constituted meeting of the creditors, could gain the required approval. I agree that the feasibility of the plan is a relevant and significant factor to be considered in determining whether to order a meeting of creditors: S.E. Edwards, "Reorganizations Under the Companies' Creditors Arrangement Act," at pp. 594-595. I would not, however, impose a heavy burden on the debtor company to establish the likelihood of ultimate success from the outset. As the Act will often be the last refuge for failing companies, it is to be expected that many of the proposed plans of reorganization will involve variables and contingencies which will make the plan's ultimate acceptability to the creditors and the Court very uncertain at the time the initial application is made.

91 On the facts before Hoolihan J., there were several factors which supported the exercise of his discretion in favour of directing a meeting of the creditors. These included the apparent support of two of the three substantial secured creditors, the companies' continued operation, and the prospect (disputed by the bank) that the companies' fortunes would take a turn for the better in the near future, the companies' ongoing efforts — that eventually met with some success — to find alternate financing, and the number of people depending on the operation of the company for their livelihood. There were also a number of factors pointing in the other direction, the most significant of which was the likelihood that a plan of reorganization acceptable to the bank could not be developed.

92 I see the situation which presented itself to Hoolihan J. as capable of a relatively straightforward risk-benefit analysis. If the s. 5 order had been refused by Hoolihan J., it was virtually certain that the operation of the companies would have ceased immediately. There would have been immediate economic and social damage to those who worked at the plants, and those who depended on those who worked at the plants for their well-being. This kind of damage cannot be ignored, especially when it occurs in small communities like those in which these plants are located. A refusal to grant the application would also have put the investments of the various creditors, with the exception of the bank, at substantial risk. Finally, there would have been obvious financial damage to the owner of the companies. Balanced against these costs inherent in refusing the order would be the benefit to the bank, which would then have been in a position to realize on its security in accordance with its agreements with the companies.

93 The granting of the s. 5 order was not without its costs. It has denied the bank the rights it had bargained for as part of its agreement to lend substantial amounts of money to the companies. Further, according to the bank, the order has put the bank at risk of having its loans become undersecured because of the diminishing value of the accounts receivable and inventory which it holds as security and because of the ever-increasing size of the companies' debt to the bank. These costs must be measured against the potential benefit to all concerned if a successful plan of reorganization could be developed and implemented.

94 As I see it, the key to this analysis rests in the measurement of the risk to the bank inherent in the granting of the s. 5 order. If there was a real risk that the loan made by the bank would become undersecured during the operative period of the s. 5 order, I would be inclined to hold that the bank should not have that risk forced on it by the Court. However, I am unable to see that the bank is in any real jeopardy. The value of the security held by the bank appears to be well in excess of the size of its loan

on the initial application. In his affidavit, Mr. Gibbons of Coopers & Lybrand asserted that the companies had overstated their cash flow projections, that the value of the inventory could diminish if customers of the companies looked to alternate sources for their product, and that the value of the accounts receivable could decrease if customers began to claim set-offs against those receivables. On the record before me, these appear to be no more than speculative possibilities. The bank has had access to all of the companies' financial data on an ongoing basis since the order of Hoolihan J. was made almost 2 months ago. Nothing was placed before this Court to suggest that any of the possibilities described above had come to pass.

95 Even allowing for some overestimation by the companies of the value of the security held by the bank, it would appear that the bank holds security valued at approximately $4 million for a loan that was, as of the hearing of this appeal, about $2.3 million. The order of Hoolihan J. was to terminate no later than November 14, 1990. I am not satisfied that the bank ran any real risk of having the amount of the loan exceed the value of the security by that date. It is also worth noting that the order under appeal provided that any party could apply to terminate the order at any point prior to November 14. This provision provided further protection for the bank in the event that it wished to make the case that its loan was at risk because of the deteriorating value of its security.

96 Even though the chances of a successful reorganization were not good, I am satisfied that the benefits flowing from the making of the s. 5 order exceeded the risk inherent in that order. In my view, Hoolihan J. properly exercised his discretion in directing that a meeting of creditors should be held pursuant to s. 5 of the Act.

VI Did Hoolihan J. Err in Directing that the Bank and RoyNat Inc. Should be Placed in the Same Class for the Purposes of the Act?

97 I agree with Finlayson J.A. that the bank and RoyNat Inc., the two principal creditors, should not have been placed in the same class of secured creditors for the purposes of ss. 5 and 6 of the Act. Their interests are not only different, they are opposed. The classification scheme created by Hoolihan J. effectively denied the bank any control over any plan of reorganization.

98 To accord with the principles found in the cases cited by Finlayson J.A., the secured creditors should have been grouped as follows:

— Class 1 — The City of Chatham and the Village of Glencoe

— Class 2 — The Bank of Nova Scotia

— Class 3 — RoyNat Inc., Ontario Development Corporation, and those holding debentures issued by the company on August 29 and 31, 1990.

VII Did Hoolihan J. Err in Making the Interim Orders He Made?

99 Hoolihan J. made a number of orders designed to control the conduct of all of the parties, pending the creditors' meeting and the placing of a plan of reorganization before the Court. The first order was made on September 11, 1990, and was to expire on or before October 24, 1990. Subsequent orders varied the terms of the initial order somewhat, and extended its effective date until November 14, 1990.

100 These orders imposed the following conditions pending the meeting:

(a) all proceedings with respect to the debtor companies should be stayed, including any action by the bank to realize on its security;

(b) the bank could not reduce its loan by applying incoming receipts to those debts;

(c) the bank was to be the sole banker for the companies;

(d) the companies could carry on business in the normal course, subject to certain very specific restrictions;

(e) a licensed trustee was to be appointed to monitor the business operations of the companies and to report to the creditors on a regular basis; and

(f) any party could apply to terminate the interim orders, and the orders would be terminated automatically if the companies defaulted on any of the obligations imposed on them by the interim orders.

101 The orders placed significant restrictions on the bank for a 2-month period, but balanced those restrictions with provisions limiting the debtor companies' activities, and giving the bank ongoing access to up-to-date financial information concerning the companies. The bank was also at liberty to return to the Court to request any variation in the interim orders which changes in financial circumstances might merit.

102 These orders were made under the wide authority granted to the court by s. 11 of the Act. L.W. Houlden and C.H. Morawetz, in *Bankruptcy Law of Canada*, 3d ed. (Toronto: Carswell, 1989), at pp. 2-102 to 2-103, describe the purpose of the section:

The legislation is intended to have wide scope and allows a judge to make orders which will effectively maintain the status quo for a period while the insolvent company attempts to gain the approval of its creditors for a proposed arrangement which will enable the company to remain in operation for what is, hopefully, the future benefit of both the company and it creditors. This aim is facilitated by s. 11 of the Act, which enables the court to restrain further proceedings in any action, suit or proceeding against the company upon such terms as the court sees fit.

103 A similar sentiment appears in *Hongkong Bank of Canada v. Chef Ready Foods Ltd.*. Gibbs J.A., in discussing the scope of s. 11, said at p. 7 [unreported, pp. 88-89 B.C.L.R.]:

When a company has recourse to the C.C.A.A. the court is called upon to play a kind of supervisory role to preserve the status quo and to move the process along to the point where a compromise or arrangement is approved or it is evident that the attempt is doomed to failure. Obviously time is critical. Equally obviously, if the attempt at compromise or arrangement is to have any prospect of success, there must be a means of holding the creditors at bay, hence the powers vested in the court under s. 11.

104 Similar views of the scope of the power to make interim orders covering the period when reorganization is being attempted are found in *Meridian Developments Inc. v. Toronto-Dominion Bank; Meridian Developments Inc. v. Nu-West Ltd.*, 52 C.B.R. (N.S.) 109, [1984] 5 W.W.R. 215, 32 Alta. L.R. (2d) 150, 11 D.L.R. (4th) 576, 53 A.R. 39 (Q.B.) at 114-118 [C.B.R.]; *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.* (1988), 72 C.B.R. (N.S.) 1, 63 Alta. L.R. (2d) 361, 92 A.R. 81 (Q.B.) at 12-15 [C.B.R.]; *Quintette Coal Ltd. v. Nippon Steel Corp.*, an unreported judgment of Thackray J., released June 18, 1990 [since reported (1990), 47 B.C.L.R. (2d) 193 (S.C.)], at pp. 5-9 [pp. 196-198 B.C.L.R.]; and B. O'Leary, "A Review of the Companies' Creditors Arrangement Act," at p. 41.

105 The interim orders made by Hoolihan J. are all within the wide authority created by s. 11 of the Act. The orders were crafted to give the company the opportunity to continue in operation, pending its attempt to reorganize, while at the same time providing safeguards to the creditors, including the bank, during that same period. I find no error in the interim relief granted by Hoolihan J.

VIII Conclusion

106 In the result, I would allow the appeal in part, vacate the order of Hoolihan J. of October 18, 1990, insofar as it purports to settle the class of creditors for the purpose of the Act, and I would substitute an order establishing the three classes referred to in Part VI of these reasons. I would not disturb any of the other orders made by Hoolihan J.

Appeal allowed.

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2009 NSSC 163
Nova Scotia Supreme Court

ScoZinc Ltd., Re

2009 CarswellNS 283, 2009 NSSC 163, 177 A.C.W.S. (3d) 294, 55 C.B.R. (5th) 205

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 ScoZinc Limited

D.R. Beveridge J.

Heard: May 1, 2009
Judgment: May 1, 2009
Written reasons: May 20, 2009
Docket: Hfx 305549

Counsel: John D. Stringer, Q.C., Ben Durnford for Applicant
Robbie MacKeigan, Q.C. for Daniel Rozon
John McFarlane, Q.C. for Kamatsu

Subject: Insolvency

Headnote

Bankruptcy and insolvency --- Proposal — Companies' Creditors Arrangement Act — Arrangements — Effect of arrangement — Stay of proceedings

Company obtained order under s. 11 of Companies' Creditors Arrangement Act for stay of proceedings — This order was, as required by Act, limited to period of 30 days — Order was extended on two occasions and was now due to expire one day after day on which meeting of creditors was scheduled — There was tentative return date scheduled for one week after meeting of creditors for court to consider sanctioning plan, should it be approved by creditors — Company brought motion seeking order for, inter alia, further stay of proceedings — Motion granted — In light of conclusion that company met threshold for ordering meeting of creditors under ss. 4 and 5 of Act, appropriateness of further extension of stay of proceedings permitting company to return to court within very short period of time following meeting of creditors was patently obvious.

Bankruptcy and insolvency --- Proposal — Companies' Creditors Arrangement Act — Miscellaneous issues

Company obtained stay of proceedings under Companies' Creditors Arrangement Act, which was later extended on two occasions — Company brought motion seeking order for, inter alia, meeting of creditors pursuant to ss. 4 and 5 of Act and approval of notice of this motion being given only to certain defined creditors — Motion granted — Court should only decline to give preliminary approval of proposed plan and refuse to order meeting if it was of view that there was no hope that plan would be approved by creditors or, if it was approved by creditors, it would not, for some other reason, be approved by court — Monitor's report indicated proposed plan was reasonable — Given that opinion and in light of terms set out in proposed plan, plan was far from one that was doomed to failure — Plan was one that should be put to creditors for consideration — It was appropriate to exercise discretion set out in ss. 4 and 5 of Act and order meeting of creditors — Given number of creditors that appeared early on in proceedings, it was somewhat impractical to give notice to each of them with volumes of materials that would be required to be produced and served — With respect to prior motions, it had been required that notice be given to all creditors asserting claims against company in excess of $100,000 and all creditors asserting builders liens — In addition, all creditors were apprised of these proceedings by way of mail out to

every creditor as required by Act leading to filing of proofs of claim — Status of proceedings, including this motion, was posted on monitor's website — No reason to depart from previous practice.

Table of Authorities

Cases considered by *D.R. Beveridge J.*:

Fairview Industries Ltd., Re (1991), 1991 CarswellNS 35, 11 C.B.R. (3d) 43, (sub nom. *Fairview Industries Ltd., Re (No. 2))* 109 N.S.R. (2d) 12, (sub nom. *Fairview Industries Ltd., Re (No. 2))* 297 A.P.R. 12 (N.S. T.D.) — considered

Federal Gypsum Co., Re (2007), 2007 NSSC 384, 2007 CarswellNS 630, 261 N.S.R. (2d) 314, 835 A.P.R. 314, 40 C.B.R. (5th) 39 (N.S. S.C.) — considered

ScoZinc Ltd., Re (2009), 2009 CarswellNS 177, 2009 NSSC 108, 52 C.B.R. (5th) 200 (N.S. S.C.) — referred to

Statutes considered:

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

s. 4 — referred to

s. 5 — referred to

s. 11 — referred to

s. 11(4) — referred to

s. 11(6) — referred to

MOTION by company for order for meeting of creditors pursuant to ss. 4 and 5 of *Companies' Creditors Arrangement Act*, further extension of stay of proceedings granted to company under *Act*, and approval of notice of motion being given only to certain defined creditors.

***D.R. Beveridge J.*:**

1 ScoZinc brings a motion seeking an order to accomplish three things. The first is for a meeting of the creditors pursuant to ss. 4 and 5 of the *Companies' Creditors Arrangement Act*. The second is a further extension of the stay of proceedings initially ordered by this Court on December 22, 2008 and extended from time to time. The third is approval of notice of this motion being given only to certain defined creditors.

2 The company has filed an affidavit of William Felderhof referred to as his seventh affidavit, sworn April 28, 2009 and the Monitor has filed its sixth report dated April 30, 2009.

3 As part of its submissions the company notes that there is nothing in the *CCAA* which requires the Court to give prior preliminary approval of ScoZinc's proposed plan before it is presented to the creditors. It notes that the jurisprudence establishes that this approval is generally desirable prior to calling a meeting of the creditors. Some, but not all of this jurisprudence was reviewed by MacAdam J. in *Federal Gypsum Co., Re*, 2007 NSSC 384 (N.S. S.C.).

4 Justice MacAdam in *Federal Gypsum Co., Re* did refer to the two different standards that have been proposed or referred to in cases from Ontario and British Columbia. Some of these cases have expressed the view that the debtor company should

establish that the plan has "a reasonable chance" that it would be accepted by the creditors. Other cases have referred to the appropriate test as simply a determination as to whether or not the proposed plan is one that would be "doomed to failure".

5 In a different context, Glube C.J.T.D. (as she then was) in *Fairview Industries Ltd., Re* (1991), 11 C.B.R. (3d) 43 (N.S. T.D.) cautioned that it would be impractical and extremely costly to continue to prepare a plan when "there is no hope that it would be approved".

6 I think it fair to say that MacAdam J., although not expressly but by necessary implication, preferred the lower standard facing a debtor company in submitting its plan to the Court for a preliminary approval. At para. 12 he wrote:

> [12] In view of the relatively low threshold on the Company in seeking Court approval to have a plan of arrangement submitted to the creditors for a vote, I am satisfied the plan should proceed and the creditors should determine whether they do, or do not accept the plan as finally filed.

7 In my opinion it should not be up to the Court to second guess the probability of success of a proposed plan of arrangement. Businessmen are free to make their own views known before and ultimately at the creditors' meeting. It seems to me that the Court should only decline to give preliminary approval and refuse to order a meeting if it was of the view that there was no hope that the plan would be approved by the creditors or, if it was approved by the creditors, it would not, for some other reason, be approved by the Court.

8 The Monitor in its sixth report says that the proposed plan is reasonable under the circumstances. This opinion appears to flow from its conclusion that if the plan is rejected and the company forced into receivership or bankruptcy, unsecured creditors will not recover the amount offered in the plan and it is highly unlikely that the secured creditors will recover the amount offered to them. I see no reason to disagree with the opinion offered by the Monitor.

9 Given that opinion and in light of the terms that are set out in the proposed plan I am certainly satisfied that the plan is far from one that is doomed to failure. It is one that should be put to the creditors for their consideration. It is therefore appropriate that I exercise the discretion that is set out in ss. 4 and 5 of the *CCAA* and order a meeting of the creditors on the terms set out in the proposed meeting order.

10 With respect to the extension of the stay of proceedings, as I noted at the outset there had been an initial order of this Court under s.11 of the *CCAA*. This order was granted on December 22, 2008. It was, as required by the statute, limited to a period of 30 days. It has been extended on two previous occasions. It is now due to expire May 22 nd , 2009. The meeting of the creditors is scheduled for May 21, 2009. There is a tentative return date scheduled for May 28, 2009 for the Court to consider sanctioning the plan, should it be approved by the creditors.

11 The test with respect to extending the stay of proceedings has been set out in a number of cases that have considered ss. 11(4) and (6) of the *CCAA*. These were reviewed by me in *ScoZinc Ltd., Re*, 2009 NSSC 108 (N.S. S.C.). In these circumstances there is no need to review the test and the evidence in support of that test.

12 In light of my conclusion that the company had met the threshold for ordering a meeting of the creditors under ss. 4 and 5 of the *CCAA* the appropriateness of a further extension permitting the company to return to the Court within a very short period of time following that meeting of the creditors is patently obvious. The extension is therefore granted.

13 The last issue is the approval of notice of this motion being given only to certain defined creditors. Given the number of creditors that appeared early on in the proceedings it was somewhat impractical to give notice to each of them with the volumes of materials that would be required to be produced and served. With respect to the prior motions it was required that notice be given to all creditors asserting claims against the debtor company in excess of $100,000.00 and all creditors asserting builders liens. In addition all creditors were apprised of these proceedings by way of the mail out to each and every creditor as required by the *CCAA* leading to filing of proofs of claim. The status of the proceedings, including this motion, have been posted on the Monitor's website. I see no reason to depart from the previous practice and this aspect of the motion is also granted.

Motion granted.

2009 NSSC 163, 2009 CarswellNS 283, 177 A.C.W.S. (3d) 294, 55 C.B.R. (5th) 205

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Indexed as:

Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.

[1988] A.J. No. 1226

[1989] 2 W.W.R. 566

64 Alta. L.R. (2d) 139

72 C.B.R. (N.S.) 20

Action No. 8801-14453

Alberta Court of Queen's Bench
Judicial District of Calgary

Forsyth J.

December 22, 1988.

Counsel:

J.J. Marshall, Q.C., J.A. Legge, for Norcen Energy Resources Limited and Prairie Oil Royalties Company, Ltd.
E.D. Tavender, Q.C., D. Lloyd, R. Wigham, R.C. Dixon, for Oakwood Petroleums Ltd.
B. Tait, B.D. Newton, for the Bank of Montreal.
B. O'Leary, M.R. Russo, A. Pettie, A.Z. Breitman for Sceptre Resources Limited.
L. Robinson, for the Royal Bank of Canada.
P.T. McCarthy, T. Warner, for the HongKong Bank of Canada.
R. Gregory, P. Jull, for Bank America, Canada.
R.C. Pittman, B.J. Roth, for Esso Resources.
W. Corbett, for Canadian Co-operative Society and Saskatchewan Co-operative Society.
T.L. Czechowskyj, for National Bank.
J.G. Hanley, H.J.R. Clarke, for A.B.C. noteholders.
V.P. Lalonde, L.R. Duncan, for Innovex Equities Corporation.
I. Kerr, for Alberta Securities.
G.K. Randall, Q.C., for the Director C.B.C.A.

1 **FORSYTH J.**:-- On 12th December 1988 Oakwood Petroleums Limited ("Oakwood") filed with the court a plan of arrangement ("the plan") made pursuant to the Companies' Creditors Arrangement Act (Canada), R.S.C. 1970, c. C-25 ("C.C.A.A."), as amended, ss. 185 and 185.1 of the Canada Business Corporations Act, S.C. 1974-75-76 as amended, and s. 186 of the Business Corporations Act (Alberta), S.A. 1981, c. B-15, as amended.

2 On 16th December 1988 Oakwood brought an application before me for an order which would, inter alia, approve the classification of creditors and shareholders proposed in the plan. I would note that the classifications requested are made pursuant to ss. 4, 5 and 6 of the C.C.A.A. for the purpose of holding a vote within each class to approve the plan.

3 Since my concern primarily is with the secured creditors of Oakwood, I shall set out, in part, the sections of the C.C.A.A. relevant to the court's authority with respect to compromises with secured creditors:

> 5. Where a compromise or arrangement is proposed between a debtor company and its secured creditors or any class of them, the court may . . . order a meeting of such creditors or class of creditors . . .
> 6. Where a majority in numbers representing three-fourths in value of the creditors, or class of creditors, as the case may be, present and voting either in person or by proxy at the meeting or meetings . . . held pursuant to sections 4 and 5 . . . agree to any compromise or arrangement . . . [it] may be sanctioned by the court, and if so sanctioned is binding on all the creditors . . .

4 The plan filed with the court envisions five separate classes of creditors and shareholders. They are as follows:

> (i) The secured creditors;
> (ii) The unsecured creditors;
> (iii) The preferred shareholders of Oakwood;
> (iv) The common shareholders and holders of class A non-voting shares of Oakwood;
> (v) The shareholders of New York Oils Ltd.

5 With the exception of the proposed class comprising the secured creditors of Oakwood, there has been for the moment no objection to the proposed groupings. I add here that shareholders of course have not yet had notice of the proposal with respect to voting percentages and classes with respect to their particular interests. With that caveat, and leaving aside the proposed single class of secured creditors, I am satisfied that the other classes suggested are appropriate and they are approved.

6 I turn now to the proposed one class of secured creditors. The membership of and proposed scheme of voting within the secured creditors class is dependent upon the value of each creditor's security as determined by Sceptre Resources Ltd. ("Sceptre"), the purchaser under the plan.

7 As a result of those valuations, the membership of that class was determined to include: the Bank of Montreal, the A.B.C. noteholders, the Royal Bank of Canada, the National Bank of Canada and the HongKong Bank of Canada and the Bank of America Canada. Within the class, each secured creditor will receive one vote for each dollar of "security value". The valuations made by Sceptre represent what it considers to be a fair value for the securities.

8 Any dispute over the amount of money each creditor is to receive for its security will be determined at a subsequent fairness hearing where approval of the plan will be sought. Further, it should be noted that all counsel have agreed that, on the facts of this case, any errors made in the valuations would not result in any significant shift of voting power within the proposed class so as to alter the outcome of any vote. Therefore, the valuations made by Sceptre do not appear to be a major issue before me at this time insofar as voting is concerned.

9 The issue with which I am concerned arises from the objection raised by two of Oakwood's secured creditors, namely, HongKong Bank and Bank of America Canada, that they are grouped together with the other secured creditors. They have brought applications before me seeking leave to realize upon their security or, in the alternative, to be constituted a separate and exclusive class of creditors and to be entitled to vote as such at any meeting convened pursuant to the plan.

10 The very narrow issue which I must address concerns the propriety of classifying all the secured creditors of the company into one group. Counsel for Oakwood and Sceptre have attempted to justify their classifications by reference to the "commonality of interests test" described in Sovereign Life Assur. Co. v. Dodd [1892] 2 Q.B. 573. That test received the approval of the Alberta Court of Appeal in Savage v. Amoco Acquisition Co. (1988), 59 Alta. L.R. (2d) 260, where Kerans J.A., on behalf of the court, stated:

> We agree that the basic rule for the creation of groups for the consideration of fundamental corporate changes was expressed by Lord Esher in Sovereign Life Assur. Co. v. Dodd, [supra] when he said, speaking about creditors:
>
> ". . . if we find a different state of facts existing among different creditors which may differently affect their minds and their judgments, they must be divided into different classes."

11 In the case of Sovereign Life Assur. Co., Bowen L.J. went on to state at p. 583 that the class:

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

interest.

12 Counsel also made reference to two other "tests" which they argued must be complied with - the "minority veto test" and the "bona fide lack of oppression test". The former, it is argued, holds that the classes must not be so numerous as to give a veto power to an otherwise insignificant minority. In support of this test, they cite my judgment in Amoco Can. Petroleum Co. v. Dome Petroleum Ltd., Calgary No. 8701-20108, 28th January 1988 (not yet reported).

13 I would restrict my comments on the applicability of this test to the fact that, in the Amoco case, I was dealing with "a very small minority group of [shareholders] near the bottom of the chain of priorities". Such is not the case here.

14 In support of the "bona fide lack of oppression test", counsel cite Re Alabama, New Orleans, Texas & Pac. Junction Ry. Co., [1891] 1 Ch. 213, where Lindley L.J. stated at p. 239:

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

15 Whether this test is properly considered at this stage, that is, whether the issue is the constitution of a membership of a class, is not necessary for me to decide as there have been no allegations by the HongKong Bank or Bank of America as to a lack of bona fides.

16 What I am left with, then, is the application to the facts of this case of the "commonality of interests test" while keeping in mind that the proposed plan of arrangement arises under the C.C.A.A.

17 Sceptre and Oakwood have argued that the secured creditors' interests are sufficiently common that they can be grouped together as one class. That class is comprised of six institutional lenders (I would note that the A.B.C. noteholders are actually a group of ten lenders) who have each taken first charges as security on assets upon which they have the right to realize in order to recover their claims. The same method of valuation was applied to each secured claim in order to determine the security value under the plan.

18 On the other hand, HongKong Bank and Bank of America have argued that their interests are distinguishable from the secured creditors class as a whole and from other secured creditors on an individual basis. While they have identified a number of individually distinguishing features of their interests vis-à-vis those of other secured parties (which I will address later), they have put forth the proposition that since each creditor has taken separate security on different assets, the necessary commonality of interests is not present. The rationale offered is that the different assets may give rise to a different state of facts which could alter the creditors' view as to the propriety of participating in the plan. For example, it was suggested that the relative ease of marketability of a

distinct asset as opposed to the other assets granted as security could lead that secured creditor to choose to disapprove of the proposed plan. Similarly, the realization potential of assets may also lead to distinctions in the interests of the secured creditors and consequently bear upon their desire to participate in the plan.

19 In support of this proposition, the HongKong Bank and Bank of America draw from comments made by Ronald N. Robertson, Q.C., in a publication entitled "Legal Problems on Reorganization of Major Financial and Commercial Debtors", Canadian Bar Association - Ontario Continuing Legal Education, 5th April 1983, at p. 15, and by Stanley E. Edwards in an earlier article, "Reorganizations under the Companies' Creditors Arrangement Act" (1947), 25 Can. Bar Rev. 587, at p. 603. Both authors gave credence to this "identity of interest" proposition that secured creditors should not be members of the same class "unless their security is on the same or substantially the same property and in equal priority". They also made reference to a case decided under c. 11 of the Bankruptcy Code of the United States of America which, while not applying that proposition in that given set of facts, accepted it as a "general rule". That authority is Re Palisades-on-the-Desplaines; Seidel v. Palisades-on-the-Desplaines 89 F. 2d. 214 at 217-18 (1937, Ill.).

20 Basically, in putting forth that proposition, the HongKong Bank and Bank of America are asserting that they have made advances to Oakwood on the strength of certain security which they identified as sufficient and desirable security and which they alone have the right to realize upon. Of course, the logical extension of that argument is that in the facts of this case each secured creditor must itself comprise a class of creditors. While counsel for the HongKong Bank and Bank of America suggested it was not necessary to do so in this case, as they are the only secured creditors opposed to the classification put forth, in principle such would have to be the case if I were to accept their proposition.

21 To put the issue in another light, what I must decide is whether the holding of distinct security by each creditor necessitates a separate class of creditor for each, or whether notwithstanding this factor that they each share, nevertheless this factor does not override the grouping into one class of creditors. In my opinion, this decision cannot be made without considering the underlying purpose of the C.C.A.A.

22 In Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd. Calgary No. 8801-14453, 17th November 1988, after canvassing the few authorities on point, I concluded that the purpose of the C.C.A.A. is to allow debtor companies to continue to carry on their business and that necessarily incidental to that purpose is the power to interfere with contractual relations. In referring to the case authority Re Companies' Creditors Arrangement Act; A.G. Can. v. A.G. Que., [1934] S.C.R. 659, I stated at pp. 24 and 25:

> It was held in that case that the Act was valid as relating to bankruptcy and insolvency rather than property and civil rights. At p. 664, Cannon J. held:

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

23 I went on to note:

> The C.C.A.A. is an Act designed to continue, rather than liquidate companies . . . The critical part of the decision is that federal legislation pertaining to assisting in the continuing operation of companies is constitutionally valid. In effect the Supreme Court of Canada has given the term "insolvency" a broad meaning in the constitutional sense by bringing within that term an Act designed to promote the continuation of an insolvent company. [emphasis added]

24 In this regard, I would make extensive reference to the article by Mr. Robertson, Q.C., where, in discussing the classification of creditors under the C.C.A.A. and after stating the proposition referred to by counsel for the HongKong Bank and Bank of America, he states at p. 16 in his article:

> An initial, almost instinctive, response that differences in claims and property subject to security automatically means segregation into different classes does not necessarily make economic or legal sense in the context of an act such as the C.C.A.A.

25 And later at pp. 19 and 20, in commenting on the article by Mr. Edwards, he states:

> However, if the trend of Edwards' suggestions that secured creditors can only be classed together when they held security of the same priority, that perhaps classes should be sub-divided into further groups according to whether or not a member of the class also holds some other security or form of interest in the debtor company, the multiplicity of discrete classes or sub-classes classes might be so compounded as to defeat the object of the act. As Edwards himself says, the subdivision of voting groups and the counting of angels on the heads of pins must top somewhere and some forms of differences must surely be disregarded.

26 In summarizing his discussion, he states on pp. 20-21:

> From the foregoing one can perceive at least two potentially conflicting approaches to the issue of classification. On the one hand there is the concept that members of a class ought to have the same "interest" in the company, ought to be only creditors entitled to look to the same "source" or "fund" for payment, and ought to encompass all of the creditors who do have such an identity of legal rights. On the other hand, there is recognition that the legislative intent is to facilitate reorganization, that excessive fragmentation of classes may be counter-productive and that some degree of difference between claims should not preclude creditors being put in the same class.
>
> It is fundamental to any imposed plan or reorganization that strict legal rights are going to be altered and that such alteration may be imposed against the will of at least some creditors. When one considers the complexity and magnitude of contemporary large business organizations, and the potential consequences of their failure it may be that the courts will be compelled to focus less on whether there is any identity of legal rights and rather focus on whether or not those constituting the class are persons, to use Lord Esher's phrase, "whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest". . .
>
> If the plan of reorganization is such that the creditors' particular priorities and securities are preserved, especially in the event of ultimate failure, it may be that the courts will, for example in an apt case decide that creditors who have basically made the same kinds of loans against the same kind of security, even though on different terms and against different particular secured assets, do have a sufficient similarity of interest to warrant being put into one class and being made subject to the will of the required majority of that class. [emphasis added]

27 These comments may be reduced to two cogent points. First, it is clear that the C.C.A.A. grants a court the authority to alter the legal rights of parties other than the debtor company without their consent. Second, the primary purpose of the Act is to facilitate reorganizations and this factor must be given due consideration at every stage of the process, including the classification of creditors made under a proposed plan. To accept the "identity of interest" proposition as a starting point in the classification of creditors necessarily results in a "multiplicity of discrete classes" which would make any reorganization difficult, if not impossible, to achieve.

28 In the result, given that this planned reorganization arises under the C.C.A.A., I must reject the arguments put forth by the HongKong Bank and the Bank of America, that since they hold separate security over different assets, they must therefore be classified as a separate class of creditors.

29 I turn now to the other factors which the HongKong Bank and Bank of America submit distinguishes them on individual bases from other creditors of Oakwood. The HongKong Bank and Bank of America argue that the values used by Sceptre are significantly understated. With respect to the Bank of Montreal, it is alleged that that bank actually holds security valued close to, if not in excess of, the outstanding amount of its loans when compared to the HongKong Bank and Bank of America whose security, those banks allege, is approximately equal to the amount of its loans. It is submitted that a plan which understates the value of assets results in the oversecured party being more inclined to support a plan under which they will receive, without the difficulties of realization, close to full payments of their loans.

30 The problem with this argument is that it is a throwback to the "identity of interest" proposition. Differing security positions and changing security values are a fact of life in the world of secured financing. To accept this argument would again result in a different class of creditor for each secured lender, with the possible exception of the A.B.C. noteholders who could be lumped with the HongKong Bank or Bank of America, as their percentage realization under the proposed plan is approximately equal to that of the HongKong Bank and Bank of America.

31 Further, the HongKong Bank and Bank of America also submit that since the Royal Bank and National Bank of Canada are so much more undersecured on their loans, they too have a distinct interest in participating in the plan which is not shared by themselves. The sum total of their submissions would seem to be that, since oversecured and undersecured lenders have a greater incentive to participate, it is only those lenders, such as themselves with just the right amount of security, that do not share that common interest. Frankly, it appears to me that these arguments are drawn from the fact that they are the only secured creditors of Oakwood who would prefer to retain their right to realize upon their security, as opposed to participating in the plan. I do not wish to suggest that they should be chided for taking such a position, but surely expressed approval or disapproval of the plan is not a valid reason to create different classes of creditors. Further, as I have already clearly stated, the C.C.A.A. can validly be used to alter or remove the rights of creditors.

32 Finally, I wish to address the argument that, since Sceptre has made arrangements with the Royal Bank of Canada relating to the purchase of Oakwood, it has an interest not shared by the other secured creditors. The Royal Bank's position as a principal lender in the reorganization is separate from its status as a secured creditor of Oakwood and arises from a separate business decision. In the absence of any allegation that the Royal Bank will not act bona fide in considering the benefit of the plan of the secured creditors as a class, the HongKong Bank and Bank of America cannot be heard to criticize the Royal Bank's presence in the same class.

33 In light of my conclusions, the result is that I approve the proposed classification of secured creditors into one class.

34 There is one further comment I wish to make with respect to the valuations made by Sceptre for the purposes of the vote calculations. I assume that Sceptre will be relying on those valuations at

any fairness hearing, assuming this matter proceeds. I would simply observe that the onus is of course on Sceptre to establish that the valuations relied on and set forth in their plan in fact represent fair value under all the circumstances.

35 It has been obvious during the course of the hearing of this phase of the application that at least two of the secured creditors, to whom reference has been made, are not satisfied that that is the case, and in the event evidence is led by them in an effort to establish that the values proposed do not represent the fair value, the onus will be on Sceptre and Oakwood to establish the contrary. Underlying my comments above are of course the court's concern of ensuring that approval of any plan proposed does not result in unfair confiscation of the property of any secured creditors. In that regard, the underlying value of the assets of each individual secured creditor on the facts of this case would appear to be of prime importance.

FORSYTH J.

qp/s/drk

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2009 ABQB 490
Alberta Court of Queen's Bench

SemCanada Crude Co., Re

2009 CarswellAlta 1269, 2009 ABQB 490, [2009] A.W.L.D. 3785, 180 A.C.W.S. (3d) 374, 479 A.R. 318, 57 C.B.R. (5th) 205

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

B.E. Romaine J.

Heard: August 5, 2009
Judgment: August 24, 2009
Docket: Calgary 0801-08510

Counsel: A. Robert Anderson, Q.C., Rupert Chartrand, Michael De Lellis, Cynthia L. Spry, Douglas Schweitzer for Applicants
David R. Byers, for Bank of America
Patrick T. McCarthy, Josef A. Krüger for Monitor
Douglas S. Nishimura for ARC Resources Ltd., City of Medicine Hat, Black Rider Resources Inc. Wolf Coulee Resources Inc., Orleans Energy Ltd., Crew Energy Inc., Trilogy Energy LP
Brendan O'Neill, Jason Wadden for Fortis Capital Corp.
Sean Fitzgerald for Tri-Ocean Engineering Ltd.
Dean Hutchison for Crescent Point Energy Trust, Enbridge Pipelines Inc.
Caireen Hanert for Bellamount Exploration Ltd., Enersul Limited Partnership
Bryce McLean for DPH Focus Corporation
Aubrey Kauffman for BNP Paribas

Subject: Insolvency

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Approval by court — Miscellaneous

S brought application for various relief related to holding of meetings of creditors to consider three plans to restructure and distribute assets of Companies' Creditors Arrangement Act ("CCAA") applicants, including applications for orders authorizing establishment of single class of creditors for each plan for purpose of considering and voting on plan — Applications granted — There was no good reason to exclude secured lenders and noteholders from single classification of voters in proposed plans, nor to create separate class for their votes — There were no material distinctions between claims of these two creditors and claims of remaining unsecured creditors that were not more properly subject of sanction hearing, apart from deferred issue of whether secured lenders were entitled to vote their entire guarantee claim — No rights of remaining unsecured creditors were being confiscated by proposed classification, and no injustice arose, particularly given separate tabulation of votes which enabled voice of remaining unsecured creditors to be heard and measured at sanction hearing — There were no conflicts of interest so over-riding as to make consultation impossible — While there were differences of interest and treatment among affected creditors in class, these were issues that would be addressed

at sanction hearing — Approval of proposed classification in context of integrated plans was in accordance with spirit and purpose of CCAA.

Table of Authorities

Cases considered by *B.E. Romaine J.*:

Campeau Corp., Re (1991), 10 C.B.R. (3d) 100, 86 D.L.R. (4th) 570, 1991 CarswellOnt 155 (Ont. Gen. Div.) — considered

Canadian Airlines Corp., Re (2000), 80 Alta. L.R. (3d) 213, 2000 ABCA 149, 2000 CarswellAlta 503, 19 C.B.R. (4th) 33, 261 A.R. 120, 225 W.A.C. 120 (Alta. C.A. [In Chambers]) — considered

Canadian Airlines Corp., Re (2000), 2000 CarswellAlta 919, [2000] 10 W.W.R. 314, 20 C.B.R. (4th) 46, 84 Alta. L.R. (3d) 52, 9 B.L.R. (3d) 86, 2000 ABCA 238, 266 A.R. 131, 228 W.A.C. 131 (Alta. C.A. [In Chambers]) — followed

Canadian Airlines Corp., Re (2000), 88 Alta. L.R. (3d) 8, 2001 ABCA 9, 2000 CarswellAlta 1556, [2001] 4 W.W.R. 1, 277 A.R. 179, 242 W.A.C. 179 (Alta. C.A.) — referred to

Canadian Airlines Corp., Re (2001), 2001 CarswellAlta 888, 2001 CarswellAlta 889, 275 N.R. 386 (note), 293 A.R. 351 (note), 257 W.A.C. 351 (note) (S.C.C.) — referred to

Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd. (1988), [1989] 2 W.W.R. 566, 72 C.B.R. (N.S.) 20, 64 Alta. L.R. (2d) 139, 1988 CarswellAlta 319 (Alta. Q.B.) — considered

San Francisco Gifts Ltd., Re (2004), 5 C.B.R. (5th) 92, 42 Alta. L.R. (4th) 352, 2004 ABQB 705, 2004 CarswellAlta 1241, 359 A.R. 71 (Alta. Q.B.) — referred to

San Francisco Gifts Ltd., Re (2004), 2004 ABCA 386, 2004 CarswellAlta 1607, 5 C.B.R. (5th) 300, 42 Alta. L.R. (4th) 371, 361 A.R. 220, 339 W.A.C. 220 (Alta. C.A.) — considered

SemCanada Crude Co., Re (2009), 2009 CarswellAlta 167, 2009 ABQB 90, 52 C.B.R. (5th) 131 (Alta. Q.B.) — referred to

Sklar-Peppler Furniture Corp. v. Bank of Nova Scotia (1991), 1991 CarswellOnt 220, 8 C.B.R. (3d) 312, 86 D.L.R. (4th) 621 (Ont. Gen. Div.) — considered

Stelco Inc., Re (2005), 2005 CarswellOnt 6818, 204 O.A.C. 205, 78 O.R. (3d) 241, 261 D.L.R. (4th) 368, 11 B.L.R. (4th) 185, 15 C.B.R. (5th) 307 (Ont. C.A.) — considered

Woodward's Ltd., Re (1993), 20 C.B.R. (3d) 74, 84 B.C.L.R. (2d) 206, 1993 CarswellBC 555 (B.C. S.C.) — considered

Statutes considered:

Bankruptcy Code, 11 U.S.C.
s. 503(b)(9) — referred to

Chapter 7 — referred to

Chapter 11 — referred to

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

s. 6 — referred to

s. 11(1) — referred to

s. 22(2) [rep. & sub. 2007, c. 36, s. 71] — referred to

APPLICATION for orders authorizing establishment of single class of creditors for three plans to restructure and distribute assets for purpose of considering and voting on plans.

***B.E. 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 (A319") 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: *SemCanada Crude Co., Re*, 2009 ABQB 90 (Alta. Q.B.).

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 *Canadian Airlines Corp., Re* (2000), 20 C.B.R. (4th) 46 (Alta. C.A. [In Chambers]), leave to appeal refused (2000), 20 C.B.R. (4th) 46 (Alta. C.A. [In Chambers]), affirmed [2001] 4 W.W.R. 1 (Alta. C.A.), leave to appeal to SCC refused [2001] S.C.C.A. No. 60 (S.C.C.) 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 (Alta. 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 *Woodward's Ltd., Re* (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 *Canadian Airlines Corp., Re* and elaborated further in Alberta in *San Francisco Gifts Ltd., Re*, 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: *Canadian Airlines Corp., Re* at para. 18; *San Francisco Gifts Ltd., Re* at para. 12; *Stelco Inc., Re* (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 *Canadian Airlines Corp., Re* 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: *Woodward's Ltd., Re* 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 Inc., Re*, 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: *Woodward's Ltd., Re* at para. 27, 29; *Stelco Inc., Re* 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: *Campeau Corp., Re* (1991), 10 C.B.R. (3d) 100 (Ont. Gen. Div.); *Canadian Airlines Corp., Re*, supra.

24 The classification issues in the *Campeau Corp., Re* restructuring were similar to the present issues. In *Campeau Corp., Re*, 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: *San Francisco Gifts Ltd., Re* 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: *Woodward's Ltd., Re* at para. 14; *San Francisco Gifts Ltd., Re* 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 *Stelco Inc., Re* 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 Inc., Re* 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 *Canadian Airlines Corp., Re*, 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 *Canadian Airlines Corp., Re*. 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 *San Francisco Gifts Ltd., Re*, 2004 ABCA 386 (Alta. C.A.) 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 *Campeau Corp., Re* 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 *Canadian Airlines Corp., Re* 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 *San Francisco Gifts Ltd., Re*. 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 *Canadian Airlines Corp., Re* (2000), 19 C.B.R. (4th) 33 (Alta. C.A. [In Chambers]) 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.

Applications granted.

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2005 CarswellOnt 6818
Ontario Court of Appeal

Stelco Inc., Re

2005 CarswellOnt 6818, [2005] O.J. No. 4883, 11 B.L.R. (4th) 185, 144 A.C.W.S. (3d) 15, 15 C.B.R. (5th) 307, 204 O.A.C. 205, 261 D.L.R. (4th) 368, 78 O.R. (3d) 241

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

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT WITH RESPECT TO STELCO INC., AND OTHER APPLICANTS LISTED IN SCHEDULE "A"

APPLICATION UNDER THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36 AS AMENDED

Goudge, Sharpe, Blair JJ.A.

Heard: November 14, 2005
Judgment: November 17, 2005
Docket: CA C44436, M33171

Proceedings: additional reasons at *Stelco Inc., Re* ((2005)), 2005 CarswellOnt 6510, 15 C.B.R. (5th) 305 ((Ont. C.A.)); affirmed *Stelco Inc., Re* ((2005)), 2005 CarswellOnt 6483, 15 C.B.R. (5th) 297 ((Ont. S.C.J. [Commercial List]))

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Michael E. Barrack, Geoff R. Hall for Stelco Inc.
Robert Staley, Alan Gardner for Senior Debenture Holders
Fred Myers for Her Majesty the Queen in Right of Ontario, Superintendent of Financial Services
Ken Rosenberg for United Steelworkers of America
A Kauffman for Tricap Management Ltd.
Kyla Mahar for Monitor
Murray Gold for Salaried Retirees
Heath Whitley for CIBC
Steven Bosnick for U.S.W.A. Loc. 5328, 8782

Subject: Insolvency; Civil Practice and Procedure

Headnote

Bankruptcy and insolvency --- Proposal — Practice and procedure

Leave to appeal order made in Companies' Creditors Arrangement Act proceeding — S Inc. presented Proposed Plan of Compromise or Arrangement (Plan) to its unsecured creditors for approval — Plan included subordinated debenture holders, senior debt holders, and trade creditors in same group for purposes of voting on Plan — Prior to vote on Plan, subordinated debenture holders brought motion seeking order classifying themselves as separate class for voting purposes on basis that they had different interests from rest of group — Supervising judge dismissed motion — Subordinated debenture holders sought leave to appeal dismissal of motion — Leave to appeal granted — Leave is only sparingly granted with regard to orders made in Companies' Creditors Arrangement Act (CCAA) proceedings because of their "real time" dynamic and because of generally discretionary character underlying many of orders made by supervising judges in such proceedings — Here, leave to appeal was granted because proposed appeal raised issue of significance to practice, namely

nature of common interest test to be applied by courts for purposes of classification of creditors in CCAA proceedings — Where there is urgency that leave application be expedited in public interest, court will do so in this area of law as it does in other area; however, where what is involved is essentially attempt to review discretionary order made on facts of case, in tightly supervised process with which judge is intimately familiar, collapsed process that was made available in this particular situation will not generally be afforded — Issues raised on this appeal, and timing factor involved, warranted expedited procedure that was ordered.

Bankruptcy and insolvency --- Proposal — Companies' Creditors Arrangement Act — Miscellaneous issues

S Inc. presented Proposed Plan of Compromise or Arrangement (Plan) to its unsecured creditors for approval — Plan included subordinated debenture holders, senior debt holders, and trade creditors in same group for purposes of voting on Plan — Prior to vote, subordinated debenture holders brought motion seeking order classifying themselves as separate class for voting purposes on basis that they had different interests from rest of group — Supervising judge dismissed motion — Subordinated debenture holders appealed from dismissal of motion — Appeal dismissed — No error could be found in supervising judge's factual findings or in his exercise of discretion in determining that subordinated debenture holders should remain in same class as other creditors — There was no material distinction between legal rights of subordinated debenture holders and those of senior debt holders vis-à-vis S Inc. — Supervising judge was correct in law in applying principles dealing with commonality of interest test as summarized in recent case, which principles were cited with approval by Court of Appeal in another recent decision — Principles applied by supervising judge were not inconsistent with earlier decision of present court in other case dealing with common interest test, because differing interests in question were not different legal interest as between two creditors; they were different legal interests as between each of creditors and debtor company — Case cited by subordinated debenture holders did not deal with issue of whether creditors with divergent interests as amongst themselves, as opposed to divergent legal interests vis-à-vis debtor company, could be forced to vote as members of common class — Creditors should be classified in accordance with their contract rights, i.e., according to their respective interests in debtor company — To hold classification and voting process hostage to vagaries of potentially infinite variety of disputes, as between already disgruntled creditors who had been caught in maelstrom of Companies' Creditors Arrangement Act (CCAA) restructuring, would run risk of hobbling that process unduly and could lead to very type of fragmentation and multiplicity of discrete classes or sub-classes of classes that judges have warned might well defeat purpose of CCAA.

Table of Authorities

Cases considered by *Blair J.A.*:

Campeau Corp., Re (1991), 10 C.B.R. (3d) 100, 86 D.L.R. (4th) 570, 1991 CarswellOnt 155 (Ont. Gen. Div.) — referred to

Canadian Airlines Corp., Re (2000), 2000 CarswellAlta 623, 19 C.B.R. (4th) 12 (Alta. Q.B.) — followed

Canadian Airlines Corp., Re (2000), 2000 ABCA 149, 2000 CarswellAlta 503, 80 Alta. L.R. (3d) 213, 19 C.B.R. (4th) 33, 261 A.R. 120, 225 W.A.C. 120 (Alta. C.A. [In Chambers]) — referred to

Country Style Food Services Inc., Re (2002), 2002 CarswellOnt 1038, 158 O.A.C. 30 (Ont. C.A. [In Chambers]) — referred to

Fairview Industries Ltd., Re (1991), 11 C.B.R. (3d) 71, *(*sub nom. *Fairview Industries Ltd., Re (No. 3))* 109 N.S.R. (2d) 32, *(*sub nom. *Fairview Industries Ltd., Re (No. 3))* 297 A.P.R. 32, 1991 CarswellNS 36 (N.S. T.D.) — referred to

Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd. (1988), 64 Alta. L.R. (2d) 139, [1989] 2 W.W.R. 566, 72 C.B.R. (N.S.) 20, 1988 CarswellAlta 319 (Alta. Q.B.) — referred to

Northland Properties Ltd., Re (1988), 31 B.C.L.R. (2d) 35, 73 C.B.R. (N.S.) 166, 1988 CarswellBC 556 (B.C. S.C.) — referred to

Northland Properties Ltd., Re (1989), (sub nom. *Northland Properties Ltd. v. Excelsior Life Insurance Co. of Canada)* 34 B.C.L.R. (2d) 122, (sub nom. *Northland Properties Ltd. v. Excelsior Life Insurance Co. of Canada)* 73 C.B.R. (N.S.) 195, (sub nom. *Northland Properties Ltd. v. Excelsior Life Insurance Co. of Canada)* [1989] 3 W.W.R. 363, 1989 CarswellBC 334 (B.C. C.A.) — referred to

Nova Metal Products Inc. v. Comiskey (Trustee of) (1990), 1 C.B.R. (3d) 101, (sub nom. *Elan Corp. v. Comiskey)* 1 O.R. (3d) 289, (sub nom. *Elan Corp. v. Comiskey)* 41 O.A.C. 282, 1990 CarswellOnt 139 (Ont. C.A.) — considered

NsC Diesel Power Inc., Re (1990), 79 C.B.R. (N.S.) 1, 97 N.S.R. (2d) 295, 258 A.P.R. 295, 1990 CarswellNS 33 (N.S. T.D.) — referred to

Pacific Coastal Airlines Ltd. v. Air Canada (2001), 2001 BCSC 1721, 2001 CarswellBC 2943, 19 B.L.R. (3d) 286 (B.C. S.C.) — considered

Savage v. Amoco Acquisition Co. (1988), 59 Alta. L.R. (2d) 260, 68 C.B.R. (N.S.) 154, 40 B.L.R. 188, (sub nom. *Amoco Acquisition Co. v. Savage)* 87 A.R. 321, 1988 CarswellAlta 291 (Alta. C.A.) — referred to

Sklar-Peppler Furniture Corp. v. Bank of Nova Scotia (1991), 8 C.B.R. (3d) 312, 86 D.L.R. (4th) 621, 1991 CarswellOnt 220 (Ont. Gen. Div.) — referred to

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

Stelco Inc., Re (2005), 253 D.L.R. (4th) 109, 75 O.R. (3d) 5, 2005 CarswellOnt 1188, 2 B.L.R. (4th) 238, 9 C.B.R. (5th) 135, 196 O.A.C. 142 (Ont. C.A.) — referred to

Wellington Building Corp., Re (1934), 16 C.B.R. 48, [1934] O.R. 653, [1934] 4 D.L.R. 626, 1934 CarswellOnt 103 (Ont. S.C.) — referred to

Woodward's Ltd., Re (1993), 20 C.B.R. (3d) 74, 84 B.C.L.R. (2d) 206, 1993 CarswellBC 555 (B.C. S.C.) — referred to

Statutes considered:

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

Joint Stock Companies Arrangements Act, 1870 (33 & 34 Vict.), c. 104
Generally — referred to

ADDITIONAL REASONS to judgment reported at *Stelco Inc., Re* (2005), 2005 CarswellOnt 6510, 15 C.B.R. (5th) 305 (Ont. C.A.).

***Blair J.A.*:**

Background

1 This appeal arises out of the reorganization of Stelco Inc., and related companies, pursuant to the *Companies' Creditors Arrangement Act* ("CCAA"). [1] Stelco has been in the midst of this fractious process for approximately twenty-one months. Justice Farley has been the supervising judge throughout.

2 Stelco has presented a Proposed Plan of Compromise or Arrangement to its creditors for their approval. The vote was scheduled for Tuesday, November 15, 2005. On Thursday, November 10, a group of creditors known as the Informal Independent Converts' Committee ("the Converts' Committee) sought an order from the supervising judge, amongst other things, classifying the Subordinated Debenture Holders whom they represent as a separate class for voting purposes. Justice Farley dismissed the motion. In the face of the pending vote, the Converts' Committee sought leave to appeal on Thursday afternoon (The courts were closed on Friday, November 11, for Remembrance Day). Rosenberg J.A. dealt with the matter and directed that the application for leave, and if leave be granted, the appeal, be heard by a panel of this court on Monday, November 14, 2005.

3 This panel heard the application for leave and the appeal on Monday. We concluded that leave should be granted, but that the appeal must be dismissed, and at the conclusion of argument — and in order to clarify matters so that the vote could proceed the following day — we issued a brief endorsement with our decision, but indicating that more detailed reasons would follow.

4 The endorsement read as follows:

> In our view, the appellants have not demonstrated a different legal interest from the other unsecured creditors vis à vis the debtor, nor any basis for setting aside the finding of Farley J. that there are no different practical interests such that the appellants deserve a separate class. We see no legal error or error in principle in his exercise of discretion.
>
> Leave to appeal is granted, but the appeal must therefore be dismissed. Because of the importance of the issue for Ontario practice in this area, we propose to expand somewhat on these reasons in due course.

5 These are those expanded reasons.

Facts

6 Stelco's Proposed Plan is made to unsecured creditors only. It is not intended to affect the claims of secured creditors.

7 The Converts' Committee represents unsecured creditors who hold $90 million of convertible unsecured subordinated debentures issued by Stelco pursuant to a Supplemental Trust Indenture dated January 21, 2002, and due in 2007. With interest, the claims of the Subordinated Debenture Holders now amount to approximately $110 million. Those claims are subordinated to approximately $328 million in favour of Senior Debt Holders. In addition, Stelco has unsecured trade debts totalling approximately, $228 million. In the Proposed Plan, these three groups of unsecured creditors — the Subordinated Debenture Holders (represented by the Converts' Committee), the Senior Debt Holders, and the Trade Creditors — have all been included in the same class for the purposes of voting on the Proposed Plan or any amended version of it.

8 The Converts' Committee takes issue with this, and seeks to have the Subordinated Debenture Holders classified as a separate class of creditors for voting purposes. They argue that their interests are different than those of the Bondholders and that creditors who do not have common interests should not be classified in the same group for voting purposes. They submit, therefore, that the supervising judge erred in law in not granting them a separate classification. In that regard, they rely upon this court's decision in *Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 1 O.R. (3d) 289 (Ont. C.A.). They also argue that the supervising judge was wrong, on the facts contained in the record, in finding that the Subordinated Debenture Holders and the Bondholders did not have conflicting interests.

9 In making their argument about a different interest, the appellants rely upon their status as subordinated debt holders as shaped particularly by Articles 6.2 and 6.3 of the Supplemental Trust Indenture. In essence those provisions reinforce the subordinated nature of their debt. They stipulate (a) that if the Subordinated Debenture Holders receive any payment from

Stelco, or any distribution from the assets of Stelco, before the Senior Debt is fully paid, they are obliged to remit any such payment or distribution to the Senior Debt Holders until the latter have been paid in full (Art. 6.2(3)), but (b) that no such payment or distribution by Stelco shall be deemed to constitute a payment on the Subordinated Debenture Holders' debt (Art. 6.3). The parties refer to these provisions as the "Turnover Payment" provisions.

10 In short, although Stelco is obliged to pay both groups of creditors in full, as between the Subordinated Debenture Holders and the Senior Debt Holders, the latter are entitled to be paid in full before the former receive anything. The Supplemental Trust Indenture makes it clear that the provisions of Article 6 "are intended solely for the purpose of defining the relative rights of [the Subordinated Debenture Holders] and the holders of the Senior Debt" (Art. 6.3).

11 The appellants contend that the Turnover Payment provisions distinguish their interests from those of the Subordinated Debenture Holders when it comes to voting on Stelco's Proposed Plan. They say that the Subordinated Debenture Holders' interest in maximizing the amounts to be made available to unsecured creditors ends once they have received full recovery, in part as a result of the Turnover Payments that the Subordinated Debenture Holders will be required to make from their portion of the funds. On the other hand, the Subordinated Debenture Holders will have an interest in seeking more because their recovery, for practical purposes, will have only begun once that point is reached.

12 The respondents submit, for their part, that the appellants are seeking a separate classification for a collateral purpose, i.e., so that they will be able to veto the Proposed Plan, or at least threaten to veto it, unless they are granted a benefit to which they are not entitled — the elimination of their subordinated position by virtue of the Turnover Payment provisions.

13 Farley J. rejected the appellants' arguments. The thrust of his decision in this regard is found in paragraphs 13 and 14 of his reasons:

> [13] I would note as well that the primary and most significant attribute of the ConCom debt and that of the BondCom debt/Senior Debt[2] plus the trade debt vis-à-vis Stelco is that it is all unsecured debt. Thus 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 any unnecessary fragmentation — and in this respect multiplicity of classes does not mean that 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.
>
> [14] Is it necessary to have more than one class? Firstly, it would not appear to me that as between Stelco and the unsecured creditors overall there is any material distinction. Secondly, there would not appear to me to be any confiscation of any rights (or the other side of the coin any new imposition of obligations) upon the holders of the ConCom debt. The subrogation issue was something which these holders assumed on the issue of that debt. Thirdly, I do not see that there is a realistic conflict of interest. Each group of unsecured creditors including the ConCom debt holders and the BondCom debt holders has the same general interest vis-à-vis Stelco, namely to extract from Stelco through the Plan the maximum value in the sense of consideration possible. . . . That situation is not impacted for our purposes here in this motion by the possibility that in a subsequent dispute between the ConCom holders and the BondCom holders there may be a difference of opinion as to the variation of the consideration obtained.

14 We agree with his conclusion and see no basis to interfere with his findings in that regard.

The Leave Application

15 The principles to be applied by this court in determining whether leave to appeal should be granted to someone dissatisfied with an order made in a CCAA proceeding are not in dispute. Leave is only sparingly granted in such matters because of their "real time" dynamic and because of the generally discretionary character underlying many of the orders made by supervising judges in such proceedings. There must be serious and arguable grounds that are of real and significant interest to the parties. The court has assessed this criterion on the basis of a four-part test, namely,

> a) whether the point on appeal is of significance to the practice;

b) whether the point is of significance to the action;

c) whether the appeal is *prima facie* meritorious or frivolous; and

d) whether the appeal will unduly hinder the progress of the action.

See *Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5 (Ont. C.A.) at para. 24; *Country Style Food Services Inc., Re*, [2002] O.J. No. 1377, 158 O.A.C. 30 (Ont. C.A. [In Chambers]) at para. 15; *Canadian Airlines Corp., Re* (2000), 19 C.B.R. (4th) 33 (Alta. C.A. [In Chambers]) at para. 7.

16 Here, we granted leave to appeal because the proposed appeal raised an issue of significance to the practice, namely the nature of the "common interest" test to be applied by the courts for purposes of the classification of creditors in CCAA proceedings. Although the law seems to have progressed in the lower courts along the lines developed in Alberta, beginning with the decision of Paperny J. in *Canadian Airlines Corp., Re* (2000), 19 C.B.R. (4th) 12 (Alta. Q.B.), this court has not dealt with the issue since its decision in *Nova Metal Products Inc. v. Comiskey (Trustee of)*, *supra*, and the Converts' Committee argues that the Alberta line of authorities is contrary to *Nova Metal Products Inc.*

17 A brief further comment respecting the leave process may be in order.

18 The court recognizes the importance of its ability to react in a responsible and timely fashion to the appellate needs arising in the "real time" dynamics of CCAA restructurings. Often, as in the case of this restructuring, they involve a significant public dimension. For good policy reasons, however, appellate courts in Canada — including this one — have developed relatively stringent parameters for the granting of leave to appeal in CCAA cases. As noted, leave is only sparingly granted. The parameters as set out in the authorities cited above remain good law.

19 Merely because a corporate restructuring is a big one and money is no object to the participants in the process, does not mean that the court will necessarily depart from the normal leave to appeal process that applies to other cases. In granting leave to appeal in these circumstances, we do not wish to be taken as supporting a notion that the fusion of leave applications with the hearing of the appeal in CCAA restructurings — particularly in major ones such as this one involving Stelco — has become the practice. Where there is an urgency that a leave application be expedited in the public interest, the court will do so in this area of the law as it does in other areas. However, where what is involved is essentially an attempt to review a discretionary order made on the facts of the case, in a tightly supervised process with which the judge is intimately familiar, the collapsed process that was made available in this particular situation will not generally be afforded.

20 As these reasons demonstrate, however, the issues raised on this particular appeal, and the timing factor involved, warranted the expedited procedure that was ordered by Justice Rosenberg.

The Appeal

No Error in Law or Principle

21 Everyone agrees that the classification of creditors for CCAA voting purposes is to be determined generally on the basis of a "commonality of interest" (or a "common interest") between creditors of the same class. Most analyses of this approach start with a reference to *Sovereign Life Assurance Co. v. Dodd* (1892), [1891-94] All E.R. Rep. 246 (Eng. C.A.), which dealt with the classification of creditors for voting purposes in a winding-up proceeding. Two passages from the judgments in that decision are frequently cited:

At pp. 249-250 Lord Esher said:

> The Act provides that the persons to be summoned to the meeting, all of whom, it is to be observed, are creditors, are persons who can be divided into different classes, classes which the Act[3] recognizes, though it does not define. The creditors, therefore, must be divided into different classes. What is the reason for prescribing such a course? It is because the creditors

> composing the different classes have different interests, and, therefore, if a different state of facts exists with respect to different creditors, which may affect their minds and judgments differently, they must be separated into different classes.

At p. 251, Bowen L.J. stated:

> The word "class" used in the statute is vague, and to find out what it means we must look at the general scope of the section, which enables the court to order a meeting of a "class of creditors" to be summoned. It seems to me that we must give such a meaning to the term 'class' as will prevent the section being so worked as to produce confiscation and injustice, and that we must confine its meaning to those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest.

22 These views have been applied in the CCAA context. But what comprises those "not so dissimilar" rights and what are the components of that "common interest" have been the subject of debate and evolution over time. It is clear that classification is a fact-driven exercise, dependent upon the circumstances of each particular case. Moreover, given the nature of the CCAA process and the underlying flexibility of that process — a flexibility which is its genius — there can be no fixed rules that must apply in all cases.

23 In *Canadian Airlines Corp., Re* (2000), 19 C.B.R. (4th) 12 (Alta. Q.B.), Paperny J. nonetheless extracted a number of principles to be considered by the courts in dealing with the commonality of interest test. At para. 31 she said:

> In summary, the cases establish 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 C.C.C.A., namely to facilitate reorganizations if possible.
>
> 4. In placing a broad and purposive interpretation on the C.C.C.A., 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.

24 In developing this summary of principles, Paperny J. considered a number of authorities from across Canada, including the following: *Sklar-Peppler Furniture Corp. v. Bank of Nova Scotia* (1991), 86 D.L.R. (4th) 621 (Ont. Gen. Div.); *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.* (1988), 72 C.B.R. (N.S.) 20 (Alta. Q.B.); *Fairview Industries Ltd., Re* (1991), 11 C.B.R. (3d) 71 (N.S. T.D.); *Woodward's Ltd., Re* (1993), 84 B.C.L.R. (2d) 206 (B.C. S.C.); *Northland Properties Ltd., Re* (1988), 73 C.B.R. (N.S.) 166 (B.C. S.C.); *Northland Properties Ltd., Re* (1989), 73 C.B.R. (N.S.) 195 (B.C. C.A.); *NsC Diesel Power Inc., Re* (1990), 79 C.B.R. (N.S.) 1 (N.S. T.D.); *Savage v. Amoco Acquisition Co.* (1988), 68 C.B.R. (N.S.) 154 (Alta. C.A.), (*sub nom. Amoco Acquisition Co. v. Savage*); *Wellington Building Corp., Re* (1934), 16 C.B.R. 48 (Ont. S.C.). Her summarized principles were cited by the Alberta Court of Appeal, apparently with approval, in a subsequent *Canadian Airlines Corp., Re* decision: *Canadian Airlines Corp., Re* (2000), 19 C.B.R. (4th) 33 (Alta. C.A. [In Chambers]) at para. 27.

25 In the passage from his reasons cited above (paragraphs 13 and 14) the supervising judge in this case applied those principles. In our view he was correct in law in doing so.

26 We do not read the foregoing principles as being inconsistent with the earlier decision of this court in *Nova Metal Products Inc. v. Comiskey (Trustee of)*. There the court applied a common interest test in determining that the two creditors in question

ought not to be grouped in the same class of creditors for voting purposes. But the differing interests in question were not different legal interests as between the two creditors; they were different legal interests as between each of the creditors and the debtor company. One creditor (the Bank) held first security over the debtor company's receivables and the other creditor (RoyNat) held second security on those assets; RoyNat, however, held first security over the debtor's building and realty, whereas the Bank was second in priority in relation to those assets. The two creditors had differing commercial interests in how the assets should be dealt with (it was in the interests of the bank, with a smaller claim, to collect and retain the more realizable receivable assets, but in the interests of RoyNat to preserve the cash flow and have the business sold as a going concern). Those differing commercial interests were rooted in differing legal interests as between the individual creditors and the debtor company, arising from the different security held. Because of the size of its claim, RoyNat would dominate any group that it was in, and Finlayson J.A. was of the view that RoyNat, as the holder of second security, should not be able to override the Bank's legal interest as the first secured creditor with respect to the receivables by virtue of its voting rights. On the basis that there was "no true community of interest" between the secured creditors (p. 259), given their different legal interests, he ordered that the Bank be placed in a separate class for voting purposes.

27 *Nova Metal Products Inc. v. Comiskey (Trustee of)* did not deal with the issue of whether creditors with divergent interests as amongst themselves — as opposed to divergent legal interests vis-à-vis the debtor company — could be forced to vote as members of a common class. Nor did it apply an "identity of interest" test — a test that has been rejected as too narrow and too likely to lead to excessive fragmentation: see *Sklar-Peppler Furniture Corp. v. Bank of Nova Scotia*, *supra*,); *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.*, *supra*; *Fairview Industries Ltd., Re*, *supra*; *Woodward's Ltd., Re*, *supra*. In our view, there is nothing in the decision in *Nova Metal Products Inc.* that is inconsistent with the evolutionary set of principles developed in the Alberta jurisprudence and applied by the supervising judge here.

28 In addition to commonality of interest concerns, a court dealing with a classification of creditors issue needs to be alert to concerns about the confiscation of legal rights and about avoiding what the parties have referred to as "a tyranny of the minority". Examples of the former include *Nova Metal Products Inc. v. Comiskey (Trustee of)* [4] and *Wellington Building Corp., Re*, *supra* [5]. Examples of the latter include *Sklar-Peppler*, *supra* [6] and *Campeau Corp., Re* (1991), 10 C.B.R. (3d) 100 (Ont. Gen. Div.) [7].

29 Here, as noted earlier in these reasons, the respondents argue that the appellants are seeking a separate classification in order to extract a benefit to which they are not entitled, namely a concession that the Turnover Payment requirements of their subordinated position be extinguished by the Proposed Plan, thus avoiding their obligation to transfer payments to the Senior Debt Holders until they have been paid in full, and freeing up all of the distribution the appellants will receive from Stelco for payment on account of their own claims. On the other hand, the appellants point to this conflict between the Subordinated Debenture Holders and the Senior Debt Holders as evidence that they do not have a commonality of interest or the ability to consult together with a view to whatever commonality of interest they may have vis-à-vis Stelco.

30 We agree with the line of authorities summarized in *Canadian Airlines Corp., Re* and applied by the supervising judge in this case which stipulate that the classification of creditors is determined by their legal rights in relation to the debtor company, as opposed to their rights as creditors in relation to each other. To the extent that other authorities at the trial level in other jurisdictions may suggest to the contrary — see, for example *NsC Diesel Power Inc., Re*, *supra* — we prefer the Alberta approach.

31 There are good reasons for such an approach.

32 First, as the supervising judge noted, the CCAA itself is more compendiously styled "An act to facilitate compromises and arrangements between companies and their creditors". There is no mention of dealing with issues that would change the nature of the relationships as between the creditors themselves. As Tysoe J. noted in *Pacific Coastal Airlines Ltd. v. Air Canada*, [2001] B.C.J. No. 2580 (B.C. S.C.) at para. 24 (after referring to the full style of the legislation):

> [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.

33 In this particular case, the supervising judge was very careful to say that nothing in his reasons should be taken to determine or affect the relationship between the Subordinate Debenture Holders and the Senior Debt Holders.

34 Secondly, it has long been recognized that creditors should be classified in accordance with their contract rights, that is, according to their respective interests in the debtor company: see Stanley E. Edwards, "Reorganizations Under the Companies' Creditors Arrangement Act" (1947) 25 Can. Bar. Rev. 587, at p. 602.

35 Finally, to hold the classification and voting process hostage to the vagaries of a potentially infinite variety of disputes as between already disgruntled creditors who have been caught in the maelstrom of a CCAA restructuring, runs the risk of hobbling that process unduly. It could lead to the very type of fragmentation and multiplicity of discrete classes or sub-classes of classes that judges and legal writers have warned might well defeat the purpose of the Act: see Stanley Edwards, "Reorganizations under the Companies' Creditors Arrangement Act", *supra*; Ronald N. Robertson Q.C., "Legal Problems on Reorganization of Major Financial and Commercial Debtors", Canadian Bar Association — Ontario Continuing Legal Education, 5th April 1983 at 19-21; *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.*, *supra*, at para. 27; *Northland Properties Ltd., Re*, *supra*; *Sklar-Peppler*, *supra*; *Woodward's Ltd., Re*, *supra*.

36 In the end, it is important to remember that classification of creditors, like most other things pertaining to the CCAA, must be crafted with the underlying purpose of the CCAA in mind, namely facilitation of the reorganization of an insolvent company through the negotiation and approval of a plan of compromise or arrangement between the debtor company and its creditors, so that the debtor company can continue to carry on its business to the benefit of all concerned. As Paperny J. noted in *Canadian Airlines Corp., Re*, "the Court should be careful to resist classification approaches that would potentially jeopardize viable Plans."

Discretion and Fact Finding

37 Having concluded that the supervising judge made no error in law or principle in his approach to the classification issue, we can find no error in his factual findings or in his exercise of discretion in determining that the Subordinate Debenture Holders should remain in the same class as the Senior Debt Holders and Trade Creditors in the circumstances of this case.

38 We agree that there is no material distinction between the legal rights of the Subordinated Debenture Holders and those of the Senior Debt Holders vis-à-vis Stelco. Each is entitled to be paid the monies owing under their respective debt contracts. The only difference is that the former creditors are subordinated in interest to the latter and have agreed to pay over to the latter any portion of their recovery received until the Senior Debt has been paid in full. As between the two groups of creditors, this merely reflects the very deal the Subordinated Debenture Holders bought into when they purchased their subordinated debentures. For that reason, the supervising judge was also entitled to determine that this was not a case involving any confiscation of legal rights.

39 Finally, the supervising judge's finding that there is no "realistic conflict of interest" between the creditors is supported on the record. Each has the same general interest in relation to Stelco, namely to be paid under their contracts, and to maximize the amount recoverable from the debtor company through the Plan negotiation process. We do not accept the argument that the Senior Debt Holder's efforts will be moderated in some respect because they will be content to make their recovery on the backs of the Subordinated Debenture Holders through the Turnover Payment process. In order to carry the class, the Senior Debt Holders will require the support of the Trade Creditors, whose interest is not affected by the subordination agreement. Thus the Senior Debt Holders will be required to support the maximization approach.

40 We need not deal with whether a realistic and genuine conflict of interest, produced by different legal positions of creditors vis-à-vis each other, could ever warrant separate classes, as we are satisfied that even if it could, this is not such a case.

Disposition

41 Accordingly, we would not interfere with the supervising judge's decision that the appellants had not made out a case for a separate class. The appeal is therefore dismissed.

***Goudge J.A.*:**

I agree.

***Sharpe J.A.*:**

I agree.

Application granted; appeal dismissed.

Footnotes

1 R.S.C. 1985, c. C-36, as amended.

2 Farley J. uses the term "ConCom debt" to refer to the debt represented by the Converts' Committee (i.e., that of the Subordinated Debenture Holders), and the term "BondCom debt" to refer to that of the Senior Debt Holders.

3 The *Joint Stock Companies Arrangement Act*, 1870.

4 A second secured creditor with superior voting power was separated from a first secured creditor for voting purposes, in order prevent the former from utilising its superior voting strength to adversely affect the latter's prior security position.

5 The court refused to allow subsequent mortgagees to vote in the same class as a first mortgagee because in the circumstances the subsequent mortgagees would be able to use their voting power to destroy the priority rights and security of the first mortgagee.

6 Borins J., as he then was, warned against the dangers of "excessive fragmentation" and of 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".

7 Montgomery J. declined to grant a separate classification to a minority group of creditors who would use that classification to extract benefits to which it was not otherwise entitled.

7

2000 CarswellAlta 623
Alberta Court of Queen's Bench

Canadian Airlines Corp., Re

2000 CarswellAlta 623, [2000] A.W.L.D. 642, [2000] A.J. No. 1693, 19 C.B.R. (4th) 12

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

In the Matter of the Business Corporations Act (Alberta) S.A. 1981, c. B-15, As Amended, Section 185

In the Matter of Canadian Airlines Corporation and Canadian Airlines International Ltd.

Paperny J.

Judgment: May 12, 2000 *
Docket: Calgary 0001-05071

Proceedings: refused leave to appeal *Canadian Airlines Corp., Re*, 2000 ABCA 149, 80 Alta. L.R. (3d) 213 (Alta. C.A. [In Chambers])

Counsel: *A.L. Friend, Q.C.*, *H.M. Kay, Q.C.*, and *R.B. Low, Q.C.*, for Canadian Airlines.
V.P. Lalonde and *Ms M. Lalonde*, for AMR Corporation.
S. Dunphy, for Air Canada.
P.T. McCarthy, Q.C., for PricewaterhouseCoopers.
D. Nishimura, for Resurgence Asset Management LLC.
E. Halt, for Claims Officer.
A.J. McConnell, for Bank of Nova Scotia Trust Company of New York and Montreal Trust Co. of Canada.

Subject: Corporate and Commercial; Insolvency

Headnote

Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangement Act — Miscellaneous issues

Creditors of corporation gave corporation concessions worth $200 million in exchange for assurance from airline that creditors would cease to be affected by CCAA proceedings — Concessions were reflected in promissory notes assigned to airline in exchange for its guarantee of aircraft leases — Representative of 60 per cent of unsecured noteholders in corporation brought application for order that all unsecured claims held or controlled by airline be placed in separate class from other unsecured claims for voting purposes, and for order striking portion of reorganization plan — Application dismissed — Class of creditors should include all those with commonality of interest — Commonality of interest refers to rights creditor has vis-à-vis debtor — "Interest" does not include personality or identity of creditor, and absent bad faith, motivation of creditor for supporting plan is not classification issue — Proper point at which to consider effect of airline's status as assignee of unsecured debt was at fairness hearing — Legal rights of unsecured noteholders and airline were essentially same — Votes cast by airline should be tabulated separately to provide evidentiary record for fairness hearing — Propriety of airline voting to share in pool of cash funded by it for benefit of unsecured creditors was also issue best considered at fairness hearing — Provision of plan that released directors, officers and others should not be struck at classification stage as fairness of proposed compromises or claims was issue for fairness hearing — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

Table of Authorities

Cases considered by *Paperny J.*:

Fairview Industries Ltd., Re (1991), 11 C.B.R. (3d) 71, *(*sub nom. *Fairview Industries Ltd., Re (No. 3))* 109 N.S.R. (2d) 32, *(*sub nom. *Fairview Industries Ltd., Re (No. 3))* 297 A.P.R. 32 (N.S. T.D.) — considered

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

Northland Properties Ltd., Re (1988), 31 B.C.L.R. (2d) 35, 73 C.B.R. (N.S.) 166 (B.C. S.C.) — considered

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

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

Savage v. Amoco Acquisition Co. (1988), 59 Alta. L.R. (2d) 260, 68 C.B.R. (N.S.) 154, 40 B.L.R. 188, *(*sub nom. *Amoco Acquisition Co. v. Savage)* 87 A.R. 321 (Alta. C.A.) — considered

Sklar-Peppler Furniture Corp. v. Bank of Nova Scotia (1991), 8 C.B.R. (3d) 312, 86 D.L.R. (4th) 621 (Ont. Gen. Div.) — considered

Sovereign Life Assurance Co. v. Dodd (1891), [1891-4] All E.R. Rep. 246, [1892] 2 Q.B. 573 (Eng. C.A.) — applied

Wellington Building Corp., Re, 16 C.B.R. 48, [1934] O.R. 653, [1934] 4 D.L.R. 626 (Ont. S.C.) — distinguished

Woodward's Ltd., Re (1993), 20 C.B.R. (3d) 74, 84 B.C.L.R. (2d) 206 (B.C. S.C.) — considered

Statutes considered:

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

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

s. 5.1 [en. 1997, c. 12, s. 122] — referred to

s. 5.1(3) [en. 1997, c. 12, s. 122] — considered

APPLICATION by unsecured creditors of corporation for order that unsecured claims held by Air Canada should be placed in separate class from other unsecured creditors, and for order striking portion of reorganization plan.

***Paperny J.* (orally):**

1 Resurgence Asset Management LLC "Resurgence" appeared on behalf of holders of approximately 60 percent of the unsecured notes issued by Canadian Airlines Corporation in the total amount of $100 million U.S. These unsecured note holders are proposed to be classified as unsecured creditors in the plan that is the subject of these proceedings.

2 Resurgence applied for the following relief:

1. An order lifting the stay of proceedings against Canadian Airlines Corporation and Canadian Airlines International Ltd. (respectively "CAC" and "CAIL" and collectively called "Canadian") to permit Resurgence to commence and proceed with an oppression action against Canadian, Air Canada and others.

2. Further, and in the alternative, Resurgence sought the same relief described in item one above in the context of the C.C.A.A. proceedings.

3. An order that any and all unsecured claims held or controlled, directly or indirectly by Air Canada shall be placed in a separate class and either not allowed to be voted at all, or, alternatively, allowed to be voted in separate class from all other affected unsecured claims.

4. An order that there be a separation in class between creditors of CAC and CAIL

5. An order striking Section 6.2(2)(ii) of the plan on the basis that it is contrary to the C.C.A.A.

3 Resurgence abandoned the application described in item 1 above, and the application in item 2 was addressed in my ruling given May 8, 2000, in these proceedings.

Standing

4 Prior to dealing with the remaining issues of classification, voting and Section 6.2(2)(ii) of the plan, the issue of standing needs to be addressed. This was a matter of some debate, largely in the context of the first two applications. Canadian argued that Resurgence was only a fund manager and did not hold the unsecured notes, beneficially or otherwise, and, accordingly, did not have standing to make any of the applications. The evidence establishes that Resurgence is not the legal owner and the evidence of beneficial ownership is equivocal.

5 Canadian has not raised this issue on any of the previous occasions on which Resurgence has been before the court in these proceedings. There has been a consent order involving Resurgence and Canadian.

6 In my view, it is not appropriate now for Canadian to suggest that Resurgence does not represent the interests of the holders of 60 percent of the unsecured notes and essentially seek a declaration that Resurgence is a stranger to these proceedings.

7 I am not prepared to dismiss the applications of Resurgence on classification, voting and amending the plan out of hand on the basis of standing.

8 Resurgence was also supported in these applications by the senior secured note holders. For the purposes of these applications, I accept that Resurgence is representing the interests of 60 percent of the unsecured note holders.

Classification of Air Canada's Unsecured Claim

9 By my April 14, 2000 order in these proceedings, I approved transactions involving CAIL, a large number of aircraft lessors and Air Canada, which achieved approximately $200 million worth of concessions for CAIL. In exchange for granting the concession, each creditor received a guarantee from Air Canada and the assurance that the creditor would immediately cease to be affected by the C.C.A.A. proceedings.

10 These concessions or deficiency claims were quantified and reflected in promissory notes which were assigned to Air Canada in exchange for its guarantee of the aircraft leases. The monitor approved the method of quantifying these claims and recognized the value of the concessions to Canadian. In that order I reserved the issue of classification and voting to be determined at some later date. The plan provides for two classes of creditors, secured and unsecured.

11 The unsecured class is composed of a number of types of unsecured claims, including aircraft financings, executory contracts, unsecured notes, litigation claims, real estate leases and the deficiencies, if any, of the senior secured note holders.

12 In one portion of the application, Resurgence seeks to have Air Canada vote the promissory notes in separate class and relied on several factors to distinguish the claims of other Affected, Unsecured Creditors from Air Canada's unsecured claim, including the following:

> 1. The Air Canada appointed board caused Canadian to enter into these C.C.A.A. proceedings under which Air Canada stands to gain substantial benefits in its own operations and in the merged operations and ownership contemplated after the compromise of debts under the plan.
>
> 2. Air Canada is providing the fund of money to be distributed to the Affected Unsecured Creditors and will, therefore, end up paying itself a portion of that money if it is included in the Affected Unsecured Creditors' class and permitted to vote.
>
> 3. Air Canada gave no real consideration in acquiring the deficiency claims and manufactured them only to secure a 'yes' vote.

13 Air Canada and Canadian argue that the legal right associated with Air Canada's unsecured promissory notes and with the other Affected, Unsecured Claims, are the same and that the matters raised by Resurgence, as relating to classification, are really matters of fairness, more appropriately dealt with at the fairness hearing. Air Canada and Canadian emphasized that classification must be determined according to the rights of the creditors, not their personalities.

14 The starting point in determining classification is the statute under which the parties are operating and from which the court obtains its jurisdiction. The primary purpose of the C.C.A.A. is to facilitate the re-organization of insolvent companies, and this goal must be given proper consideration at every stage of the C.C.A.A. process, including classification of claims; see, for example, *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.* (1988), 72 C.B.R. (N.S.) 20 (Alta. Q.B.)

15 Beyond identifying secured and unsecured classes, the C.C.A.A. does not offer any guidance to the classification of claims. The process, instead, has developed in the case law.

16 A frequently cited description of the method of classification of creditors for the purposes of voting on a plan, under the C.C.A.A., is *Sovereign Life Assurance Co. v Dodd* (1891), [1892] 2 Q.B. 573 (Eng. C.A.).

17 At page 583 (Q.B.), Bowen, L.J. stated:

> The word 'class' is vague and to find out what is meant by it, we must look at the scope of the section which is a section enabling the court to order a meeting of a class of creditors to be called. It seems plain that we must give such a meaning to the term 'class' as will prevent the section being so worked as to result in confiscation and injustice, and that it must be confined to those persons whose rights are not so dissimilar as to make it impossible for them to consult together with the view to their common interest.

This test has been described as the "commonality of interest" test. All counsel agree that this is the test to apply in classification of claims under the C.C.A.A. However, there is a dispute on the types of interests that are to be considered in determining commonality.

18 Generally, the cases hold that classification is a fact-driven determination unique to the circumstances of every case, upon which the court should be loathe to impose rules for universal application, particularly in light of the flexible and remedial jurisdiction involved; see, for example, *Re Fairview Industries Ltd.* (1991), 11 C.B.R. (3d) 71 (N.S. T.D.)

19 The majority of the cases presented to me, held that commonality of the interest is to be determined by the rights the creditor has vis-a-vis the debtor. Courts have also found it helpful to consider the context of the proposed plan and treatment

of creditors under a liquidation scenario. In the absence of bad faith, motivation for supporting or rejecting a plan is not a classification issue in the authorities.

20 In considering what interests are included in the commonality of interest test, Forsyth J., in *Norcen Energy Resources Ltd.* (Supra) had to determine whether all the secured creditors of the company ought to be included in one class. The creditors all had first-charge security and the same method of valuation was applied to each secured claim in order to determine security value under the plan. The distinguishing features were submitted to be based on the difference in the security held, including ease of marketability and realization potential. In holding that a separate class was not necessary, Forsyth J., said at page 29:

> Different security positioning and changing security values are a fact of life in the world of secured financing. To accept this argument would again result in a different class of creditor for each secured lender.

In doing so, Forsyth J. rejected the "identity of the interest" approach in which creditors in a class must have identical interests.

21 It was also submitted in *Norcen Energy Resources Ltd.* that since the purchaser under the plan had made financing arrangements with the Royal Bank, the bank had an interest not shared by the other secured creditors. Forsyth J., held that in the absence of any allegation that the Royal Bank was not acting bona fide in considering the benefit of the plan, the secured creditors could not be heard to criticize the presence of the Royal Bank in their class.

22 Forsyth J., also emphasized in *Norcen Energy Resources Ltd.* that the commonality test cannot be considered without also considering the underlying purpose of the C.C.A.A., which is to facilitate reorganizations of insolvent companies. To that end, the court should not approve a classification scheme which would make a reorganization difficult, if not impossible, to achieve. At the same time, while the C.C.A.A. grants the court the authority to alter the legal rights of parties other than the debtor company without their consent, the court will not permit a confiscation of rights or an injustice to occur.

23 The *Norcen Energy Resources Ltd.* approach was specifically adopted in British Columbia in *Northland Properties Ltd. v. Excelsior Life Insurance Co. of Canada* (1989), 73 C.B.R. (N.S.) 195 (B.C. C.A.), where it was held that various mortgagees with different mortgages against different properties were included in the same class.

24 In *Savage v. Amoco Acquisition Co.* (1988), 68 C.B.R. (N.S.) 154 (Alta. C.A.) the Alberta Court of Appeal rejected the argument that shareholders who have private arrangements with the applicant or who are brokers or officers or otherwise in a special position vis-a-vis the debtor company, should be put in a special category.

25 At page 158 the court stated in regard to the test applied to classification:

> We do not think that this rule justifies the division of shareholders into separate classes on the basis of their presumed prior commitment to a point of view. The state of facts, common to all, is that they are all offered this proposal, face as an alternative the break-up of this apparently insolvent company and hold shares that appear to be worthless on break-up. In any event, any attempt to divide them on the basis suggested, would be futile. One would have as many groups as there are shareholders.

The commonality of interest test was addressed by the British Columbia Supreme Court in *Re Woodward's Ltd.* (1993), 84 B.C.L.R. (2d) 206 (B.C. S.C.). Tysoe J. rejected the identity of interest approach and held that it was permissible to include creditors with different legal rights in the same class, so long as their legal rights were not so dissimilar that it was still possible for them to vote with a common interest.

26 Tysoe J. went on to find that legal interests should be considered in the context of the proposed plan and that it was also necessary to examine the legal rights of creditors in the context of the possible failure of the plan.

27 In other words, "interest" for the purpose of classification does not include the personality or identity of the creditor, and the interests it may have in the broader commercial sphere that might influence its decision or predispose it to vote in a particular way; rather, "interest" involves the entitlement of the debt holder viewed within the context of the provisions of the proposed plan. In that regard, see *Woodward's Ltd.* at page 212.

28 In *Fairview Industries Ltd.* , the court held that in classification there need not be a commonality of interest of debts involved, so long as the legal interests were the same. Justice Glube (as she then was) stated that it did not automatically follow that those with different commercial interests, for example, those with security on "quick" assets, are necessarily in conflict with those with security on "fixed" assets. She stated that just saying there is a conflict is insufficient to warrant separation.

29 In *Sklar-Peppler Furniture Corp. v. Bank of Nova Scotia* (1991), 86 D.L.R. (4th) 621 (Ont. Gen. Div.) at 626 like *Norcen Energy Resources Ltd.*, the "identity of interests" approach was rejected. The court preserved a class of creditors which included debenture holders, terminated employees, realty lessors and equipment lessors.

30 Borins J. held that not every difference in the nature of the debt warrants a separate class and that in placing a broad and purposive interpretation on the C.C.A.A., the court should "take care to resist approaches which would potentially jeopardize a potentially viable plan." He observed that "excessive fragmentation is counterproductive to the legislative intent to facilitate corporate reorganization" and that it would be "improper to create a special class simply for the benefit of an opposing creditor which would give that creditor the potential to exercise an unwarranted degree of power." (p. 627).

31 In summary, the cases establish the following principles applicable to assessing commonality of interest:

1. Commonality of interest should be viewed on the basis of the non-fragmentation test, not on an identity of interest test;

2. The interests to be considered are the legal interests the 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 these interests are to be viewed purposively, bearing in mind the object of the C.C.A.A., namely to facilitate reorganizations if at all possible;

4. In placing a broad and purposive interpretation on the C.C.A.A., the court should be careful to resist classification approaches which would potentially jeopardize potentially viable plans.

5. Absent bad faith, the motivations of the creditors to approve or disapprove 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.

32 With this background, I will make several observations relating to the reasons asserted by Resurgence that distinguish Air Canada from the rest of the Affected Unsecured Creditors.

33 The first two reasons given relate to interests of Air Canada extraneous to its legal rights as a unsecured creditor. The third reason relates largely to the further assertion that Air Canada should not be allowed to vote at all. The matter of voting is addressed more specifically later in these reasons.

34 The factors described by Resurgence distinguish between Air Canada and other unsecured creditors relate largely to the fact that Air Canada is the assignee of the unsecured debt. In my view, that approach is to be discouraged at the classification stage. To require the court to consider who holds the claim, as distinct from what they hold, at that point would be untenable. I note that Mr. Edwards recognizes in 1947 in his article, "*Reorganizations under the Companies Creditors Arrangement Act*", (1947), 25 Cdn. Bar Rev. 587, and observe this concern is heightened in the current commercial reality of debt trading.

35 Resurgence also asserted that a court should avoid placing creditors with a potential conflict of interest in the same class and relies on *Re NsC Diesel Power Inc.* (1990), 79 C.B.R. (N.S.) 1 (N.S. T.D.), a case in which the court considered a potential conflict of interest between subcontractors and direct contractors. To the extent this case can be seen as decided on the basis of the distinct legal rights of the creditors, I agree with the result. To the extent that the case determined that a class could be separated based on a conflict of interest not based on legal right, I disagree. In my view, this would be the sort of issue the court should consider at the fairness hearing.

36 Resurgence also relied on the decisions of the British Columbia Supreme Court in *Re Northland Properties Ltd.* (1988), 73 C.B.R. (N.S.) 166 (B.C. S.C.), a case decided prior to *Norcen Energy Resources Ltd.*. In that case the court held that a subsidiary wholly owned by Northland Bank was incorporated to purchase certain bonds from Northland in exchange for preferred shares and was not entitled to vote. The court found that would be tantamount to Northland Bank voting in its own reorganization and relied on *Re Wellington Building Corp.*, [1934] O.R. 653, 16 C.B.R. 48 (Ont. S.C.) In this regard. I would note that the passage relied upon at page 5 in that case, in *Wellington Building Corp* (Supra) dealt with whether the scheme, as proposed, was unfair.

37 All creditors proposed to be included in the class of Affected, Unsecured Creditors, are all unsecured and are treated the same under the plan. All would be treat similarly under the BIA. The plan provides that they will receive 12 cents on the dollar. The Monitor opined that in liquidation unsecured creditors would realize a maximum of 3 cents on the dollar. Their legal interests are essentially the same. Issue is taken with the presence of Air Canada, supporter and funder of the plan, also having taken an assignment of a substantial, unsecured claim. However, absent bad faith, who creditors are is not relevant. Air Canada's mere presence in the class does not in and of itself constitute bad faith.

38 Further, all of these methods of distinguishing Air Canada's unsecured claim at their core are fundamentally issues of fairness which will be addressed by the Court at the fairness hearing on June 5, 2000. I am prepared to give serious consideration to these matters at that time and direct that there be a separate tabulation of the votes cast by Air Canada arising from any assignments of promissory notes they have taken, so that there is an evidentiary record to assist me in assessing the fairness of the vote when and if I am called upon to sanction the plan. This approach was taken by Justice Forsyth in *Norcen Energy Resources Ltd.*, and in my view is consistent with the underlying purpose of the C.C.A.A. I wish to emphasize that the concerns raised by Resurgence will form part of the assessment of the overall fairness of the plan.

39 Permitting the classification to remain intact for voting purposes will not result in a confiscation of rights of or injustice to the unsecured note holders. Their treatment does not at this point depart from any other Affected Unsecured Creditors and recognizes the similarity of legal rights. Although based on different legal instruments, the legal rights of the unsecured note holders and Air Canada are essentially the same. Neither has security, nor specific entitlement to assets. Further, the ability of all of the Affected Unsecured Creditors to realize their claims against the debtor companies, depend in significant part, on the company's ability to continue as a going concern.

40 The separate tabulation of votes will allow the "voice" of unsecured creditors to be heard, while at the same time, permit rather than rule out the possibility that a plan might proceed.

41 It is important to preserve this possibility in the interests of facilitating the aim of the C.C.A.A. and protecting interests of all constituents. To fracture the class prior to the vote, may have the effect of denying the court jurisdiction to consider sanctioning a plan which may pass the fairness test but which has been rejected by one creditor. This would be contrary to the purpose of the C.C.A.A.

Separating the Claims Against CAC and CAIL

42 Resurgence briefly argued that since Air Canada's debt is owed by CAIL only, it could only look to CAIL's assets in a bankruptcy and would not be able to look to any CAC assets. In contrast, Resurgence suggested that the unsecured note holders are creditors of both CAIL under a guarantee, and CAC under the notes. Resurgence submitted that the resulting difference in legal rights destroys the commonality of interests.

43 There is insufficient evidence to suggest that the unsecured note holders are also creditors of CAIL. Counsel referred only to a statement made by Mr. Carty on cross-examination that there was an "unsecured guarantee". However, no documents have been brought to my attention that would support this statement and, in of itself, the statement is not determinative. In any case, I do not have sufficient evidence before me to conclude that there would be a meaningful difference in recoveries for unsecured creditors of CAC and CAIL in the event of bankruptcy. I, therefore, cannot conclude on this basis that rights are being confiscated, unlike Tysoe J.'s ability to do so in *Re Woodward's Ltd.* Simply looking to different assets or pools of assets

will not alone fracture a class; some unique additional legal right of value in liquidation going unrecognized in a plan and not balanced by others losing rights as well is needed on the analysis of Tysoe J.

44 I recognize the struggle between the unsecured note holders, represented by Resurgence on one side, and Air Canada and Canadian on the other. Resurgence fears the inclusion of Air Canada and the Affected Unsecured Creditors' class will swamp the vote. Air Canada and Canadian fear that exclusion of Air Canada will result in the voting down of a plan which, in their view, otherwise stands a realistic chance of approval. As unsecured creditors, they do share similar legal rights. As supporters or opponents of the plan, they may well have distinctly different financial or strategic interests. I believe that in the circumstances of this case, these other interests and their impact on the plan, are best addressed as matters of fairness at the June 5, 2000 hearing, and in this way, the concerns will be heard by the court without necessarily putting an end to the entire process.

Voting

45 Although my decision on classification makes it clear that I will permit Air Canada to vote on the plan, I wish to comment further on this issue. Air Canada submitted that it should be entitled to vote the face value of the promissory notes which represent deficiency claims assigned to it from aircraft lessors in the same fashion as any other creditor who has acquired the claims by assignment. All parties accept that deficiency claims such as these would normally be included and voted upon in an unsecured claims class. The request by Resurgence to deny them a vote would have the effect of varying rights associated with those notes.

46 The concessions achieved in the re-negotiation of the aircraft leases, represent value to CAIL. The methodology of calculation of the claims and their valuation was reviewed by the Monitor and this is not being challenged. Rather, it is because it is Air Canada that now holds them, that it is objectionable to Resurgence. Resurgence asserts that Air Canada manufactured the assignment so it could preserve a 'yes' vote. This, in my view, is a matter going to fairness. Is it fair for Air Canada to vote to share in the pool of cash funded by it for the benefit of unsecured creditors? That matter is best resolved at the fairness hearing.

47 Resurgence relied on *Northland Properties Ltd.* in which a wholly owned subsidiary of the debtor company was not allowed to vote because to do so would amount to the debtor company voting in its own reorganization. The corporate relationship between Air Canada and CAIL can be distinguished from the parent and wholly owned subsidiary in *Northland Properties Ltd.*. Air Canada is not CAIL's parent and owns 10 percent of a numbered company which owns 82 percent of CAIL. Further, as noted above, the court in *Northland Properties Ltd.* apparently relied on the passage from *Wellington Building Corp* which indicated in that case the court was being asked to approve a plan as fair. Again, the basis on which Resurgence seeks to deprive Air Canada of its vote is really an issue of fairness.

Section 6(2)(2) of the Plan

48 Resurgence wishes me to strike out Section 6(2)(2) of the plan, which essentially purports to provide a release by affected creditors of all claims based in whole or in part on any act, omission transaction, event or occurrence that took place prior to the effective date in any way relating to the debtor companies and subsidiaries, the C.C.A.A. proceeding or the plan against:

1. The debtor companies and its subsidiaries;

2. The directors, officers and employees;

3. The former directors, officers and employees of the debtor companies and its subsidiaries; or

4. The respective current and former professionals of the entities, including the Monitor, its counsel and its current officers and directors, et cetera. Resurgence submits that this provision constitutes a wholesale release of directors and others which is beyond that permitted by Section 5.1 of the C.C.A.A. CAIL and CAC submit that the proposed release was not intended to preclude rights expressly preserved by the statute and are prepared to amend the plan to state this.

49 Section 5.1(3) of the C.C.A.A. provides that 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.

50 In this application of Resurgence, the court must deal with two issues: One, what releases are permitted under the statute; and, two, what releases ought to be permitted, if any, under the plan.

51 In my view, I will be in a better position to assess the fairness of the proposed compromise of claims which is drafted in extremely broad terms, when I consider the other issues of fairness raised by Resurgence. Accordingly, I leave that matter to the fairness hearing as well.

52 In summary, the application contained in paragraph (d) of the Resurgence Notice of Motion is dismissed. The application in paragraph (e) is adjourned to June 5, 2000.

Application dismissed.

Footnotes

* Leave to appeal refused 2000 ABCA 149, 80 Alta L.R. (3d) 213, 19 C.B.R. (4th) 33 (Alta C.A. [In Chambers]).

2000 ABCA 149
Alberta Court of Appeal [In Chambers]

Canadian Airlines Corp., Re

2000 CarswellAlta 503, 2000 ABCA 149, [2000] A.W.L.D. 563, [2000] A.J. No. 610, 19 C.B.R. (4th) 33, 225 W.A.C. 120, 261 A.R. 120, 80 Alta. L.R. (3d) 213, 97 A.C.W.S. (3d) 844

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

In the Matter of the Business Corporations Act (Alberta) S.A. 1981, c.B-15., as amended, Section 185

In the Matter of Canadian Airlines Corporation and Canadian Airlines International Ltd.

Resurgence Asset Management LLC, Applicant and Canadian Airlines Corporation and Canadian Airlines International Ltd., Respondents

Wittmann J.A.

Heard: May 18, 2000
Judgment: May 29, 2000
Docket: Calgary Appeal 00-18816

Proceedings: (May 12, 2000), Doc. Calgary 0001-05071 [Alta. Q.B.]

Counsel: *D. Haigh, Q.C.*, and *D. Nishimura*, for Applicant.
A.L. Friend, Q.C., and *H.M. Kay, Q.C.*, for Respondents.
S. Dunphy, for Air Canada.
A.J. McConnell, for Bank of Nova Scotia Trust Company of New York and Montreal Trust Co. of Canada.
P.T. McCarthy, Q.C., for Price Waterhouse Coopers.

Subject: Corporate and Commercial; Insolvency

Headnote

Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangement Act — Miscellaneous issues

Applicant was unsecured creditor of C Corp. — Board appointed by A Corp. caused C Corp. to commence proceedings under CCAA under which A Corp. stood to gain substantial benefits — Proposed plan of compromise and arrangement filed under Act — Order made that classification of creditors not be fragmented to exclude A Corp. as separate class from applicant in terms of unsecured creditors, that A Corp. be entitled to vote on plan pursuant to s. 6 of Act, that there be no separation of unsecured creditors of two divisions of C Corp. for voting purposes, and that votes in respect of claims assigned to A Corp. be recorded and tabulated separately for purpose of consideration in application for court approval of plan — Applicant brought application for leave to appeal that order — Application dismissed — Decisions of supervising judge under Act entitled to considerable deference — Person seeking leave to appeal required to show error in principle of law or palpable and overriding error of fact — Exercise of discretion by reviewing judge not subject to review so long as discretion exercised judicially — Reviewing judge made no error of law — Applicant failed to make out prima facie meritorious case — Granting of leave would likely unduly hinder progress of action — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 6.

Table of Authorities

Cases considered by *Wittmann J.A.*:

Blue Range Resource Corp., Re (1999), 244 A.R. 103, 209 W.A.C. 103, 12 C.B.R. (4th) 186 (Alta. C.A.) — referred to

Blue Range Resource Corp., Re, (sub nom. *Blue Range Resources Corp., Re)* 250 A.R. 172, (sub nom. *Blue Range Resources Corp., Re)* 213 W.A.C. 172, 15 C.B.R. (4th) 160, 2000 ABCA 3 (Alta. C.A. [In Chambers]) — referred to

Blue Range Resource Corp., Re (2000), (sub nom. *Blue Range Resources Corp., Re)* 250 A.R. 239, (sub nom. *Blue Range Resources Corp., Re)* 213 W.A.C. 239, 15 C.B.R. (4th) 192 (Alta. C.A. [In Chambers]) — referred to

Fairview Industries Ltd., Re (1991), 11 C.B.R. (3d) 71, (sub nom. *Fairview Industries Ltd., Re (No. 3))* 109 N.S.R. (2d) 32, (sub nom. *Fairview Industries Ltd., Re (No. 3))* 297 A.P.R. 32 (N.S. T.D.) — referred to

Med Finance Co. S.A. v. Bank of Montreal (1993), 24 B.C.A.C. 318, 40 W.A.C. 318, 22 C.B.R. (3d) 279 (B.C. C.A.) — referred to

Multitech Warehouse Direct Inc., Re (1995), 32 Alta. L.R. (3d) 62 (Alta. C.A.) — referred to

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

Northland Properties Ltd., Re (1988), 31 B.C.L.R. (2d) 35, 73 C.B.R. (N.S.) 166 (B.C. S.C.) — referred to

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

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

Pacific National Lease Holding Corp., Re (1992), 72 B.C.L.R. (2d) 368, 19 B.C.A.C. 134, 34 W.A.C. 134, 15 C.B.R. (3d) 265 (B.C. C.A. [In Chambers]) — considered

Power Consolidated (China) Pulp Inc. v. British Columbia Resources Investment Corp. (1988), 19 C.P.C. (3d) 396 (B.C. C.A.) — referred to

Royal Bank v. Fracmaster Ltd. (1999), (sub nom. *UTI Energy Corp. v. Fracmaster Ltd.)* 244 A.R. 93, (sub nom. *UTI Energy Corp. v. Fracmaster Ltd.)* 209 W.A.C. 93, 11 C.B.R. (4th) 230 (Alta. C.A.) — considered

Savage v. Amoco Acquisition Co. (1988), 59 Alta. L.R. (2d) 260, 68 C.B.R. (N.S.) 154, 40 B.L.R. 188, (sub nom. *Amoco Acquisition Co. v. Savage)* 87 A.R. 321 (Alta. C.A.) — referred to

Sklar-Peppler Furniture Corp. v. Bank of Nova Scotia (1991), 8 C.B.R. (3d) 312, 86 D.L.R. (4th) 621 (Ont. Gen. Div.) — referred to

Smoky River Coal Ltd., Re, (sub nom. *Luscar Ltd. v. Smoky River Coal Ltd.)* 237 A.R. 83, (sub nom. *Luscar Ltd. v. Smoky River Coal Ltd.)* 197 W.A.C. 83, 1999 ABCA 62 (Alta. C.A.) — referred to

Smoky River Coal Ltd., Re, 175 D.L.R. (4th) 703, 237 A.R. 326, 197 W.A.C. 326, 71 Alta. L.R. (3d) 1, [1999] 11 W.W.R. 734, 12 C.B.R. (4th) 94 (Alta. C.A.) — considered

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Wellington Building Corp., Re, 16 C.B.R. 48, [1934] O.R. 653, [1934] 4 D.L.R. 626 (Ont. S.C.) — referred to

Woodward's Ltd., Re (1993), 20 C.B.R. (3d) 74, 84 B.C.L.R. (2d) 206 (B.C. S.C.) — referred to

Statutes considered:

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

s. 2 "secured creditor" — considered

s. 2 "unsecured creditor" — considered

s. 4 — considered

s. 5 — considered

s. 6 — considered

s. 6(a) — considered

s. 6(b) — considered

s. 13 — considered

APPLICATION for leave to appeal from judgment reported at (2000), 19 C.B.R. (4th) 12 (Alta. Q.B.).

Memorandum of decision. *Wittmann J.A.*:

Introduction

1 This is an application for leave to appeal the decision of Paperny, J. made on May 12, 2000, pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (*CCAA*). The applicant, Resurgence Asset Management LLC (Resurgence), is an unsecured creditor by virtue of its holding 58.2 per cent of U.S. $100,000,000.00 unsecured notes issued by Canadian Airlines Corporation (CAC)

2 CAC and Canadian Airlines International Ltd. (CAIL) (collectively Canadian) commenced proceedings under the *CCAA* on March 24, 2000.

3 A proposed Plan of Compromise and Arrangement (the Plan) has been filed in this matter regarding CAC and CAIL, pursuant to the CCAA.

4 The decision of Paperny, J. May 12, 2000 (the Decision) ordered, among other things, that the classification of creditors not be fragmented to exclude Air Canada as a separate class from Resurgence in terms of the unsecured creditors; that Air Canada should be entitled to vote on the Plan pursuant to s. 6 of the *CCAA* at the creditors' meeting to be held May 26, 2000; that there be no separation of unsecured creditors of CAC from unsecured creditors of CAIL for voting purposes; and that votes in respect of claims assigned to Air Canada, be recorded and tabulated separately, for the purpose of consideration in the application for court approval of the Plan (the Fairness Hearing).

Leave to Appeal Under the CCAA

5 The section of the *CCAA* governing appeals to this Court is as follows:

> 13. Except in the Yukon Territory, any person dissatisfied with an order or a decision made under this Act may appeal therefrom on obtaining leave of the judge appealed from or of the court or a judge of the court to which the appeal lies and on such terms as to security and in other respects as the judge or court directs.

6 The criterion to be applied in an application for leave to appeal pursuant to the *CCAA* is not in dispute. The general criterion is embodied in the concept that there must be serious and arguable grounds that are of real and significant interest to the parties: *Re Multitech Warehouse Direct Inc.* (1995), 32 Alta. L.R. (3d) 62 (Alta. C.A.) at 63; *Re Smoky River Coal Ltd.* (1999), 237 A.R. 83 (Alta. C.A.); *Re Blue Range Resource Corp.* (1999), 244 A.R. 103 (Alta. C.A.); *Re Blue Range Resource Corp.* (2000), 15 C.B.R. (4th) 160 (Alta. C.A. [In Chambers]); *Re Blue Range Resource Corp.* (2000), 15 C.B.R. (4th) 192 (Alta. C.A. [In Chambers]).

7 Subsumed in the general criterion are four applicable elements which originated in *Power Consolidated (China) Pulp Inc. v. British Columbia Resources Investment Corp.* (1988), 19 C.P.C. (3d) 396 (B.C. C.A.), and were adopted in *Med Finance Co. S.A. v. Bank of Montreal* (1993), 22 C.B.R. (3d) 279 (B.C. C.A.). McLachlin, J.A. (as she then was) set forth the elements in *Power Consolidated* as follows at p.397:

> (1) whether the point on appeal is of significance to the practice;
>
> (2) whether the point raised is of significance to the action itself;
>
> (3) whether the appeal is *prima facie* meritorious or, on the other hand, whether it is frivolous; and
>
> (4) whether the appeal will unduly hinder the progress of the action.

These elements have been considered and applied by this Court, and were not in dispute before me as proper elements of the applicable criterion.

Facts

8 On or about October 19, 1999, Air Canada announced its intention to make a bid for CAC and to proceed to complete a merger subject to a restructuring of Canadian's debt. On or about November 5, 1999, following a ruling by the Quebec Superior Court, a competing offer by Airline Industry Revitalization Co. Inc. was withdrawn and Air Canada indicated that it would proceed with its offer for CAC.

9 On or about November 11, 1999, Air Canada caused the incorporation of 853350 Alberta Ltd. (853350), for the sole purpose of acquiring the majority of the shares of CAC. At the time of incorporation, Air Canada held 10 per cent of the shares of 853350. Paul Farrar, among others, holds the remaining 90 per cent of the shares of 853350.

10 On or about November 11, 1999, Air Canada, through 853350, offered to purchase the outstanding shares of CAC at a price of $2.00 per share for a total of $92,000,000.00 for all of the issued and outstanding voting and non-voting shares of CAC.

11 On or about January 4, 2000, Air Canada and 853350 acquired 82 per cent of CAC's outstanding common shares for approximately $75,000,000.00 plus the preferred shares of CAIL for a purchase price of $59,000,000.00. Air Canada then replaced the Board of Directors of CAC with its own nominees.

12 Substantially all of the aircraft making up the fleet of Canadian are held by Air Canada through lease arrangements with various lessors or other aircraft financial agencies. These arrangements were the result of negotiations with lessors, jointly conducted by Air Canada and Canadian.

13 In general, these arrangements include the following:

(i) the leases have been renegotiated to reflect contemporary fair market value (or below) based on two independent desk top valuations; and

(ii) the present value of the difference between the financial terms under the previous lease arrangements and the renegotiated fair market value terms was characterized as "unsecured deficiency," reflected in a Promissory Note payable to the lessor from Canadian and assigned by the lessor to Air Canada.

14 In the result, Air Canada has acquired or is in the process of acquiring all but eight of the deficiency claims of aircraft lessors or financiers listed in Schedule "B" to the Plan in the total amount of $253,506.944.00. Air Canada intends to vote those claims as an unsecured creditor under the Plan.

15 The executory contracts claims listed in Schedule "B" to the Plan total $110,677,000.00, of which $108,907,000.00 is the claim of Loyalty Management Group Canada Inc. (Loyalty), an entity with a long term contract with Canadian to purchase air miles. The claim is subject to an agreement of settlement between Loyalty, Canadian and Air Canada. Air Canada was assigned the Loyalty unsecured claim.

16 In the Plan, all unsecured creditors of both CAC and CAI are grouped in the same class for voting purposes.

17 Pursuant to the Plan, unsecured creditors will receive a payment of $0.12 on the dollar for each $1.00 of their claim unless the total amount of unsecured claims exceeds $800 million, in which case, they will receive less. Air Canada will fund this Pro Rata Cash Amount. As a result of the assignments of the deficiency amounts in favour of Air Canada, if the Plan is approved, Air Canada will notionally be paying a substantial proportion of the Pro Rata Cash Amount to itself.

18 The Plan further contemplates Air Canada becoming the 100 per cent owner of Canadian through 853350.

19 On April 7, 2000, an Order was granted by Paperny, J., directing that the Plan be filed by the Petitioners; establishing a claims dispute process; authorizing the calling of meetings for affected creditors to vote on the Plan to be held on May 26, 2000; authorizing the Petitioners to make application for an Order sanctioning the Plan on June 5, 2000; and providing other directions.

20 The April 7, 2000 Order established three classes of creditors: (a) the holders of Canadian Airlines Corporation 10 per cent Senior Secured Notes due 2005 (the Secured Noteholders); (b) the secured creditors of the Petitioners affected by the Plan (the Affected Secured Creditors); and (c) the unsecured creditors affected by the Plan (the Affected Unsecured Creditors).

21 On April 25, 2000, the Petitioners filed and served the Plan, in accordance with the Order of April 7, 2000. By Notice of Motion dated April 27, 2000, Resurgence brought an application, among other things, seeking "directions as to the classification and voting rights of the creditors ... (and) the quantum of the 'deficiency claims' assigned to Air Canada." Resurgence sought to have Air Canada excluded from voting as an unsecured creditor unless segregated into a separate class. Resurgence also sought to have the holders of the unsecured notes vote as a separate class.

22 The result of the April 27, 2000 motion by Resurgence is the Decision.

The Decision

23 In the Decision, the supervising chambers judge referred to her order of April 14, 2000, wherein she approved transactions involving the re-negotiation of the aircraft leases. She referred to "about $200,000,000.00 worth of concessions for CAIL" as "concessions or deficiency claims" which were quantified and reflected in promissory notes which were assigned to Air Canada in exchange for its guarantee of the aircraft leases. The monitor approved of the method of quantifying the claims and Paperny, J. approved the transactions, reserving the issue of classification and voting to her May 12 Decision.

24 The Plan provides for one class of unsecured creditor. The unsecured class is composed of a number of types of unsecured claims including executory contracts (e.g. Air Canada from Loyalty) unsecured notes (e.g. Resurgence), aircraft leases (e.g. Air Canada from lessors), litigation claims, real estate leases and the deficiencies, if any, of the senior secured noteholders.

25 In seeking to have Air Canada vote the promissory notes in a separate class Resurgence argued several factors before Paperny, J., as set out at pp. 4-5 of the Decision as follows:

> 1. The Air Canada appointed board caused Canadian to enter into these ***CCAA*** proceedings under which Air Canada stands to gain substantial benefits in its own operations and in the merged operations and ownership contemplated after the compromise of debts under the plan.
>
> 2. Air Canada is providing the fund of money to be distributed to the Affected Unsecured Creditors and will, therefore, end up paying itself a portion of that money if it is included in the Affected Unsecured Creditors' class and permitted to vote.
>
> 3. Air Canada gave no real consideration in acquiring the deficiency claims and manufactured them only to secure a 'yes' vote.

26 She then recited the argument made by Air Canada and Canadian to the effect that the legal rights associated with Air Canada's unsecured claims are the same as those associated with the other affected unsecured claimants, and that the matters raised by Resurgence relating to classification are really matters of fairness more appropriately dealt with in a Fairness Hearing scheduled to be held June 5, 2000.

27 After observing that the *CCAA* offers no guidance with respect to the classification of claims, beyond identifying secured and unsecured categories and the possibility of classes within each category, and that the process has developed in case law, Paperny, J. embarked on a detailed analysis and consideration of the case law in this area including *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.* (1988), 72 C.B.R. (N.S.) 20 (Alta. Q.B.); *Sovereign Life Assurance Co. v. Dodd* (1891), [1892] 2 Q.B. 573 (Eng. C.A.); *Re Fairview Industries Ltd.* (1991), 11 C.B.R. (3d) 71 (N.S. T.D.); *Northland Properties Ltd. v. Excelsior Life Insurance Co. of Canada* (1989), 73 C.B.R. (N.S.) 195 (B.C. C.A.); *Savage v. Amoco Acquisition Co.* (1988), 68 C.B.R. (N.S.) 154 (Alta. C.A.); *Re Woodward's Ltd.* (1993), 84 B.C.L.R. (2d) 206 (B.C. S.C.); *Sklar-Peppler Furniture Corp. v. Bank of Nova Scotia* (1991), 86 D.L.R. (4th) 621 (Ont. Gen. Div.) at 626; *Re NsC Diesel Power Inc.* (1990), 79 C.B.R. (N.S.) 1 (N.S. T.D.); *Re Wellington Building Corp.*, [1934] O.R. 653, 16 C.B.R. 48 (Ont. S.C.). Paperny, J. also referred to an oft-cited article "Reorganization under the Companies Creditors Arrangement Act" by S. E. Edwards (1947), 25 Can. Bar Rev. 587. She concluded her legal analysis at pp.12-13 by setting forth the principles she found to be applicable in assessing commonality of interest as an appropriate test for the classification of creditors:

> 1. Commonality of interest should be viewed on the basis of the non-fragmentation test, not on an identity of interest test;
>
> 2. The interests to be considered are the legal interests the 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 these interests are to be viewed purposively, bearing in mind the object of the ***CCAA***, namely to facilitate reorganizations if at all possible;
>
> 4. In placing a broad and purposive interpretation on the ***CCAA***, the court should be careful to resist classification approaches which would potentially jeopardize potentially viable plans.
>
> 5. Absent bad faith, the motivations of the creditors to approve or disapprove 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.

The Standard of Review and Leave Applications

28 The elements of the general criterion cannot be properly considered in a leave application without regard to the standard of review that this Court applies to appeals under the *CCAA*. If leave to appeal were to be granted, the applicable standard of review is succinctly set forth by Fruman, J.A. in *Royal Bank v. Fracmaster Ltd.* (1999), 244 A.R. 93 (Alta. C.A.) where she stated for the Court at p.95:

> .... this is a court of review. It is not our task to reconsider the merits of the various offers and decide which proposal might be best. The decisions made by the Chambers judge involve a good measure of discretion, and are owed considerable deference. Whether or not we agree, we will only interfere if we conclude that she acted unreasonably, erred in principle or made a manifest error.

In another recent *CCAA* case from this Court, *Re Smoky River Coal Ltd.* (1999), 237 A.R. 326 (Alta. C.A.), Hunt, J.A., speaking for the unanimous Court, extensively reviewed the history and purpose of the *CCAA*, and observed at p.341:

> The fact that an appeal lies only with leave of an appellate court (s. 13 ***CCAA***) suggests that Parliament, mindful that ***CCAA*** cases often require quick decision-making, intended that most decisions be made by the supervising judge. This supports the view that those decisions should be interfered with only in clear cases.

29 The standard of review of this Court, in reviewing the *CCAA* decision of the supervising judge, is therefore one of correctness if there is an error of law. Otherwise, for an appellate court to interfere with the decision of the supervising judge, there must be a palpable and overriding error in the exercise of discretion or in findings of fact.

Statutory Provisions

30 The *CCAA* includes provisions defining secured creditor, unsecured creditor, refers to classes of them, and provides for court approval of a plan of compromise or arrangement in the following sections:

> **2. Interpretation**
>
> . . . . .
>
> "secured creditor" means a holder of a mortgage, hypothec, pledge, charge, lien or privilege on or against, or any assignment, cession or transfer of, all or any property of a debtor company as security for indebtedness of the debtor company, or a holder of any bond of a debtor company secured by a mortgage, hypothec, pledge, charge, lien or privilege on or against, or any assignment, cession or transfer of, or a trust in respect of, all or any property of the debtor company, whether the holder or beneficiary is resident or domiciled within or outside Canada, and a trustee under any trust deed or other instrument securing any of those bonds shall be deemed to be a secured creditor for all purposes of this Act except for the purpose of voting at a creditors' meeting in respect of any of those bonds;
>
> . . . . .
>
> "Unsecured creditor" means any creditor of a company who is not a secured creditor, whether resident or domiciled within or outside Canada, and a trustee for the holders of any unsecured bonds issue under a trust deed or other instrument running in favour of the trustee shall be deemed to be an unsecured creditor for all purposes of this Act except for the purpose of voting at a creditors' meeting in respect of any of those bonds.
>
> **Compromises and Arrangements**
>
> 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 a manner as the court directs.
>
> 5. Where a compromise or an arrangement is proposed between a debtor company and its secured creditors or any class of them, the court may, on the application in a summary way of the company or 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 courts directs.
>
> . . . . .
>
> 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 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.

Classes of Creditors

31 It is apparent from a review of the foregoing sections that division into classes of creditors within the unsecured and secured categories may, in any given case, materially affect the outcome of the vote referenced in section 6. Compliance with section 6 triggers the ability of the court to approve or sanction the Plan and to bind the parties referenced in s. 6(a) and 6(b) of the *CCAA*. In argument before me, it was conceded by the applicant that Resurgence would not have the ability to ensure approval of the Plan by casting its vote if Air Canada were to be excised from the unsecured creditor category into a separate class. Conversely, counsel for Resurgence candidly admitted that Resurgence would effectively have a veto of the Plan if Air Canada were segregated into a separate class of unsecured creditor.

Application of the Criteria for Leave to Appeal

32 The four elements of the general criterion are set out in paragraph [7]. The first and second elements are satisfied in this case. The points raised on appeal are of significance to the action. If Resurgence succeeds, it obtains a veto. If it does not succeed, and it votes as a member of the unsecured creditors class with Air Canada, Air Canada can control the vote of the unsecured creditors.

33 In terms of the points on appeal being of significance to the practice, it may be that an appellate court's views in this province on the classification of unsecured creditors issue is desirable, there being no appellate authority from this Court on this issue. Although I have doubt as to the significance of this element of the general criterion in the context of the facts of this case, I am prepared for the purposes of this application to treat this element as having being satisfied.

34 The third element is whether the appeal is *prima facie* meritorious or, on the other hand, whether it is frivolous. In my view, the proper interpretation of this element is not a mutually exclusive application of an appeal being either meritorious or frivolous. Rather, the appeal must be *prima facie* meritorious; if it is not *prima facie* meritorious, this element is not satisfied.

35 I find that the appeal on the points raised from the Decision is not *prima facie* meritorious. In the plain ordinary meaning of the words of this element, on first impression, there must appear to be an error in principle of law or a palpable and overriding error of fact. Exercise of discretion by a supervising judge, so long as it is exercised judicially, is not a matter for interference by an appellate court, even if the appellate court were inclined to decide the matter another way. It is precisely this kind of a factor which breathes life into the modifier "*prima facie*" meritorious.

36 I have carefully reviewed all of the cases referred to by the supervising chambers judge and the principles she derived from them. In my view, she made no error in law.

37 In the exercise of her discretion, she decided neither to allow the applicant's motion to excise Air Canada from the unsecured creditors class nor to prohibit Air Canada from voting. She also declined, on the facts established before her, to separate creditors of CAC from creditors of CAIL for voting purposes. She did, however, order that Air Canada's vote be recorded and tabulated and indicated that this will be considered at the Fairness Hearing.

38 It was strenuously argued before me by the applicant, that deferring classification and voting issues to the Fairness Hearing was an error of law or principle in and of itself.

39 The argument was put in terms that if, on a proper classification of unsecured creditors, Air Canada was removed from the unsecured class, and Resurgence vetoed the Plan, the matter of a Fairness Hearing would never arise. While that may be true, it does not follow that there is any error in law in what the supervising judge did. She concluded that the separate tabulation of the votes will allow the voice of the unsecured creditors to be heard, while, at the same time, permit, rather than rule out the possibility, that the Plan might proceed. This approach is consistent with the purpose of the *CCAA* as articulated in many of the authorities in this country.

40 The supervising chambers judge also refused to exclude Air Canada from voting on the basis that the legal rights attached to the notes held by Air Canada were valid. Resurgence argued that because Air Canada had other interests in the outcome of the Plan, it should be excluded from voting as an unsegregated secured creditor. Paperny, J. held that this was an issue of fairness, as was the fact that Air Canada was really voting on its own reorganization. She did not err in principle. She expressly acknowledged the authorities that, on different facts, either allowed different classes or excluded a vote. See, for example, *Re Woodward's Ltd.* (1993), 84 B.C.L.R. (2d) 206 (B.C. S.C.); *Re Northland Properties Ltd.* (1988), 73 C.B.R. (N.S.) 166 (B.C. S.C.); *Re NsC Diesel Power Inc.* (1990), 79 C.B.R. (N.S.) 1 (N.S. T.D.).

41 The fourth element of the general criterion is whether the appeal will unduly hinder the progress of the action. In other words, will the delay involved in prosecuting, hearing and deciding the appeal be of such length so as to unduly impede the ultimate resolution of the matter by a vote or court sanction? The approach of the supervising judge to the issues raised by the applicant is that its concerns will be seriously addressed at the Fairness Hearing scheduled for June 5, 2000, pursuant to s.6 of the *CCAA*, provided the creditors vote to adopt the Plan.

42 This element has at its root the purpose of the *CCAA*; the role of the supervising judge; the need for a timely and orderly resolution of the matter; and the effect on the interests of all parties pending a decision on appeal. The comments of McFarlane, J.A. in *Re Pacific National Lease Holding Corp.* (1992), 15 C.B.R. (3d) 265 (B.C. C.A. [In Chambers]) are particularly apt where he stated as follows at p.272:

> Despite what I have said, there may be an arguable case for the petitioners to present to a panel of this Court on discreet questions of law. But I am of the view that this Court should exercise its powers sparingly when it is asked to intervene with respect to questions which arise under the C.C.A.A. The process of management which the Act has assigned to the trial Court is an ongoing one. In this case a number of orders have been made. Some, including the one under appeal, have not been settled or entered. Other applications are pending. The process contemplated by the Act is continuing.
>
> A colleague has suggested that a judge exercising a supervisory function under the C.C.A.A. is more like a judge hearing a trial, who makes orders in the course of that trial, than a chambers judge who makes interlocutory or proceedings for which he has no further responsibility.
>
> Also, we know that in a case where a judgment has not been entered, it may be open to a judge to reconsider his or her judgment, and alter its terms. In supervising a proceeding under the C.C.A.A. orders are made, and orders are varied as changing circumstances require. Orders depend upon a careful and delicate balancing of a variety of interests and of problems. In that context appellate proceedings may well upset the balance, and delay or frustrate the process under the C.C.A.A. I do not say that leave will never be granted in a C.C.A.A. proceeding. But the effect upon all parties concerned will be an important consideration in deciding whether leave ought to be granted.

43 In that case, it appears that McFarlane, J.A. was satisfied that the first three elements of the criteria had been met, i.e. that there "may be an arguable case for the petitioners to present to a panel of this court on discrete [sic] questions of law".

44 It was argued before me that an appeal would give rise to an uncertainly of process and a lack of confidence in it; that the creditors, or some of them, may be inclined to withdraw support for the Plan that would otherwise be forthcoming, but for the delay. None of the parties tendered affidavit evidence on this issue.

45 Nowhere in any of the authorities has the issue of onus in meeting the elements the general criterion been prominent. I am of the view that the onus is on the applicant. That onus would include the applicant producing at least some evidence on the fourth element to shift the onus to the respondents, even though it involves proving a negative, i.e. that there will not be any material adverse impact as the result of the delay occasioned by an appeal. That evidence is lacking in this case. It is lacking on both sides but the respondents do not have an initial onus in this regard. Therefore, I find that the fourth element has not been established by the applicant.

46 The last step in a proper analysis in the context of a leave application is to ascribe appropriate weight to each of the elements of the general criterion and decide over all whether the test has been met. In most cases, the last two elements will be more important, and ought to be ascribed more weight than the first two elements. The last two elements here have not been met while the first two arguably have. In the result, I am satisfied that the applicant has not met the threshold for leave to appeal on the basis of the authorities, and I am therefore denying the application.

Conclusion

47 The application for leave to appeal the Decision is dismissed on the basis that there is no *prima facie* meritorious case and that the granting of leave would likely unduly hinder the progress of the action.

Application dismissed.

End of Document

8

2008 CarswellOnt 3523
Ontario Superior Court of Justice [Commercial List]

ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.

2008 CarswellOnt 3523, [2008] O.J. No. 2265, 168 A.C.W.S. (3d) 244, 43 C.B.R. (5th) 269, 47 B.L.R. (4th) 74

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 and Arrangement Involving 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., 6932819 Canada Inc. and 4446372 Canada Inc., Trustees of the Conduits Listed in Schedule "A" Hereto

The Investors Represented on the Pan-Canadian Investors Committee for Third-Party Structured Asset-Backed Commercial Paper Listed in Schedule "B" Hereto (Applicants) and 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., 6932819 Canada Inc. and 4446372 Canada Inc., Trustees of the Conduits Listed in Schedule "A" Hereto (Respondents)

C. Campbell J.

Heard: May 12-13, 2008; June 3, 2008
Judgment: June 5, 2008
Docket: 08-CL-7440

Counsel: B. Zarnett, F. Myers, B. Empey, for Applicants
Donald Milner, Graham Phoenix, Xeno C. Martis, David Lemieux, Robert Girard, for Respondents, 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.
Aubrey Kauffman, Stuart Brotman, for Respondents, 4446372 Canada Inc., 6932819 Canada Inc., as Issuer Trustees

Subject: Insolvency; Corporate and Commercial

Headnote

Bankruptcy and insolvency --- Proposal — Companies' Creditors Arrangement Act — Arrangements — Approval by court — Miscellaneous issues

Releases — Parties were financial institutions, dealers and noteholders in market for Asset Backed Commercial Paper ("ABCP") — Canadian ABCP market experienced liquidity crisis — Plan of Compromise and Arrangement ("Plan") was put forward under Companies' Creditors Arrangement Act ("CCAA") — Plan included Releases for claims against banks and dealers in negligence, misrepresentation and fraud, with "carve out" allowing fraudulent misrepresentations claims — Noteholders voted in favour of Plan — Minority of noteholders ("opponents") opposed Plan based on Releases — Applicants brought application for approval of Plan — Application granted — CCAA provided jurisdiction to approve Releases since they were appropriate for success of Plan — Decisions cited by opponents were not helpful as they concerned releases that did not extend to third party or that did not directly involve company — In case at bar, parties released were directly involved in company, and opponents' claims were directly related to value of company — Releases

were fair and reasonable — Given purpose of CCAA, it was reasonable to compromise claims to complete restructuring — Carve out balanced benefits to noteholders and recovery for fraud — No plan brought forward would permit fraud claims urged by opponents — Plan would be withdrawn without Releases — Plan was legitimate use of CCAA to restore confidence in Canadian financial system.

Table of Authorities

Cases considered by *C. Campbell J.*:

ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp. (2008), 2008 CarswellOnt 2653, 42 C.B.R. (5th) 102 (Ont. S.C.J. [Commercial List]) — referred to

ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp. (2008), 2008 CarswellOnt 2820 (Ont. S.C.J. [Commercial List]) — referred to

Canadian Airlines Corp., Re (2000), [2000] 10 W.W.R. 269, 20 C.B.R. (4th) 1, 84 Alta. L.R. (3d) 9, 9 B.L.R. (3d) 41, 2000 CarswellAlta 662, 2000 ABQB 442, 265 A.R. 201 (Alta. Q.B.) — considered

Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re (1998), 1998 CarswellOnt 3346, 5 C.B.R. (4th) 299, 72 O.T.C. 99 (Ont. Gen. Div. [Commercial List]) — considered

Continental Insurance Co. v. Dalton Cartage Co. (1982), 25 C.P.C. 72, [1982] 1 S.C.R. 164, 131 D.L.R. (3d) 559, (sub nom. *Dalton Cartage Ltd. v. Continental Insurance Co.)* 40 N.R. 135, [1982] I.L.R. 1-1487, 1982 CarswellOnt 372, 1982 CarswellOnt 719 (S.C.C.) — considered

Ecolab Ltd. v. Greenspace Services Ltd. (1996), 1996 CarswellOnt 3788 (Ont. Gen. Div.) — referred to

Kripps v. Touche Ross & Co. (1997), 1997 CarswellBC 925, 89 B.C.A.C. 288, 145 W.A.C. 288, 35 C.C.L.T. (2d) 60, [1997] 6 W.W.R. 421, 33 B.C.L.R. (3d) 254 (B.C. C.A.) — considered

Muscletech Research & Development Inc., Re (2006), 25 C.B.R. (5th) 231, 2006 CarswellOnt 6230 (Ont. S.C.J.) — considered

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

NBD Bank, Canada v. Dofasco Inc. (1999), 1999 CarswellOnt 4077, 1 B.L.R. (3d) 1, 181 D.L.R. (4th) 37, 46 O.R. (3d) 514, 47 C.C.L.T. (2d) 213, 127 O.A.C. 338, 15 C.B.R. (4th) 67 (Ont. C.A.) — distinguished

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

Peek v. Derry (1889), 14 H. of L. 337, 38 W.R. 33, 1 Megones Companies Act Cas 292, L.R. 14 App. Cas. 337, [1886-1890] All E.R. Rep. 1, 58 L.J. Ch. 864, 61 L.T. 265, 54 J.P. 148, 5 T.L.R. 625, 14 A.C. 337 (U.K. H.L.) — referred to

Steinberg Inc. c. Michaud (1993), [1993] R.J.Q. 1684, 55 Q.A.C. 298, 1993 CarswellQue 229, 1993 CarswellQue 2055, 42 C.B.R. (5th) 1 (Que. C.A.) — considered

Stelco Inc., Re (2005), 2005 CarswellOnt 6483, 15 C.B.R. (5th) 297 (Ont. S.C.J. [Commercial List]) — considered

Stelco Inc., Re (2005), 2005 CarswellOnt 6818, 204 O.A.C. 205, 78 O.R. (3d) 241, 261 D.L.R. (4th) 368, 11 B.L.R. (4th) 185, 15 C.B.R. (5th) 307 (Ont. C.A.) — considered

Stelco Inc., Re (2007), 2007 ONCA 483, 2007 CarswellOnt 4108, 35 C.B.R. (5th) 174, 32 B.L.R. (4th) 77, 226 O.A.C. 72 (Ont. C.A.) — considered

Toronto Dominion Bank v. Leigh Instruments Ltd. (Trustee of) (1998), 1998 CarswellOnt 2565, 63 O.T.C. 1, 40 B.L.R. (2d) 1 (Ont. Gen. Div. [Commercial List]) — followed

U.S. v. Energy Resources Co. (1990), 495 U.S. 545, 65 A.F.T.R.2d 90-1078, 58 U.S.L.W. 4609, 109 L.Ed.2d 580, 110 S.Ct. 2139 (U.S. Sup. Ct.) — considered

Vicwest, Re (2003), 2003 CarswellOnt 3600 (Ont. S.C.J. [Commercial List]) — referred to

Statutes considered:

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

s. 5 — referred to

s. 5.1 [en. 1997, c. 12, s. 122] — referred to

Interpretation Act, R.S.C. 1985, c. I-21
s. 10 — considered

Negligence Act, R.S.O. 1990, c. N.1
Generally — referred to

Words and phrases considered:

fraud

The definition of fraud in a corporate context in the common law of Canada starts with the proposition that it must be made (1) knowingly; (2) without belief in its truth; (3) recklessly, careless whether it be true or false. . . . It is my understanding that while expressed somewhat differently, the above-noted ingredients form the basis of fraud claims in the civil law of Quebec, although there are differences.

APPLICATION for approval of Plan of Compromise and Arrangement under *Companies' Creditors Arrangement Act* to address liquidity crisis in market for Asset Backed Commercial Paper.

***C. Campbell J.*:**

1 This decision follows a sanction hearing in parts in which applicants sought approval of a Plan under the *Companies Creditors Arrangement Act* ("CCAA.") Approval of the Plan as filed and voted on by Noteholders was opposed by a number of corporate and individual Noteholders, principally on the basis that this Court does not have the jurisdiction under the CCAA or if it does should not exercise discretion to approve third party releases.

History of Proceedings

2 On Monday, March 17, 2008, two Orders were granted. The first, an Initial Order on essentially an *ex parte* basis and in a form that has become familiar to insolvency practitioners, granted a stay of proceedings, a limitation of rights and remedies, the appointment of a Monitor and for service and notice of the Order.

3 The second Order made dated March 17, 2008 provided for a meeting of Noteholders and notice thereof, including the sending of what by then had become the Amended Plan of Compromise and Arrangement. Reasons for Decision were issued on April 8, 2008 elaborating on the basis of the Initial Order.

4 No appeal was taken from either of the Orders of March 17, 2008. Indeed, on the return of a motion made on April 23, 2008 by certain Noteholders (the moving parties) to adjourn the meeting then scheduled for and held on April 25, 2008, no challenge was made to the Initial Order.

5 Information was sought and provided on the issue of classification of Noteholders. The thrust of the Motions was and has been the validity of the releases of various parties provided for in the Plan.

6 The cornerstone to the material filed in support of the Initial Order was the affidavit of Purdy Crawford, O.C., Q.C., Chairman of the Applicant Pan Canadian Investors Committee. There has been no challenge to Mr. Crawford's description of the Asset Backed Commercial Paper ("ABCP") market or in general terms the circumstances that led up to the liquidity crisis that occurred in the week of August 13, 2007, or to the formation of the Plan now before the Court.

7 The unchallenged evidence of Mr. Crawford with respect to the nature of the ABCP market and to the development of the Plan is a necessary part of the consideration of the fairness and indeed the jurisdiction, of the Court to approve the form of releases that are said to be integral to the Plan.

8 As will be noted in more detail below, the meeting of Noteholders (however classified) approved the Plan overwhelmingly at the meeting of April 25, 2008.

Background to the Plan

9 Much of the description of the parties and their relationship to the market are by now well known or referred to in the earlier reasons of March 17 or April 4, 2008.

10 The focus here will be on that portion of the background that is necessary for an understanding of and decision on, the issues raised in opposition to the Plan.

11 Not unlike a sporting event that is unfamiliar to some attending without a program, it is difficult to understand the role of various market participants without a description of it. Attached as Appendix 2 are some of the terms that describe the parties, which are from the Glossary that is part of the Information Statement, attached to various of the Monitor's Reports.

12 A list of these entities that fall into various definitional categories reveals that they comprise Canadian chartered banks, Canadian investment houses and foreign banks and financial institutions that may appear in one or more categories of conduits, dealers, liquidity providers, asset providers, sponsors or agents.

13 The following paragraphs from Mr. Crawford's affidavit succinctly summarize the proximate cause of the liquidity crisis, which since August 2007 has frozen the market for ABCP in Canada:

> [7] Before the week of August 13, 2007, there was an operating market in ABCP. Various corporations (referred to below as "Sponsors") arranged for the Conduits to make ABCP available as an investment vehicle bearing interest at rates slightly higher than might be available on government or bank short-term paper.

> [8] The ABCP represents debts owing by the trustees of the Conduits. Most of the ABCP is short-term commercial paper (usually 30 to 90 days). The balance of the ABCP is made up of commercial paper that is extendible for up to 364 days and longer-term floating rate notes. The money paid by investors to acquire ABCP was used to purchase a portfolio of financial assets to be held, directly or through subsidiary trusts, by the trustees of the Conduits. Repayment of each series of ABCP is supported by the assets held for that series, which serves as collateral for the payment obligations. ABCP is therefore said to be "asset-backed."
>
> [9] Some of these supporting assets were mid-term, but most were long-term, such as pools of residential mortgages, credit card receivables or credit default swaps (which are sophisticated derivative products). Because of the generally long-term nature of the assets backing the ABCP, the cash flow they generated did not match the cash flow required to repay maturing ABCP. Before mid-August 2007, this timing mismatch was not a problem because many investors did not require repayment of ABCP on maturity; instead they reinvested or "rolled" their existing ABCP at maturity. As well, new ABCP was continually being sold, generating funds to repay maturing ABCP where investors required payment. Many of the trustees of the Conduits also entered into back-up liquidity arrangements with third-party lenders ("Liquidity Providers") who agreed to provide funds to repay maturing ABCP in certain circumstances.
>
> [10] In the week of August 13, 2007, the ABCP market froze. The crisis was largely triggered by market sentiment, as news spread of significant defaults on U.S. sub-prime mortgages. In large part, investors in Canadian ABCP lost confidence because they did not know what assets or mix of assets backed their ABCP. Because of this lack of transparency, existing holders and potential new investors feared that the assets backing the ABCP might include sub-prime mortgages or other overvalued assets. Investors stopped buying new ABCP, and holders stopped "rolling" their existing ABCP. As ABCP became due, Conduits were unable to fund repayments through new issuances or replacement notes. Trustees of some Conduits made requests for advances under the back-up arrangements that were intended to provide liquidity; however, most Liquidity Providers took the position that the conditions to funding had not been met. With no new investment, no reinvestment, and no liquidity funding available, and with long-term underlying assets whose cash flows did not match maturing short-term ABCP, payments due on the ABCP could not be made — and no payments have been made since mid-August.

14 Between mid-August 2007 and the filing of the Plan, Mr. Crawford and the Applicant Committee have diligently pursued the object of restructuring not just the specific trusts that are part of this Plan, but faith in a market structure that has been a significant part of the broader Canadian financial market, which in turn is directly linked to global financial markets that are themselves in uncertain times.

15 The previous reasons of March 17, 2008 that approved for filing the Initial Plan, recognized not just the unique circumstances facing conduits and their sponsors, but the entire market in Canada for ABCP and the impact for financial markets generally of the liquidity crisis.

16 Unlike many CCAA situations, when at the time of the first appearance there is no plan in sight, much less negotiated, this rescue package has been the product of painstaking, complicated and difficult negotiations and eventually agreement.

17 The following five paragraphs from Mr. Crawford's affidavit crystallize the problem that developed in August 2007:

> [45] Investors who bought ABCP often did not know the particular assets or mix of assets that backed their ABCP. In part, this was because ABCP was often issued and sold before or at about the same time the assets were acquired. In addition, many of the assets are extremely complex and parties to some underlying contracts took the position that the terms were confidential.
>
> [46] Lack of transparency became a significant problem as general market fears about the credit quality of certain types of investment mounted during the summer of 2007. As long as investors were willing to roll their ABCP or buy new ABCP to replace maturing notes, the ABCP market was stable. However, beginning in the first half of 2007, the economy in the United States was shaken by what is referred to as the "sub-prime" lending crisis.

> [47] U.S. sub-prime lending had an impact in Canada because ABCP investors became concerned that the assets underlying their ABCP either included U.S. sub-prime mortgages or were overvalued like the U.S. sub-prime mortgages. The lack of transparency into the pools of assets underlying ABCP made it difficult for investors to know if their ABCP investments included exposure to U.S. sub-prime mortgages or other similar products. In the week of August 13, that concern intensified to the point that investors stopped rolling their maturing ABCP, and instead demanded repayment, and new investors could not be found. Certain trustees of the Conduits then tried to draw on their Liquidity Agreements to repay ABCP. Most of the Liquidity Providers did not agree that the conditions for liquidity funding had occurred and did not provide funding, so the ABCP could not be repaid. Deteriorating conditions in the credit market affected all the ABCP, including ABCP backed by traditional assets not linked to sub-prime lending.
>
> [48] Some of the Asset Providers made margin calls under LSS swaps on certain of the Conduits, requiring them to post additional collateral. Since they could not issue new ABCP, roll over existing ABCP or draw on their Liquidity Agreements, those Conduits were not able to post the additional collateral. Had there been no standstill arrangement, as described below, these Asset Providers could have unwound the swaps and ultimately could have liquidated the collateral posted by the Conduits.
>
> [49] Any liquidation of assets under an LSS swap would likely have further depressed the LSS market, creating a domino effect under the remaining LSS swaps by triggering their "mark-to-market" triggers for additional margin calls, ultimately leading to the sale of more assets, at very depressed prices. The standstill arrangement has, to date, through successive extensions, prevented this from occurring, in anticipation of the restructuring.

18 The "Montreal Accord," as it has been called, brought together various industry representatives, Asset Providers and Liquidity Providers who entered into a "Standstill Agreement," which committed to the framework for restructuring the ABCP such that (a) all outstanding ABCP would be converted into term floating rate notes maturing at the same time as the corresponding underlying assets. This was intended to correct the mismatch between the long-term nature of the financial assets and the short-term nature of the ABCP; and (b) margin provisions under certain swaps would be changed to create renewed stability, reducing the likelihood of margin calls. This contract was intended to reduce the risk that the Conduits would have to post additional collateral for the swap obligations or be subject to having their assets seized and sold, thereby preserving the value of the assets and of the ABCP.

19 The Investors Committee of which Mr. Crawford is the Chair has been at work since September to develop a Plan that could be implemented to restore viability to the notes that have been frozen and restore liquidity so there can be a market for them.

20 Since the Plan itself is not in issue at this hearing (apart from the issue of the releases), it is not necessary to deal with the particulars of the Plan. Suffice to say I am satisfied that as the Information to Noteholders states at p. 69, "The value of the Notes if the Plan does not go forward is highly uncertain."

The Vote

21 A motion was held on April 25, 2008, brought by various corporate and individual Noteholders seeking:

> a) changing classification each in particular circumstances from the one vote per Noteholder regime;
>
> b) provision of information of various kinds;
>
> c) adjourning the vote of April 25, 2008 until issues of classification and information were fully dealt with;
>
> d) amending the Plan to delete various parties from release.

22 By endorsement of April 24, 2008 [2008 CarswellOnt 2653 (Ont. S.C.J. [Commercial List])] the issue of releases was in effect adjourned for determination later. The vote was not postponed, as I was satisfied that the Monitor would be able to tally the votes in such a way that any issue of classification could be dealt with at this hearing.

23 I was also satisfied that the Applicants and the Monitor had or would make available any and all information that was in existence and pertinent to the issue of voting. Of understandable concern to those identified as the moving parties are the developments outside the Plan affecting Noteholders holding less than $1 million of Notes. Certain dealers, Canaccord and National Bank being the most prominent, agreed in the first case to buy their customers' ABCP and in the second to extend financing assistance.

24 A logical conclusion from these developments outside the Plan is that they were designed (with apparent success) to obtain votes in favour of the Plan from various Noteholders.

25 On a one vote per Noteholder basis, the vote was overwhelmingly in favour of the Plan approximately 96%. At a case conference held on April 29, 2008, the Monitor was asked to tabulate votes that would isolate into Class A all those entities in any way associated with the formulation of the Plan, whether or not they were Noteholders or sold or advised on notes, and into Class B all other Noteholders.

26 The results of the vote on the Restructuring Resolution, tabulated on the basis set out in paragraph 30 of the Monitor's 7th Report and using the Class structure referred to in the preceding paragraph, are summarized below:

	Number		Dollar Value	
Class A				
Votes FOR the Restructuring Resolution	1,572	99.4%	$23,898, 232,639	100.0%
Votes AGAINST the Restructuring —Resolution	9	0.6%	$867,666	0.0%
CLASS B				
Votes FOR the Restructuring Resolution	289	80.5%	$5,046, 951,989	81.2%
Votes AGAINST the Restructuring— Resolution	70	19.5%	$1,168, 136,123	18.8%

27 I am satisfied that reclassification would not alter the strong majority supporting the Restructuring. The second request made at the case conference on April 29 was that the moving parties provide the Monitor with information that would permit a summary to be compiled of the claims that would have been made or anticipated to be made against so-called third parties, including Conduits and their trustees.

28 The information compiled by the Monitor reveals that the primary defendants are or are anticipated to be banks, including four Canadian chartered banks and dealers (many associated with Canadian banks). In the case of banks, they and their employees may be sued in more than one capacity.

29 The claims against proposed defendants are for the most part claims in tort, and include negligence, misrepresentation, negligent misrepresentation, failure to act prudently as a dealer/adviser, acting in conflict of interest and in a few instances, fraud or potential fraud.

30 Again in general terms, the claims for damages include the face value of notes plus interest and additional penalties and damages that may be allowable at law. It is noteworthy that the moving parties assume that they would be able to mitigate their claim for damages by taking advantage of the Plan offer without the need to provide releases.

31 The information provided by the potential defendants indicates the likelihood of claims over against parties such that no entity, institution or party involved in the Restructuring Plan could be assured being spared from likely involvement in lawsuits by way of third party or other claims over.

32 The chart prepared by the Monitor that is Appendix 3 to these Reasons shows graphically the extent of those entities that would be involved in future litigation.

Law and Analysis

33 Some of the moving parties in their written and oral submissions assumed that this Court has the power to amend the Plan to allow for the proposed lawsuits, whether in negligence or fraud. The position of the Applicants and supporting parties is that the Plan is to be accepted on the basis that it satisfies the criteria established under the CCAA, or it will be rejected on the basis that it does not.

34 I am satisfied that the Court does not have the power to amend the Plan. The Plan is that of the Applicants and their supporters. They have made it clear that the Plan is a package that allows only for acceptance or rejection by the Court. The Plan has been amended to address the concerns expressed by the Court in the May 16, 2008 [2008 CarswellOnt 2820 (Ont. S.C.J. [Commercial List])] endorsement.

35 I am satisfied and understand that if the Plan is rejected by the Court, either on the basis of fairness (i.e., that claims should be allowed to proceed beyond those provided for in the Plan) or lack of jurisdiction to compel compromise of claims, there is no reliable prospect that the Plan would be revised.

36 I do not consider that the Applicants or those supporting them are bluffing or simply trying to bargain for the best position for themselves possible. The position has been consistent throughout and for what I consider to be good and logical reasons. Those parties described as Asset or Liquidity Providers have a first secured interest in the underlying assets of the Trusts. To say that the value of the underlying assets is uncertain is an understatement after the secured interest of Asset Providers is taken into account.

37 When one looks at the Plan in detail, its intent is to benefit ALL Noteholders. Given the contribution to be made by those supporting the Plan, one can understand why they have said forcefully in effect to the Court, 'We have taken this as far as we can, particularly given the revisions. If it is not accepted by the Court as it has been overwhelmingly by Noteholders, we hold no prospect of another Plan coming forward.'

38 I have carefully considered the submissions of all parties with respect to the issue of releases. I recognize that to a certain extent the issues raised chart new territory. I also recognize that there are legitimate principle-based arguments on both sides.

39 As noted in the Reasons of April 8, 2008 and as reflected in the March 17, 2008 Order and May 16 Endorsement, the Plan represents a highly complex unique situation.

40 The vehicles for the Initial Order are corporations acting in the place of trusts that are insolvent. The trusts and the respondent corporations are not directly related except in the sense that they are all participants in the Canadian market for ABCP. They are each what have been referred to as issuer trustees.

41 There are a great number of other participants in the ABCP market in Canada who are themselves intimately connected with the Plan, either as Sponsors, Asset Providers, Liquidity Providers, participating banks or dealers.

42 I am satisfied that what is sought in this Plan is the restructuring of the ABCP market in Canada and not just the insolvent corporations that are issuer trustees.

43 The impetus for this market restructuring is the Investors Committee chaired by Mr. Crawford. It is important to note that all of the members of the Investors Committee, which comprise 17 financial and investment institutions (see Schedule B, attached), are themselves Noteholders with no other involvement. Three of the members of that Committee act as participants in other capacities.

44 The Initial Order, which no party has appealed or sought to vary or set aside, accepts for the purpose of placing before all Noteholders the revised Plan that is currently before the Court.

45 Those parties who now seek to exclude only some of the Release portions of the Plan do not take issue with the legal or practical basis for the goal of the Plan. Indeed, the statement in the Information to Noteholders, which states that

> ...as of August 31, 2007, of the total amount of Canadian ABCP outstanding of approximately $116.8 billion (excluding medium-term and floating rate notes), approximately $83.8 billion was issued by Canadian Schedule I bank-administered Conduits and approximately $33 billion was issued by non-bank administered conduits) [1]

is unchallenged.

46 The further description of the ABCP market is also not questioned:

> ABCP programs have been used to fund the acquisition of long-term assets, such as mortgages and auto loans. Even when funding short-term assets such as trade receivables, ABCP issuers still face the inherent timing mismatch between cash generated by the underlying assets and the cash needed to repay maturing ABCP. Maturing ABCP is typically repaid with the proceeds of newly issued ABCP, a process commonly referred to as "rolling". Because ABCP is a highly rated commercial obligation with a long history of market acceptance, market participants in Canada formed the view that, absent a "general market disruption", ABCP would readily be saleable without the need for extraordinary funding measures. However, to protect investors in case of a market disruption, ABCP programs typically have provided liquidity back-up facilities, usually in amounts that correspond to the amount of the ABCP programs typically have provided liquidity back-up facilities, usually in amounts that correspond to the amount of the ABCP outstanding. In the event that an ABCP issuer is unable to issue new ABCP, it may be able to draw down on the liquidity facility to ensure that proceeds are available to repay any maturing ABCP. As discussed below, there have been important distinctions between different kinds of liquidity agreements as to the nature and scope of drawing conditions which give rise to an obligation of a liquidity provider to fund [2]

47 The activities of the Investors Committee, most of whom are themselves Noteholders without other involvement, have been lauded as innovative, pioneering and essential to the success of the Plan. In my view, it is entirely inappropriate to classify the vast majority of the Investors Committee, and indeed other participants who were not directly engaged in the sale of Notes, as third parties.

48 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.

49 In these circumstances, it is unduly technical to classify the Issuer Trustees as debtors and the claims of 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.

50 The insolvency is of the ABCP market itself, the restructuring is that of the market for such paper - restructuring that involves the commitment and participation of all parties. The Latin words *sui generis* are used to mean something that is "one off" or "unique." That is certainly the case with this Plan.

51 The Plan, including all of its constituent parts, has been overwhelmingly accepted by Noteholders no matter how they are classified. In the sense of their involvement I do not think it appropriate to label any of the participants as Third Parties. Indeed, as this matter has progressed, additions to the supporter side have included for the proposed releases the members of the Ad Hoc Investors' Committee. The Ad Hoc group had initially opposed the release provisions. The Committee members account for some two billion dollars' worth of Notes.

52 It is more appropriate to consider all participants part of the market for the restructuring of ABCP and therefore not merely third parties to those Noteholders who may wish to sue some or all of them.

53 The benefit of the restructuring is only available to the debtor corporations with the input, contribution and direct assistance of the Applicant Noteholders and those associated with them who similarly contribute. Restructuring of the ABCP market cannot take place without restructuring of the Notes themselves. Restructuring of the Notes cannot take place without the input and capital to the insolvent corporations that replace the trusts.

54 A hearing was held on May 12 and 13 to hear the objections of various Noteholders to approval of the Plan insofar as it provided for comprehensive releases.

55 On May 16, 2008, by way of endorsement the issue of scope of the proposed releases was addressed. The following paragraphs from the endorsement capsulize the adjournment that was granted on the issue of releases:

> [10] I am not satisfied that the release proposed as part of the Plan, which is broad enough to encompass release from fraud, is in the circumstances of this case at this time properly authorized by the CCAA, or is necessarily fair and reasonable. I simply do not have sufficient facts at this time on which to reach a conclusion one way or another.
>
> [11] I have also reached the conclusion that in the circumstances of this Plan, at this time, it may well be appropriate to approve releases that would circumscribe claims for negligence. I recognize the different legal positions but am satisfied that this Plan will not proceed unless negligence claims are released.

56 The endorsement went on to elaborate on the particular concerns that I had with releases sought by the Applicants that could in effect exonerate fraud. As well, concern was expressed that the Plan might unduly bring hardship to some Noteholders over others.

57 I am satisfied that based on Mr. Crawford's affidavit and the statements commencing at p. 126 of the Information to Noteholders, a compelling case for the need for comprehensive releases, with the exception of certain fraud claims, has been made out.

> The Released Parties have made comprehensive releases a condition of their participation in the Plan or as parties to the Approved Agreements. Each Released Party is making a necessary contribution to the Plan without which the Plan cannot be implemented. The Asset Providers, in particular, have agreed to amend certain of the existing contracts and/or enter into new contracts that, among other things, will restructure the trigger covenants, thereby increasing their risk of loss and decreasing the risk of losses being borne by Noteholders. In addition, the Asset Providers are making further contributions that materially improve the position of Noteholders generally, including through forebearing from making collateral calls since August 15, 2007, participating in the MAV2 Margin Funding Facility at pricing favourable to the Noteholders, accepting additional collateral at par with respect to the Traditional Assets and disclosing confidential information, none of which they are contractually obligated to do. The ABCP Sponsors have also released confidential information, co-operated with the Investors Committee and its advisors in the development of the Plan, released their claims in respect of certain future fees that would accrue to them in respect of the assets and are assisting in the transition of administration services to the Asset Administrator, should the Plan be implemented. The Original Issuer Trustees, the Issuer Trustees, the Existing Note Indenture Trustees and the Rating Agency have assisted in the restructuring process as needed and have co-operated with the Investors Committee in facilitating an essential aspect of the court proceedings required to complete the restructuring of the ABCP Conduits through the replacement of the Original Issuer Trustees where required.
>
> In many instances, a party had a number of relationships in different capacities with numerous trades or programs of an ABCP Conduit, rendering it difficult or impracticable to identify and/or quantify any individual Released Party's contribution. Certain of the Released Parties may have contributed more to the Plan than others. However, in order for the releases to be comprehensive, the Released Parties (including those Released Parties without which no restructuring could occur) require that all Released Parties be included so that one Person who is not released by the Noteholders is unable to make a claim-over for contribution from a Released Party and thereby defeat the effectiveness of the releases. Certain entities represented on the Investors Committee have also participated in the Third-Party ABCP market in a variety of capacities other than as Noteholders and, accordingly, are also expected to benefit from these releases.

The evidence is unchallenged.

58 The questions raised by moving parties are (a) does the Court have jurisdiction to approve a Plan under the CCAA that provides for the releases in question?; and if so, (b) is it fair and reasonable that certain identified dealers and others be released?

59 I am also satisfied that those parties and institutions who were involved in the ABCP market directly at issue and those additional parties who have agreed solely to assist in the restructuring have valid and legitimate reasons for seeking such releases. To exempt some Noteholders from release provisions not only leads to the failure of the Plan, it does likely result in many Noteholders having to pursue fraud or negligence claims to obtain any redress, since the value of the assets underlying the Notes may, after first security interests be negligible.

Restructuring under the CCAA

60 This Application has brought into sharp focus the purpose and scope of the CCAA. It has been accepted for the last 15 years that the issue of releases beyond directors of insolvent corporations dates from the decision in *Canadian Airlines Corp., Re*[3] where Paperny J. said:

> [87] Prior to 1997, the CCAA did not provide for compromises of claims against anyone other than the petitioning company. In 1997, section 5.1 was added to the CCAA. Section 5.1 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 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.
> >
> > (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.
> >
> > (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.

61 The following paragraphs from that decision are reproduced at some length, since, in the submission principally of Mr. Woods, the releases represent an illegal or improper extension of the wording of the CCAA. Mr. Woods takes issue with the reasoning in the *Canadian Airlines* decision, which has been widely referred to in many cases since. Mme Justice Paperny continued:

> [88] Resurgence argued that the form of release does not comply with section 5.1 of the CCAA insofar as it applies to individuals beyond directors and to a broad spectrum of claims beyond obligations of the Petitioners for which their directors are "by law liable". Resurgence submitted that the addition of section 5.1 to the CCAA constituted an exception to a long standing principle and urged the court to therefore interpret s. 5.1 cautiously, if not narrowly.
>
> ...
>
> [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. Aside from the complaints of Resurgence, which by their own submissions are addressed in the amendment I have directed, and the complaints of JHHD Aircraft Leasing No. 1 and No. 2, which would also be addressed in the amendment, the terms of the release have been accepted by the requisite majority of creditors and I am loathe to further disturb the terms of the Plan, with one exception. [Emphasis added.]
>
> [93] Amex Bank of Canada submitted that the form of release appeared overly broad and might compromise unaffected claims of affected creditors. For further clarification, Amex Bank of Canada's potential claim for

defamation is unaffected by the Plan and I am prepared to order Section 6.2(2)(ii) be amended to reflect this specific exception.

[94] In determining whether to sanction a plan of arrangement under the CCAA, the court is guided by two fundamental concepts: "fairness" and "reasonableness". While these concepts are always at the heart of the court's exercise of its discretion, their meanings are necessarily shaped by the unique circumstances of each case, within the context of the Act and accordingly can be difficult to distill and challenging to apply. Blair J. described these concepts in *Olympia and York Dev. Ltd. v. Royal Trust Co.* [4] at page 9:

> "Fairness" and "reasonableness" are, in my opinion, the two keynote concepts underscoring the philosophy and workings of the Companies' Creditors Arrangement Act. Fairness is the quintessential expression of the court's equitable jurisdiction - although the jurisdiction is statutory, the broad discretionary powers given to the judiciary by the legislation which make its exercise an exercise in equity - and "reasonableness" is what lends objectivity to the process.

[95] The legislation, while conferring broad discretion on the court, offers little guidance. However, the court is assisted in the exercise of its discretion by the purpose of the CCAA: to facilitate the reorganization of a debtor company for the benefit of the company, its creditors, shareholders, employees and, in many instances, a much broader constituency of affected persons. Parliament has recognized that reorganization, if commercially feasible, is in most cases preferable, economically and socially, to liquidation: *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.*, [1989] 2 W.W.R. 566 at 574 (Alta.Q.B.); *Northland Properties Ltd. v. Excelsior Life Insurance Co. of Canada*, [1989] 3 W.W.R. 363 at 368 (B.C.C.A.).

[96] 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.

[97] As noted above, an important measure of whether a plan is fair and reasonable is the parties' approval and the degree to which it has been given. Creditor support creates an inference that the plan is fair and reasonable because the assenting creditors believe that their interests are treated equitably under the plan. Moreover, it creates an inference that the arrangement is economically feasible and therefore reasonable because the creditors are in a better position then the courts to gauge business risk. As stated by Blair J. at page 11 of *Olympia & York Developments Ltd., supra*:

> As other courts have done, I observe that it is not my function to second guess the business people with respect to the "business" aspect of the Plan or descending into the negotiating arena or 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.

62 The liberal interpretation to be given to the CCAA was and has been accepted in Ontario. In *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re* [5], Blair J. (as he then was) has been referred to with approval in later cases:

> [45] It is very common in CCAA restructurings for the Court to approve the sale and disposition of assets during the process and before the Plan if formally tendered and voted upon. There are many examples where this had occurred, the recent Eaton's restructuring being only one of them. The CCAA is designed to be a flexible instrument, and it is that very flexibility which gives it its efficacy. As Farley J said in *Dylex Ltd.* supra (p. 111), "the history of CCAA law has been an evolution of judicial interpretation". It is not infrequently that judges are told, by those opposing a particular initiative at a particular time, that if they make a particular order that is requested it will be the first time in Canadian jurisprudence (sometimes in global jurisprudence, depending upon the level of the rhetoric) that such an order has made! Nonetheless, the orders are made, if the circumstances are appropriate and the orders can be made within the framework and in the spirit of the CCAA legislation. Mr. Justice Farley has well summarized this approach in the following passage from his decision in *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]), at p. 31, which I adopt:
>
> > The CCAA is intended to facilitate compromises and arrangements between companies and their creditors as an alternative to bankruptcy and, as such, is remedial legislation entitled to a liberal interpretation. It seems to me that the purpose of the statute is to enable insolvent companies to carry on business in the ordinary course *or otherwise deal with their assets* so as to enable plan of compromise or arrangement to be prepared, filed and considered by their creditors for the proposed compromise or arrangement which will be to the benefit of both the company and its creditors. See the preamble to and sections 4,5,7,8 and 11 of the CCAA (a lengthy list of authorities cited here is omitted).
> >
> > The CCAA is intended to provide a structured environment for the negotiation of compromises between a debtor company and its creditors for the benefit of both. Where a debtor company realistically plans to continue operating *or to otherwise deal with its assets* but it requires the protection of the court in order to do so and it is otherwise too early for the court to determine whether the debtor company will succeed, relief should be granted under the CCAA (citations omitted)
> >
> > [Emphasis added]

63 In a 2006 decision in *Muscletech Research & Development Inc., Re* [6], which adopted the *Canadian Airlines* test, Ground J. said:

> [7] 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.

64 This decision is also said to be beyond the Court's jurisdiction to follow.

65 In a later decision [7] in the same matter, Ground J. said in 2007:

> [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 lovate Health Sciences Inc. and its subsidiaries (excluding the Applicants) (collectively, the "lovate Companies"), the Ad Hoc Committee of Muscle Tech 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.

66 I recognize that in *Muscletech*, as in other cases such as *Vicwest, Re*, [8], there has been no direct opposition to the releases in those cases. The concept that has been accepted is that the Court does have jurisdiction, taking into account the nature and purpose of the CCAA, to sanction release of third parties where the factual circumstances are deemed appropriate for the success of a Plan. [9]

67 The moving parties rely on the decision of the Ontario Court of Appeal in *NBD Bank, Canada v. Dofasco Inc.* [10] for the proposition that compromise of claims in negligence against those associated with a debtor corporation within a CCAA context is not permitted.

68 The claim in that case was by NBD as a creditor of Algoma Steel, then under CCAA protection against its parent Dofasco and an officer of both Algoma and Dofasco. The claim was for negligent misrepresentation by which NBD was induced to advance funds to Algoma shortly before the CCAA filing.

69 In the approved CCAA order only the debtor Algoma was released. The Court of Appeal held that the benefit of the release did not extend to officers of Algoma or to the parent corporation Dofasco or its officers.

70 Rosenberg J.A. writing for the Court said:

> [51] Algoma commenced the process under the CCAA on February 18, 1991. The process was a lengthy one and the Plan of Arrangement was approved by Farley J. in April 1992. The Plan had previously been accepted by the overwhelming majority of creditors and others with an interest in Algoma. The Plan of Arrangement included the following term:
>
> > **6.03 Releases**
> >
> > From and after the Effective Date, each Creditor and Shareholder of Algoma prior to the Effective Date (other than Dofasco) will be deemed to forever release Algoma from any and all suits, claims and causes of action that it may have had against Algoma or its directors, officers, employees and advisors. [Emphasis added.]
>
> ...
>
> [54] 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 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. [Reference omitted]

71 In my view, there is little factual similarity in *NBD* to the facts now before the Court. In this case, I am not aware of any claims sought to be advanced against directors of Issuer Trustees. The release of Algoma in the *NBD* case did not on its face extend to Dofasco, the third party. Accordingly, I do not find the decision helpful to the issue now before the Court. The moving parties also rely on decisions involving another steel company, Stelco, in support of the proposition that a CCAA Plan cannot be used to compromise claims as between creditors of the debtor company.

72 In *Stelco Inc., Re*, [11] Farley J., dealing with classification, said in November 2005:

> [7] The CCAA is styled as "An act to facilitate compromises and arrangements between companies and their creditors" and its short title is: *Companies' Creditors Arrangement Act*. Ss. 4, 5 and 6 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. See *Pacific Coastal Airlines Ltd. v. Air Canada*, [2001] B.C.J. No. 2580 (S.C.) at paras. 24-25; *Royal Bank of Canada v. Gentra Canada Investments Inc.*, [2000] O.J. No. 315 (S.C.J.) at para. 41, appeal dismissed [2001] O.J. No. 2344 (C.A.); *Re 843504 Alberta Ltd.*, [2003] A.J. No. 1549 (Q.B.) at para. 13; *Re Royal Oak Mines Inc.*, [1999] O.J. No. 709 (Gen. Div.) at para. 24; *Re Royal Oak Mines Inc.*, [1999] O.J. No. 864 (Gen. Div.) at para. 1.

73 The Ontario Court of Appeal dismissed the appeal from that decision. [12] Blair J.A., quoting Paperny J. in *Canadian Airlines Corp., Re*, *supra*, said:

> [23] In *Re Canadian Airlines Corp.* (2000), 19 C.B.R. (4th) 12 (Alta. Q.B.), Paperny J. nonetheless extracted a number of principles to be considered by the courts in dealing with the commonality of interest test. At para. 31 she said:

In summary, the cases establish 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 C.C.C.A., namely to facilitate reorganizations if possible.
>
> 4. In placing a broad and purposive interpretation on the C.C.C.A., 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.

[24] In developing this summary of principles, Paperny J. considered a number of authorities from across Canada, including the following: *Sklar-Peppler Furniture Corp. v. Bank of Nova Scotia* (1991), 86 D.L.R. (4th) 621 (Ont. Gen. Div.); *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.* (1988), 72 C.B.R. (N.S.) 20 (Alta. Q.B.); *Re Fairview Industries Ltd.* (1991), 11 C.B.R. (3d) 71 (N.S.T.D.); *Re Woodward's Ltd.* 1993 CanLII 870 (BC S.C), (1993), 84 B.C.L.R. (2d) 206 (B.C.S.C.); *Re Northland Properties Ltd.* (1988), 73 C.B.R. (N.S.) 166 (B.C.S.C.); *Northland Properties Ltd. v. Excelsior Life Insurance Co. of Canada* (1989), 73 C.B.R. (N.S.) 195 (B.C.C.A.); *Re NsC Diesel Power Inc.* (1990), 79 C.B.R. (N.S.) 1 (N.S.T.D.); *Savage v. Amoco Acquisition Co.* (1988), 68 C.B.R. (N.S.) 154, (*sub nom. Amoco Acquisition Co. v. Savage*) (Alta. C.A.); *Re Wellington Building Corp.* (1934), 16 C.B.R. 48 (Ont. H.C.J.). Her summarized principles were cited by the Alberta Court of Appeal, apparently with approval, in a subsequent *Canadian Airlines decision: Re Canadian Airlines Corp.* 2000 ABCA 149 (CanLII), (2000), 19 C.B.R. (4th) 33 (Alta. C.A.) at para. 27.

. . . . .

[32] First, as the supervising judge noted, the CCAA itself is more compendiously styled "An act to facilitate compromises and arrangements between companies and their creditors". There is no mention of dealing with issues that would change the nature of the relationships as between the creditors themselves. As Tysoe J. noted in *Pacific Coastal Airlines Ltd. v. Air Canada*, [2001] B.C.J. No. 2580 (B.C.S.C.) at para. 24 (after referring to the full style of the legislation):

> [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.

[33] In this particular case, the supervising judge was very careful to say that nothing in his reasons should be taken to determine or affect the relationship between the Subordinate Debenture Holders and the Senior Debt Holders.

[34] Secondly, it has long been recognized that creditors should be classified in accordance with their contract rights, that is, according to their respective interests in the debtor company: see Stanley E. Edwards, "Reorganizations Under the Companies' Creditors Arrangement Act" (1947) 25 Can. Bar. Rev. 587, at p. 602.

> [35] Finally, to hold the classification and voting process hostage to the vagaries of a potentially infinite variety of disputes as between already disgruntled creditors who have been caught in the maelstrom of a CCAA restructuring, runs the risk of hobbling that process unduly. It could lead to the very type of fragmentation and multiplicity of discrete classes or sub-classes of classes that judges and legal writers have warned might well defeat the purpose of the Act: see Stanley Edwards, "Reorganizations under the Companies' Creditors Arrangement Act", *supra*; Ronald N. Robertson Q.C., "Legal Problems on Reorganization of Major Financial and Commercial Debtors", Canadian Bar Association - Ontario Continuing Legal Education, 5th April 1983 at 19-21; *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd., supra*, at para. 27; *Northland Properties Ltd. v. Excelsior Life Insurance Co. of Canada, supra; Sklar-Peppler, supra; Re Woodwards Ltd., supra*.
>
> [36] In the end, it is important to remember that classification of creditors, like most other things pertaining to the CCAA, must be crafted with the underlying purpose of the CCAA in mind, namely facilitation of the reorganization of an insolvent company through the negotiation and approval of a plan of compromise or arrangement between the debtor company and its creditors, so that the debtor company can continue to carry on its business to the benefit of all concerned. As Paperny J. noted in *Re Canadian Airlines*, "the Court should be careful to resist classification approaches that would potentially jeopardize viable Plans."

74 In 2007, in *Stelco Inc., Re* [13], the Ontario Court of Appeal dismissed a further appeal and held:

> [44] We note that this approach of delaying the resolution of inter-creditor disputes is not inconsistent with the scheme of the *CCAA*. In a ruling made on November 10, 2005, in the proceedings relating to Stelco reported at 15 C.B.R. (5th) 297, Farley J. expressed this point (at para. 7) as follows:
>
> > The *CCAA* is styled as "An Act to facilitate compromises and arrangements between companies and their creditors" and its short title is: *Companies' Creditors Arrangement Act*. Ss. 4, 5 and 6 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.
>
> [45] Thus, we agree with the motion judge's interpretation of s. 6.01(2). The result of this interpretation is that the Plan extinguished the provisions of the Note Indenture respecting the rights and obligations as between Stelco and the Noteholders on the Effective Date. However, the Turnover Provisions, which relate only to the rights and obligations between the Senior Debt Holders and the Noteholders, were intended to continue to operate.

75 I have quoted from the above decisions at length since they support rather than detract from the basic principle that in my view is operative in this instance.

76 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.

77 This Plan, as it deals with releases, doesn't change the relationship of the creditors apart from involving the Company and its Notes. The only contract between creditors in this case relates directly to the Notes.

U.S. Law

78 Issue was taken by some counsel for parties opposing the Plan with the comments of Justice Ground in *Muscletech* [2007] [14] at paragraph 26, to the effect that third party creditor Releases have been recognized under United States bankruptcy

law. I accept the comment of Mr. Woods that the U.S. provisions involve a different statute with different language and therefore different considerations.

79 That does not mean that the U.S. law is to be completely ignored. It is instructive to consideration of the release issue under the CCAA to know that there has been a principled debate within judicial circles in the United States on the issue of releases in a bankruptcy proceeding of those who are not themselves directly parties in bankruptcy.

80 A very comprehensive article authored by Joshua M. Silverstein of Emory University School of Law in 2006, 23 Bank. Dev. J. 13, outlines both the line of U.S. decisions that hold that bankruptcy courts may not use their general equitable powers to modify non-bankruptcy rights, and those that hold that non-bankruptcy law is not an absolute bar to the exercise of equitable powers, particularly with respect to third party releases.

81 The author concludes at paragraph 137 that a decision of the Supreme Court of the United States in *U.S. v. Energy Resources Co.*, 495 U.S. 545 (U.S. Sup. Ct. 1990) offers crucial support for the pro-release position.

82 I do not take any of the statements to referencing U.S. law on this topic as being directly applicable to the case now before this Court, except to say that in resolving a very legitimate debate, it is appropriate to do so in a purposive way but also very much within a case-specific fact-contextual approach, which seems to be supported by the United States Supreme Court decision above.

Steinberg Decision

83 Against the authorities referred to above, those opposed to the Plan releases rely on the June 16, 1993 decision of the Quebec Court of Appeal in *Steinberg Inc. c. Michaud* [15]

84 Mr. Woods for some of the moving parties urges that the decision, which he asserts makes third party releases illegal, is still good law and binding on this Court, since no other Court of Appeal in Canada has directly considered or derogated from the result. (It appears that the decision has not been reported in English, which may explain some of the absence of comment.)

85 The Applicants not surprisingly take an opposite view. Counsel submits that undoubtedly in direct response to the *Steinberg* decision, Parliament added s. 5.1 (see above paragraph [60]) thereby opening the door for the analysis that has followed with the decisions of *Canadian Airlines, Muscletech* and others. In other words, it is urged the caselaw that has developed in the 15 years since *Steinberg* now provide a basis for recognition of third party releases in appropriate circumstances.

86 The *Steinberg* decision dealt directly with releases proposed for acts of directors. The decision appears to have focused on the nature of the contract created and binding between creditors and the company when the plan is approved. I accept that the effect of a Court-approved CCAA Plan is to impose a contract on creditors.

87 Reliance is placed on the decision of Deschamps J.A. (as she then was) at the following paragraphs of the *Steinberg* decision:

> [54] 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.
>
> [57] If the arrangement is imposed on the dissenting creditors, it means that the rules of civil law founded on consent are set aside, at least with respect to them. One cannot impose on creditors, against their will, consequences that are attached to the rules of contracts that are freely agreed to, like releases and other notions to which clauses 5.3 and 12.6 refer. Consensus corresponds to a reality quite different from that of the majorities provided for in section 6 of the Act and cannot be attributed to dissenting creditors.

> [59] Under the Act, the sanctioning judgment is required for the arrangement to bind all the creditors, including those who do not consent to it. The sanctioning cannot have as a consequence to extend the effect of the Act. As the clauses in the arrangement founded on the rules of the Civil Code are foreign to the Act, the sanctioning cannot have any effect on them.
>
> [68] The Act offers the respondent a way to arrive at a compromise with its 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.
>
> [74] If an arrangement is imposed on a creditor that prevents him from recovering part of his claim by the effect of the Act, he does not necessarily lose the benefit of other statutes that he may wish to invoke. In this sense, if the Civil Code provides a recourse in civil liability against the directors or officers, this right of the creditor cannot be wiped out, against his will, by the inclusion of a release in an arrangement.

88 If it were necessary to do so, I would accept the position of the Applicants that the history of judicial interpretation of the CCAA at both the appellate and trial levels in Canada, along with the change to s. 5.1, leaves the decision in *Steinberg* applicable to a prior era only.

89 I do not think it necessary to go that far, however. One must remember that *Steinberg* dealt with release of claims against directors. As Mme. Justice Deschamps said at paragraph 54, "[A] plan of arrangement is not the appropriate forum to settle disputes other than the claims that are the subject of the arrangement."

90 In this case, all the Noteholders have a common claim, namely to maximize the value obtainable under their notes. The anticipated increase in the value of the notes is directly affected by the risk and contribution that will be made by asset and liquidity providers.

91 In my view, depriving all Noteholders from achieving enhanced value of their notes to permit a few to pursue negligence claims that do not affect note value is quite a different set of circumstances from what was before the Court in *Steinberg*. Different in kind and quality.

92 The sponsoring parties have accepted the policy concern that exempting serious claims such as some frauds could not be regarded as fair and reasonable within the context of the spirit and purpose of the CCAA.

93 The sponsoring parties have worked diligently to respond to that concern and have developed an exemption to the release that in my view fairly balances the rights of Noteholders with serious claims, with the risk to the Plan as a Whole.

Statutory Interpretation of the CCAA

94 Reference was made during argument by counsel to some of the moving parties to rules of statutory interpretation that would suggest that the Court should not go beyond the plain and ordinary words used in the statute.

95 Various of the authorities referred to above emphasize the remedial nature of the legislation, which leaves to the greatest extent possible the stakeholders of the debtor corporation to decide what Plan will or will not be accepted with the scope of the statute.

96 The nature and extent of judicial interpretation and innovation in insolvency matters has been the subject of recent academic and judicial comment.

97 Most recently, Madam Justice Georgina R. Jackson and Dr. Janis Sarra in "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters," [16] wrote:

> The paper advances the thesis that in addressing the problem of under-inclusive or skeletal legislation, there is a hierarchy or appropriate order of utilization of judicial tools. First, the courts should engage in statutory interpretation to determine

> the limits of authority, adopting a broad, liberal and purposive interpretation that may reveal the authority. We suggest that 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 tool box. Examination of the statutory language and framework of the legislation may reveal a discretion, and statutory interpretation may determine the extent of the discretion or statutory interpretation may reveal a gap. The common law may permit the gap to be filled; if it does, the chambers judge still has a discretion as to whether he or she invokes the authority to fill the gap. The exercise of inherent jurisdiction may fill the gap; if it does, the chambers judge still has a discretion as to whether he or she invokes the authority revealed by the discovery of inherent jurisdiction. This paper considers these issues at some length. [17]
>
> Second, we suggest that inherent jurisdiction is a misnomer for much of what has occurred in decision making under the CCAA. Appeal court judgments in cases such as *Skeena Cellulose Inc.* and *Stelco* discussed below, have begun to articulate this view. As part of this observation, we suggest that for the most part, the exercise of the court's authority is frequently, although not exclusively, made on the basis of statutory interpretation. [18]
>
> Third, in the context of commercial law, a driving principle of the courts is that they are on a quest to do what makes sense commercially in the context of what is the fairest and most equitable in the circumstances. The establishment of specialized commercial lists or rosters in jurisdictions such as Ontario, Quebec, British Columbia, Alberta and Saskatchewan are aimed at the same goal, creating an expeditious and efficient forum for the fair resolution of commercial disputes effectively and on a timely basis. Similarly, the standards of review applied by appellate courts, in the context of commercial matters, have regard to the specialized expertise of the court of first instance and demonstrate a commitment to effective processes for the resolution of commercial disputes. [19] [cities omitted]

98 The case now before the Court does not involve confiscation of any rights in Notes themselves; rather the opposite: the opportunity in the business circumstances to maximize the value of the Notes. The authors go on to say at p. 45:

> Iacobucci J., writing for the Court in *Rizzo Shoes*, reaffirmed Driedger's Modern Principle as the best approach to interpretation of the legislation and stated that "statutory interpretation cannot be founded on the wording of the legislation alone". He considered the history of the legislation and the benefit-conferring nature of the legislation and examined the purpose and object of the Act, the nature of the legislation and the consequences of a contrary finding, which he labeled an absurd result. Iacobucci J. also relied on s. 10 of the *Interpretation Act*, which provides that every Act "shall be deemed to be remedial" and directs that every Act "shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit". The Court held:
>
> > 23 Although the Court of Appeal looked to the plain meaning of the specific provisions in question in the present case, with respect, I believe that the court did not pay sufficient attention to the scheme of the ESA, its object or the intention of the legislature; nor was the context of the words in issue appropriately recognized. I now turn to a discussion of these issues.
> >
> > ...
> >
> > 40 As I see the matter, when the express words of ss. 40 and 40a of the ESA are examined in their entire context, there is ample support for the conclusion that the words "terminated by the employer" must be interpreted to include termination resulting from the bankruptcy of the employer. Using the broad and generous approach to interpretation appropriate for benefits-conferring legislation, I believe that these words can reasonably bear that construction.
>
> Thus, in *Rizzo Shoes* we see the Court extending the legislation or making explicit that which was implicit only, as it were, by reference to the Modern Principle, the purpose and object of the Act and the consequences of a contrary result. No reference is made to filling the legislative gap, but rather, the Court is addressing a fact pattern not explicitly contemplated by the legislation and extending the legislation to that fact pattern.

Professor Cote also sees the issue of legislative gaps as part of the discussion of "legislative purpose", which finds expression in the codification of the mischief rule by the various Canadian interpretation statutes. The ability to extend the meaning of the provision finds particular expression when one considers the question posed by him: "can the purposive method make up for lacunae in the legislation". He points out, as does Professor Sullivan, that the courts have not provided a definitive answer, but that for him there are two schools of thought. One draws on the "literal rule" which favours judicial restraint, whereas the other, the "mischief rule", "posits correction of the text to make up for lacunae." To temper the extent of the literal rule, Professor Cote states:

> First, the judge is not legislating by adding what is already implicit. The issue is not the judge's power to actually add terms to a statute, but rather whether a particular concept is sufficiently implicit in the words of an enactment for the judge to allow it to produce effect, and if so, whether there is any principle preventing the judge from making explicit what is already implicit. Parliament is required to be particularly explicit with some types of legislation such as expropriation statutes, for example.
>
> Second, the Literal Rule suggests that as soon as the courts play any creative role in settling a dispute rather than merely administering the law, they assume the duties of Parliament. But by their very nature, judicial functions have a certain creative component. If the law is silent or unclear, the judge is still required to arrive at a decision. In doing so, he [she] may quite possibly be required to define rules which go beyond the written expression of the statute, but which in no way violate its spirit.
>
> In certain situations, the courts may refuse to correct lacunae in legislation. This is not necessarily because of a narrow definition of their role, but rather because general principles of interpretation require the judge, in some areas, to insist on explicit indications of legislative intent. It is common, for example, for judges to refuse to fill in the gaps in a tax statute, a retroactive law, or legislation that severely affects property rights. [Emphasis added. Footnotes omitted.] [20]

99 The modern purposive approach is now well established in interpreting CCAA provisions, as the authors note. The phrase more than any other with which issue is taken by the moving parties is that of Paperny J. that s. 5 of the CCAA does not preclude releases other than those specified in s. 5.1.

100 In this analysis, I adopt the purposive language of the authors at pp 55-56:

> It may be that with the increased codification in statutes, courts have lost sight of their general jurisdiction where there is a gap in the statutory language. Where there is a highly codified statute, courts may conclude that there is less room to undertake gap-filling. This is accurate insofar as the Parliament or Legislative Assembly has limited or directed the court's general jurisdiction; there is less likely to be a gap to fill. However, as the Ontario Court of Appeal observed in the above quote, the court has unlimited jurisdiction to decide what is necessary to do justice between the parties except where legislators have provided specifically to the contrary.
>
> The court's role under the CCAA is primarily supervisory and it makes determinations during the process where the parties are unable to agree, in order to facilitate the negotiation process. Thus the role is both procedural and substantive in making rights determinations within the context of an ongoing negotiation process. The court has held that because of the remedial nature of the legislation, the judiciary will exercise its jurisdiction to give effect to the public policy objectives of the statute where the express language is incomplete. The nature of insolvency is highly dynamic and the complexity of firm financial distress means that legal rules, no matter how codified, have not been fashioned to meet every contingency. Unlike rights- based litigation where the court is making determinations about rights and remedies for actions that have already occurred, many insolvency proceedings involve the court making determinations in the context of a dynamic, forward moving process that is seeking an outcome to the debtor's financial distress.
>
> 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 *Quebec* 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.

101 I accept the hierarchy suggested by the authors, namely statutory interpretation (which in the case of the CCAA has inherent in it "gap filling"), judicial discretion and thirdly inherent jurisdiction.

102 It simply does not make either commercial, business or practical common sense to say a CCAA plan must inevitably fail because one creditor cannot sue another for a claim that is over and above entitlement in the security that is the subject of the restructuring, and which becomes significantly greater than the value of the security (in this case the Notes) that would be available in bankruptcy. In CCAA situations, factual context is everything. Here, if the moving parties are correct, some creditors would recover much more than others on their security.

103 There may well be many situations in which compromise of some tort claims as between creditors is not directly related to success of the Plan and therefore should not be released; that is not the case here.

104 I have been satisfied the Plan cannot succeed without the compromise. In my view, given the purpose of the statute and the fact that this Plan is accepted by all appearing parties in principle, it is a reasonable gap-filling function to compromise certain claims necessary to complete restructuring by the parties. Those contributing to the Plan are directly related to the value of the notes themselves within the Plan.

105 I adopt the authors' conclusion at p. 94:

> On the authors' reading of the commercial jurisprudence, the problem most often for the court to resolve is that the legislation in question is under-inclusive. It is not ambiguous. It simply does not address the application that is before the court, or in some cases, grants the court the authority to make any order it thinks fit. While there can be no magic formula to address this recurring situation, and indeed no one answer, it appears to the authors that practitioners have available a number of tools to accomplish the same end. In determining the right tool, it may be best to consider the judicial task as if in a hierarchy of judicial tools that may be deployed. The first is examination of the statute, commencing with consideration of the precise wording, the legislative history, the object and purposes of the Act, perhaps a consideration of Driedger's principle of reading the words of the Act 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, and a consideration of the gap-filling power, where applicable. It may very well be that this exercise will reveal that a broad interpretation of the legislation confers the authority on the court to grant the application before it. Only after exhausting this statutory interpretive function should the court consider whether it is appropriate to assert an inherent jurisdiction. Hence, inherent jurisdiction continues to be a valuable tool, but not one that is necessary to utilize in most circumstances.

Fraud Claims

106 I have concluded that claims of fraud do fall into a category distinct from negligence. The concern expressed by the Court in the endorsement of May 16, 2008 resulted in an amendment to the Plan by those supporting it. The Applicants amended the release provisions of the Plan to in effect "carve out" some fraud claims.

107 The concern expressed by those parties opposed to the Plan — that the fraud exemption from the release was not sufficiently broad — resulted in a further hearing on the issue on June 3, 2008. Those opposed continue to object to the amended release provisions.

108 The definition of fraud in a corporate context in the common law of Canada starts with the proposition that it must be made (1) knowingly; (2) without belief in its truth; (3) recklessly, careless whether it be true or false. [21] . It is my understanding that while expressed somewhat differently, the above-noted ingredients form the basis of fraud claims in the civil law of Quebec, although there are differences.

109 The more serious nature of a civil fraud allegation, as opposed to a negligence allegation, has an effect on the degree of probability required for the plaintiff to succeed. In *Continental Insurance Co. v. Dalton Cartage Co.* [22] , Laskin J. wrote:

> There is necessarily a matter of judgment involved in weighing evidence that goes to the burden of proof, and a trial judge is justified in scrutinizing evidence with greater care if there are serious allegations to be established by the proof that is offered. I put the matter in the words used by Lord Denning in *Bater v. Bater*, *supra*, at p. 459, as follows:
>
> > It is true that by our law there is a higher standard of proof in criminal cases than in civil cases, but this is subject to the qualification that there is no absolute standard in either case. In criminal cases the charge must be proved beyond reasonable doubt, but there may be degrees of proof within that standard. Many great judges have said that, in proportion as the crime is enormous, so ought the proof to be clear. So also in civil cases. The case may be proved by a preponderance of probability, but there may be degrees of probability within that standard. The degree depends on the subject-matter. A civil court, when considering a charge of fraud, will naturally require a higher degree of probability than that which it would require if considering whether negligence were established. It does not adopt so high a degree as a criminal court, even when it is considering a charge of a criminal nature, but still it does require a degree of probability which is commensurate with the occasion.
> >
> > I do not regard such an approach as a departure from a standard of proof based on a balance of probabilities nor as supporting a shifting standard. The question in all civil cases is what evidence with what weight that is accorded to it will move the court to conclude that proof on a balance of probabilities has been established.

110 The distinction between civil fraud and negligence was further explained by Finch J.A. in *Kripps v. Touche Ross & Co.*: [23]

> [101] Whether a representation was made negligently or fraudulently, reliance upon that representation is an issue of fact as to the representee's state of mind. There are cases where the representee may be able to give direct evidence as to what, in fact, induced him to act as he did. Where such evidence is available, its weight is a question for the trier of fact. In many cases however, as the authorities point out, it would be reasonable to expect such evidence to be given, and if it were it might well be suspect as self-serving. This is such a case.
>
> [102] The distinction between cases of negligent and fraudulent misrepresentation is that proof of a dishonest or fraudulent frame of mind on the defendant's part is required in actions of deceit. That, too, is an issue of fact and one which may also, of necessity, fall to be resolved by way of inference. There is, however, nothing in that which touches on the issue of the plaintiff's reliance. I can see no reason why the burden of proving reliance by the plaintiff, and the drawing of inferences with respect to the plaintiff's state of mind, should be any different in cases of negligent misrepresentation than it is in cases of fraud.

111 In *Toronto Dominion Bank v. Leigh Instruments Ltd. (Trustee of)* [24] , Winkler J. (as he then was) reviewed the leading common law cases:

> [477] Fraud is the most serious civil tort which can be alleged, and must be both strictly pleaded and strictly proved. The main distinction between the elements of fraudulent misrepresentation and negligent misrepresentation has been

touched upon above, namely the dishonest state of mind of the representor. The state of mind was described in the seminal case *Derry v. Peek (1889)*, 14 App. Cas. 337 (H.L.) which held fraud is proved where it is shown that a false representation has been made knowingly, or without belief in its truth, or recklessly, without caring whether it is true or false. The intention to deceive, or reckless disregard for the truth is critical.

[478] Where fraudulent misrepresentation is alleged against a corporation, the intention to deceive must still be strictly proved. Further, in order to attach liability to a corporation for fraud, the fraudulent intent must have been held by an individual person who is either a directing mind of the corporation, or who is acting in the course of their employment through the principle of *respondeat superior* or vicarious liability. In *B. G. Checo v. B. C. Hydro* (1990), 4 C.C.L.T. (2d) 161 at 223 (Aff'd, [1993] 1 S.C.R. 12), Hinkson J.A., writing for the majority, traced the jurisprudence on corporate responsibility in the context of a claim in fraudulent misrepresentation at 222-223:

> Subsequently, in *H.L. Bolton (Engineering) Co. v. T.J Graham & Sons Ltd.*, [1957] 1 Q.B. 159, [1956] 3 All E.R. 624 (C.A.), Denning L.J. said at p. 172:
>
> > A company may in many ways be likened to a human body. It has a brain and nerve centre which controls what it does. It also has hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company, and control what it does. The state of mind of these managers is the state of mind of the company and is treated by the law as such. So you will find that in cases where the law requires personal fault as a condition of liability in tort, the fault of the manager will be the personal fault of the company. That is made clear by Lord Haldane's speech in *Leonard's Carrying Co. Ltd. v. Asiatic Petroleum Co. Ltd.*
>
> It is apparent that the law in Canada dealing with the responsibility of a corporation for the tort of deceit is still evolving. In view of the English decisions and the decision of the Supreme Court of Canada in the *Dredging* case, supra, it would appear that the concept of vicarious responsibility based upon *respondent superior* is too narrow a basis to determine the liability of a corporation. The structure and operations of corporations are becoming more complex. However, the fundamental proposition that the plaintiff must establish an intention to deceive on the part of the defendant still applies.
>
> See also: *Standard Investments Ltd. et al. v. Canadian Imperial Bank of Commerce* (1985), 52 O.R. (2d) 473 (C.A.) (Leave to appeal to Supreme Court of Canada refused Feb. 3, 1986).

[479] In the case of fraudulent misrepresentation, there are circumstances where silence may attract liability. If a material fact which was true at the time a contract was executed becomes false while the contract remains executory, or if a statement believed to be true at the time it was made is discovered to be false, then the representor has a duty to disclose the change in circumstances. The failure to do so may amount to a fraudulent misrepresentation. See: P. Perell, "False Statements" (1996), 18 Advocates' Quarterly 232 at 242.

[480] In *Rainbow Industrial Caterers Ltd. v. Canadian National Railway Co.* (1988), 54 D.L.R. (4th) 43 (B.C.C.A.) (Aff'd on other grounds [1991] 3 S.C.R. 3), the British Columbia Court of Appeal overturned the trial judge's finding of fraud through non-disclosure on the basis that the defendant did not remain silent as to the changed fact but was simply slow to respond to the change and could only be criticized for its "communications arrangements." In so doing, the court adopted the approach to fraud through silence established by the House of Lords in *Brownlie v. Campbell* (1880), 5 App. Cas. 925 at 950. Esson J.A. stated at 67-68:

> There is much emphasis in the plaintiffs submissions and in the reasons of the trial judge on the circumstance that this is not a case of fraud "of the usual kind" involving positive representations of fact but is, rather, one concerned only with non-disclosure by a party which has become aware of an altered set of circumstances. It is,

> I think, potentially misleading to regard these as different categories of fraud rather than as a different factual basis for a finding of fraud. Where the fraud is alleged to arise from failure to disclose, the plaintiff remains subject to all of the stringent requirements which the law imposes upon those who allege fraud. The authority relied upon by the trial judge was the speech of Lord Blackburn in *Brownlie v. Campbell*.... The trial judge quoted this excerpt:
>
> > ... when a statement or representation has been made in the bona fide belief that it is true, and the party who has made it afterwards comes to find out that it is untrue, and discovers what he should have said, he can no longer honestly keep up that silence on the subject after that has come to his knowledge, thereby allowing the other party to go on, and still more, inducing him to go on, upon a statement which was honestly made at the time at which it was made, but which he has not now retracted when he has become aware that it can be no long honestly perservered [sic] in.
>
> The relationship between the two bases for fraud appears clearly enough if one reads that passage in the context of the passage which immediately precedes it:
>
> > I quite agree in this, that whenever a man in order to induce a contract says that which is in his knowledge untrue with the intention to mislead the other side, and induce them to enter into the contract, that is downright fraud; in plain English, and Scotch also, it is a downright lie told to induce the other party to act upon it, and it should of course be treated as such. I further agree in this: that when a statement or representation...
>
> [481] Fraud through "active non-disclosure" was considered by the Court of Appeal for Ontario in *Abel v. McDonald*, [1964] 2 O.R. 256 (C.A.) in which the court held at 259: "By active non-disclosure is meant that the defendants, with knowledge that the damage to the premises had occurred actively prevented as far as they could that knowledge from coming to the notice of the appellants.

112 I agree with the comment of Winkler J. in *Toronto Dominion Bank v. Leigh Instruments Ltd. (Trustee of)* *supra*, that the law in Canada for corporate responsibility for the tort of deceit is evolving. Hence the concern expressed by counsel for Asset Providers that a finding as a result of fraud (an intentional tort) could give rise to claims under the *Negligence Act* to extend to all who may be said to have contributed to the "fault." [25]

113 I understand the reasoning of the Plan supporters for drawing the fraud "carve out" in a narrow fashion. It is to avoid the potential cascade of litigation that they fear would result if a broader "carve out" were to be allowed. Those opposed urged that quite simply to allow the restrictive fraud claim only would be to deprive them of a right at law.

114 The fraud issue was put in simplistic terms during the oral argument on June 3, 2008. Those parties who oppose the restrictions in the amended Release to deal with only some claims of fraud, argue that the amendments are merely cosmetic and are meaningless and would operate to insulate many individuals and corporations who *may* have committed fraud.

115 Mr. Woods, whose clients include some corporations resident in Quebec, submitted that the "carve out," as it has been called, falls short of what would be allowable under the civil law of Quebec as claims of fraud. In addition, he pointed out that under Quebec law, security for costs on a full indemnity basis would not be permitted.

116 I accept the submission of Mr. Woods that while there is similarity, there is no precise equivalence between the civil law of Quebec and the common law of Ontario and other provinces as applied to fraud.

117 Indeed, counsel for other opposing parties complain that the fraud carve out is unduly restrictive of claims of fraud that lie at common law, which their clients should be permitted in fairness to pursue.

118 The particular carve out concern, which is applicable to both the civil and common law jurisdictions, would limit causes of actions to authorized representatives of ABCP dealers. "ABCP dealers" is a defined term within the Plan. Those actions would proceed in the home province of the plaintiffs.

119 The thrust of the Plan opponents' arguments is that as drafted, the permitted fraud claims would preclude recovery in circumstances where senior bank officers who had the requisite fraudulent intent directed sales persons to make statements that the sales persons reasonably believed but that the senior officers knew to be false.

120 That may well be the result of the effect of the Releases as drafted. Assuming that to be the case, I am not satisfied that the Plan should be rejected on the basis that the release covenant for fraud is not as broad as it could be.

121 The Applicants and supporters have responded to the Court's concern that as initially drafted, the initial release provisions would have compromised all fraud claims. I was aware when the further request for release consideration was made that any "carve out" would unlikely be sufficiently broad to include any possibility of all deceit or fraud claims being made in the future.

122 The particular concern was to allow for those claims that might arise from knowingly false representations being made directly to Noteholders, who relied on the fraudulent misrepresentation and suffered damage as a result.

123 The Release as drafted accomplishes that purpose. It does not go as far as to permit all possible fraud claims. I accept the position of the Applicants and supporters that as drafted, the Releases are in the circumstances of this Plan fair and reasonable. I reach this conclusion for the following reasons:

> 1. I am satisfied that the Applicants and supporters will not bring forward a Plan that is as broad in permitting fraud claims as those opposing urge should be permitted.
>
> 2. None of the Plan opponents have brought forward particulars of claims against persons or parties that would fall outside those envisaged within the carve out. Without at least some particulars, expanded fraud claims can only be regarded as hypothetical or speculative.
>
> 3. I understand and accept the position of the Plan supporters that to broaden fraud claim relief does risk extensive complex litigation, the prevention of which is at the heart of the Plan. The likelihood of expanded claims against many parties is most likely if the fraud issue were open-ended.
>
> 4. Those who wish to claim fraud within the Plan can do so in addition to the remedies on the Notes that are available to them and to all other Noteholders. In other words, those Noteholders claiming fraud also obtain the other Plan benefits.

124 Mr. Sternberg on behalf of Hy Bloom did refer to the claims of his clients particularized in the Claim commenced in the Superior Court of Quebec. The Claim particularizes statements attributed to various National Bank representatives both before and after the August 2007 freeze of the Notes. Mr. Sternberg asked rhetorically how could the Court countenance the compromise of what in the future might be found to be fraud perpetrated at the highest levels of the Canadian and foreign banks.

125 The response to Mr. Sternberg and others is that for the moment, what is at issue is a liquidity crisis that affects the ABCP market in Canada. The Applicants and supporters have brought forward a Plan to alleviate and attempt to fix that liquidity crisis.

126 The Plan does in my view represent a reasonable balance between benefit to all Noteholders and enhanced recovery for those who can make out specific claims in fraud.

127 I leave to others the questions of all the underlying causes of the liquidity crisis that prompted the Note freeze in August 2007. If by some chance there is an organized fraudulent scheme, I leave it to others to deal with. At the moment, the Plan as proposed represents the best contract for recovery for the vast majority of Noteholders and hopefully restoration of the ABCP market in Canada.

Hardship

128 As to the hardship issue, the Court was apprised in the course of submissions that the Plan was said by some to act unfairly in respect of certain Noteholders, in particular those who hold Ironstone Series B notes. It was submitted that unlike other trusts for which underlying assets will be pooled to spread risk, the underlying assets of Ironstone Trust are being "siloed" and will bear the same risk as they currently bear.

129 Unfortunately, this will be the case but the result is not due to any particular directive purpose of the Plan itself, but rather because the assets that underlie the trust have been determined to be totally "Ineligible Assets," which apparently have exposure to the U.S. residential sub-prime mortgage market.

130 I have concluded that within the context of the Plan as a whole it does not unfairly treat the Ironstone Noteholders (although their replacement notes may not be worth as much as others'.) The Ironstone Noteholders have still voted by a wide majority in favour of the Plan.

131 Since the Initial Order of March 17, there have been a number of developments (settlements) by parties outside the Plan itself of which the Court was not fully apprised until recently, which were intended to address the issue of hardship to certain investors. These efforts are summarized in paragraphs 10 to 33 of the Eighth Report of the Monitor.

132 I have reviewed the efforts made by various parties supporting the Plan to deal with hardship issues. I am satisfied that they represent a fair and reasonable attempt to deal with issues that result in differential impact among Noteholders. The pleas of certain Noteholders to have their individual concerns addressed have through the Monitor been passed on to those necessary for a response.

133 Counsel for one affected Noteholder, the Avrith family, which opposes the Plan, drew the Court's attention to their particular plight. In response, counsel for National Bank noted the steps it had taken to provide at least some hardship redress.

134 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.

135 The information available satisfies me that business judgment by a number of supporting parties has been applied to deal with a number of inequities. The Plan cannot provide complete redress to all Noteholders. The parties have addressed the concerns raised. In my view, the Court can ask nothing more.

Conclusion

136 I noted in the endorsement of May 16, 2008 my acceptance and understanding of why the Plan Applicants and sponsors required comprehensive releases of negligence. I was and am satisfied that there would be the third and fourth claims they anticipated if the Plan fails. If negligence claims were not released, any Noteholder who believed that there was value to a tort claim would be entitled to pursue the same. There is no way to anticipate the impact on those who support the Plan. As a result, I accept the Applicants' position that the Plan would be withdrawn if this were to occur.

137 The CCAA has now been accepted as a statute that allows for judicial flexibility to enable business people by the exercise of majority vote to restructure insolvent entities.

138 It would defeat the purpose of the statute if a single creditor could hold a restructuring Plan hostage by insisting on the ability to sue another creditor whose participation in and contribution to the restructuring was essential to its success. Tyranny by a minority to defeat an otherwise fair and reasonable plan is contrary to the spirit of the CCAA.

139 One can only speculate on what response might be made by any one of the significant corporations that are moving parties and now oppose confirmation of this Plan, if any of those entities were undergoing restructuring and had their Plans in jeopardy because a single creditor sought to sue a financing creditor, which required a release as part of its participation.

140 There are a variety of underlying causes for the liquidity crisis that has given rise to this restructuring.

141 The following quotation from the May 23, 2008 issue of The Economist magazine succinctly describes the problem:

> If the crisis were simply about the creditworthiness of underlying assets, that question would be simpler to answer. The problem has been as much about confidence as about money. Modern financial systems contain a mass of amplifiers that multiply the impact of both losses and gains, creating huge uncertainty.

142 The above quote is not directly about the ABCP market in Canada, but about the potential crisis to the worldwide banking system at this time. In my view it is applicable to the ABCP situation at this time. 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.

143 I have as a result addressed a number of questions in order to be satisfied that in the specific context of this case, a Plan that includes third party releases is justified within CCAA jurisdiction. I have concluded that all of the following questions can be answered in the affirmative.

1. Are the parties to be released necessary and essential to the restructuring of the debtor?

2. Are the claims to be released rationally related to the purpose of the Plan and necessary for it?

3. Can the Court be satisfied that without the releases the Plan cannot succeed?

4. Are the parties who will have claims against them released contributing in a tangible and realistic way to the Plan?

5. Is the Plan one that will benefit not only the debtor but creditor Noteholders generally?

6. Have the voting creditors approved the Plan with knowledge of the nature and effect of the releases?

7. Is the Court satisfied that in the circumstances the releases are fair and reasonable in the sense that they are not overly broad and not offensive to public policy?

144 I have concluded on the facts of this Application that the releases sought as part of the Plan, including the language exempting fraud, to be permissible under the CCAA and are fair and reasonable.

145 The motion to approve the Plan of Arrangement sought by the Application is hereby granted on the terms of the draft Order filed and signed.

146 One of the unfortunate aspects of CCAA real time litigation is that it produces a tension between well-represented parties who would not be present if time were not of the essence.

147 Counsel for some of those opposing the Plan complain that they were not consulted by Plan supporters to "negotiate" the release terms. On the other side, Plan supporters note that with the exception of general assertions in the action on behalf of Hy Bloom (who claims negligence as well), there is no articulation by those opposing of against whom claims would be made and the particulars of those claims.

148 It was submitted on behalf of one Plan opponent that the limitation provisions are unduly restrictive and should extend to at least two years from the date a potential plaintiff becomes aware of an Expected Claim.

149 The open-ended claim potential is rejected by the Plan supporters on the basis that what is needed now, since Notes have been frozen for almost one year, is certainty of claims and that those who allege fraud surely have had plenty of opportunity to know the basis of their evidence.

150 Other opponents seek to continue a negotiation with Plan supporters to achieve a resolution with respect to releases satisfactory to each opponent.

151 I recognize that the time for negotiation has been short. The opponents' main opposition to the Plan has been the elimination of negligence claims and the Court has been advised that an appeal on that issue will proceed.

152 I can appreciate the desire for opponents to negotiate for any advantage possible. I can also understand the limitation on the patience of the variety of parties who are Plan supporters, to get on with the Plan or abandon it.

153 I am satisfied that the Plan supporters have listened to some of the concerns of the opponents and have incorporated those concerns to the extent they are willing in the revised release form. I agreed that it is time to move on.

154 I wish to thank all counsel for their cooperation and assistance. There would be no Plan except for the sustained and significant effort of Mr. Crawford and the committee he chairs.

155 This is indeed hopefully a unique situation in which it is necessary to look at larger issues than those affecting those who feel strongly that personal redress should predominate.

156 If I am correct, the CCAA is indeed a vehicle that can adequately balance the issues of all those concerned.

157 The Plan is a business proposal and that includes the releases. The Plan has received overwhelming creditor support. I have concluded that the releases that are part of the Plan are fair and reasonable in all the circumstances.

158 The form of Order that was circulated to the Service List for comment will issue as signed with the release of this decision.

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

Canada Post Corporation

Credit Union Central of Alberta Limited

Credit Union Central of British Columbia

Credit Union Central of Canada

Credit Union Central of Ontario

Credit Union Central of Saskatchewan

Desjardins Group

Magna International Inc.

National Bank Financial Inc./National Bank of Canada

NAV Canada

Northwater Capital Management Inc.

Public Sector Pension Investment Board

The Governors of the University of Alberta

Application granted.

APPENDIX 1

Parties & Their Counsel

Counsel	*Party Represented*
Benjamin Zarnett Fred Myers Brian Empey	Applicants: Pan-Canadian Investors Committee for Third-Party Structured Asset-Backed Commercial Paper
Donald Milner Graham Phoenix, Xeno C. Martis David Lemieux Robert Girard	Respondents: 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.
Aubrey Kauffman Stuart Brotman Craig J. Hill Sam P. Rappos Marc Duchesne	Respondents: 4446372 Canada Inc. and 6932819 Canada Inc., as Issuer Trustees Monitor: Ernst & Young Inc.
Jeffrey Carhart Joseph Marin Jay Hoffman	Ad Hoc Committee and PricewaterhouseCoopers Inc., in its capacity as Financial Advisor
Arthur O. Jacques Thomas McRae	Ad Hoc Retail Creditors Committee (Brian Hunter, et al)
Henry Jurowiesky Eliezer Karp	Ad Hoc Retail Creditors Committee (Brian Hunter, et al)
Jay A. Swartz Nathasha MacParland	Administrator of Aria Trust, Encore Trust, Newshore Canadian Trust and Symphony Trust
James A. Woods Mathieu Giguere Sébastien Richemont Marie-Anne Paquette	Air Transat A.T. Inc., Transat Tours Canada Inc., The Jean Coutu Group (PJC) Inc., Aéroports de Montreal Inc., Aéroports de Montréal Capital Inc., Pomerleau Ontario Inc., Pomerleau Inc., Labopharm Inc., L'Agence Métropolitaine de Transport (AMT), Domtar Inc., Domtar Pulp and Paper Products Inc., Giro Inc., Vetements de sports RGR Inc., 131519 Canada Inc., Tecsys Inc., New Gold Inc., Services Hypothécaires La Patremoniale Inc. and Jazz Air LLP
Peter F.C. Howard Samaneh Hosseini William Scott	Asset Providers/Liquidity Suppliers: 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; Merrill Lynch Capital Services Inc.; Swiss Re Financial Products Corporation; and UBS AG
George S. Glezos Lisa C. Munro	Becmar Investments Ltd, Dadrex Holdings Inc. and JTI-Macdonald Corp.
Jeremy E. Dacks	Blackrock Financial Management, Inc.
Virginie Gauthier Mario Forte	Caisse de Dépôt et Placement du Québec
Kevin P. McElcheran Malcolm M. Mercer Geoff R. Hall	Canadian Banks: Bank of Montreal, Canadian Imperial Bank of Commerce, Royal Bank of Canada, The Bank of Nova Scotia and The Toronto-Dominion Bank
Harvey Chaiton	Canadian Imperial Bank of Commerce
S. Richard Orzy Jeffrey S. Leon	CIBC Mellon Trust Company, Computershare Trust Company of Canada and BNY Trust Company of Canada, as Indenture Trustees
Margaret L. Waddell	Cinar Corporation, Cinar Productions (2004) and Cookie Jar Animation Inc., ADR Capital Inc. and GMAC Leaseco Corporation
Robin B. Schwill James Rumball	Coventree Capital Inc. and Nereus Financial Inc.
J. Thomas Curry Usman M. Sheikh	Coventree Capital Inc.
Kenneth Kraft	DBRS Limited
David E. Baird, Q.C. Edmond Lamek Ian D. Collins	Desjardins Group
Allan Sternberg Sam R. Sasso	Hy Bloom Inc. and Cardacian Mortgages Services Inc.
Catherine Francis Phillip Bevans	Individual Noteholder
Howard Shapray, Q.C. Stephen Fitterman	Ivanhoe Mines Inc.
Kenneth T. Rosenberg Lily Harmer Massimo Starnino	Jura Energy Corporation, Redcorp Ventures Ltd. and as agent to Ivanhoe Mines Inc.
Joel Vale	I. Mucher Family
John Salmas	Natcan Trust Company, as Note Indenture Trustee
John B. Laskin Scott Bomhof	National Bank Financial Inc. and National Bank of Canada
Robin D. Walker Clifton Prophet Junior Sirivar	NAV Canada
Timothy Pinos	Northern Orion Canada Pampas Ltd.
Murray E. Stieber	Paquette & Associés Huissiers en Justice, s.e.n.c. and André Perron

Susan Grundy	Public Sector Pension Investment Board
Dan Dowdall	Royal Bank of Canada
Thomas N.T. Sutton	Securitus Capital Corp.
Daniel V. MacDonald Andrew Kent	The Bank of Nova Scotia
James H. Grout	The Goldfarb Corporation
Tamara Brooks	The Investment Dealers Association of Canada and the Investment Industry Regulatory Organization of Canada
Sam R. Sasso	Travelers Transportation Services Inc.
Scott A. Turner	WebTech Wireless Inc. and Wynn Capital Corporation Inc.
Peter T. Linder, Q.C. Edward H. Halt, Q.C.	West Energy Ltd., Petrolifera Petroleum Ltd., Vaquero Resources Ltd., UTS Energy Corporation, Nexstar Energy Ltd., Sabre Tooth Energy Ltd., Sabre Energy Ltd., Alliance Pipeline Ltd., Standard Energy Inc. and Power Play Resources Limited
Steven L. Graff	Woods LLP
Gordon Capern Megan E. Shortreed	Xceed Mortgage Corporation

APPENDIX 2

Terms

"ABCP Conduits" means, collectively, the trusts that are subject to the Plan, namely the following: 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, SAT, Selkirk Funding Trust, Silverstone Trust, SIT III, Slate Trust, Symphony Trust and Whitehall Trust, and their respective satellite trusts, where applicable.

"ABCP Sponsors" means, collectively, the Sponsors of the ABCP Conduits (and, where applicable, such Sponsors' affiliates) that have issued the Affected ABCP, namely, Coventree Capital Inc., Quanto Financial Corporation, National Bank Financial Inc., Nereus Financial Inc., Newshore Financial Services Inc. and Securitus Capital Corp.

"Ad Hoc Committee" means those Noteholders, represented by the law firm of Miller Thomson LLP, who sought funding from the Investors Committee to retain Miller Thomson and PricewaterhouseCoopers Inc., to assist it in starting to form a view on the restructuring. The Investors Committee agreed to fund up to $1 million in fees and facilitated the entering into of confidentiality agreements among Miller Thomson, PwC, the Asset Providers, the Sponsors, JPMorgan and E&Y so that Miller Thomson and PwC, could carry out their mandate. Chairman Crawford met with representatives of Miller Thomson and PwC, and the Committee's advisors answered questions and discussed the proposed restructuring with them.

"Applicants" means, collectively, the 17 member institutions of the Investors Committee in their respective capacities as Noteholders.

"CCAA Parties" means, collectively, the Issuer Trustees in respect of the Affected ABCP, namely 4446372 Canada Inc., 6932819 Canada Inc., 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. and the ABCP Conduits.

"Conduit" means a special purpose entity, typically in the form of a trust, used in an ABCP program that purchases assets and funds these purchases either through term securitizations or through the issuance of commercial paper.

"Issuer Trustees" means, collectively, the issuer trustees of each of the ABCP Conduits, namely, 4446372 Canada Inc., 6932819 Canada Inc., Metcalfe & Mansfield Alternative Investments II Corp., Metcalfe & Mansfield Alternative Investments III Corp., Metcalfe & Mansfield Alternative Investments V Corp., Metcalfe & Mansfield Alternative Investments XI Corp. and Metcalfe & Mansfield Alternative Investments XII Corp. and *"Issuer Trustee"* means any one of them. The Issuer Trustees, together with the ABCP Conduits, are sometimes referred to, collectively, as the *"CCAA Parties"*.

"Liquidity Provider" means like asset providers, dealer banks, commercial banks and other entities often the same as the asset providers who provide liquidity to ABCP, or a party that agreed to provide liquidity funding upon the terms and subject to the conditions of a liquidity agreement in respect of an ABCP program. The Liquidity Providers in respect of the Affected ABCP include, without limitation: ABN AMRO Bank N.V., Canada Branch; Bank of America N.A., Canada Branch; Canadian Imperial Bank of Commerce; Citibank Canada; Citibank, N.A.; Danske Bank A/S; Deutsche Bank AG; HSBC Bank Canada; HSBC Bank USA National Association; Merrill Lynch Capital Services, Inc.; Merrill Lynch International; Royal Bank of Canada; Swiss Re Financial Products Corporation; The Bank of Nova Scotia; The Royal Bank of Scotland plc and UBS AG.

"Noteholder" means a holder of Affected ABCP.

"Sponsors" means, generally, the entities that initiate the establishment of an ABCP program in respect of a Conduit. Sponsors are effectively management companies for the ABCP program that arrange deals with Asset Providers and capture the excess spread on these transactions. The Sponsor approves the terms of an ABCP program and serves as administrative agent and/or financial services (or securitization) agent for the ABCP program directly or through its affiliates.

"Traditional Assets" means those assets held by the ABCP Conduits in non-synthetic securitization structures such as trade receivables, credit card receivables, RMBS and CMBS and investments in CDOs entered into by third-parties.

APPENDIX 3

[Missing text]

Footnotes

1 Information Statement, p. 18

2 Information Statement, p. 18

3 *Canadian Airlines Corp., Re*, [2000] A.J. No. 771, 2000 ABQB 442, [2000] 10 W.W.R. 269, 84 Alta. L.R. (3d) 9, 265 A.R. 201, 9 B.L.R. (3d) 41, 20 C.B.R. (4th) 1, 98 A.C.W.S. (3d) 334 (Alta. Q.B.).

4 *Olympia & York Developments Ltd. v. Royal Trust Co.* (1993), 17 C.B.R. (3d) 1 (Ont. Gen. Div.)

5 *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re*, [1998] O.J. No. 3306, 72 O.T.C. 99, 5 C.B.R. (4th) 299, 81 A.C.W.S. (3d) 932 (Ont. Gen. Div. [Commercial List])

6 *Muscletech Research & Development Inc., Re*, [2006] O.J. No. 4087, 25 C.B.R. (5th) 231, 152 A.C.W.S. (3d) 16, 2006 CarswellOnt 6230 (Ont. S.C.J.)

7 *Muscletech Research & Development Inc., Re*, [2007] O.J. No. 695, 30 C.B.R. (5th) 59, 156 A.C.W.S. (3d) 22, 2007 CarswellOnt 1029 (Ont. S.C.J. [Commercial List])

8 *Vicwest, Re* (Ont. S.C.J. [Commercial List]) per Pepall J. at paragraph 23

9 The Court was provided with copies of 12 Plan approvals under the CCAA in which releases were granted. In various instances these included officers, directors and creditors. The moving parties note that no objection to the nature or extent of release was taken.

10 *NBD Bank, Canada v. Dofasco Inc.*, [1999] O.J. No. 4749, 46 O.R. (3d) 514, 181 D.L.R. (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 (Ont. C.A.)

11 *Stelco Inc., Re*, [2005] O.J. No. 4814, 15 C.B.R. (5th) 297, 143 A.C.W.S. (3d) 623, 2005 CarswellOnt 6483 (Ont. S.C.J. [Commercial List])

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2008 ONCA 587
Ontario Court of Appeal

ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.

2008 CarswellOnt 4811, 2008 ONCA 587, [2008] O.J. No. 3164, 168 A.C.W.S. (3d) 698, 240 O.A.C. 245, 296 D.L.R. (4th) 135, 45 C.B.R. (5th) 163, 47 B.L.R. (4th) 123, 92 O.R. (3d) 513

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 AND ARRANGEMENT INVOLVING 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., 4446372 CANADA INC. AND 6932819 CANADA INC., TRUSTEES OF THE CONDUITS LISTED IN SCHEDULE "A" HERETO

THE INVESTORS REPRESENTED ON THE PAN-CANADIAN INVESTORS COMMITTEE FOR THIRD-PARTY STRUCTURED ASSET-BACKED COMMERCIAL PAPER LISTED IN SCHEDULE "B" HERETO (Applicants / Respondents in Appeal) and 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., 4446372 CANADA INC. AND 6932819 CANADA INC., TRUSTEES OF THE CONDUITS LISTED IN SCHEDULE "A" HERETO (Respondents / Respondents in Appeal) and AIR TRANSAT A.T. INC., TRANSAT TOURS CANADA INC., THE JEAN COUTU GROUP (PJC) INC., AÉROPORTS DE MONTRÉAL INC., AÉROPORTS DE MONTRÉAL CAPITAL INC., POMERLEAU ONTARIO INC., POMERLEAU INC., LABOPHARM INC., DOMTAR INC., DOMTAR PULP AND PAPER PRODUCTS INC., GIRO INC., VÊTEMENTS DE SPORTS R.G.R. INC., 131519 CANADA INC., AIR JAZZ LP, PETRIFOND FOUNDATION COMPANY LIMITED, PETRIFOND FOUNDATION MIDWEST LIMITED, SERVICES HYPOTHÉCAIRES LA PATRIMONIALE INC., TECSYS INC. SOCIÉTÉ GÉNÉRALE DE FINANCEMENT DU QUÉBEC, VIBROSYSTM INC., INTERQUISA CANADA L.P., REDCORP VENTURES LTD., JURA ENERGY CORPORATION, IVANHOE MINES LTD., WEBTECH WIRELESS INC., WYNN CAPITAL CORPORATION INC., HY BLOOM INC., CARDACIAN MORTGAGE SERVICES, INC., WEST ENERGY LTD., SABRE ENERTY LTD., PETROLIFERA PETROLEUM LTD., VAQUERO RESOURCES LTD. and STANDARD ENERGY INC. (Respondents / Appellants)

J.I. Laskin, E.A. Cronk, R.A. Blair JJ.A.

Heard: June 25-26, 2008
Judgment: August 18, 2008 *
Docket: CA C48969

Proceedings: affirming *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.* (2008), 2008 CarswellOnt 3523, 43 C.B.R. (5th) 269 (Ont. S.C.J. [Commercial List])

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Subject: Insolvency; Civil Practice and Procedure

Headnote

Bankruptcy and insolvency --- Proposal — Companies' Creditors Arrangement Act — Arrangements — Approval by court — Miscellaneous issues

Releases — Parties were financial institutions, dealers and noteholders in market for Asset Backed Commercial Paper ("ABCP") — Canadian ABCP market experienced liquidity crisis — Plan of Compromise and Arrangement ("Plan") was put forward under Companies' Creditors Arrangement Act ("CCAA") — Plan included releases for claims against banks and dealers in negligence, misrepresentation and fraud, with "carve out" allowing fraudulent misrepresentations claims — Noteholders voted in favour of Plan — Minority noteholders ("opponents") opposed Plan based on releases — Applicants' application for approval of Plan was granted — Opponents brought application for leave to appeal and appeal from that decision — Application granted; appeal dismissed — CCAA permits inclusion of third party releases in plan of compromise or arrangement to be sanctioned by court where those releases were reasonably connected to proposed restructuring — It is implicit in language of CCAA that court has authority to sanction plans incorporating third-party releases that are reasonably related to proposed restructuring — CCAA is supporting framework for resolution of corporate insolvencies in public interest — Parties are entitled to put anything in Plan that could lawfully be incorporated into any contract — Plan of compromise or arrangement may propose that creditors agree to compromise claims against debtor and to release third parties, just as any debtor and creditor might agree to such terms in contract between them — Once statutory mechanism regarding voter approval and court sanctioning has been complied with, plan becomes binding on all creditors.

Bankruptcy and insolvency --- Practice and procedure in courts — Appeals — To Court of Appeal — Availability — Miscellaneous cases

Leave to appeal — Parties were financial institutions, dealers and noteholders in market for Asset Backed Commercial Paper ("ABCP") — Canadian ABCP market experienced liquidity crisis — Plan of Compromise and Arrangement ("Plan") was put forward under Companies' Creditors Arrangement Act ("CCAA") — Plan included releases for claims against banks and dealers in negligence, misrepresentation and fraud, with "carve out" allowing fraudulent misrepresentations claims — Noteholders voted in favour of Plan — Minority noteholders ("opponents") opposed Plan based on releases — Applicants' application for approval of Plan was granted — Opponents brought application for leave to appeal and appeal from that decision — Application granted; appeal dismissed — Criteria for granting leave to appeal in CCAA proceedings was met — Proposed appeal raised issues of considerable importance to restructuring proceedings under CCAA Canada-wide — These were serious and arguable grounds of appeal and appeal would not unduly delay progress of proceedings.

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s. 92 — referred to

s. 92 ¶ 13 — referred to

Words and phrases considered:

arrangement

"Arrangement" is broader than "compromise" and would appear to include any scheme for reorganizing the affairs of the debtor.

APPEAL by opponents of creditor-initiated plan from judgment reported at *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.* (2008), 2008 CarswellOnt 3523, 43 C.B.R. (5th) 269, 47 B.L.R. (4th) 74 (Ont. S.C.J. [Commercial List]), granting application for approval of plan.

***R.A. 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 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 time-table — 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 *Country Style Food Services Inc., Re* (2002), 158 O.A.C. 30 (Ont. C.A. [In Chambers]), 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.

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 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 Montréal Protocol — the parties committed 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 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 Article 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 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 cooperated 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 25th. The vote was overwhelmingly in support of the Plan — 96% 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% of those connected with the development of the Plan voted positively, as did 80% 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 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?

(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 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 / Société Canadienne de la Croix-Rouge, Re* (1998), 5 C.B.R. (4th) 299 (Ont. Gen. Div. [Commercial List]). As Farley J. noted in *Dylex Ltd., Re* (1995), 31 C.B.R. (3d) 106 (Ont. Gen. Div. [Commercial List]), at 111, "[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 — 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] 1 S.C.R. 27 (S.C.C.) 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 (S.C.C.) 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.

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 *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 4 C.B.R. (3d) 311 (B.C. C.A.) at 318, 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, *Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 1 O.R. (3d) 289 (Ont. C.A.), *per* Doherty J.A. in dissent; *Skydome Corp., Re* (1998), 16 C.B.R. (4th) 125 (Ont. Gen. Div. [Commercial List]); *Anvil Range Mining Corp., Re* (1998), 7 C.B.R. (4th) 51 (Ont. Gen. Div. [Commercial List]).

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

> . . . [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 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 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.
>
> 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: Houlden & Morawetz, *Bankruptcy and Insolvency Law of Canada*, loose-leaf, 3rd ed., vol. 4 (Toronto: Thomson Carswell) at 10A-12.2, N§10. It has been said to be "a very wide and indefinite [word]": *Reference re Refund of Dues Paid under s.47 (f) of Timber Regulations in the Western Provinces*, [1935] A.C. 184 (Canada P.C.) at 197, affirming S.C.C. [1933] S.C.R. 616 (S.C.C.). See also, *Guardian Assurance Co., Re*, [1917] 1 Ch. 431 (Eng. C.A.) at 448, 450; *T&N Ltd., Re* (2006), [2007] 1 All E.R. 851 (Eng. Ch. Div.).

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., 1985, c. B-3 (the "BIA") is a contract: *Employers' Liability Assurance Corp. v. Ideal Petroleum (1959) Ltd.*, [1978] 1 S.C.R. 230 (S.C.C.) at 239; *Society of Composers, Authors & Music Publishers of Canada v. Armitage* (2000), 50 O.R. (3d) 688 (Ont. 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), 2 C.B.R. (5th) 4 (Ont. S.C.J. [Commercial List]) at para. 6; *Olympia & York Developments Ltd. v. Royal Trust Co.* (1993), 12 O.R. (3d) 500 (Ont. Gen. Div.) at 518.

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., Re*, *supra*, is instructive in this regard. It is a rare example of a court focussing 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 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 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;

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, just 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:

> [76] 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.
>
> [77] 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 Bench in *Canadian Airlines Corp., Re* (2000), 265 A.R. 201 (Alta. Q.B.), leave to appeal refused by (2000), 266 A.R. 131 (Alta. C.A. [In Chambers]), and (2001), 293 A.R. 351 (note) (S.C.C.). In *Muscletech Research & Development Inc., Re* (2006), 25 C.B.R. (5th) 231 (Ont. 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 Corp., Re*, however, the releases in those restructurings — including *Muscletech Research & Development Inc., Re* — 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 Corp., 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 well-spring 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 *Steinberg Inc. c. Michaud*, [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).

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 *Steinberg Inc. c. Michaud*, *supra*; *NBD Bank, Canada v. Dofasco Inc.* (1999), 46 O.R. (3d) 514 (Ont. C.A.); *Pacific Coastal Airlines Ltd. v. Air Canada* (2001), 19 B.L.R. (3d) 286 (B.C. S.C.); and *Stelco Inc., Re* (2005), 78 O.R. (3d) 241 (Ont. C.A.) ("*Stelco I*"). I do not think these cases assist the appellants, however. With the exception of *Steinberg Inc.*, they do not involve third party claims that were reasonably connected to the restructuring. As I shall explain, it is my opinion that *Steinberg Inc.* does not express a correct view of the law, and I decline to follow it.

80 In *Pacific Coastal Airlines Ltd.*, 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 Airlines Ltd.* 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. 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, Canada* 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:

> 53 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 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.
>
> 54 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 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, Canada* 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 Bank, Canada* to the facts now before the Court" (para. 71). Contrary to the facts of this case, in *NBD Bank, Canada* 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, Canada* 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 *Re Stelco Inc.* (2005), 15 C.B.R. (5th) 297 (Ont. S.C.J. [Commercial List]) 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 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), 21 C.B.R. (5th) 157 (Ont. 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 *Steinberg Inc. c. Michaud*, *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):

> [42] 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.

. . . . .

> [54] 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.
>
> . . . . .
>
> [58] 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 Inc.*, 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 appears to have been based, at least partly, on a rejection of the use of contract-law concepts in analysing the Act — an approach inconsistent with the jurisprudence referred to above.

94 Finally, the majority in *Steinberg Inc.* 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 Inc.* 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 Inc.* 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 Inc.* 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.
>
> **Exception**
>
> (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.
>
> **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.
>
> 1997, c. 12, s. 122.

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 Inc.*. 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 & Morawetz, vol.1, *supra*, at 2-144, E§11A; *Royal Penfield Inc., Re*, [2003] R.J.Q. 2157 (Que. S.C.) 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 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; Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed., (Markham: 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*.

103 I do not accept these submissions. It has long been established that the CCAA is valid federal legislation under the federal insolvency power: *Reference re Companies' Creditors Arrangement Act (Canada)*, [1934] S.C.R. 659 (S.C.C.). As the Supreme Court confirmed in that case (p. 661), citing Viscount Cave L.C. in *Quebec (Attorney General) v. Bélanger (Trustee of)*, [1928] A.C. 187 (Canada 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 the absence of a demonstrable error an appellate court will not interfere: see *Ravelston Corp., Re* (2007), 31 C.B.R. (5th) 233 (Ont. C.A. [In Chambers]).

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: *Fotinis Restaurant Corp. v. White Spot Ltd* (1998), 38 B.L.R. (2d) 251 (B.C. S.C. [In Chambers]) 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, 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, 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% 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 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.

***J.I. Laskin J.A.*:**

I agree.

***E.A. Cronk J.A.*:**

I agree.

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

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 A — 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

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, Sebastien 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.

Application granted; appeal dismissed.

Footnotes

* Leave to appeal refused at *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.* (2008), 2008 CarswellOnt 5432, 2008 CarswellOnt 5433 (S.C.C.).

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

2 Justice Georgina R. Jackson and Dr. 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: Thomson Carswell, 2007).

3 Citing Gibbs J.A. in *Chef Ready Foods*, *supra*, at pp.319-320.

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 Inc.* was originally reported in French: *Steinberg Inc. c. Michaud*, [1993] R.J.Q. 1684 (Que. C.A.). All paragraph references to *Steinberg Inc.* in this judgment are from the unofficial English translation available at 1993 CarswellQue 2055 (Que. C.A.)

8 Reed Dickerson, *The Interpretation and Application of Statutes* (1975) at pp.234-235, cited in Bryan A. Garner, ed., Black's Law Dictionary, 8th ed. (West Group, St. Paul, Minn., 2004) at 621.

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9

2000 ABQB 442
Alberta Court of Queen's Bench

Canadian Airlines Corp., Re

2000 CarswellAlta 662, 2000 ABQB 442, [2000] 10 W.W.R. 269, [2000] A.W.L.D. 654, [2000] A.J. No. 771, 20 C.B.R. (4th) 1, 265 A.R. 201, 84 Alta. L.R. (3d) 9, 98 A.C.W.S. (3d) 334, 9 B.L.R. (3d) 41

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

In the Matter of the Business Corporations Act (Alberta) S.A. 1981, c. B-15, as Amended, Section 185

In the Matter of Canadian Airlines Corporation and Canadian Airlines International Ltd.

Paperny J.

Heard: June 5-19, 2000
Judgment: June 27, 2000 *
Docket: Calgary 0001-05071

Counsel: *A.L. Friend, Q.C.*, *H.M. Kay, Q.C.*, *R.B. Low, Q.C.*, and *L. Goldbach*, for Petitioners.
S.F. Dunphy, *P. O'Kelly*, and *E. Kolers*, for Air Canada and 853350 Alberta Ltd.
D.R. Haigh, Q.C., *D.N. Nishimura*, *A.Z.A. Campbell* and *D. Tay*, for Resurgence Asset Management LLC.
L.R. Duncan, Q.C., and *G. McCue*, for Neil Baker, Michael Salter, Hal Metheral, and Roger Midiaty.
F.R. Foran, Q.C., and *P.T. McCarthy, Q.C.*, for Monitor, PwC.
G.B. Morawetz, *R.J. Chadwick* and *A. McConnell*, for Senior Secured Noteholders and the Bank of Nova Scotia Trust Co.
C.J. Shaw, Q.C., for Unionized Employees.
T. Mallett and *C. Feasby*, for Amex Bank of Canada.
E.W. Halt, for J. Stephens Allan, Claims Officer.
M. Hollins, for Pacific Costal Airlines.
P. Pastewka, for JHHD Aircraft Leasing No. 1 and No. 2.
J. Thom, for Royal Bank of Canada.
J. Medhurst-Tivadar, for Canada Customs and Revenue Agency.
R. Wilkins, Q.C., for Calgary and Edmonton Airport Authority.

Subject: Corporate and Commercial; Insolvency

Headnote

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

Airline brought application for approval of plan of arrangement under Companies' Creditors Arrangement Act — Investment corporation brought counter-application for declaration that plan constituted merger or transfer of airline's assets to AC Corp., that plan would not affect investment corporation, and directing repurchase of notes pursuant to trust indenture, and that actions of airline and AC Corp. in formulating plan were oppressive and unfairly prejudicial to them — Application granted; counter-application dismissed — All statutory conditions were fulfilled and plan was fair and reasonable — Fairness did not require equal treatment of all creditors — Aim of plan was to allow airline to sustain operations and permanently adjust debt structure to reflect current market for asset values and carrying costs, in return for AC Corp. providing guarantee of restructured obligations — Plan was not oppressive to minority shareholders who, in alternative bankruptcy scenario, would receive less than under plan — Reorganization of share capital did not cancel

minority shareholders' shares, and did not violate s. 167 of Business Corporations Act of Alberta — Act contemplated reorganizations in which insolvent corporation would eliminate interests of common shareholders, without requiring shareholder approval — Proposed transaction was not "sale, lease or exchange" of airline's property which required shareholder approval — Requirements for "related party transaction" under Policy 9.1 of Ontario Securities Commission were waived, since plan was fair and reasonable — Plan resulted in no substantial injustice to minority creditors, and represented reasonable balancing of all interests — Evidence did not support investment corporation's position that alternative existed which would render better return for minority shareholders — In insolvency situation, oppression of minority shareholder interests must be assessed against altered financial and legal landscape, which may result in shareholders' no longer having true interest to be protected — Financial support and corporate integration provided by other airline was not assumption of benefit by other airline to detriment of airline, but benefited airline and its stakeholders — Investment corporation was not oppressed — Corporate reorganization provisions in plan could not be severed from debt restructuring — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 5.1(2) — Business Corporations Act, S.A. 1981, c. B-15, s. 167.

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s. 167(1) [am. 1996, c. 32, s. 1(4)] — considered

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s. 6 [am. 1992, c. 27, s. 90(1)(f); am. 1996, c. 6, s. 167(1)(d)] — considered

s. 12 — referred to

Competition Act, R.S.C. 1985, c. C-34
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APPLICATION by airline for approval of plan of arrangement; COUNTER-APPLICATION by investment corporation for declaration that plan constituted merger or transfer of airline's assets to AC Corp., that plan would not affect investment corporation, and directing repurchase of notes pursuant to trust indenture, and that actions of airline and AC Corp. in formulating plan were oppressive and unfairly prejudicial; COUNTER-APPLICATION by minority shareholders.

***Paperny J.*:**

I. Introduction

1 After a decade of searching for a permanent solution to its ongoing, significant financial problems, Canadian Airlines Corporation ("CAC") and Canadian Airlines International Ltd. ("CAIL") seek the court's sanction to a plan of arrangement filed under the *Companies' Creditors Arrangement Act* ("CCAA") and sponsored by its historic rival, Air Canada Corporation ("Air Canada"). To Canadian, this represents its last choice and its only chance for survival. To Air Canada, it is an opportunity to lead the restructuring of the Canadian airline industry, an exercise many suggest is long overdue. To over 16,000 employees of Canadian, it means continued employment. Canadian Airlines will operate as a separate entity and continue to provide domestic and international air service to Canadians. Tickets of the flying public will be honoured and their frequent flyer points maintained. Long term business relationships with trade creditors and suppliers will continue.

2 The proposed restructuring comes at a cost. Secured and unsecured creditors are being asked to accept significant compromises and shareholders of CAC are being asked to accept that their shares have no value. Certain unsecured creditors oppose the plan, alleging it is oppressive and unfair. They assert that Air Canada has appropriated the key assets of Canadian to itself. Minority shareholders of CAC, on the other hand, argue that Air Canada's financial support to Canadian, before and during this restructuring process, has increased the value of Canadian and in turn their shares. These two positions are irreconcilable, but do reflect the perception by some that this plan asks them to sacrifice too much.

3 Canadian has asked this court to sanction its plan under s. 6 of the CCAA. The court's role on a sanction hearing is to consider whether the plan fairly balances the interests of all the stakeholders. 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.

II. Background

Canadian Airlines and its Subsidiaries

4 CAC and CAIL are corporations incorporated or continued under the *Business Corporations Act* of Alberta, S.A. 1981, c. B-15 ("ABCA"). 82% of CAC's shares are held by 853350 Alberta Ltd.("853350") and the remaining 18% are held publicly. CAC, directly or indirectly, owns the majority of voting shares in and controls the other Petitioner, CAIL and these shares represent CAC's principal asset. CAIL owns or has an interest in a number of other corporations directly engaged in the airline industry or other businesses related to the airline industry, including Canadian Regional Airlines Limited ("CRAL"). Where the context requires, I will refer to CAC and CAIL jointly as "Canadian" in these reasons.

5 In the past fifteen years, CAIL has grown from a regional carrier operating under the name Pacific Western Airlines ("PWA") to one of Canada's two major airlines. By mid-1986, Canadian Pacific Air Lines Limited ("CP Air"), had acquired the regional carriers Nordair Inc. ("Nordair") and Eastern Provincial Airways ("Eastern"). In February, 1987, PWA completed its purchase of CP Air from Canadian Pacific Limited. PWA then merged the four predecessor carriers (CP Air, Eastern, Nordair, and PWA) to form one airline, "Canadian Airlines International Ltd.", which was launched in April, 1987.

6 By April, 1989, CAIL had acquired substantially all of the common shares of Wardair Inc. and completed the integration of CAIL and Wardair Inc. in 1990.

7 CAIL and its subsidiaries provide international and domestic scheduled and charter air transportation for passengers and cargo. CAIL provides scheduled services to approximately 30 destinations in 11 countries. Its subsidiary, Canadian Regional Airlines (1998) Ltd. ("CRAL 98") provides scheduled services to approximately 35 destinations in Canada and the United States. Through code share agreements and marketing alliances with leading carriers, CAIL and its subsidiaries provide service to approximately 225 destinations worldwide. CAIL is also engaged in charter and cargo services and the provision of services to third parties, including aircraft overhaul and maintenance, passenger and cargo handling, flight simulator and equipment

rentals, employee training programs and the sale of Canadian Plus frequent flyer points. As at December 31, 1999, CAIL operated approximately 79 aircraft.

8 CAIL directly and indirectly employs over 16,000 persons, substantially all of whom are located in Canada. The balance of the employees are located in the United States, Europe, Asia, Australia, South America and Mexico. Approximately 88% of the active employees of CAIL are subject to collective bargaining agreements.

Events Leading up to the CCAA Proceedings

9 Canadian's financial difficulties significantly predate these proceedings.

10 In the early 1990s, Canadian experienced significant losses from operations and deteriorating liquidity. It completed a financial restructuring in 1994 (the "1994 Restructuring") which involved employees contributing $200,000,000 in new equity in return for receipt of entitlements to common shares. In addition, Aurora Airline Investments, Inc. ("Aurora"), a subsidiary of AMR Corporation ("AMR"), subscribed for $246,000,000 in preferred shares of CAIL. Other AMR subsidiaries entered into comprehensive services and marketing arrangements with CAIL. The governments of Canada, British Columbia and Alberta provided an aggregate of $120,000,000 in loan guarantees. Senior creditors, junior creditors and shareholders of CAC and CAIL and its subsidiaries converted approximately $712,000,000 of obligations into common shares of CAC or convertible notes issued jointly by CAC and CAIL and/or received warrants entitling the holder to purchase common shares.

11 In the latter half of 1994, Canadian built on the improved balance sheet provided by the 1994 Restructuring, focussing on strict cost controls, capacity management and aircraft utilization. The initial results were encouraging. However, a number of factors including higher than expected fuel costs, rising interest rates, decline of the Canadian dollar, a strike by pilots of Time Air and the temporary grounding of Inter-Canadien's ATR-42 fleet undermined this improved operational performance. In 1995, in response to additional capacity added by emerging charter carriers and Air Canada on key transcontinental routes, CAIL added additional aircraft to its fleet in an effort to regain market share. However, the addition of capacity coincided with the slow-down in the Canadian economy leading to traffic levels that were significantly below expectations. Additionally, key international routes of CAIL failed to produce anticipated results. The cumulative losses of CAIL from 1994 to 1999 totalled $771 million and from January 31, 1995 to August 12, 1999, the day prior to the issuance by the Government of Canada of an Order under Section 47 of the *Canada Transportation Act* (relaxing certain rules under the *Competition Act* to facilitate a restructuring of the airline industry and described further below), the trading price of Canadian's common shares declined from $7.90 to $1.55.

12 Canadian's losses incurred since the 1994 Restructuring severely eroded its liquidity position. In 1996, Canadian faced an environment where the domestic air travel market saw increased capacity and aggressive price competition by two new discount carriers based in western Canada. While Canadian's traffic and load factor increased indicating a positive response to Canadian's post-restructuring business plan, yields declined. Attempts by Canadian to reduce domestic capacity were offset by additional capacity being introduced by the new discount carriers and Air Canada.

13 The continued lack of sufficient funds from operations made it evident by late fall of 1996 that Canadian needed to take action to avoid a cash shortfall in the spring of 1997. In November 1996, Canadian announced an operational restructuring plan (the "1996 Restructuring") aimed at returning Canadian to profitability and subsequently implemented a payment deferral plan which involved a temporary moratorium on payments to certain lenders and aircraft operating lessors to provide a cash bridge until the benefits of the operational restructuring were fully implemented. Canadian was able successfully to obtain the support of its lenders and operating lessors such that the moratorium and payment deferral plan was able to proceed on a consensual basis without the requirement for any court proceedings.

14 The objective of the 1996 Restructuring was to transform Canadian into a sustainable entity by focussing on controllable factors which targeted earnings improvements over four years. Three major initiatives were adopted: network enhancements, wage concessions as supplemented by fuel tax reductions/rebates, and overhead cost reductions.

15 The benefits of the 1996 Restructuring were reflected in Canadian's 1997 financial results when Canadian and its subsidiaries reported a consolidated net income of $5.4 million, the best results in 9 years.

16 In early 1998, building on its 1997 results, Canadian took advantage of a strong market for U.S. public debt financing in the first half of 1998 by issuing U.S. $175,000,000 of senior secured notes in April, 1998 ("Senior Secured Notes") and U.S. $100,000,000 of unsecured notes in August, 1998 ("Unsecured Notes").

17 The benefits of the 1996 Restructuring continued in 1998 but were not sufficient to offset a number of new factors which had a significant negative impact on financial performance, particularly in the fourth quarter. Canadian's eroded capital base gave it limited capacity to withstand negative effects on traffic and revenue. These factors included lower than expected operating revenues resulting from a continued weakness of the Asian economies, vigorous competition in Canadian's key western Canada and the western U.S. transborder markets, significant price discounting in most domestic markets following a labour disruption at Air Canada and CAIL's temporary loss of the ability to code-share with American Airlines on certain transborder flights due to a pilot dispute at American Airlines. Canadian also had increased operating expenses primarily due to the deterioration of the value of the Canadian dollar and additional airport and navigational fees imposed by NAV Canada which were not recoverable by Canadian through fare increases because of competitive pressures. This resulted in Canadian and its subsidiaries reporting a consolidated loss of $137.6 million for 1998.

18 As a result of these continuing weak financial results, Canadian undertook a number of additional strategic initiatives including entering the *oneworldTM* Alliance, the introduction of its new "Proud Wings" corporate image, a restructuring of CAIL's Vancouver hub, the sale and leaseback of certain aircraft, expanded code sharing arrangements and the implementation of a service charge in an effort to recover a portion of the costs relating to NAV Canada fees.

19 Beginning in late 1998 and continuing into 1999, Canadian tried to access equity markets to strengthen its balance sheet. In January, 1999, the Board of Directors of CAC determined that while Canadian needed to obtain additional equity capital, an equity infusion alone would not address the fundamental structural problems in the domestic air transportation market.

20 Canadian believes that its financial performance was and is reflective of structural problems in the Canadian airline industry, most significantly, over capacity in the domestic air transportation market. It is the view of Canadian and Air Canada that Canada's relatively small population and the geographic distribution of that population is unable to support the overlapping networks of two full service national carriers. As described further below, the Government of Canada has recognized this fundamental problem and has been instrumental in attempts to develop a solution.

Initial Discussions with Air Canada

21 Accordingly, in January, 1999, CAC's Board of Directors directed management to explore all strategic alternatives available to Canadian, including discussions regarding a possible merger or other transaction involving Air Canada.

22 Canadian had discussions with Air Canada in early 1999. AMR also participated in those discussions. While several alternative merger transactions were considered in the course of these discussions, Canadian, AMR and Air Canada were unable to reach agreement.

23 Following the termination of merger discussions between Canadian and Air Canada, senior management of Canadian, at the direction of the Board and with the support of AMR, renewed its efforts to secure financial partners with the objective of obtaining either an equity investment and support for an eventual merger with Air Canada or immediate financial support for a merger with Air Canada.

Offer by Onex

24 In early May, the discussions with Air Canada having failed, Canadian focussed its efforts on discussions with Onex Corporation ("Onex") and AMR concerning the basis upon which a merger of Canadian and Air Canada could be accomplished.

25 On August 23, 1999, Canadian entered into an Arrangement Agreement with Onex, AMR and Airline Industry Revitalization Co. Inc. ("AirCo") (a company owned jointly by Onex and AMR and controlled by Onex). The Arrangement Agreement set out the terms of a Plan of Arrangement providing for the purchase by AirCo of all of the outstanding common and non-voting shares of CAC. The Arrangement Agreement was conditional upon, among other things, the successful completion of a simultaneous offer by AirCo for all of the voting and non-voting shares of Air Canada. On August 24, 1999, AirCo announced its offers to purchase the shares of both CAC and Air Canada and to subsequently merge the operations of the two airlines to create one international carrier in Canada.

26 On or about September 20, 1999 the Board of Directors of Air Canada recommended against the AirCo offer. On or about October 19, 1999, Air Canada announced its own proposal to its shareholders to repurchase shares of Air Canada. Air Canada's announcement also indicated Air Canada's intention to make a bid for CAC and to proceed to complete a merger with Canadian subject to a restructuring of Canadian's debt.

27 There were several rounds of offers and counter-offers between AirCo and Air Canada. On November 5, 1999, the Quebec Superior Court ruled that the AirCo offer for Air Canada violated the provisions of the *Air Canada Public Participation Act*. AirCo immediately withdrew its offers. At that time, Air Canada indicated its intention to proceed with its offer for CAC.

28 Following the withdrawal of the AirCo offer to purchase CAC, and notwithstanding Air Canada's stated intention to proceed with its offer, there was a renewed uncertainty about Canadian's future which adversely affected operations. As described further below, Canadian lost significant forward bookings which further reduced the company's remaining liquidity.

Offer by 853350

29 On November 11, 1999, 853350 (a corporation financed by Air Canada and owned as to 10% by Air Canada) made a formal offer for all of the common and non-voting shares of CAC. Air Canada indicated that the involvement of 853350 in the take-over bid was necessary in order to protect Air Canada from the potential adverse effects of a restructuring of Canadian's debt and that Air Canada would only complete a merger with Canadian after the completion of a debt restructuring transaction. The offer by 853350 was conditional upon, among other things, a satisfactory resolution of AMR's claims in respect of Canadian and a satisfactory resolution of certain regulatory issues arising from the announcement made on October 26, 1999 by the Government of Canada regarding its intentions to alter the regime governing the airline industry.

30 As noted above, AMR and its subsidiaries and affiliates had certain agreements with Canadian arising from AMR's investment (through its wholly owned subsidiary, Aurora Airline Investments, Inc.) in CAIL during the 1994 Restructuring. In particular, the Services Agreement by which AMR and its subsidiaries and affiliates provided certain reservations, scheduling and other airline related services to Canadian provided for a termination fee of approximately $500 million (as at December 31, 1999) while the terms governing the preferred shares issued to Aurora provided for exchange rights which were only retractable by Canadian upon payment of a redemption fee in excess of $500 million (as at December 31, 1999). Unless such provisions were amended or waived, it was practically impossible for Canadian to complete a merger with Air Canada since the cost of proceeding without AMR's consent was simply too high.

31 Canadian had continued its efforts to seek out all possible solutions to its structural problems following the withdrawal of the AirCo offer on November 5, 1999. While AMR indicated its willingness to provide a measure of support by allowing a deferral of some of the fees payable to AMR under the Services Agreement, Canadian was unable to find any investor willing to provide the liquidity necessary to keep Canadian operating while alternative solutions were sought.

32 After 853350 made its offer, 853350 and Air Canada entered into discussions with AMR regarding the purchase by 853350 of AMR's shareholding in CAIL as well as other matters regarding code sharing agreements and various services provided to Canadian by AMR and its subsidiaries and affiliates. The parties reached an agreement on November 22, 1999 pursuant to which AMR agreed to reduce its potential damages claim for termination of the Services Agreement by approximately 88%.

33 On December 4, 1999, CAC's Board recommended acceptance of 853350's offer to its shareholders and on December 21, 1999, two days before the offer closed, 853350 received approval for the offer from the Competition Bureau as well as clarification from the Government of Canada on the proposed regulatory framework for the Canadian airline industry.

34 As noted above, Canadian's financial condition deteriorated further after the collapse of the AirCo Arrangement transaction. In particular:

> a) the doubts which were publicly raised as to Canadian's ability to survive made Canadian's efforts to secure additional financing through various sale-leaseback transactions more difficult;
>
> b) sales for future air travel were down by approximately 10% compared to 1998;
>
> c) CAIL's liquidity position, which stood at approximately $84 million (consolidated cash and available credit) as at September 30, 1999, reached a critical point in late December, 1999 when it was about to go negative.

35 In late December, 1999, Air Canada agreed to enter into certain transactions designed to ensure that Canadian would have enough liquidity to continue operating until the scheduled completion of the 853350 take-over bid on January 4, 2000. Air Canada agreed to purchase rights to the Toronto-Tokyo route for $25 million and to a sale-leaseback arrangement involving certain unencumbered aircraft and a flight simulator for total proceeds of approximately $20 million. These transactions gave Canadian sufficient liquidity to continue operations through the holiday period.

36 If Air Canada had not provided the approximate $45 million injection in December 1999, Canadian would likely have had to file for bankruptcy and cease all operations before the end of the holiday travel season.

37 On January 4, 2000, with all conditions of its offer having been satisfied or waived, 853350 purchased approximately 82% of the outstanding shares of CAC. On January 5, 1999, 853350 completed the purchase of the preferred shares of CAIL owned by Aurora. In connection with that acquisition, Canadian agreed to certain amendments to the Services Agreement reducing the amounts payable to AMR in the event of a termination of such agreement and, in addition, the unanimous shareholders agreement which gave AMR the right to require Canadian to purchase the CAIL preferred shares under certain circumstances was terminated. These arrangements had the effect of substantially reducing the obstacles to a restructuring of Canadian's debt and lease obligations and also significantly reduced the claims that AMR would be entitled to advance in such a restructuring.

38 Despite the $45 million provided by Air Canada, Canadian's liquidity position remained poor. With January being a traditionally slow month in the airline industry, further bridge financing was required in order to ensure that Canadian would be able to operate while a debt restructuring transaction was being negotiated with creditors. Air Canada negotiated an arrangement with the Royal Bank of Canada ("Royal Bank") to purchase a participation interest in the operating credit facility made available to Canadian. As a result of this agreement, Royal Bank agreed to extend Canadian's operating credit facility from $70 million to $120 million in January, 2000 and then to $145 million in March, 2000. Canadian agreed to supplement the assignment of accounts receivable security originally securing Royal's $70 million facility with a further Security Agreement securing certain unencumbered assets of Canadian in consideration for this increased credit availability. Without the support of Air Canada or another financially sound entity, this increase in credit would not have been possible.

39 Air Canada has stated publicly that it ultimately wishes to merge the operations of Canadian and Air Canada, subject to Canadian completing a financial restructuring so as to permit Air Canada to complete the acquisition on a financially sound basis. This pre-condition has been emphasized by Air Canada since the fall of 1999.

40 Prior to the acquisition of majority control of CAC by 853350, Canadian's management, Board of Directors and financial advisors had considered every possible alternative for restoring Canadian to a sound financial footing. Based upon Canadian's extensive efforts over the past year in particular, but also the efforts since 1992 described above, Canadian came to the conclusion that it must complete a debt restructuring to permit the completion of a full merger between Canadian and Air Canada.

41 On February 1, 2000, Canadian announced a moratorium on payments to lessors and lenders. As a result of this moratorium Canadian defaulted on the payments due under its various credit facilities and aircraft leases. Absent the assistance provided by this moratorium, in addition to Air Canada's support, Canadian would not have had sufficient liquidity to continue operating until the completion of a debt restructuring.

42 Following implementation of the moratorium, Canadian with Air Canada embarked on efforts to restructure significant obligations by consent. The further damage to public confidence which a CCAA filing could produce required Canadian to secure a substantial measure of creditor support in advance of any public filing for court protection.

43 Before the Petitioners started these CCAA proceedings, Air Canada, CAIL and lessors of 59 aircraft in its fleet had reached agreement in principle on the restructuring plan.

44 Canadian and Air Canada have also been able to reach agreement with the remaining affected secured creditors, being the holders of the U.S. $175 million Senior Secured Notes, due 2005, (the "Senior Secured Noteholders") and with several major unsecured creditors in addition to AMR, such as Loyalty Management Group Canada Inc.

45 On March 24, 2000, faced with threatened proceedings by secured creditors, Canadian petitioned under the CCAA and obtained a stay of proceedings and related interim relief by Order of the Honourable Chief Justice Moore on that same date. Pursuant to that Order, PricewaterhouseCoopers, Inc. was appointed as the Monitor, and companion proceedings in the United States were authorized to be commenced.

46 Since that time, due to the assistance of Air Canada, Canadian has been able to complete the restructuring of the remaining financial obligations governing all aircraft to be retained by Canadian for future operations. These arrangements were approved by this Honourable Court in its Orders dated April 14, 2000 and May 10, 2000, as described in further detail below under the heading "The Restructuring Plan".

47 On April 7, 2000, this court granted an Order giving directions with respect to the filing of the plan, the calling and holding of meetings of affected creditors and related matters.

48 On April 25, 2000 in accordance with the said Order, Canadian filed and served the plan (in its original form) and the related notices and materials.

49 The plan was amended, in accordance with its terms, on several occasions, the form of Plan voted upon at the Creditors' Meetings on May 26, 2000 having been filed and served on May 25, 2000 (the "Plan").

The Restructuring Plan

50 The Plan has three principal aims described by Canadian:

> (a) provide near term liquidity so that Canadian can sustain operations;
>
> (b) allow for the return of aircraft not required by Canadian; and
>
> (c) permanently adjust Canadian's debt structure and lease facilities to reflect the current market for asset values and carrying costs in return for Air Canada providing a guarantee of the restructured obligations.

51 The proposed treatment of stakeholders is as follows:

> 1. Unaffected Secured Creditors- Royal Bank, CAIL's operating lender, is an unaffected creditor with respect to its operating credit facility. Royal Bank holds security over CAIL's accounts receivable and most of CAIL's operating assets not specifically secured by aircraft financiers or the Senior Secured Noteholders. As noted above, arrangements entered into between Air Canada and Royal Bank have provided CAIL with liquidity necessary for it to continue operations since January 2000.

Also unaffected by the Plan are those aircraft lessors, conditional vendors and secured creditors holding security over CAIL's aircraft who have entered into agreements with CAIL and/or Air Canada with respect to the restructuring of CAIL's obligations. A number of such agreements, which were initially contained in the form of letters of intent ("LOIs"), were entered into prior to the commencement of the CCAA proceedings, while a total of 17 LOIs were completed after that date. In its Second and Fourth Reports the Monitor reported to the court on these agreements. The LOIs entered into after the proceedings commenced were reviewed and approved by the court on April 14, 2000 and May 10, 2000.

The basis of the LOIs with aircraft lessors was that the operating lease rates were reduced to fair market lease rates or less, and the obligations of CAIL under the leases were either assumed or guaranteed by Air Canada. Where the aircraft was subject to conditional sale agreements or other secured indebtedness, the value of the secured debt was reduced to the fair market value of the aircraft, and the interest rate payable was reduced to current market rates reflecting Air Canada's credit. CAIL's obligations under those agreements have also been assumed or guaranteed by Air Canada. The claims of these creditors for reduced principal and interest amounts, or reduced lease payments, are Affected Unsecured Claims under the Plan. In a number of cases these claims have been assigned to Air Canada and Air Canada disclosed that it would vote those claims in favour of the Plan.

2. Affected Secured Creditors- The Affected Secured Creditors under the Plan are the Senior Secured Noteholders with a claim in the amount of US$175,000,000. The Senior Secured Noteholders are secured by a diverse package of Canadian's assets, including its inventory of aircraft spare parts, ground equipment, spare engines, flight simulators, leasehold interests at Toronto, Vancouver and Calgary airports, the shares in CRAL 98 and a $53 million note payable by CRAL to CAIL.

The Plan offers the Senior Secured Noteholders payment of 97 cents on the dollar. The deficiency is included in the Affected Unsecured Creditor class and the Senior Secured Noteholders advised the court they would be voting the deficiency in favour of the Plan.

3. Unaffected Unsecured Creditors-In the circular accompanying the November 11, 1999 853350 offer it was stated that:

> The Offeror intends to conduct the Debt Restructuring in such a manner as to seek to ensure that the unionized employees of Canadian, the suppliers of new credit (including trade credit) and the members of the flying public are left unaffected.
>
> The Offeror is of the view that the pursuit of these three principles is essential in order to ensure that the long term value of Canadian is preserved.

Canadian's employees, customers and suppliers of goods and services are unaffected by the CCAA Order and Plan.

Also unaffected are parties to those contracts or agreements with Canadian which are not being terminated by Canadian pursuant to the terms of the March 24, 2000 Order.

4. Affected Unsecured Creditors- CAIL has identified unsecured creditors who do not fall into the above three groups and listed these as Affected Unsecured Creditors under the Plan. They are offered 14 cents on the dollar on their claims. Air Canada would fund this payment.

The Affected Unsecured Creditors fall into the following categories:

a. Claims of holders of or related to the Unsecured Notes (the "Unsecured Noteholders");

b. Claims in respect of certain outstanding or threatened litigation involving Canadian;

c. Claims arising from the termination, breach or repudiation of certain contracts, leases or agreements to which Canadian is a party other than aircraft financing or lease arrangements;

d. Claims in respect of deficiencies arising from the termination or re-negotiation of aircraft financing or lease arrangements;

e. Claims of tax authorities against Canadian; and

f. Claims in respect of the under-secured or unsecured portion of amounts due to the Senior Secured Noteholders.

52 There are over $700 million of proven unsecured claims. Some unsecured creditors have disputed the amounts of their claims for distribution purposes. These are in the process of determination by the court-appointed Claims Officer and subject to further appeal to the court. If the Claims Officer were to allow all of the disputed claims in full and this were confirmed by the court, the aggregate of unsecured claims would be approximately $1.059 million.

53 The Monitor has concluded that if the Plan is not approved and implemented, Canadian will not be able to continue as a going concern and in that event, the only foreseeable alternative would be a liquidation of Canadian's assets by a receiver and/or a trustee in bankruptcy. Under the Plan, Canadian's obligations to parties essential to ongoing operations, including employees, customers, travel agents, fuel, maintenance and equipment suppliers, and airport authorities are in most cases to be treated as unaffected and paid in full. In the event of a liquidation, those parties would not, in most cases, be paid in full and, except for specific lien rights and statutory priorities, would rank as ordinary unsecured creditors. The Monitor estimates that the additional unsecured claims which would arise if Canadian were to cease operations as a going concern and be forced into liquidation would be in excess of $1.1 billion.

54 In connection with its assessment of the Plan, the Monitor performed a liquidation analysis of CAIL as at March 31, 2000 in order to estimate the amounts that might be recovered by CAIL's creditors and shareholders in the event of disposition of CAIL's assets by a receiver or trustee. The Monitor concluded that a liquidation would result in a shortfall to certain secured creditors, including the Senior Secured Noteholders, a recovery by ordinary unsecured creditors of between one cent and three cents on the dollar, and no recovery by shareholders.

55 There are two vociferous opponents of the Plan, Resurgence Asset Management LLC ("Resurgence") who acts on behalf of its and/or its affiliate client accounts and four shareholders of CAC. Resurgence is incorporated pursuant to the laws of New York, U.S.A. and has its head office in White Plains, New York. It conducts an investment business specializing in high yield distressed debt. Through a series of purchases of the Unsecured Notes commencing in April 1999, Resurgence clients hold $58,200,000 of the face value of or 58.2% of the notes issued. Resurgence purchased 7.9 million units in April 1999. From November 3, 1999 to December 9, 1999 it purchased an additional 20,850,000 units. From January 4, 2000 to February 3, 2000 Resurgence purchased an additional 29,450,000 units.

56 Resurgence seeks declarations that: the actions of Canadian, Air Canada and 853350 constitute an amalgamation, consolidation or merger with or into Air Canada or a conveyance or transfer of all or substantially all of Canadian's assets to Air Canada; that any plan of arrangement involving Canadian will not affect Resurgence and directing the repurchase of their notes pursuant to the provisions of their trust indenture and that the actions of Canadian, Air Canada and 853350 are oppressive and unfairly prejudicial to it pursuant to section 234 of the Business Corporations Act.

57 Four shareholders of CAC also oppose the plan. Neil Baker, a Toronto resident, acquired 132,500 common shares at a cost of $83,475.00 on or about May 5, 2000. Mr. Baker sought to commence proceedings to "remedy an injustice to the minority holders of the common shares". Roger Midiaty, Michael Salter and Hal Metheral are individual shareholders who were added as parties at their request during the proceedings. Mr. Midiaty resides in Calgary, Alberta and holds 827 CAC shares which he has held since 1994. Mr. Metheral is also a Calgary resident and holds approximately 14,900 CAC shares in his RRSP and has held them since approximately 1994 or 1995. Mr. Salter is a resident of Scottsdale, Arizona and is the beneficial owner

of 250 shares of CAC and is a joint beneficial owner of 250 shares with his wife. These shareholders will be referred in the Decision throughout as the "Minority Shareholders".

58 The Minority Shareholders oppose the portion of the Plan that relates to the reorganization of CAIL, pursuant to section 185 of the *Alberta Business Corporations Act* ("ABCA"). They characterize the transaction as a cancellation of issued shares unauthorized by section 167 of the ABCA or alternatively is a violation of section 183 of the ABCA. They submit the application for the order of reorganization should be denied as being unlawful, unfair and not supported by the evidence.

III. Analysis

59 Section 6 of the CCAA provides that:

> 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 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.

60 Prior to sanctioning a plan under the CCAA, the court must be satisfied in regard to each of the following criteria:

> (1) there must be compliance with all statutory requirements;
>
> (2) all material filed and procedures carried out must be examined to determine if anything has been done or purported to be done which is not authorized by the CCAA; and
>
> (3) the plan must be fair and reasonable.

61 A leading articulation of this three-part test appears in *Re Northland Properties Ltd.* (1988), 73 C.B.R. (N.S.) 175 (B.C. S.C.) at 182-3, aff'd (1989), 73 C.B.R. (N.S.) 195 (B.C. C.A.) and has been regularly followed, see for example *Re Sammi Atlas Inc.* (1998), 3 C.B.R. (4th) 171 (Ont. Gen. Div. [Commercial List]) at 172 and *Re T. Eaton Co.* (1999), 15 C.B.R. (4th) 311 (Ont. S.C.J. [Commercial List]) at paragraph 7. Each of these criteria are reviewed in turn below.

1. Statutory Requirements

62 Some of the matters that may be considered by the court on an application for approval of a plan of compromise and arrangement include:

> (a) the applicant comes within the definition of "debtor company" in section 2 of the CCAA;
>
> (b) the applicant or affiliated debtor companies have total claims within the meaning of section 12 of the CCAA in excess of $5,000,000;
>
> (c) the notice calling the meeting was sent in accordance with the order of the court;
>
> (d) the creditors were properly classified;
>
> (e) the meetings of creditors were properly constituted;

(f) the voting was properly carried out; and

(g) the plan was approved by the requisite double majority or majorities.

63 I find that the Petitioners have complied with all applicable statutory requirements. Specifically:

(a) CAC and CAIL are insolvent and thus each is a "debtor company" within the meaning of section 2 of the CCAA. This was established in the affidavit evidence of Douglas Carty, Senior Vice President and Chief Financial Officer of Canadian, and so declared in the March 24, 2000 Order in these proceedings and confirmed in the testimony given by Mr. Carty at this hearing.

(b) CAC and CAIL have total claims that would be claims provable in bankruptcy within the meaning of section 12 of the CCAA in excess of $5,000,000.

(c) In accordance with the April 7, 2000 Order of this court, a Notice of Meeting and a disclosure statement (which included copies of the Plan and the March 24 th and April 7 th Orders of this court) were sent to the Affected Creditors, the directors and officers of the Petitioners, the Monitor and persons who had served a Notice of Appearance, on April 25, 2000.

(d) As confirmed by the May 12, 2000 ruling of this court (leave to appeal denied May 29, 2000), the creditors have been properly classified.

(e) Further, as detailed in the Monitor's Fifth Report to the Court and confirmed by the June 14, 2000 decision of this court in respect of a challenge by Resurgence Asset Management LLC ("Resurgence"), the meetings of creditors were properly constituted, the voting was properly carried out and the Plan was approved by the requisite double majorities in each class. The composition of the majority of the unsecured creditor class is addressed below under the heading "Fair and Reasonable".

2. Matters Unauthorized

64 This criterion has not been widely discussed in the reported cases. As recognized by Blair J. in *Olympia & York Developments Ltd. v. Royal Trust Co.* (1993), 17 C.B.R. (3d) 1 (Ont. Gen. Div.) and Farley J. in *Re Cadillac Fairview Inc.* (February 6, 1995), Doc. B348/94 (Ont. Gen. Div. [Commercial List]), within the CCAA process the court must rely on the reports of the Monitor as well as the parties in ensuring nothing contrary to the CCAA has occurred or is contemplated by the plan.

65 In this proceeding, the dissenting groups have raised two matters which in their view are unauthorized by the CCAA: firstly, the Minority Shareholders of CAC suggested the proposed share capital reorganization of CAIL is illegal under the ABCA and Ontario Securities Commission Policy 9.1, and as such cannot be authorized under the CCAA and secondly, certain unsecured creditors suggested that the form of release contained in the Plan goes beyond the scope of release permitted under the CCAA.

a. Legality of proposed share capital reorganization

66 Subsection 185(2) of the ABCA provides:

(2) If a corporation is subject to an order for reorganization, its articles may be amended by the order to effect any change that might lawfully be made by an amendment under section 167.

67 Sections 6.1(2)(d) and (e) and Schedule "D" of the Plan contemplate that:

a. All CAIL common shares held by CAC will be converted into a single retractable share, which will then be retracted by CAIL for $1.00; and

b. All CAIL preferred shares held by 853350 will be converted into CAIL common shares.

68 The Articles of Reorganization in Schedule "D" to the Plan provide for the following amendments to CAIL's Articles of Incorporation to effect the proposed reorganization:

(a) consolidating all of the issued and outstanding common shares into one common share;

(b) redesignating the existing common shares as "Retractable Shares" and changing the rights, privileges, restrictions and conditions attaching to the Retractable Shares so that the Retractable Shares shall have attached thereto the rights, privileges, restrictions and conditions as set out in the Schedule of Share Capital;

(c) cancelling the Non-Voting Shares in the capital of the corporation, none of which are currently issued and outstanding, so that the corporation is no longer authorized to issue Non-Voting Shares;

(d) changing all of the issued and outstanding Class B Preferred Shares of the corporation into Class A Preferred Shares, on the basis of one (1) Class A Preferred Share for each one (1) Class B Preferred Share presently issued and outstanding;

(e) redesignating the existing Class A Preferred Shares as "Common Shares" and changing the rights, privileges, restrictions and conditions attaching to the Common Shares so that the Common Shares shall have attached thereto the rights, privileges, restrictions and conditions as set out in the Schedule of Share Capital; and

(f) cancelling the Class B Preferred Shares in the capital of the corporation, none of which are issued and outstanding after the change in paragraph (d) above, so that the corporation is no longer authorized to issue Class B Preferred Shares;

Section 167 of the ABCA

69 Reorganizations under section 185 of the ABCA are subject to two preconditions:

a. The corporation must be "subject to an order for re-organization"; and

b. The proposed amendments must otherwise be permitted under section 167 of the ABCA.

70 The parties agreed that an order of this court sanctioning the Plan would satisfy the first condition.

71 The relevant portions of section 167 provide as follows:

167(1) Subject to sections 170 and 171, the articles of a corporation may by special resolution be amended to

(e) change the designation of all or any of its shares, and add, change or remove any rights, privileges, restrictions and conditions, including rights to accrued dividends, in respect of all or any of its shares, whether issued or unissued,

(f) change the shares of any class or series, whether issued or unissued, into a different number of shares of the same class or series into the same or a different number of shares of other classes or series,

(g.1) cancel a class or series of shares where there are no issued or outstanding shares of that class or series,

72 Each change in the proposed CAIL Articles of Reorganization corresponds to changes permitted under s. 167(1) of the ABCA, as follows:

Proposed Amendment in Schedule "D"	**Subsection 167(1), ABCA**
(a) — consolidation of Common Shares	167(1)(f)
(b) — change of designation and rights	167(1)(e)

(c) — cancellation	167(1)(g.1)
(d) — change in shares	167(1)(f)
(e) — change of designation and rights	167(1)(e)
(f) — cancellation	167(1)(g.1)

73 The Minority Shareholders suggested that the proposed reorganization effectively cancels their shares in CAC. As the above review of the proposed reorganization demonstrates, that is not the case. Rather, the shares of CAIL are being consolidated, altered and then retracted, as permitted under section 167 of the ABCA. I find the proposed reorganization of CAIL's share capital under the Plan does not violate section 167.

74 In R. Dickerson et al, *Proposals for a New Business Corporation Law for Canada*, Vol.1: Commentary (the "Dickerson Report") regarding the then proposed Canada Business Corporations Act, the identical section to section 185 is described as having been inserted with the object of enabling the "court to effect any necessary amendment of the articles of the corporation in order to achieve the objective of the reorganization without having to comply with the formalities of the Draft Act, particularly shareholder approval of the proposed amendment".

75 The architects of the business corporation act model which the ABCA follows, expressly contemplated reorganizations in which the insolvent corporation would eliminate the interest of common shareholders. The example given in the Dickerson Report of a reorganization is very similar to that proposed in the Plan:

> For example, the reorganization of an insolvent corporation may require the following steps: first, reduction or even elimination of the interest of the common shareholders; second, relegation of the preferred shareholders to the status of common shareholders; and third, relegation of the secured debenture holders to the status of either unsecured Noteholders or preferred shareholders.

76 The rationale for allowing such a reorganization appears plain; the corporation is insolvent, which means that on liquidation the shareholders would get nothing. In those circumstances, as described further below under the heading "Fair and Reasonable", there is nothing unfair or unreasonable in the court effecting changes in such situations without shareholder approval. Indeed, it would be unfair to the creditors and other stakeholders to permit the shareholders (whose interest has the lowest priority) to have any ability to block a reorganization.

77 The Petitioners were unable to provide any case law addressing the use of section 185 as proposed under the Plan. They relied upon the decisions of *Re Royal Oak Mines Inc.* (1999), 14 C.B.R. (4th) 279 (Ont. S.C.J. [Commercial List]) and *T. Eaton Co.*, *supra* in which Farley J.of the Ontario Superior Court of Justice emphasized that shareholders are at the bottom of the hierarchy of interests in liquidation or liquidation related scenarios.

78 Section 185 provides for amendment to articles by court order. I see no requirement in that section for a meeting or vote of shareholders of CAIL, quite apart from shareholders of CAC. Further, dissent and appraisal rights are expressly removed in subsection (7). To require a meeting and vote of shareholders and to grant dissent and appraisal rights in circumstances of insolvency would frustrate the object of section 185 as described in the Dickerson Report.

79 In the circumstances of this case, where the majority shareholder holds 82% of the shares, the requirement of a special resolution is meaningless. To require a vote suggests the shares have value. They do not. The formalities of the ABCA serve no useful purpose other than to frustrate the reorganization to the detriment of all stakeholders, contrary to the CCAA.

Section 183 of the ABCA

80 The Minority Shareholders argued in the alternative that if the proposed share reorganization of CAIL were not a cancellation of their shares in CAC and therefore allowed under section 167 of the ABCA, it constituted a "sale, lease, or exchange of substantially all the property" of CAC and thus required the approval of CAC shareholders pursuant to section

183 of the ABCA. The Minority Shareholders suggested that the common shares in CAIL were substantially all of the assets of CAC and that all of those shares were being "exchanged" for $1.00.

81 I disagree with this creative characterization. The proposed transaction is a reorganization as contemplated by section 185 of the ABCA. As recognized in *Savage v. Amoco Acquisition Co.* (1988), 68 C.B.R. (N.S.) 154 (Alta. C.A.) aff'd (1988), 70 C.B.R. (N.S.) xxxii (S.C.C.), the fact that the same end might be achieved under another section does not exclude the section to be relied on. A statute may well offer several alternatives to achieve a similar end.

Ontario Securities Commission Policy 9.1

82 The Minority Shareholders also submitted the proposed reorganization constitutes a "related party transaction" under Policy 9.1 of the Ontario Securities Commission. Under the Policy, transactions are subject to disclosure, minority approval and formal valuation requirements which have not been followed here. The Minority Shareholders suggested that the Petitioners were therefore in breach of the Policy unless and until such time as the court is advised of the relevant requirements of the Policy and grants its approval as provided by the Policy.

83 These shareholders asserted that in the absence of evidence of the going concern value of CAIL so as to determine whether that value exceeds the rights of the Preferred Shares of CAIL, the Court should not waive compliance with the Policy.

84 To the extent that this reorganization can be considered a "related party transaction", I have found, for the reasons discussed below under the heading "Fair and Reasonable", that the Plan, including the proposed reorganization, is fair and reasonable and accordingly I would waive the requirements of Policy 9.1.

b. Release

85 Resurgence argued that the release of directors and other third parties contained in the Plan does not comply with the provisions of the CCAA.

86 The release is contained in section 6.2(2)(ii) of the Plan and states as follows:

> As of the Effective Date, each of the Affected Creditors will be deemed to forever release, waive and discharge all claims, obligations, suits, judgments, damages, demands, debts, rights, causes of action and liabilities...that are based in whole or in part on any act, omission, transaction, event or other occurrence taking place on or prior to the Effective Date in any way relating to the Applicants and Subsidiaries, the CCAA Proceedings, or the Plan against:(i) The Applicants and Subsidiaries; (ii) The Directors, Officers and employees of the Applicants or Subsidiaries in each case as of the date of filing (and in addition, those who became Officers and/or Directors thereafter but prior to the Effective Date); (iii) The former Directors, Officers and employees of the Applicants or Subsidiaries, or (iv) the respective current and former professionals of the entities in subclauses (1) to (3) of this s.6.2(2) (including, for greater certainty, the Monitor, its counsel and its current Officers and Directors, and current and former Officers, Directors, employees, shareholders and professionals of the released parties) acting in such capacity.

87 Prior to 1997, the CCAA did not provide for compromises of claims against anyone other than the petitioning company. In 1997, section 5.1 was added to the CCAA. Section 5.1 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 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.
>
> (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.

(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.

88 Resurgence argued that the form of release does not comply with section 5.1 of the CCAA insofar as it applies to individuals beyond directors and to a broad spectrum of claims beyond obligations of the Petitioners for which their directors are "by law liable". Resurgence submitted that the addition of section 5.1 to the CCAA constituted an exception to a long standing principle and urged the court to therefore interpret s. 5.1 cautiously, if not narrowly. Resurgence relied on *Crabtree (Succession de) c. Barrette*, [1993] 1 S.C.R. 1027 (S.C.C.) at 1044 and *Bruce Agra Foods Inc. v. Everfresh Beverages Inc. (Receiver of)* (1996), 45 C.B.R. (3d) 169 (Ont. Gen. Div.) at para. 5 in this regard.

89 With respect to Resurgence's complaint regarding the breadth of the claims covered by the release, the Petitioners asserted that the release is not intended to override section 5.1(2). Canadian suggested this can be expressly incorporated into the form of release by adding the words "*excluding the claims excepted by s. 5.1(2) of the CCAA*" immediately prior to subsection (iii) and clarifying the language in Section 5.1 of the Plan. Canadian also acknowledged, in response to a concern raised by Canada Customs and Revenue Agency, that in accordance with s. 5.1(1) of the CCAA, directors of CAC and CAIL could only be released from liability arising before March 24, 2000, the date these proceedings commenced. Canadian suggested this was also addressed in the proposed amendment. Canadian did not address the propriety of including individuals in addition to directors in the form of release.

90 In my view it is appropriate to amend the proposed release to expressly comply with section 5. 1(2) of the CCAA and to clarify Section 5.1 of the Plan as Canadian suggested in its brief. The additional language suggested by Canadian to achieve this result shall be included in the form of order. Canada Customs and Revenue Agency is apparently satisfied with the Petitioners' acknowledgement that claims against directors can only be released to the date of commencement of proceedings under the CCAA, having appeared at this hearing to strongly support the sanctioning of the Plan, so I will not address this concern further.

91 Resurgence argued that its claims fell within the categories of excepted claims in section 5.1(2) of the CCAA and accordingly, its concern in this regard is removed by this amendment. Unsecured creditors JHHD Aircraft Leasing No. 1 and No. 2 suggested there may be possible wrongdoing in the acts of the directors during the restructuring process which should not be immune from scrutiny and in my view this complaint would also be caught by the exception captured in the amendment.

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. Aside from the complaints of Resurgence, which by their own submissions are addressed in the amendment I have directed, and the complaints of JHHD Aircraft Leasing No. 1 and No. 2, which would also be addressed in the amendment, the terms of the release have been accepted by the requisite majority of creditors and I am loathe to further disturb the terms of the Plan, with one exception.

93 Amex Bank of Canada submitted that the form of release appeared overly broad and might compromise unaffected claims of affected creditors. For further clarification, Amex Bank of Canada's potential claim for defamation is unaffected by the Plan and I am prepared to order Section 6.2(2)(ii) be amended to reflect this specific exception.

3. Fair and Reasonable

94 In determining whether to sanction a plan of arrangement under the CCAA, the court is guided by two fundamental concepts: "fairness" and "reasonableness". While these concepts are always at the heart of the court's exercise of its discretion, their meanings are necessarily shaped by the unique circumstances of each case, within the context of the Act and accordingly can be difficult to distill and challenging to apply. Blair J. described these concepts in *Olympia & York Developments Ltd. v. Royal Trust Co.*, *supra*, at page 9:

> "Fairness" and "reasonableness" are, in my opinion, the two keynote concepts underscoring the philosophy and workings of the Companies' Creditors Arrangement Act. Fairness is the quintessential expression of the court's equitable jurisdiction — although the jurisdiction is statutory, the broad discretionary powers given to the judiciary by the legislation which make its exercise an exercise in equity — and "reasonableness" is what lends objectivity to the process.

95 The legislation, while conferring broad discretion on the court, offers little guidance. However, the court is assisted in the exercise of its discretion by the purpose of the CCAA: to facilitate the reorganization of a debtor company for the benefit of the company, its creditors, shareholders, employees and, in many instances, a much broader constituency of affected persons. Parliament has recognized that reorganization, if commercially feasible, is in most cases preferable, economically and socially, to liquidation: *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.* (1988), [1989] 2 W.W.R. 566 (Alta. Q.B.) at 574; *Northland Properties Ltd. v. Excelsior Life Insurance Co. of Canada*, [1989] 3 W.W.R. 363 (B.C. C.A.) at 368.

96 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.

a. Composition of the unsecured vote

97 As noted above, an important measure of whether a plan is fair and reasonable is the parties' approval and the degree to which it has been given. Creditor support creates an inference that the plan is fair and reasonable because the assenting creditors believe that their interests are treated equitably under the plan. Moreover, it creates an inference that the arrangement is economically feasible and therefore reasonable because the creditors are in a better position then the courts to gauge business risk. As stated by Blair J. at page 11 of *Olympia & York Developments Ltd.*, *supra*:

> As other courts have done, I observe that it is not my function to second guess the business people with respect to the "business" aspect of the Plan or descending into the negotiating arena or 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.

98 However, given the manner of voting under the CCAA, the court must be cognizant of the treatment of minorities within a class: see for example *Re Quintette Coal Ltd.* (1992), 13 C.B.R. (3d) 146 (B.C. S.C.) and *Re Alabama, New Orleans, Texas & Pacific Junction Railway* (1890), 60 L.J. Ch. 221 (Eng. C.A.). The court can address this by ensuring creditors' claims are properly classified. As well, it is sometimes appropriate to tabulate the vote of a particular class so the results can be assessed from a fairness perspective. In this case, the classification was challenged by Resurgence and I dismissed that application. The vote was also tabulated in this case and the results demonstrate that the votes of Air Canada and the Senior Secured Noteholders, who voted their deficiency in the unsecured class, were decisive.

99 The results of the unsecured vote, as reported by the Monitor, are:

1. For the resolution to approve the Plan: 73 votes (65% in number) representing $494,762,304 in claims (76% in value);

2. Against the resolution: 39 votes (35% in number) representing $156,360,363 in claims (24% in value); and

3. Abstentions: 15 representing $968,036 in value.

100 The voting results as reported by the Monitor were challenged by Resurgence. That application was dismissed.

101 The members of each class that vote in favour of a plan must do so in good faith and the majority within a class must act without coercion in their conduct toward the minority. When asked to assess fairness of an approved plan, the court will not countenance secret agreements to vote in favour of a plan secured by advantages to the creditor: see for example, *Hochberger v. Rittenberg* (1916), 36 D.L.R. 450 (S.C.C.)

102 In *Re Northland Properties Ltd.* (1988), 73 C.B.R. (N.S.) 175 (B.C. S.C.) at 192-3 aff'd (1989), 73 C.B.R. (N.S.) 195 (B.C. C.A.), dissenting priority mortgagees argued the plan violated the principle of equality due to an agreement between the debtor company and another priority mortgagee which essentially amounted to a preference in exchange for voting in favour of the plan. Trainor J. found that the agreement was freely disclosed and commercially reasonable and went on to approve the plan, using the three part test. The British Columbia Court of Appeal upheld this result and in commenting on the minority complaint McEachern J.A. stated at page 206:

> In my view, the obvious benefits of settling rights and keeping the enterprise together as a going concern far outweigh the deprivation of the appellants' wholly illusory rights. In this connection, the learned chambers judge said at p.29:
>
> > I turn to the question of the right to hold the property after an order absolute and whether or not this is a denial of something of that significance that it should affect these proceedings. There is in the material before me some evidence of values. There are the principles to which I have referred, as well as to the rights of majorities and the rights of minorities.
> >
> > Certainly, those minority rights are there, but it would seem to me that in view of the overall plan, in view of the speculative nature of holding property in the light of appraisals which have been given as to value, that this right is something which should be subsumed to the benefit of the majority.

103 Resurgence submitted that Air Canada manipulated the indebtedness of CAIL to assure itself of an affirmative vote. I disagree. I previously ruled on the validity of the deficiency when approving the LOIs and found the deficiency to be valid. I found there was consideration for the assignment of the deficiency claims of the various aircraft financiers to Air Canada, namely the provision of an Air Canada guarantee which would otherwise not have been available until plan sanction. The Monitor reviewed the calculations of the deficiencies and determined they were calculated in a reasonable manner. As such, the court approved those transactions. If the deficiency had instead remained with the aircraft financiers, it is reasonable to assume those claims would have been voted in favour of the plan. Further, it would have been entirely appropriate under the circumstances for the aircraft financiers to have retained the deficiency and agreed to vote in favour of the Plan, with the same result to Resurgence. That the financiers did not choose this method was explained by the testimony of Mr. Carty and Robert Peterson, Chief Financial Officer for Air Canada; quite simply it amounted to a desire on behalf of these creditors to shift the "deal risk" associated with the Plan to Air Canada. The agreement reached with the Senior Secured Noteholders was also disclosed and the challenge by Resurgence regarding their vote in the unsecured class was dismissed There is nothing inappropriate in the voting of the deficiency claims of Air Canada or the Senior Secured Noteholders in the unsecured class. There is no evidence of secret vote buying such as discussed in *Re Northland Properties Ltd.*

104 If the Plan is approved, Air Canada stands to profit in its operation. I do not accept that the deficiency claims were devised to dominate the vote of the unsecured creditor class, however, Air Canada, as funder of the Plan is more motivated than Resurgence to support it. This divergence of views on its own does not amount to bad faith on the part of Air Canada.

Resurgence submitted that only the Unsecured Noteholders received 14 cents on the dollar. That is not accurate, as demonstrated by the list of affected unsecured creditors included earlier in these Reasons. The Senior Secured Noteholders did receive other consideration under the Plan, but to suggest they were differently motivated suggests that those creditors did not ascribe any value to their unsecured claims. There is no evidence to support this submission.

105 The good faith of Resurgence in its vote must also be considered. Resurgence acquired a substantial amount of its claim after the failure of the Onex bid, when it was aware that Canadian's financial condition was rapidly deteriorating. Thereafter, Resurgence continued to purchase a substantial amount of this highly distressed debt. While Mr. Symington maintained that he bought because he thought the bonds were a good investment, he also acknowledged that one basis for purchasing was the hope of obtaining a blocking position sufficient to veto a plan in the proposed debt restructuring. This was an obvious ploy for leverage with the Plan proponents

106 The authorities which address minority creditors' complaints speak of "substantial injustice" (*Re Keddy Motor Inns Ltd.* (1992), 13 C.B.R. (3d) 245 (N.S. C.A.), "confiscation" of rights (*Re Campeau Corp.* (1992), 10 C.B.R. (3d) 104 (Ont. Gen. Div.); *Re SkyDome Corp.* (March 21, 1999), Doc. 98-CL-3179 (Ont. Gen. Div. [Commercial List])) and majorities "feasting upon" the rights of the minority (*Re Quintette Coal Ltd.* (1992), 13 C.B.R. (3d) 146 (B.C. S.C.). Although it cannot be disputed that the group of Unsecured Noteholders represented by Resurgence are being asked to accept a significant reduction of their claims, as are all of the affected unsecured creditors, I do not see a "substantial injustice", nor view their rights as having been "confiscated" or "feasted upon" by being required to succumb to the wishes of the majority in their class. No bad faith has been demonstrated in this case. Rather, the treatment of Resurgence, along with all other affected unsecured creditors, represents a reasonable balancing of interests. While the court is directed to consider whether there is an injustice being worked within a class, it must also determine whether there is an injustice with respect the stakeholders as a whole. Even if a plan might at first blush appear to have that effect, when viewed in relation to all other parties, it may nonetheless be considered appropriate and be approved: *Algoma Steel Corp. v. Royal Bank* (1992), 11 C.B.R. (3d) 1 (Ont. Gen. Div.) and *Re Northland Properties Ltd.*, *supra* at 9.

107 Further, to the extent that greater or discrete motivation to support a Plan may be seen as a conflict, the Court should take this same approach and look at the creditors as a whole and to the objecting creditors specifically and determine if their rights are compromised in an attempt to balance interests and have the pain of compromise borne equally.

108 Resurgence represents 58.2% of the Unsecured Noteholders or $96 million in claims. The total claim of the Unsecured Noteholders ranges from $146 million to $161 million. The affected unsecured class, excluding aircraft financing, tax claims, the noteholders and claims under $50,000, ranges from $116.3 million to $449.7 million depending on the resolutions of certain claims by the Claims Officer. Resurgence represents between 15.7% - 35% of that portion of the class.

109 The total affected unsecured claims, excluding tax claims, but including aircraft financing and noteholder claims including the unsecured portion of the Senior Secured Notes, ranges from $673 million to $1,007 million. Resurgence represents between 9.5% - 14.3% of the total affected unsecured creditor pool. These percentages indicate that at its very highest in a class excluding Air Canada's assigned claims and Senior Secured's deficiency, Resurgence would only represent a maximum of 35% of the class. In the larger class of affected unsecured it is significantly less. Viewed in relation to the class as a whole, there is no injustice being worked against Resurgence.

110 The thrust of the Resurgence submissions suggests a mistaken belief that they will get more than 14 cents on liquidation. This is not borne out by the evidence and is not reasonable in the context of the overall Plan.

b. Receipts on liquidation or bankruptcy

111 As noted above, the Monitor prepared and circulated a report on the Plan which contained a summary of a liquidation analysis outlining the Monitor's projected realizations upon a liquidation of CAIL ("Liquidation Analysis").

112 The Liquidation Analysis was based on: (1) the draft unaudited financial statements of Canadian at March 31, 2000; (2) the distress values reported in independent appraisals of aircraft and aircraft related assets obtained by CAIL in January, 2000; (3) a review of CAIL's aircraft leasing and financing documents; and (4) discussions with CAIL Management.

113 Prior to and during the application for sanction, the Monitor responded to various requests for information by parties involved. In particular, the Monitor provided a copy of the Liquidation Analysis to those who requested it. Certain of the parties involved requested the opportunity to question the Monitor further, particularly in respect to the Liquidation Analysis and this court directed a process for the posing of those questions.

114 While there were numerous questions to which the Monitor was asked to respond, there were several areas in which Resurgence and the Minority Shareholders took particular issue: pension plan surplus, CRAL, international routes and tax pools. The dissenting groups asserted that these assets represented overlooked value to the company on a liquidation basis or on a going concern basis.

Pension Plan Surplus

115 The Monitor did not attribute any value to pension plan surplus when it prepared the Liquidation Analysis, for the following reasons:

> 1) The summaries of the solvency surplus/deficit positions indicated a cumulative net deficit position for the seven registered plans, after consideration of contingent liabilities;
>
> 2) The possibility, based on the previous splitting out of the seven plans from a single plan in 1988, that the plans could be held to be consolidated for financial purposes, which would remove any potential solvency surplus since the total estimated contingent liabilities exceeded the total estimated solvency surplus;
>
> 3) The actual calculations were prepared by CAIL's actuaries and actuaries representing the unions could conclude liabilities were greater; and
>
> 4) CAIL did not have a legal opinion confirming that surpluses belonged to CAIL.

116 The Monitor concluded that the entitlement question would most probably have to be settled by negotiation and/or litigation by the parties. For those reasons, the Monitor took a conservative view and did not attribute an asset value to pension plans in the Liquidation Analysis. The Monitor also did not include in the Liquidation Analysis any amount in respect of the claim that could be made by members of the plan where there is an apparent deficit after deducting contingent liabilities.

117 The issues in connection with possible pension surplus are: (1) the true amount of any of the available surplus; and (2) the entitlement of Canadian to any such amount.

118 It is acknowledged that surplus prior to termination can be accessed through employer contribution holidays, which Canadian has taken to the full extent permitted. However, there is no basis that has been established for any surplus being available to be withdrawn from an ongoing pension plan. On a pension plan termination, the amount available as a solvency surplus would first have to be further reduced by various amounts to determine whether there was in fact any true surplus available for distribution. Such reductions include contingent benefits payable in accordance with the provisions of each respective pension plan, any extraordinary plan wind up cost, the amounts of any contribution holidays taken which have not been reflected, and any litigation costs.

119 Counsel for all of Canadian's unionized employees confirmed on the record that the respective union representatives can be expected to dispute all of these calculations as well as to dispute entitlement.

120 There is a suggestion that there might be a total of $40 million of surplus remaining from all pension plans after such reductions are taken into account. Apart from the issue of entitlement, this assumes that the plans can be treated separately, that

a surplus could in fact be realized on liquidation and that the Towers Perrin calculations are not challenged. With total pension plan assets of over $2 billion, a surplus of $40 million could quickly disappear with relatively minor changes in the market value of the securities held or calculation of liabilities. In the circumstances, given all the variables, I find that the existence of any surplus is doubtful at best and I am satisfied that the Monitor's Liquidation Analysis ascribing it zero value is reasonable in this circumstances.

CRAL

121 The Monitor's liquidation analysis as at March 31, 2000 of CRAL determined that in a distress situation, after payments were made to its creditors, there would be a deficiency of approximately $30 million to pay Canadian Regional's unsecured creditors, which include a claim of approximately $56.5 million due to Canadian. In arriving at this conclusion, the Monitor reviewed internally prepared unaudited financial statements of CRAL as of March 31, 2000, the Houlihan Lokey Howard and Zukin, distress valuation dated January 21, 2000 and the Simat Helliesen and Eichner valuation of selected CAIL assets dated January 31, 2000 for certain aircraft related materials and engines, rotables and spares. The Avitas Inc., and Avmark Inc. reports were used for the distress values on CRAL's aircraft and the CRAL aircraft lease documentation. The Monitor also performed its own analysis of CRAL's liquidation value, which involved analysis of the reports provided and details of its analysis were outlined in the Liquidation Analysis.

122 For the purpose of the Liquidation Analysis, the Monitor did not consider other airlines as comparable for evaluation purposes, as the Monitor's valuation was performed on a distressed sale basis. The Monitor further assumed that without CAIL's national and international network to feed traffic into and a source of standby financing, and considering the inevitable negative publicity which a failure of CAIL would produce, CRAL would immediately stop operations as well.

123 Mr. Peterson testified that CRAL was worth $260 million to Air Canada, based on Air Canada being a special buyer who could integrate CRAL, on a going concern basis, into its network. The Liquidation Analysis assumed the windup of each of CRAL and CAIL, a completely different scenario.

124 There is no evidence that there was a potential purchaser for CRAL who would be prepared to acquire CRAL or the operations of CRAL 98 for any significant sum or at all. CRAL has value to CAIL, and in turn, could provide value to Air Canada, but this value is attributable to its ability to feed traffic to and take traffic from the national and international service operated by CAIL. In my view, the Monitor was aware of these features and properly considered these factors in assessing the value of CRAL on a liquidation of CAIL.

125 If CAIL were to cease operations, the evidence is clear that CRAL would be obliged to do so as well immediately. The travelling public, shippers, trade suppliers, and others would make no distinction between CAIL and CRAL and there would be no going concern for Air Canada to acquire.

International Routes

126 The Monitor ascribed no value to Canadian's international routes in the Liquidation Analysis. In discussions with CAIL management and experts available in its aviation group, the Monitor was advised that international routes are unassignable licenses and not property rights. They do not appear as assets in CAIL's financials. Mr. Carty and Mr. Peterson explained that routes and slots are *not* treated as assets by airlines, but rather as rights in the control of the Government of Canada. In the event of bankruptcy/receivership of CAIL, CAIL's trustee/receiver could not sell them and accordingly they are of no value to CAIL.

127 Evidence was led that on June 23, 1999 Air Canada made an offer to purchase CAIL's international routes for $400 million cash plus $125 million for aircraft spares and inventory, along with the assumption of certain debt and lease obligations for the aircraft required for the international routes. CAIL evaluated the Air Canada offer and concluded that the proposed purchase price was insufficient to permit it to continue carrying on business in the absence of its international routes. Mr. Carty testified that something in the range of $2 billion would be required.

128 CAIL was in desperate need of cash in mid December, 1999. CAIL agreed to sell its Toronto — Tokyo route for $25 million. The evidence, however, indicated that the price for the Toronto — Tokyo route was not derived from a valuation, but rather was what CAIL asked for, based on its then-current cash flow requirements. Air Canada and CAIL obtained Government approval for the transfer on December 21, 2000.

129 Resurgence complained that despite this evidence of offers for purchase and actual sales of international routes and other evidence of sales of slots, the Monitor did not include Canadian's international routes in the Liquidation Analysis and only attributed a total of $66 million for all intangibles of Canadian. There is some evidence that slots at some foreign airports may be bought or sold in some fashion. However, there is insufficient evidence to attribute any value to other slots which CAIL has at foreign airports. It would appear given the regulation of the airline industry, in particular, the *Aeronautics Act* and the *Canada Transportation Act*, that international routes for a Canadian air carrier only have full value to the extent of federal government support for the transfer or sale, and its preparedness to allow the then-current license holder to sell rather than act unilaterally to change the designation. The federal government was prepared to allow CAIL to sell its Toronto — Tokyo route to Air Canada in light of CAIL's severe financial difficulty and the certainty of cessation of operations during the Christmas holiday season in the absence of such a sale.

130 Further, statements made by CAIL in mid-1999 as to the value of its international routes and operations in response to an offer by Air Canada, reflected the amount CAIL needed to sustain liquidity without its international routes and was not a representation of market value of what could realistically be obtained from an arms length purchaser. The Monitor concluded on its investigation that CAIL's Narida and Heathrow slots had a realizable value of $66 million, which it included in the Liquidation Analysis. I find that this conclusion is supportable and that the Monitor properly concluded that there were no other rights which ought to have been assigned value.

Tax Pools

131 There are four tax pools identified by Resurgence and the Minority Shareholders that are material: capital losses at the CAC level, undepreciated capital cost pools, operating losses incurred by Canadian and potential for losses to be reinstated upon repayment of fuel tax rebates by CAIL.

Capital Loss Pools

132 The capital loss pools at CAC will not be available to Air Canada since CAC is to be left out of the corporate reorganization and will be severed from CAIL. Those capital losses can essentially only be used to absorb a portion of the debt forgiveness liability associated with the restructuring. CAC, who has virtually all of its senior debt compromised in the plan, receives compensation for this small advantage, which cost them nothing.

Undepreciated capital cost ("UCC")

133 There is no benefit to Air Canada in the pools of UCC unless it were established that the UCC pools are in excess of the fair market value of the relevant assets, since Air Canada could create the same pools by simply buying the assets on a liquidation at fair market value. Mr. Peterson understood this pool of UCC to be approximately $700 million. There is no evidence that the UCC pool, however, could be considered to be a source of benefit. There is no evidence that this amount is any greater than fair market value.

Operating Losses

134 The third tax pool complained of is the operating losses. The debt forgiven as a result of the Plan will erase any operating losses from prior years to the extent of such forgiven debt.

Fuel tax rebates

135 The fourth tax pool relates to the fuel tax rebates system taken advantage of by CAIL in past years. The evidence is that on a consolidated basis the total potential amount of this pool is $297 million. According to Mr. Carty's testimony, CAIL has not been taxable in his ten years as Chief Financial Officer. The losses which it has generated for tax purposes have been sold on a 10 - 1 basis to the government in order to receive rebates of excise tax paid for fuel. The losses can be restored retroactively if the rebates are repaid, but the losses can only be carried forward for a maximum of seven years. The evidence of Mr. Peterson indicates that Air Canada has no plan to use those alleged losses and in order for them to be useful to Air Canada, Air Canada would have to complete a legal merger with CAIL, which is not provided for in the plan and is not contemplated by Air Canada until some uncertain future date. In my view, the Monitor's conclusion that there was no value to any tax pools in the Liquidation Analysis is sound.

136 Those opposed to the Plan have raised the spectre that there may be value unaccounted for in this liquidation analysis or otherwise. Given the findings above, this is merely speculation and is unsupported by any concrete evidence.

c. Alternatives to the Plan

137 When presented with a plan, affected stakeholders must weigh their options in the light of commercial reality. Those options are typically liquidation measured against the plan proposed. If not put forward, a hope for a different or more favourable plan is not an option and no basis upon which to assess fairness. On a purposive approach to the CCAA, what is fair and reasonable must be assessed against the effect of the Plan on the creditors and their various claims, in the context of their response to the plan. Stakeholders are expected to decide their fate based on realistic, commercially viable alternatives (generally seen as the prime motivating factor in any business decision) and not on speculative desires or hope for the future. As Farley J. stated in *T. Eaton Co.* (1999), 15 C.B.R. (4th) 311 (Ont. S.C.J. [Commercial List]) at paragraph 6:

> One has to be cognizant of the function of a balancing of their prejudices. Positions must be realistically assessed and weighed, all in the light of what an alternative to a successful plan would be. Wishes are not a firm foundation on which to build a plan; nor are ransom demands.

138 The evidence is overwhelming that all other options have been exhausted and have resulted in failure. The concern of those opposed suggests that there is a better plan that Air Canada can put forward. I note that significant enhancements were made to the plan during the process. In any case, this is the Plan that has been voted on. The evidence makes it clear that there is not another plan forthcoming. As noted by Farley J. in *T. Eaton Co.*, *supra*, "no one presented an alternative plan for the interested parties to vote on" (para. 8).

d. Oppression

Oppression and the CCAA

139 Resurgence and the Minority Shareholders originally claimed that the Plan proponents, CAC and CAIL and the Plan supporters 853350 and Air Canada had oppressed, unfairly disregarded or unfairly prejudiced their interests, under Section 234 of the ABCA. The Minority Shareholders (for reasons that will appear obvious) have abandoned that position.

140 Section 234 gives the court wide discretion to remedy corporate conduct that is unfair. As remedial legislation, it attempts to balance the interests of shareholders, creditors and management to ensure adequate investor protection and maximum management flexibility. The Act requires the court to judge the conduct of the company and the majority in the context of equity and fairness: *First Edmonton Place Ltd. v. 315888 Alberta Ltd.* (1988), 40 B.L.R. 28 (Alta. Q.B.). Equity and fairness are measured against or considered in the context of the rights, interests or reasonable expectations of the complainants: *Diligenti v. RWMD Operations Kelowna Ltd.* (1976), 1 B.C.L.R. 36 (B.C. S.C.).

141 The starting point in any determination of oppression requires an understanding as to what the rights, interests, and reasonable expectations are and what the damaging or detrimental effect is on them. MacDonald J. stated in *First Edmonton Place*, *supra* at 57:

> In deciding what is unfair, the history and nature of the corporation, the essential nature of the relationship between the corporation and the creditor, the type of rights affected in general commercial practice should all be material. More concretely, the test of unfair prejudice or unfair disregard should encompass the following considerations: The protection of the underlying expectation of a creditor in the arrangement with the corporation, the extent to which the acts complained of were unforeseeable where the creditor could not reasonably have protected itself from such acts and the detriment to the interests of the creditor.

142 While expectations vary considerably with the size, structure, and value of the corporation, all expectations must be reasonably and objectively assessed: *Pente Investment Management Ltd. v. Schneider Corp.* (1998), 42 O.R. (3d) 177 (Ont. C.A.).

143 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.* (March 7, 1995), Doc. B28/95 (Ont. Gen. Div. [Commercial List]), and *T. Eaton Company*, *supra*.

144 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 to the company, the employees and the public, and tests the fairness of the plan with reference to its impact on all of the constituents.

145 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.

Oppression allegations by Resurgence

146 Resurgence alleges that it has been oppressed or had its rights disregarded because the Petitioners and Air Canada disregarded the specific provisions of their trust indenture, that Air Canada and 853350 dealt with other creditors outside of the CCAA, refusing to negotiate with Resurgence and that they are generally being treated inequitably under the Plan.

147 The trust indenture under which the Unsecured Notes were issued required that upon a "change of control", 101% of the principal owing thereunder, plus interest would be immediately due and payable. Resurgence alleges that Air Canada, through 853350, caused CAC and CAIL to purposely fail to honour this term. Canadian acknowledges that the trust indenture was breached. On February 1, 2000, Canadian announced a moratorium on payments to lessors and lenders, including the Unsecured Noteholders. As a result of this moratorium, Canadian defaulted on the payments due under its various credit facilities and aircraft leases.

148 The moratorium was not directed solely at the Unsecured Noteholders. It had the same impact on other creditors, secured and unsecured. Canadian, as a result of the moratorium, breached other contractual relationships with various creditors. The breach of contract is not sufficient to found a claim for oppression in this case. Given Canadian's insolvency, which Resurgence

recognized, it cannot be said that there was a reasonable expectation that it would be paid in full under the terms of the trust indenture, particularly when Canadian had ceased making payments to other creditors as well.

149 It is asserted that because the Plan proponents engaged in a restructuring of Canadian's debt before the filing under the CCAA, that its use of the Act for only a small group of creditors, which includes Resurgence is somehow oppressive.

150 At the outset, it cannot be overlooked that the CCAA does not require that a compromise be proposed to *all* creditors of an insolvent company. The CCAA is a flexible, remedial statute which recognizes the unique circumstances that lead to and away from insolvency.

151 Next, Air Canada made it clear beginning in the fall of 1999 that Canadian would have to complete a financial restructuring so as to permit Air Canada to acquire CAIL on a financially sound basis and as a wholly owned subsidiary. Following the implementation of the moratorium, absent which Canadian could not have continued to operate, Canadian and Air Canada commenced efforts to restructure significant obligations by consent. They perceived that further damage to public confidence that a CCAA filing could produce, required Canadian to secure a substantial measure of creditor support in advance of any public filing for court protection. Before the Petitioners started the CCAA proceedings on March 24, 2000, Air Canada, CAIL and lessors of 59 aircraft in its fleet had reached agreement in principle on the restructuring plan.

152 The purpose of the CCAA is to create an environment for negotiations and compromise. Often it is the stay of proceedings that creates the necessary stability for that process to unfold. Negotiations with certain key creditors in advance of the CCAA filing, rather than being oppressive or conspiratorial, are to be encouraged as a matter of principle if their impact is to provide a firm foundation for a restructuring. Certainly in this case, they were of critical importance, staving off liquidation, preserving cash flow and allowing the Plan to proceed. Rather than being detrimental or prejudicial to the interests of the other stakeholders, including Resurgence, it was beneficial to Canadian and all of its stakeholders.

153 Resurgence complained that certain transfers of assets to Air Canada and its actions in consolidating the operations of the two entities prior to the initiation of the CCAA proceedings were unfairly prejudicial to it.

154 The evidence demonstrates that the sales of the Toronto — Tokyo route, the Dash 8s and the simulators were at the suggestion of Canadian, who was in desperate need of operating cash. Air Canada paid what Canadian asked, based on its cash flow requirements. The evidence established that absent the injection of cash at that critical juncture, Canadian would have ceased operations. It is for that reason that the Government of Canada willingly provided the approval for the transfer on December 21, 2000.

155 Similarly, the renegotiation of CAIL's aircraft leases to reflect market rates supported by Air Canada covenant or guarantee has been previously dealt with by this court and found to have been in the best interest of Canadian, not to its detriment. The evidence establishes that the financial support and corporate integration that has been provided by Air Canada was not only in Canadian's best interest, but its only option for survival. The suggestion that the renegotiations of these leases, various sales and the operational realignment represents an assumption of a benefit by Air Canada to the detriment of Canadian is not supported by the evidence.

156 I find the transactions predating the CCAA proceedings, were in fact Canadian's life blood in ensuring some degree of liquidity and stability within which to conduct an orderly restructuring of its debt. There was no detriment to Canadian or to its creditors, including its unsecured creditors. That Air Canada and Canadian were so successful in negotiating agreements with their major creditors, including aircraft financiers, without resorting to a stay under the CCAA underscores the serious distress Canadian was in and its lenders recognition of the viability of the proposed Plan.

157 Resurgence complained that other significant groups held negotiations with Canadian. The evidence indicates that a meeting was held with Mr. Symington, Managing Director of Resurgence, in Toronto in March 2000. It was made clear to Resurgence that the pool of unsecured creditors would be somewhere between $500 and $700 million and that Resurgence would be included within that class. To the extent that the versions of this meeting differ, I prefer and accept the evidence of Mr. Carty. Resurgence wished to play a significant role in the debt restructuring and indicated it was prepared to utilize

the litigation process to achieve a satisfactory result for itself. It is therefore understandable that no further negotiations took place. Nevertheless, the original offer to affected unsecured creditors has been enhanced since the filing of the plan on April 25, 2000. The enhancements to unsecured claims involved the removal of the cap on the unsecured pool and an increase from 12 to 14 cents on the dollar.

158 The findings of the Commissioner of Competition establishes beyond doubt that absent the financial support provided by Air Canada, Canadian would have failed in December 1999. I am unable to find on the evidence that Resurgence has been oppressed. The complaint that Air Canada has plundered Canadian and robbed it of its assets is not supported but contradicted by the evidence. As described above, the alternative is liquidation and in that event the Unsecured Noteholders would receive between one and three cents on the dollar. The Monitor's conclusions in this regard are supportable and I accept them.

e. Unfairness to Shareholders

159 The Minority Shareholders essentially complained that they were being unfairly stripped of their only asset in CAC — the shares of CAIL. They suggested they were being squeezed out by the new CAC majority shareholder 853350, without any compensation or any vote. When the reorganization is completed as contemplated by the Plan, their shares will remain in CAC but CAC will be a bare shell.

160 They further submitted that Air Canada's cash infusion, the covenants and guarantees it has offered to aircraft financiers, and the operational changes (including integration of schedules, "quick win" strategies, and code sharing) have all added significant value to CAIL to the benefit of its stakeholders, including the Minority Shareholders. They argued that they should be entitled to continue to participate into the future and that such an expectation is legitimate and consistent with the statements and actions of Air Canada in regard to integration. By acting to realign the airlines before a corporate reorganization, the Minority Shareholders asserted that Air Canada has created the expectation that it is prepared to consolidate the airlines with the participation of a minority. The Minority Shareholders take no position with respect to the debt restructuring under the CCAA, but ask the court to sever the corporate reorganization provisions contained in the Plan.

161 Finally, they asserted that CAIL has increased in value due to Air Canada's financial contributions and operational changes and that accordingly, before authorizing the transfer of the CAIL shares to 853350, the current holders of the CAIL Preferred Shares, the court must have evidence before it to justify a transfer of 100% of the equity of CAIL to the Preferred Shares.

162 That CAC will have its shareholding in CAIL extinguished and emerge a bare shell is acknowledged. However, the evidence makes it abundantly clear that those shares, CAC's "only asset", have no value. That the Minority Shareholders are content to have the debt restructuring proceed suggests by implication that they do not dispute the insolvency of both Petitioners, CAC and CAIL.

163 The Minority Shareholders base their expectation to remain as shareholders on the actions of Air Canada in acquiring only 82% of the CAC shares before integrating certain of the airlines' operations. Mr. Baker (who purchased *after* the Plan was filed with the Court and almost six months after the take over bid by Air Canada) suggested that the contents of the bid circular misrepresented Air Canada's future intentions to its shareholders. The two dollar price offered and paid per share in the bid must be viewed somewhat skeptically and in the context in which the bid arose. It does not support the speculative view that some shareholders hold, that somehow, despite insolvency, their shares have some value on a going concern basis. In any event, any claim for misrepresentation that Minority Shareholders might have arising from the take over bid circular against Air Canada or 853350, if any, is unaffected by the Plan and may be pursued after the stay is lifted.

164 In considering Resurgence's claim of oppression I have already found that the financial support of Air Canada during this restructuring period has benefited Canadian and its stakeholders. Air Canada's financial support and the integration of the two airlines has been critical to keeping Canadian afloat. The evidence makes it abundantly clear that without this support Canadian would have ceased operations. However it has not transformed CAIL or CAC into solvent companies.

165 The Minority Shareholders raise concerns about assets that are ascribed limited or no value in the Monitor's report as does Resurgence (although to support an opposite proposition). Considerable argument was directed to the future operational

savings and profitability forecasted for Air Canada, its subsidiaries and CAIL and its subsidiaries. Mr. Peterson estimated it to be in the order of $650 to $800 million on an annual basis, commencing in 2001. The Minority Shareholders point to the tax pools of a restructured company that they submit will be of great value once CAIL becomes profitable as anticipated. They point to a pension surplus that at the very least has value by virtue of the contribution holidays that it affords. They also look to the value of the compromised claims of the restructuring itself which they submit are in the order of $449 million. They submit these cumulative benefits add value, currently or at least realizable in the future. In sharp contrast to the Resurgence position that these acts constitute oppressive behaviour, the Minority Shareholders view them as enhancing the value of their shares. They go so far as to suggest that there may well be a current going concern value of the CAC shares that has been conveniently ignored or unquantified and that the Petitioners must put evidence before the court as to what that value is.

166 These arguments overlook several important facts, the most significant being that CAC and CAIL are insolvent and will remain insolvent until the debt restructuring is fully implemented. These companies are not just technically or temporarily insolvent, they are massively insolvent. Air Canada will have invested upward of $3 billion to complete the restructuring, while the Minority Shareholders have contributed nothing. Further, it was a fundamental condition of Air Canada's support of this Plan that it become the sole owner of CAIL. It has been suggested by some that Air Canada's share purchase at two dollars per share in December 1999 was unfairly prejudicial to CAC and CAIL's creditors. Objectively, any expectation by Minority Shareholders that they should be able to participate in a restructured CAIL is not reasonable.

167 The Minority Shareholders asserted the plan is unfair because the effect of the reorganization is to extinguish the common shares of CAIL held by CAC and to convert the voting and non-voting Preferred Shares of CAIL into common shares of CAIL. They submit there is no expert valuation or other evidence to justify the transfer of CAIL's equity to the Preferred Shares. There is no equity in the CAIL shares to transfer. The year end financials show CAIL's shareholder equity at a deficit of $790 million. The Preferred Shares have a liquidation preference of $347 million. There is no evidence to suggest that Air Canada's interim support has rendered either of these companies solvent, it has simply permitted operations to continue. In fact, the unaudited consolidated financial statements of CAC for the quarter ended March 31, 2000 show total shareholders equity went from a deficit of $790 million to a deficit of $1.214 million, an erosion of $424 million.

168 The Minority Shareholders' submission attempts to compare and contrast the rights and expectations of the CAIL preferred shares as against the CAC common shares. This is not a meaningful exercise; the Petitioners are not submitting that the Preferred Shares have value and the evidence demonstrates unequivocally that they do not. The Preferred Shares are merely being utilized as a corporate vehicle to allow CAIL to become a wholly owned subsidiary of Air Canada. For example, the same result could have been achieved by issuing new shares rather than changing the designation of 853350's Preferred Shares in CAIL.

169 The Minority Shareholders have asked the court to sever the reorganization from the debt restructuring, to permit them to participate in whatever future benefit might be derived from the restructured CAIL. However, a fundamental condition of this Plan and the expressed intention of Air Canada on numerous occasions is that CAIL become a wholly owned subsidiary. To suggest the court ought to sever this reorganization from the debt restructuring fails to account for the fact that it is not two plans but an integral part of a single plan. To accede to this request would create an injustice to creditors whose claims are being seriously compromised, and doom the entire Plan to failure. Quite simply, the Plan's funder will not support a severed plan.

170 Finally, the future profits to be derived by Air Canada are not a relevant consideration. While the object of any plan under the CCAA is to create a viable emerging entity, the germane issue is what a prospective purchaser is prepared to pay in the circumstances. Here, we have the one and only offer on the table, Canadian's last and only chance. The evidence demonstrates this offer is preferable to those who have a remaining interest to a liquidation. Where secured creditors have compromised their claims and unsecured creditors are accepting 14 cents on the dollar in a potential pool of unsecured claims totalling possibly in excess of $1 billion, it is not unfair that shareholders receive nothing.

e. The Public Interest

171 In this case, the court cannot limit its assessment of fairness to how the Plan affects the direct participants. The business of the Petitioners as a national and international airline employing over 16,000 people must be taken into account.

172 In his often cited article, *Reorganizations Under the Companies' Creditors Arrangement Act* (1947), 25 Can.Bar R.ev. 587 at 593 Stanley Edwards stated:

> Another reason which is usually operative in favour of reorganization is the interest of the public in the continuation of the enterprise, particularly if the company supplies commodities or services that are necessary or desirable to large numbers of consumers, or if it employs large numbers of workers who would be thrown out of employment by its liquidation. This public interest may be reflected in the decisions of the creditors and shareholders of the company and is undoubtedly a factor which a court would wish to consider in deciding whether to sanction an arrangement under the C.C.A.A.

173 In *Re Repap British Columbia Inc.* (1998), 1 C.B.R. (4th) 49 (B.C. S.C.) the court noted that the fairness of the plan must be measured against the overall economic and business environment and against the interests of the citizens of British Columbia who are affected as "shareholders" of the company, and creditors, of suppliers, employees and competitors of the company. The court approved the plan even though it was unable to conclude that it was necessarily fair and reasonable. In *Re Quintette Coal Ltd.*, *supra*, Thackray J. acknowledged the significance of the coal mine to the British Columbia economy, its importance to the people who lived and worked in the region and to the employees of the company and their families. Other cases in which the court considered the public interest in determining whether to sanction a plan under the CCAA include *Re Canadian Red Cross Society / Société Canadienne de la Croix-Rouge* (1998), 5 C.B.R. (4th) 299 (Ont. Gen. Div. [Commercial List]) and *Algoma Steel Corp. v. Royal Bank* (April 16, 1992), Doc. Toronto B62/91-A (Ont. Gen. Div.)

174 The economic and social impacts of a plan are important and legitimate considerations. Even in insolvency, companies are more than just assets and liabilities. The fate of a company is inextricably tied to those who depend on it in various ways. It is difficult to imagine a case where the economic and social impacts of a liquidation could be more catastrophic. It would undoubtedly be felt by Canadian air travellers across the country. The effect would not be a mere ripple, but more akin to a tidal wave from coast to coast that would result in chaos to the Canadian transportation system.

175 More than sixteen thousand unionized employees of CAIL and CRAL appeared through counsel. The unions and their membership strongly support the Plan. The unions represented included the Airline Pilots Association International, the International Association of Machinists and Aerospace Workers, Transportation District 104, Canadian Union of Public Employees, and the Canadian Auto Workers Union. They represent pilots, ground workers and cabin personnel. The unions submit that it is essential that the employee protections arising from the current restructuring of Canadian not be jeopardized by a bankruptcy, receivership or other liquidation. Liquidation would be devastating to the employees and also to the local and national economies. The unions emphasize that the Plan safeguards the employment and job dignity protection negotiated by the unions for their members. Further, the court was reminded that the unions and their members have played a key role over the last fifteen years or more in working with Canadian and responsible governments to ensure that Canadian survived and jobs were maintained.

176 The Calgary and Edmonton Airport authorities, which are not for profit corporations, also supported the Plan. CAIL's obligations to the airport authorities are not being compromised under the Plan. However, in a liquidation scenario, the airport authorities submitted that a liquidation would have severe financial consequences to them and have potential for severe disruption in the operation of the airports.

177 The representations of the Government of Canada are also compelling. Approximately one year ago, CAIL approached the Transport Department to inquire as to what solution could be found to salvage their ailing company. The Government saw fit to issue an order in council, pursuant to section 47 of the *Transportation Act*, which allowed an opportunity for CAIL to approach other entities to see if a permanent solution could be found. A standing committee in the House of Commons reviewed a framework for the restructuring of the airline industry, recommendations were made and undertakings were given by Air Canada. The Government was driven by a mandate to protect consumers and promote competition. It submitted that the Plan

is a major component of the industry restructuring. Bill C-26, which addresses the restructuring of the industry, has passed through the House of Commons and is presently before the Senate. The Competition Bureau has accepted that Air Canada has the only offer on the table and has worked very closely with the parties to ensure that the interests of consumers, employees, small carriers, and smaller communities will be protected.

178 In summary, in assessing whether a plan is fair and reasonable, courts have emphasized that perfection is not required: see for example *Re Wandlyn Inns Ltd.* (1992), 15 C.B.R. (3d) 316 (N.B. Q.B.), *Quintette Coal*, *supra* and *Repap*, *supra*. Rather, various rights and remedies must be sacrificed to varying degrees to result in a reasonable, viable compromise for all concerned. The court is required to view the "big picture" of the plan and assess its impact as a whole. I return to *Algoma Steel v. Royal Bank*, *supra* at 9 in which Farley J. endorsed this approach:

> 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.

179 Fairness and reasonableness are not abstract notions, but must be measured against the available commercial alternatives. The triggering of the statute, namely insolvency, recognizes a fundamental flaw within the company. In these imperfect circumstances there can never be a perfect plan, but rather only one that is supportable. As stated in *Re Sammi Atlas Inc.* (1998), 3 C.B.R. (4th) 171 (Ont. Gen. Div. [Commercial List]) at 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.

180 I find that in all the circumstances, the Plan is fair and reasonable.

IV. Conclusion

181 The Plan has obtained the support of many affected creditors, including virtually all aircraft financiers, holders of executory contracts, AMR, Loyalty Group and the Senior Secured Noteholders.

182 Use of these proceedings has avoided triggering more than $1.2 billion of incremental claims. These include claims of passengers with pre-paid tickets, employees, landlords and other parties with ongoing executory contracts, trade creditors and suppliers.

183 This Plan represents a solid chance for the continued existence of Canadian. It preserves CAIL as a business entity. It maintains over 16,000 jobs. Suppliers and trade creditors are kept whole. It protects consumers and preserves the integrity of our national transportation system while we move towards a new regulatory framework. The extensive efforts by Canadian and Air Canada, the compromises made by stakeholders both within and without the proceedings and the commitment of the Government of Canada inspire confidence in a positive result.

184 I agree with the opposing parties that the Plan is not perfect, but it is neither illegal nor oppressive. Beyond its fair and reasonable balancing of interests, the Plan is a result of bona fide efforts by all concerned and indeed is the only alternative to bankruptcy as ten years of struggle and creative attempts at restructuring by Canadian clearly demonstrate. This Plan is one step toward a new era of airline profitability that hopefully will protect consumers by promoting affordable and accessible air travel to all Canadians.

185 The Plan deserves the sanction of this court and it is hereby granted. The application pursuant to section 185 of the ABCA is granted. The application for declarations sought by Resurgence are dismissed. The application of the Minority Shareholders is dismissed.

Application granted; counter-applications dismissed.

Footnotes

* Leave to appeal refused 84 Alta. L.R. (3d) 52, 9 B.L.R. (3d) 86, [2000] 10 W.W.R. 314, 2000 ABCA 238, 20 C.B.R. (4th) 46 (Alta. C.A. [In Chambers]).

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Court File No. CV-13-1003300CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE **FRIDAY, THE 8TH DAY**

JUSTICE MORAWETZ **OF MARCH, 2013**

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 AND ARRANGEMENT OF SKYLINK AVIATION INC.

CLAIMS PROCEDURE ORDER

THIS MOTION made by SkyLink Aviation Inc. (the "**Applicant**") for an order establishing a claims procedure for the identification and quantification of certain claims against the Applicant was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the Notice of Motion, the Affidavit of Jan Ottens sworn March 7, 2013 (the "**Ottens Affidavit**"), the report of Duff & Phelps Canada Restructuring Inc. in its capacity as Court-appointed monitor of the Applicant (the "**Monitor**") and on hearing from counsel for the Applicant, the Monitor, the Initial Consenting Noteholders (as defined in the Ottens Affidavit), the DIP Lenders (as defined in the Ottens Affidavit) and such other counsel as were present, no one else appearing although duly served as appears from the affidavit of service, filed.

SERVICE

1. **THIS COURT ORDERS** that the time for service of the Notice of Motion and Motion Record herein be and is hereby abridged and that the motion is properly returnable today and service upon any interested party other than those parties served is hereby dispensed with.

DEFINITIONS AND INTERPRETATION

2. **THIS COURT ORDERS** that, for the purposes of this Order (the "**Claims Procedure Order**"), in addition to terms defined elsewhere herein, the following terms shall have the following meanings:

(a) "**Assessments**" means Claims of Her Majesty the Queen in Right of Canada or of any Province or Territory or Municipality or any other taxation authority in any Canadian or foreign jurisdiction, including, without limitation, amounts which may arise or have arisen under any notice of assessment, notice of reassessment, notice of appeal, audit, investigation, demand or similar request from any taxation authority;

(b) "**Affected Unsecured Claims**" means all Claims against the Applicant that are not (i) Unaffected Claims, (ii) the Claims of Secured Noteholders in respect of their applicable portions of the Secured Noteholders Allowed Secured Claim, or (iii) Equity Claims; and for greater certainty, the Secured Noteholders Allowed Unsecured Claim is an Affected Unsecured Claim;

(c) **"Affected Unsecured Creditor"** means the holder of an Affected Unsecured Claim in respect of and to the extent of such Affected Unsecured Claim, whether a Known Unsecured Creditor or an Unknown Unsecured Creditor;

(d) "**Business Day**" means a day, other than a Saturday, Sunday or a statutory holiday, on which banks are generally open for business in Toronto, Ontario and New York, New York;

(e) "**Calendar Day**" means a day, including Saturday, Sunday and any statutory holidays in the Province of Ontario, Canada;

(f) "**CCAA**" means the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended;

(g) "**CCAA Proceedings**" means the within proceedings commenced by the Applicant under the CCAA;

(h) "**Claim**" means:

(i) any right or claim of any Person against the Applicant, whether or not asserted, in connection with any indebtedness, liability or obligation of any kind whatsoever of the Applicant in existence on the Filing Date, and costs payable in respect thereof to and including the Filing Date, whether or not such right or claim is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, unsecured, perfected, unperfected, present, future, known, or unknown, by guarantee, surety or otherwise, and whether or not such right is executory or anticipatory in nature, including the right or ability of any Person to advance a claim for contribution or indemnity or otherwise with respect to any matter, action, cause or chose in action, whether existing at present or commenced in the future, which

indebtedness, liability or obligation is based in whole or in part on facts which existed prior to the Filing Date and any other claims that would have been claims provable in bankruptcy had the Applicant become bankrupt on the Filing Date, including for greater certainty any Equity Claim and any claim against the Applicant for indemnification by any Director or Officer in respect of a Director/Officer Claim but excluding any such indemnification claims covered by the Directors' Charge (as such term is defined in the Initial Order) (each, a "**Prefiling Claim**", and collectively, the "**Prefiling Claims**");

(ii) any right or claim of any Person against the Applicant in connection with any indebtedness, liability or obligation of any kind whatsoever owed by the Applicant to such Person arising out of the restructuring, disclaimer, resiliation, termination or breach by the Applicant on or after the Filing Date of any contract, lease or other agreement whether written or oral (each, a "**Restructuring Period Claim**", and collectively, the "**Restructuring Period Claims**"); and

(iii) any right or claim of any Person against one or more of the Directors and/or Officers of the Applicant howsoever arising, whether or not such right or claim is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, unsecured, perfected, unperfected, present, future, known, or unknown, by guarantee, surety or otherwise, and whether or not such right is executory or anticipatory in nature, including the right or ability of any

Person to advance a claim for contribution or indemnity or otherwise with respect to any matter, action, cause or chose in action, whether existing at present or commenced in the future, including any right of contribution or indemnity, for which any Director or Officer of the Applicant is alleged to be by statute or otherwise by law liable to pay in his or her capacity as a Director or Officer (each a "**Director/Officer Claim**", and collectively, the "**Director/Officer Claims**"),

in each case other than any Unaffected Claim;

(i) "**Claims Bar Date**" means 5:00 p.m. on the date that is twenty (20) Calendar Days after the date hereof;

(j) **"Claims Package"** means the materials to be provided by the Applicant to Persons who may have a Claim in accordance with this Claims Procedure Order, which materials shall include:

(i) in the case of a Known Unsecured Creditor, a Notice of Claim, a Notice of Dispute of Claim, an Instruction Letter, and such other materials as the Applicant, with the consent of the Monitor, may consider appropriate or desirable; or

(ii) in the case of an Unknown Unsecured Creditor, a blank Proof of Claim and Proof of Claim Instruction Letter, and such other materials as the Applicant, with the consent of the Monitor, may consider appropriate or desirable.

(k) "**Claims Schedule**" means a list of all known secured and unsecured Creditors with Claims against the Applicant prepared and updated from time to time by the Applicant, with the assistance of the Monitor, showing the name, last known address, last known facsimile number, and last known email address of each such Creditor (except that where such Creditor is represented by counsel known by the Applicant, the address, facsimile number, and email address of such counsel may be substituted) and the amount of each such Creditor's Claim against the Applicant as valued by the Applicant;

(l) "**Court**" means the Superior Court of Justice (Commercial List) in the City of Toronto in the Province of Ontario;

(m) "**Creditor**" means any Person having a Claim and includes without limitation the transferee or assignee of a Claim transferred and recognized as a Creditor in accordance with paragraph 46 hereof or a trustee, executor, liquidator, receiver, receiver and manager, or other Person acting on behalf of or through such Person;

(n) "**Directors**" means all current and former directors (or their estates) of the Applicant in such capacity and "**Director**" means any one of them;

(o) "**Disputed Claim**" means a Disputed Voting Claim or a Disputed Distribution Claim;

(p) "**Disputed Director/Officer Claim**" means a Director/Officer Claim which is validly disputed in accordance with the Claims Procedure Order and which remains subject to adjudication in accordance with this Claims Procedure Order;

(q) "**Disputed Distribution Claim**" means an Affected Unsecured Claim (including a contingent Affected Unsecured Claim which may crystallize upon the occurrence of an event or events occurring after the date of the Initial Order) or such portion thereof which has not been allowed as a Distribution Claim, which is validly disputed for distribution purposes in accordance with this Claims Procedure Order and which remains subject to adjudication for distribution purposes in accordance with this Claims Procedure Order;

(r) "**Disputed Voting Claim**" means an Affected Unsecured Claim (including a contingent Affected Unsecured Claim which may crystallize upon the occurrence of an event or events occurring after the date of the Initial Order) or such portion thereof which has not been allowed as a Voting Claim, which is validly disputed for voting purposes in accordance with this Claims Procedure Order and which remains subject to adjudication for voting purposes in accordance with this Claims Procedure Order;

(s) "**Distribution Claim**" means the amount of the Claim against the Applicant as finally accepted and determined for distribution purposes in accordance with this Claims Procedure Order and the CCAA;

(t) "**Equity Claim**" has the meaning set forth in Section 2(1) of the CCAA;

(u) "**Filing Date**" means the date of the Initial Order;

(v) "**Government Authority**" means any federal, provincial, state or local government, agency or instrumentality thereof or similar entity, howsoever

designated or constituted exercising executive, legislative, judicial, regulatory or administrative functions in Canada, the United States, or elsewhere;

(w) "**Initial Order**" means the Initial Order of the Honourable Justice Morawetz made March 8, 2013, as amended, restated or varied from time to time;

(x) "**Instruction Letter**" means the instruction letter to Known Unsecured Creditors, substantially in the form attached as Schedule "B" hereto, regarding the Notice of Claim, completion of a Notice of Dispute of Claim by a Known Unsecured Creditor and the claims procedure described herein;

(y) "**IPSA**" means the Interest Payment Support Agreement dated as of September 17, 2012, as amended and supplemented from time to time, among the IPSA Noteholder Participants, SkyLink Aviation and certain guarantors party to the Secured Note Indenture;

(z) "**IPSA Noteholder Participants**" means those Secured Noteholders that executed the IPSA;

(aa) "**Known Unsecured Creditor**" means an Affected Unsecured Creditor whose Claim against the Applicant is known to the Applicant as of the date of this Claims Procedure Order and whose Affected Unsecured Claim is included in the Claims Schedule, other than a Secured Noteholder in respect of its applicable portion of the Secured Noteholders Allowed Unsecured Claim;

(bb) "**Majority Initial Consenting Noteholders**" means Initial Consenting Noteholders holding not less than a majority of the principal amount of Notes

held by all Initial Consenting Noteholders; the Applicant and the Monitor shall be entitled to rely on written confirmation from Bennett Jones LLP that the Majority Initial Consenting Noteholders have agreed, waived, consented to or approved a particular matter, and Bennett Jones LLP shall be entitled to rely on a communication in any form acceptable to Bennett Jones LLP, in its sole discretion, from any Initial Consenting Noteholder for the purpose of determining whether such Initial Consenting Noteholder has agreed, waived, consented to or approved a particular matter, and the principal amount of Notes held by such Initial Consenting Noteholder;

(cc) "**Meetings**", and each a "**Meeting**", means a meeting of the Creditors of the Applicant called for the purpose of considering and voting in respect of a Plan;

(dd) **"Meetings Order"** means the Order under the CCAA dated March 8, 2013 that, among other things, sets the date for the Meetings, as same may be amended, restated or varied from time to time;

(ee) "**Notice of Claim**" means the notice referred to in paragraph 18 hereof, substantially in the form attached hereto as Schedule "C", advising each Known Unsecured Creditor of its Claim against the Applicant as valued by the Applicant based on the books and records of the Applicant;

(ff) "**Notice of Dispute of Claim**" means the notice referred to in paragraph 19 hereof, substantially in the form attached as Schedule "D" hereto, which must be delivered to the Monitor by any Known Unsecured Creditor wishing to dispute a Notice of Claim, with reasons for its dispute;

(gg) "**Notice of Dispute of Revision or Disallowance**" means the notice referred to in paragraph 28 or 41 hereof, as applicable, substantially in the form attached as Schedule "F" hereto, which must be delivered to the Monitor by any Unknown Unsecured Creditor or a Person asserting a Director/Officer Claim wishing to dispute a Notice of Revision or Disallowance, with reasons for its dispute;

(hh) "**Notice of Revision or Disallowance**" means the notice referred to in paragraph 27 or paragraph 40 hereof, as applicable, substantially in the form of Schedule "E" advising an Unknown Unsecured Creditor or a Person asserting a Director/Officer Claim that the Applicant, with the consent of the Monitor, has revised or rejected all or part of such Unknown Unsecured Creditor's Claim set out in its Proof of Claim;

(ii) "**Notice to Creditors**" means the notice for publication by the Monitor as described in paragraph 17 hereof, substantially in the form attached hereto as Schedule "A";

(jj) **"Officers"** means all current and former officers (or their estates) of the Applicant in such capacity and "**Officer**" means any one of them;

(kk) "**Person**" means any individual, corporation, firm, limited or unlimited liability company, general or limited partnership, association (incorporated or unincorporated), trust, unincorporated organization, joint venture, trade union, Government Authority or any agency, regulatory body or officer thereof or any other entity, wherever situate or domiciled, and whether or not having legal status;

(ll) "**Plan**" means the plan of compromise and arrangement to be filed by the Applicant pursuant to the CCAA and the Meetings Order as the same may be amended, supplemented or restated from time to time in accordance with the terms thereof;

(mm) "**Plan Implementation Date**" shall have the meaning ascribed thereto in the Plan;

(nn) "**Prefiling Claim**" has the meaning ascribed to that term in paragraph 2(h)(i) of this Claims Procedure Order;

(oo) "**Proof of Claim**" means the Proof of Claim referred to in paragraph 25 hereof to be filed by Unknown Unsecured Creditors, substantially in the form attached hereto as Schedule "H";

(pp) "**Proof of Claim Instruction Letter**" means the instruction letter to Unknown Unsecured Creditors, substantially in the form attached as Schedule "G" hereto, regarding the completion of a Proof of Claim by an Unknown Unsecured Creditor;

(qq) "**Restructuring Period Claim**" has the meaning ascribed to that term in paragraph 2(h)(ii) of this Claims Procedure Order;

(rr) "**Restructuring Period Claims Bar Date**" means seven (7) Calendar Days after termination, repudiation or resiliation of the applicable agreement or other event giving rise to the applicable Restructuring Period Claim;

(ss) **"Secured Note Indenture"** means the note indenture dated March 15, 2011 that was entered into between the Applicant, certain guarantor parties and the Secured Note Indenture Trustee in connection with the issuance of the Secured Notes, as amended from time to time;

(tt) **"Secured Note Indenture Trustee"** means Computershare Trust Company of Canada, in its capacity as trustee under the Secured Note Indenture;

(uu) **"Secured Noteholder"** means a registered or beneficial holder of Secured Notes in that capacity, and, for greater certainty, does not include former registered or beneficial holders of Secured Notes;

(vv) **"Secured Noteholders Allowed Claim"** has the meaning ascribed thereto in paragraph 14 hereof;

(ww) **"Secured Noteholders Allowed Secured Claim"** has the meaning ascribed thereto in paragraph 15 hereof;

(xx) **"Secured Noteholders Allowed Unsecured Claim"** has the meaning ascribed thereto in paragraph 15 hereof;

(yy) **"Secured Notes"** means the 12.25% senior secured second lien notes due 2016 issued by the Applicant;

(zz) **"Unaffected Claims"** and each an **"Unaffected Claim"** shall have the meaning ascribed thereto in the Plan;

(aaa) **"Unknown Unsecured Creditor"** means an Affected Unsecured Creditor other than a Known Unsecured Creditor with respect to its Claim against the Applicant included in the Claims Schedule and set out in a Notice of Claim but including any Known Unsecured Creditor asserting any other Claim against the Applicant;

(bbb) "**Voting Claim**" means the amount of the Claim of a Creditor against the Applicant as finally accepted and determined for voting at a Meeting, in accordance with the provisions of this Claims Procedure Order and the CCAA.

3. **THIS COURT ORDERS** that all references as to time herein shall mean local time in Toronto, Ontario, Canada, and any reference to an event occurring on a Business Day shall mean prior to 5:00 p.m. on such Business Day unless otherwise indicated herein.

4. **THIS COURT ORDERS** that all references to the word "including" shall mean "including without limitation".

5. **THIS COURT ORDERS** that all references to the singular herein include the plural, the plural include the singular, and any gender includes the other gender.

GENERAL PROVISIONS

6. **THIS COURT ORDERS** that the Applicant and the Monitor are hereby authorized to use reasonable discretion as to the adequacy of compliance with respect to the manner in which forms delivered hereunder are completed and executed, and may, where they are satisfied that a Claim has been adequately proven, waive strict compliance with the requirements of this Claims Procedure Order as to completion and execution of such forms and to request any further documentation from a Creditor that the Applicant or the Monitor may require in order to enable them to determine the validity of a Claim.

7. **THIS COURT ORDERS** that all Claims shall be denominated in Canadian dollars. Any Claims denominated in a foreign currency shall be converted to Canadian dollars at the Bank of Canada noon exchange rate in effect at the date of the Initial Order. For greater certainty, U.S. dollar denominated claims shall be converted at the Bank of Canada Canadian/U.S. dollar noon exchange rate in effect on the Filing Date.

8. **THIS COURT ORDERS** that interest and penalties that would otherwise accrue after the Filing Date shall not be included in any Claim. Amounts claimed in Assessments issued after the Filing Date shall be subject to this Claims Procedure Order and there shall be no presumption of validity or deeming of the amount due in respect of the Claim set out in any Assessment where such Assessment was issued after the Filing Date.

9. **THIS COURT ORDERS** that copies of all forms delivered hereunder, as applicable, and determinations of Claims by the Court shall be maintained by the Monitor.

10. **THIS COURT ORDERS** that, notwithstanding anything to the contrary herein, the Applicant may, with the consent of the Monitor, refer an Affected Unsecured Creditor's Claim or a Director/Officer Claim for resolution to the Court, where in the Applicant's view such a referral is preferable or necessary for the resolution or the valuation of the Claim.

11. **THIS COURT ORDERS** that the Applicant may, with the consent of the Majority Initial Consenting Noteholders and the Monitor, apply to this Court for an Order appointing a claims officer to resolve Disputed Claims and/or Disputed Director/Officer Claims on such terms and in accordance with such process as may be ordered by this Court.

MONITOR'S ROLE

12. **THIS COURT ORDERS** that the Monitor, in addition to its prescribed rights, duties, responsibilities and obligations under the CCAA and under the Initial Order, shall assist the Applicant in connection with the administration of the claims procedure provided for herein, including the determination of Claims of Creditors and the referral of a particular Claim to the Court, as requested by the Applicant from time to time, and is hereby directed and empowered to take such other actions and fulfill such other roles as are contemplated by this Claims Procedure Order.

CLAIMS PROCEDURE FOR SECURED NOTEHOLDERS

13. **THIS COURT ORDERS** that neither the Applicant nor the Monitor shall be required to send to a Secured Noteholder a Notice of Claim and neither the Secured Noteholders nor the Secured Note Indenture Trustee shall be required to file a Proof of Claim in respect of Claims pertaining to the Notes or any Claims for amounts owing to the IPSA Noteholder Participants under the IPSA.

14. **THIS COURT ORDERS AND DECLARES** that the aggregate of all amounts owing directly by the Applicant under the IPSA, the Secured Note Indenture and the guarantees executed by the Applicant in respect of the Notes (including, in each case, principal and accrued interest thereon) up to the Filing Date (the "**Secured Noteholders Allowed Claim**") shall be determined by the Applicant, with the consent of the Monitor and the Majority Initial Consenting Noteholders, and reported to the Court in advance of the Meetings. In the event that the Applicant, the Monitor and the Majority Initial Consenting Noteholders are unable to agree on the amount of the Secured Noteholder Allowed Claim, any of such parties shall be entitled to apply to this Court for advice and

directions concerning the determination of the Secured Noteholders Allowed Secured Claim.

15. **THIS COURT ORDERS** that, for purposes of this Claims Procedure Order, the Meetings Order and the Plan, the Secured Noteholders Allowed Claim shall be allowed for both voting and distribution purposes against the Applicant as follows:

(a) an amount to be agreed among the Applicant, the Monitor and the Majority Initial Consenting Noteholders, and reported to the Court in advance of the Meetings, shall be allowed as secured Claims against the Applicant (collectively the "**Secured Noteholders Allowed Secured Claim**"); and

(b) the balance of the Secured Noteholders Allowed Claim shall be allowed as unsecured Claims against the Applicant (collectively the "**Secured Noteholders Allowed Unsecured Claim**"),

provided that the foregoing treatment of the Secured Noteholders Allowed Claim shall be without prejudice to the right of the Secured Noteholders and the Secured Note Indenture Trustee to treat the full amount of the Secured Noteholders Allowed Claim as a secured Claim for any other purpose. In the event that the Applicant, the Monitor and the Majority Initial Consenting Noteholders are unable to agree on the amount of the Secured Noteholders Allowed Secured Claim, any of such parties shall be entitled to apply to this Court for advice and directions concerning the determination of the Secured Noteholders Allowed Secured Claim.

16. **THIS COURT ORDERS** that the Claims comprising the Secured Noteholders Allowed Secured Claim and the Secured Noteholders Allowed Unsecured Claim shall constitute

Voting Claims and Distribution Claims for the purpose of voting on and receiving distributions pursuant to the Plan.

NOTICE TO CREDITORS

17. **THIS COURT ORDERS** that forthwith after the date of this Claims Procedure Order the Monitor shall publish the Notice to Creditors, for at least two (2) Business Days in The Globe & Mail.

CLAIMS PROCEDURE FOR KNOWN UNSECURED CREDITORS

(i) Notice of Claims

18. **THIS COURT ORDERS** that the Monitor shall send a Claims Package to each of the Known Unsecured Creditors by prepaid ordinary mail to the address as shown on the Claims Schedule before 11:59 p.m. on the date that is three (3) Business Days after the date hereof. The Monitor shall specify in the Notice of Claim the Known Unsecured Creditor's Claim against the Applicant for voting and distribution purposes as valued by the Applicant based on the books and records of the Applicant.

(ii) Adjudication of Claims against the Applicant

19. **THIS COURT ORDERS** that if a Known Unsecured Creditor wishes to dispute the amount of the Claim as set out in the Notice of Claim, the Known Unsecured Creditor shall deliver to the Monitor a Notice of Dispute of Claim which must be received by the Monitor by no later than the Claims Bar Date. Such Known Unsecured Creditor shall specify therein the details of the dispute with respect to its Claim and shall specify whether it disputes the amount of the Claim for voting and/or distribution purposes.

20. **THIS COURT ORDERS** that if a Known Unsecured Creditor does not deliver to the Monitor a completed Notice of Dispute of Claim such that it is received by the Monitor by the Claims Bar Date disputing its Claims as valued in the Notice of Claim for voting and distribution purposes; then (a) such Known Unsecured Creditor shall be deemed to have accepted the valuation of the Known Unsecured Creditor's Claims as set out in the Notice of Claim; (b) such Known Unsecured Creditor's Claim as valued in the Notice of Claim shall be treated as both a Voting Claim and a Distribution Claim; and (c) any and all of the Known Unsecured Creditor's rights to dispute the Claims as valued by the Applicant or to otherwise assert or pursue such Claims in an amount that exceeds the amount set forth on the Notice of Claim shall be forever extinguished and barred without further act or notification. A Known Unsecured Creditor may accept a Claim for voting purposes as set out in the Notice of Claim and dispute the Claim for distribution purposes in such Known Unsecured Creditor's Notice of Dispute of Claim provided that it does so in its Notice of Dispute of Claim and such Notice of Dispute of Claim is received by the Monitor by the Claims Bar Date. A determination of a Voting Claim of a Known Unsecured Creditor does not in any way affect and is without prejudice to the process to determine such Known Unsecured Creditor's Distribution Claim.

(iii) Resolution of Claims against the Applicant

21. **THIS COURT ORDERS** that in the event that the Applicant, with the assistance of the Monitor, is unable to resolve a dispute regarding any Disputed Voting Claim with a Known Unsecured Creditor, the Applicant shall so notify the Monitor and the Known Unsecured Creditor. Thereafter, the Disputed Voting Claim shall be referred to the Court for resolution or to such alternative dispute resolution as may be ordered by the Court or

as agreed to by the Monitor, the Applicant and the applicable Creditor; provided, however that to the extent a Claim is referred under this paragraph to the Court or an alternative dispute resolution, it shall be on the basis that the value of the Claim against the Applicant shall be resolved or adjudicated both for voting and distribution purposes (and that it shall remain open to the parties to agree that the Creditor's Voting Claim may be settled by the Known Unsecured Creditor and the Applicant without prejudice to a future determination of the Creditor's Distribution Claim). The Court or an alternative dispute resolution, as the case may be, shall resolve the dispute between the Applicant and the Known Unsecured Creditor.

22. **THIS COURT ORDERS** that where the value of a Known Unsecured Creditor's Disputed Voting Claim has not been finally determined in accordance with this Claims Procedure Order by the date on which a vote is held at a Meeting, the ability of such Known Unsecured Creditor to vote its Disputed Voting Claim and the effect of casting any such vote shall be governed by the Meetings Order.

23. **THIS COURT ORDERS** that in the event that the Applicant, with the assistance of the Monitor, is unable to resolve a dispute with a Known Unsecured Creditor regarding any Distribution Claim, the Applicant shall so notify the Monitor and the Known Unsecured Creditor. Thereafter, the Disputed Distribution Claim shall be referred to the Court for resolution or to such alternative dispute resolution as may be ordered by the Court or as agreed to by the Monitor, the Applicant and the applicable Creditor. The Court or an alternative dispute resolution, as the case may be, shall resolve the dispute between the Applicant and such Known Unsecured Creditor.

24. **THIS COURT ORDERS** that, notwithstanding anything to the contrary in this Order, in respect of any Disputed Claim with a Known Unsecured Creditor that exceeds $150,000, the Monitor and the Applicant shall not accept, admit, settle, resolve, value (for any purpose) or revise such Disputed Claim or any part thereof without the consent of the Majority Initial Consenting Noteholders or a further Order of the Court.

CLAIMS PROCEDURE FOR UNKNOWN UNSECURED CREDITORS

(i) Proof of Claim

25. **THIS COURT ORDERS** that the Monitor shall send a Claims Package to any Unknown Unsecured Creditor who makes a request therefor prior to the Claims Bar Date. Any Unknown Unsecured Creditor that wishes to assert a Claim must file a completed Proof of Claim such that it is received by the Monitor by no later than the Claims Bar Date.

26. **THIS COURT ORDERS** that, notwithstanding anything to the contrary in paragraphs 25 and 27 hereof, the following shall apply with respect to any Restructuring Period Claims:

(a) any notices of disclaimer or resiliation delivered to Creditors by the Applicant or the Monitor after the Filing Date shall be accompanied by a Claims Package;

(b) the Monitor shall send a Claims Package to any Creditor who makes a request therefor in respect of a Restructuring Period Claim prior to the Restructuring Period Claims Bar Date;

(c) any Creditor that wishes to assert a Restructuring Period Claim must return a completed Proof of Claim to the Monitor such that it is received by the Monitor by no later than 5:00 p.m. on the Restructuring Period Claims Bar Date;

(d) any Creditor that does not return a Proof of Claim to the Monitor by 5:00 p.m. on the Restructuring Period Claims Bar Date shall not be entitled to attend or vote at any Meeting and shall not be entitled to receive any distribution from any Plan and any and all Restructuring Period Claims of such Creditor shall be forever extinguished and barred without any further act or notification.

(ii) Adjudication of Claims against the Applicant

27. **THIS COURT ORDERS** that any Unknown Unsecured Creditor that does not file a Proof of Claim such that it is received by the Monitor by the Claims Bar Date with respect to a Claim against the Applicant shall not be entitled to attend or vote at any Meeting and shall not be entitled to receive any distribution from any Plan and any and all such Claims of such Unknown Unsecured Creditor shall be forever extinguished and barred without any further act or notification and irrespective of whether or not such Unknown Unsecured Creditor received a Claims Package.

28. **THIS COURT ORDERS** that the Applicant, with the assistance of the Monitor, shall review all Proofs of Claim received by the Claims Bar Date or the Restructuring Period Claims Bar Date, as applicable, and shall accept, revise or reject the amount of each Claim against the Applicant set out therein for voting and/or distribution purposes. The Monitor shall notify each Unknown Unsecured Creditor who has delivered a Proof of Claim by the Claims Bar Date or the Restructuring Period Claims Bar Date, as applicable, as to whether such Unknown Unsecured Creditor's Claim against the Applicant as set out therein has been revised or rejected for voting purposes (and/or for distribution purposes if the Applicant elects to do so), and the reasons therefor, by sending a Notice of Revision or Disallowance.

29. **THIS COURT ORDERS** that any Unknown Unsecured Creditor who wishes to dispute a Notice of Revision or Disallowance sent pursuant to the immediately preceding paragraph shall deliver a Notice of Dispute of Revision or Disallowance to the Monitor by no later than 5:00 p.m. on the date that is seven (7) Calendar Days after the date of delivery to the applicable Unknown Unsecured Creditor of the Notice of Revision or Disallowance.

30. **THIS COURT ORDERS** that where an Unknown Unsecured Creditor that receives a Notice of Revision or Disallowance pursuant to paragraph 28 above does not file a Notice of Dispute of Revision or Disallowance by the time set out in paragraph 29 above, the value of such Unknown Unsecured Creditor's Voting Claim and Distribution Claim (if the Notice of Revision or Disallowance also dealt with the Distribution Claim) shall be deemed to be as set out in the Notice of Revision or Disallowance and any and all of the Unknown Unsecured Creditor's rights to dispute the Claim(s) as valued on the Notice of Revision or Disallowance or to otherwise assert or pursue such Claims in an amount that exceeds the amount set forth on the Notice of Revision or Disallowance, in each case for voting purposes and distribution purposes (if the Notice of Revision or Disallowance dealt with the Distribution Claim), shall be forever extinguished and barred without further act or notification.

(iii) Resolution of Claims against the Applicant

31. **THIS COURT ORDERS** that in the event that the Applicant, with the assistance of the Monitor, is unable to resolve a dispute regarding any Disputed Voting Claim with an Unknown Unsecured Creditor, the Applicant shall so notify the Monitor and the Unknown Unsecured Creditor. Thereafter, the Disputed Voting Claim shall be referred

to the Court for resolution or to such alternative dispute resolution as may be ordered by the Court or as agreed to by the Monitor, the Applicant and the applicable Creditor; provided, however that to the extent a Claim is referred under this paragraph to the Court or an alternative dispute resolution, it shall be on the basis that the value of the Claim shall be resolved or adjudicated both for voting and distribution purposes (and that it shall remain open to the parties to agree that the Creditor's Voting Claim may be settled by the Unknown Unsecured Creditor and the Applicant without prejudice to a future hearing by the Court or an alternative dispute resolution to determine the Creditor's Distribution Claim in accordance with paragraph 36 hereof). The Court or an alternative dispute resolution, as the case may be, shall resolve the dispute between the Applicant and the Unknown Unsecured Creditor.

32. **THIS COURT ORDERS** that where the value of an Unknown Unsecured Creditor's Voting Claim has not been finally determined by the date of the Meetings, the ability of such Unknown Unsecured Creditor to vote its Disputed Voting Claim and the effect of casting any such vote shall be governed by the Meetings Order.

33. **THIS COURT ORDERS** that the Applicant, with the assistance of the Monitor, shall review and consider the Proofs of Claim filed in accordance with this Claims Procedure Order in order to determine the Distribution Claims of Unknown Unsecured Creditors. The Applicant shall notify each Unknown Unsecured Creditor who filed a Proof of Claim and who did not receive a Notice of Revision or Disallowance for distribution purposes pursuant to paragraph 28 herein as to whether such Unknown Unsecured Creditor's Claim as set out in such Unknown Unsecured Creditor's Proof of Claim has been revised

or rejected for distribution purposes, and the reasons therefor, by delivery of a Notice of Revision or Disallowance.

34. **THIS COURT ORDERS** that any Unknown Unsecured Creditor who wishes to dispute a Notice of Revision or Disallowance for distribution purposes sent pursuant to the immediately preceding paragraph shall deliver a Notice of Dispute of Revision or Disallowance to the Monitor such that it is received by the Monitor by no later than 5:00 p.m. on the date that is seven (7) Calendar Days after the date of delivery to the applicable Unknown Unsecured Creditor of the Notice of Revision or Disallowance referred to in paragraph 33.

35. **THIS COURT ORDERS** that where an Unknown Unsecured Creditor that receives a Notice of Revision or Disallowance pursuant to paragraph 33 above does not file a Notice of Dispute of Revision or Disallowance for distribution purposes by the time set out in paragraph 34 above, the value of such Unknown Unsecured Creditor's Distribution Claim shall be deemed to be as set out in the Notice of Revision or Disallowance for distribution purposes and any and all of the Unknown Unsecured Creditor's rights to dispute the Distribution Claim as valued on the Notice of Revision or Disallowance or to otherwise assert or pursue such Distribution Claim in an amount that exceeds the amount set forth on the Notice of Revision or Disallowance shall be forever extinguished and barred without further act or notification.

36. **THIS COURT ORDERS** that in the event that the Applicant, with the assistance of the Monitor, is unable to resolve a dispute regarding any Distribution Claim with an Unknown Unsecured Creditor, the Applicant shall so notify the Monitor and the Unknown Unsecured Creditor. Thereafter, the Disputed Distribution Claim shall be

referred to the Court for resolution or to such alternative dispute resolution as may be ordered by the Court or as agreed to by the Monitor, the Applicant and the applicable Creditor. The Court or an alternative dispute resolution, as the case may be, shall resolve the dispute between the Applicant and the Unknown Unsecured Creditor.

37. **THIS COURT ORDERS** that, notwithstanding anything to the contrary in this Order, in respect of any Disputed Claim with an Unknown Unsecured Creditor that exceeds $150,000, the Monitor and the Applicant shall not accept, admit, settle, resolve, value (for any purpose) or revise such Disputed Claim or any part thereof without the consent of the Majority Initial Consenting Noteholders or a further Order of the Court.

(iv) Adjudication of Director/Officer Claims

38. **THIS COURT ORDERS** that, for greater certainty, the procedures in paragraphs 18-37 shall not apply to adjudication of Director/Officer Claims.

39. **THIS COURT ORDERS** that if a Person does not file a Proof of Claim with the Monitor such that it is received by the Monitor by the Claims Bar Date with respect to a Director/Officer Claim, any and all such Claims of such Person shall be forever extinguished and barred without any further act or notification and irrespective of whether or not such Person received a Claims Package and the Directors and Officers shall have no liability whatsoever in respect of such Director/Officer Claims.

40. **THIS COURT ORDERS** that the Applicant, with the assistance of the Monitor, shall review all Proofs of Claim received by the Claims Bar Date in respect of Director/Officer Claims and shall accept, revise or reject the amount of each Director/Officer Claim set out therein. The Monitor shall provide copies of Proofs of Claim in respect of

Director/Officer Claims to any counsel to a Director or Officer upon such request being made. The Monitor, with the consent of the Applicant, shall notify each Person who has delivered a Proof of Claim by the Claims Bar Date in respect of Director/Officer Claims as to whether such Person's Claim as set out therein has been revised or rejected and the reasons therefor, by sending a Notice of Revision or Disallowance. The Monitor shall provide a copy of such Notice of Revision or Disallowance to any counsel to a Director or Officer.

41. **THIS COURT ORDERS** that any Person who wishes to dispute a Notice of Revision or Disallowance sent pursuant to the immediately preceding paragraph shall deliver a Notice of Dispute of Revision or Disallowance to the Monitor such that it is received by the Monitor by no later than 5:00 p.m. on the date that is seven (7) Calendar Days after the date of delivery to the applicable Person of the Notice of Revision or Disallowance. The Monitor shall provide a copy of such Notice of Dispute of Revision or Disallowance to any counsel to a Director or Officer upon such request being made.

42. **THIS COURT ORDERS** that where a Person that receives a Notice of Revision or Disallowance pursuant to paragraph 40 above does not file a Notice of Dispute of Revision or Disallowance by the time set out in paragraph 41 above, the value of such Person's Director/Officer Claim shall be deemed to be as set out in the Notice of Revision or Disallowance and any and all of such Person's rights to dispute the Director/Officer Claim(s) as valued on the Notice of Revision or Disallowance or to otherwise assert or pursue such Director/Officer Claims in an amount that exceeds the amount set forth on the Notice of Revision or Disallowance shall be forever extinguished and barred without further act or notification.

(v) Resolution of Director/Officer Claims

43. **THIS COURT ORDERS** that in the event that the Applicant determines that it is necessary to finally determine the amount of a Director/Officer Claim and the Applicant, with the assistance of the Monitor and the consent of the applicable Directors and Officers, is unable to resolve a dispute regarding such Director/Officer Claim with the Person asserting such Director/Officer Claim, the Applicant shall so notify the Monitor and such Person. Thereafter, the Disputed Director/Officer Claim shall be referred to the Court for resolution or to such alternative dispute resolution as may be ordered by the Court or as agreed to by the Monitor, the Applicant and the applicable Person. The Court or an alternative dispute resolution, as the case may be, shall resolve the dispute.

44. **THIS COURT ORDERS** that, notwithstanding anything to the contrary in this Order, in respect of any Disputed Director/Officer Claim that exceeds $150,000, the Monitor and the Applicant shall not accept, admit, settle, resolve, value (for any purpose) or revise such Disputed Director/Officer Claim or any part thereof without the consent of the Majority Initial Consenting Noteholders or a further Order of the Court.

SET-OFF

45. **THIS COURT ORDERS** that the Applicant may set-off (whether by way of legal, equitable or contractual set-off) against payments or other distributions to be made pursuant to the Plan to any Creditor, any claims of any nature whatsoever that the Applicant may have against such Creditor, however, neither the failure to do so nor the allowance of any Claim hereunder shall constitute a waiver or release by the Applicant of any such claim that the Applicant may have against such Creditor.

NOTICE OF TRANSFEREES

46. **THIS COURT ORDERS** that if, after the Filing Date, the holder of a Claim transfers or assigns the whole of such Claim to another Person, neither the Monitor nor the Applicant shall be obligated to give notice or otherwise deal with the transferee or assignee of such Claim in respect thereof unless and until actual notice of transfer or assignment, together with satisfactory evidence of such transfer or assignment, shall have been received and acknowledged by the Applicant and the Monitor in writing and thereafter such transferee or assignee shall for the purposes hereof constitute the "Creditor" in respect of such Claim. Any such transferee or assignee of a Claim shall be bound by any notices given or steps taken in respect of such Claim in accordance with this Claims Procedure Order prior to receipt and acknowledgement by the Applicant and the Monitor of satisfactory evidence of such transfer or assignment. A transferee or assignee of a Claim takes the Claim subject to any rights of set-off to which the Applicant may be entitled with respect to such Claim. For greater certainty, a transferee or assignee of a Claim is not entitled to set-off, apply, merge, consolidate or combine any Claims assigned or transferred to it against or on account or in reduction of any amounts owing by such Person to the Applicant. The effect of a transfer or assignment of a Claim for purposes of voting at any

Meeting shall be governed by the Meetings Order. Reference to transfer in this Claims Procedure Order includes a transfer or assignment whether absolute or intended as security.

47. **THIS COURT ORDERS** that, subject to any restrictions contained in Applicable Laws, a Creditor (other than a Secured Noteholder) may transfer or assign the whole of its Claim after the Meetings provided that the Applicant or the Monitor shall not be obliged to make distributions to any such transferee or assignee or otherwise deal with such transferee or assignee as a Creditor in respect thereof unless and until actual notice of the transfer or assignment, together with satisfactory evidence of such transfer or assignment and such other documentation as the Applicant and the Monitor may reasonably require, has been received by the Applicant and the Monitor on or before the Plan Implementation Date, or such other date as the Monitor may agree, failing which the original transferor shall have all applicable rights as the "Creditor" with respect to such Claim as if no transfer of the Claim had occurred. Thereafter, such transferee or assignee shall, for all purposes in accordance with the Claims Procedure Order constitute the Creditor in respect of the transferred or assigned Claim and shall be bound by notices given and steps taken in respect of such Claim. For greater certainty, the Applicant shall not recognize partial transfers or assignments of Claims.

48. **THIS COURT ORDERS** that nothing in this Claims Procedure Order shall restrict Secured Noteholders who have beneficial ownership of a Claim in respect of Secured Notes from transferring or assigning such Claim, in whole or in part, in connection with a transfer of such Secured Noteholders' Notes, provided that if such transfer or assignment occurs after any applicable record date, the Applicant, the Monitor and their agents shall

have no obligation to deal with such transferee or assignee as a Creditor in respect thereof for purposes of dealing with any matter in respect of which such record date was set, and the Applicant, the Monitor and their agents shall deal with the Secured Noteholder who beneficially owned such notes as of such record date in respect of any such matter. Secured Noteholders who assign or acquire their Claims after the Plan Implementation Date shall be wholly responsible for ensuring that plan distributions intended to be included within such assignments are in fact delivered to the assignee and neither the Applicant, the Monitor, CDS, the Secured Note Indenture Trustee nor their agents, as applicable, shall have any liability in connection therewith.

SERVICE AND NOTICES

49. **THIS COURT ORDERS** that the Applicant and the Monitor may, unless otherwise specified by this Claims Procedure Order, serve and deliver the Claims Package, any letters, notices or other documents to Creditors or any other interested Person by forwarding true copies thereof by prepaid ordinary mail, courier, personal delivery, facsimile transmission or email to such Persons at the physical or electronic address, as applicable, last shown on the books and records of the Applicant or set out in such Creditor's Proof of Claim. Any such service and delivery shall be deemed to have been received: (i) if sent by ordinary mail, on the third Business Day after mailing within Ontario, the fifth Business Day after mailing within Canada (other than within Ontario), and the tenth Business Day after mailing internationally; (ii) if sent by courier or personal delivery, on the next Business Day following dispatch; and (iii) if delivered by facsimile transmission or email by 5:00 p.m. on a Business Day, on such Business Day and if delivered after 5:00 p.m. or other than on a Business Day, on the following Business Day.

50. **THIS COURT ORDERS** that any notice or communication required to be provided or delivered by a Creditor to the Monitor or the Applicant under this Claims Procedure Order shall be in writing in substantially the form, if any, provided for in this Claims Procedure Order and will be sufficiently given only if delivered by prepaid registered mail, courier, personal delivery, facsimile transmission or email addressed to:

If to the Applicant:

c/o SkyLink Aviation Inc.
1027 Yonge Street,
Toronto, Ontario M4W 2K9
Attention: David Miller, Chief Compliance Officer and General Counsel

Fax: (416) 924-9006
Email: dmiller@skylinkaviation.com

With a copy to:

Goodmans LLP
Bay Adelaide Centre
333 Bay Street, Suite 3400
Toronto, Ontario M5H 2S7
Attention: Robert Chadwick/ Logan Willis

Fax: (416) 979-1234
Email: rchadwick@goodmans.ca/ lwillis@goodmans.ca

If to the Monitor:

Duff & Phelps Canada Restructuring Inc., Court-appointed Monitor of SkyLink Aviation Inc.

Claims Process

333 Bay Street
14th Floor
Toronto, Ontario M5H 2R2
Attention: Robert Kofman/David Sieradzki

Fax: (647) 497-9490/(647) 497-9470
Email bobby.kofman@duffandphelps.com/david.sieradzki@duffandphelps.com

With a copy to:

Lax O'Sullivan Scott Lisus LLP
145 King Street West
Suite 1920
Toronto, Ontario M5H 1J8
Attention: Matthew Gottlieb

Fax: (416) 598-3730
Email: mgottlieb@counsel-toronto.com

Any such notice or communication delivered by a Creditor shall be deemed to be received upon actual receipt by the Monitor thereof during normal business hours on a Business Day or if delivered outside of normal business hours, the next Business Day.

51. **THIS COURT ORDERS** that if during any period during which notices or other communications are being given pursuant to this Claims Procedure Order a postal strike or postal work stoppage of general application should occur, such notices or other communications sent by ordinary mail and then not received shall not, absent further Order of this Court, be effective and notices and other communications given hereunder during the course of any such postal strike or work stoppage of general application shall only be effective if given by courier, personal delivery, facsimile transmission or email in accordance with this Claims Procedure Order.

52. **THIS COURT ORDERS** that in the event that this Claims Procedure Order is later amended by further Order of the Court, the Applicant or the Monitor may post such further Order on the Monitor's website and such posting shall constitute adequate notice to Creditors of such amended claims procedure.

MISCELLANEOUS

53. **THIS COURT ORDERS** that notwithstanding any other provisions of this Claims Procedure Order, the solicitation by the Monitor or the Applicant of Proofs of Claim, the

delivery of a Notice of Claim, and the filing by any Person of any Proof of Claim shall not, for that reason only, grant any Person any standing in these proceedings or rights under any proposed Plan.

54. **THIS COURT ORDERS** that nothing in this Claims Procedure Order shall constitute or be deemed to constitute an allocation or assignment of Claims into particular classes for the purpose of a Plan and, for greater certainty, the treatment of Claims, or any other claims and the classification of Creditors for voting and distribution purposes shall be subject to the terms of any proposed Plan, the Meetings Order or further Order of this Court.

55. **THIS COURT ORDERS** that the Applicant or the Monitor may from time to time apply to this Court to amend, vary, supplement or replace this Order or for advice and directions concerning the discharge of their respective powers and duties under this Order or the interpretation or application of this Order.

56. **THIS COURT ORDERS** that any interested party, other than the Applicant or the Monitor, that wishes to amend or vary this Order shall bring a motion before this Court on a date to be set by this Court upon the granting of this Order (the "**Comeback Date**"), and any such interested party shall give notice to any other party or parties likely to be affected by the order sought at least four (4) Calendar Days in advance of the Comeback Date.

57. **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 be enforceable.

58. **THIS COURT REQUESTS** the aid and recognition of other Canadian and foreign Courts, tribunal, regulatory or administrative bodies, including any Court or administrative tribunal of any Federal or State Court or administrative body in the United States of America, to act in aid of and to be complementary to this Court in carrying out the terms of this Order where required. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Applicant and to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Monitor in any foreign proceeding, or to assist the Applicant and the Monitor and their respective agents in carrying out the terms of this Order.

A. Anissimova
Registrar

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

MAR 8 - 2013

SCHEDULE "A"

NOTICE TO CREDITORS OF SkyLink Aviation Inc. (the "Applicant") and/or its Directors or Officers

RE: NOTICE OF CLAIMS BAR DATE IN COMPANIES' CREDITORS ARRANGEMENT ACT ("CCAA") PROCEEDINGS

NOTICE IS HEREBY GIVEN that pursuant to an Order of the Ontario Superior Court of Justice made March 8, 2013 (the "**Order**"), a claims procedure has been commenced for the purpose of identifying and determining all claims against the Applicant and the Directors and Officers of the Applicant that are to be affected in the Applicant's Plan of Compromise and Arrangement under the CCAA.

PLEASE TAKE NOTICE that the claims procedure applies only to the Claims described in the Order. A copy of the Order and other public information concerning CCAA Proceedings can be found at the following website: http://www.duffandphelps.com/services/restructuring/Pages/RestructuringCases.aspx. Any creditor, other than a Secured Noteholder, who has not received a Notice of Claim and who believes that he or she has a Claim against the Applicant or a Director or Officer under the Order must contact the Monitor in order to obtain a Proof of Claim form.

THE CLAIMS BAR DATE is **5:00 p.m. (Toronto Time) on March 28, 2013**. Proofs of Claim in respect of Prefiling Claims and Director/Officer Claims must be completed and filed with the Monitor on or before the Claims Bar Date.

THE RESTRUCTURING PERIOD CLAIMS BAR DATE is **5:00pm (Toronto Time) on the date that is seven (7) Calendar Days after termination, repudiation or resiliation of the agreement or other event giving rise to the Restructuring Period Claim.** Proofs of Claim in respect of Restructuring Period Claims must be completed and filed with the Monitor on or before the Restructuring Period Claims Bar Date.

HOLDERS OF CLAIMS who have not received a Notice of Claim and who do not file a Proof of Claim by the Claims Bar Date or the Restructuring Period Claims Bar Date, as applicable, shall not be entitled to vote at any meeting of creditors regarding the plan of compromise and arrangement being proposed by the Applicant or to participate in any distribution under such plan, and any Claims such creditor may have against the Applicant and/or any of the Directors or Officers of the Applicant shall be forever extinguished and barred.

CREDITORS REQUIRING INFORMATION or claim documentation may contact the Monitor at the following address by prepaid registered mail, courier, personal delivery, facsimile transmission, email or telephone:

Duff & Phelps Canada Restructuring Inc., Court-appointed Monitor of SkyLink Aviation Inc.

Claims Process

333 Bay Street
14th Floor
Toronto, Ontario M5H 2R2
Attention: Robert Kofman/David Sieradzki

Telephone: (416) 932-6228/(416) 932-6030
Fax: (647) 497-9490/(647) 497-9470
Email bobby.kofman@duffandphelps.com/david.sieradzki@duffandphelps.com

SCHEDULE "B"

INSTRUCTION LETTER
FOR THE CLAIMS PROCEDURE FOR KNOWN UNSECURED CREDITORS
OF SKYLINK AVIATION INC. (the "Applicant")

CLAIMS PROCEDURE

By Order of the Ontario Superior Court of Justice (Commercial List) dated March 8, 2013 (as such Order may be amended from time to time, the "**Claims Procedure Order**") under the *Companies' Creditors Arrangement Act,* R.S.C. 1985, c. C-36 (the "**CCAA**"), the Applicant and Duff & Phelps Canada Restructuring Inc., in its capacity as Court-appointed monitor of the Applicant (the "**Monitor**"), have been authorized to conduct a claims procedure (the "**Claims Procedure**"). A copy of the Claims Procedure Order and other public information concerning these proceedings can be obtained from the Monitor's website at http://www.duffandphelps.com/services/restructuring/Pages/RestructuringCases.aspx.

This letter provides general instructions for completing a Notice of Dispute of Claim form. Defined terms not defined within this instruction letter shall have the meaning ascribed thereto in the Claim Procedure Order.

The Claims Procedure is intended to identify and determine the amount of any claims against the Applicant or any or all of the Directors or Officers of the Applicant, whether unliquidated, contingent or otherwise, that are to be affected in the plan of compromise and arrangement being pursued by the Applicant under the CCAA. Please review the Claims Procedure Order for the full terms of the Claims Procedure.

All notices and inquiries with respect to the Claims Procedure should be directed to the Monitor by prepaid registered mail, courier, personal delivery, facsimile transmission, email, or telephone at the address below:

Duff & Phelps Canada Restructuring Inc., Court-appointed Monitor of SkyLink Aviation Inc.

Claims Process

333 Bay Street
14th Floor
Toronto, Ontario M5H 2R2
Attention: Robert Kofman/David Sieradzki

Telephone: (416) 932-6228/(416) 932-6030
Fax: (647) 497-9490/(647) 497-9470
Email bobby.kofman@duffandphelps.com/david.sieradzki@duffandphelps.com

FOR CREDITORS DISPUTING A NOTICE OF CLAIM

If you have received a Notice of Claim and you dispute the value of your Claims as set forth therein for voting and/or distribution purposes, you must file a Notice of Dispute of Claim form with the Monitor. All Notices of Dispute of Claim **must be received by the Monitor on or before 5:00 p.m. (Toronto Time) on March 28, 2013**. If a Notice of Dispute of Claim is not received on or before that time then you shall be deemed to have accepted the valuation of your Claims as set out in the Notice of Claim for both voting and distribution purposes, and any and all of your rights to dispute such Claims as so valued or to otherwise assert or pursue such Claims in an amount that exceeds the amount set forth on the Notice of Claim shall be forever extinguished and barred without further act or notification.

If you believe you have any additional Claims other than the Claims set out in the Notice of Claim (including a Pre-Filing Claim, a Director/Officer Claim or a Restructuring Period Claim) you must file a Proof of Claim to assert any such additional Claims so that it is received by the Monitor by the Claims Bar Date or the Restructuring Period Claims Bar Date, as applicable, otherwise any such Claim shall be forever extinguished and barred without further act or notification.

All Claims shall be converted to Canadian dollars at the Bank of Canada Canadian Dollar noon exchange rate in effect at the date of the Initial Order.

Additional Notices of Dispute of Claim forms and Proof of Claim forms can be obtained from the Monitor's website at http://www.duffandphelps.com/services/restructuring/Pages/RestructuringCases.aspx or by contacting the Monitor.

DATED this _____ day of _____, 2013.

SCHEDULE "C"

Court File No. ●

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST
IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED AND IN THE MATTER OF A PLAN OF COMPROMISE AND ARRANGEMENT OF SKYLINK AVIATION INC.

NOTICE OF CLAIM

TO: **[insert name and address of creditor]**

This notice is issued pursuant to the Claims Procedure for Claims in respect of SkyLink Aviation Inc. (the "**Applicant**"), and its Directors and Officers, which was approved by the Order of the Ontario Superior Court of Justice (Commercial List) granted March 8, 2013 in the CCAA Proceedings ("**Claims Procedure Order**"). Capitalized terms used herein are as defined in the Claims Procedure Order unless otherwise noted. A copy of the Claims Procedure Order can be obtained from the website of Duff & Phelps Canada Restructuring Inc., the Court-appointed Monitor of the Applicant, at http://www.duffandphelps.com/services/restructuring/Pages/RestructuringCases.aspx.

According to the books, records and other relevant information in the possession of the Applicant, your total Claim(s) are as follows:

Type of Claim	Amount
	$

If you agree that the foregoing amount accurately reflects your Claim against the Applicant, you are not required to respond to this Notice of Claim. If you disagree with the amount of your Claim against the Applicant as set out herein, you must deliver a Notice of Dispute of Claim to

the Monitor such that it is received by the Monitor by no later than **5:00 p.m. (Toronto Time) on March 28, 2013** (the "**Claims Bar Date**").

You may accept the Claim set out in this Notice of Claim for voting purposes without prejudice to your rights to dispute the Claim for distribution purposes. If you fail to deliver a Notice of Dispute of Claim for voting and distribution purposes such that it is received by the Monitor by the Claims Bar Date, then you shall be deemed to have accepted your Claim as set out in this Notice of Claim.

If you believe you have a Claim that has not been provided for in the Notice of Claim you received, including any additional Prefiling Claim, any Restructuring Period Claim or any Director/Officer Claims, you must contact the Monitor to request a Claims Package and you must complete a Proof of Claim form in respect of such Claim and deliver it to the Monitor at the address or facsimile noted below such that it is received by the Monitor by the Claims Bar Date (in respect of a Prefiling Claim or Director/Officer Claims) and by 5:00pm (Toronto Time) on the date that is seven (7) Calendar Days after termination, repudiation or resiliation of the agreement or other event giving rise to the Restructuring Period Claim (in respect of a Restructuring Period Claim) (the "**Restructuring Period Claims Bar Date**"). If you fail to deliver such Proof of Claim by such date, you shall not be entitled to vote at any Meeting of creditors regarding the plan of compromise and arrangement by the Applicant or participate in any distribution under such plan in respect of such Claim, and such Claim shall be forever extinguished and barred.

DATED at Toronto, this ____ day of ●, 2013.

Duff & Phelps Canada Restructuring Inc., Court-appointed Monitor of SkyLink Aviation Inc.

Claims Process

333 Bay Street
14th Floor
Toronto, Ontario M5H 2R2
Attention: Robert Kofman/David Sieradzki

Telephone: (416) 932-6228/(416) 932-6030
Fax: (647) 497-9490/(647) 497-9470
Email bobby.kofman@duffandphelps.com/david.sieradzki@duffandphelps.com

SCHEDULE "D"

Court File No. ●

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

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

AND IN THE MATTER OF A PLAN OF COMPROMISE AND ARRANGEMENT OF SKYLINK AVIATION INC.

NOTICE OF DISPUTE OF CLAIM

---

1. **PARTICULARS OF CREDITOR**

(a) Full Legal Name of Creditor: _____

(b) Full Mailing Address of Creditor: _____

_____

_____

_____

(c) Telephone Number of Creditor: _____

(d) Facsimile Number of Creditor: _____

(e) E-mail Address of Creditor: _____

(f) Attention (Contact Person): _____

2. **PARTICULARS OF ORIGINAL CREDITOR FROM WHOM YOU ACQUIRED CLAIM, IF APPLICABLE:**

(a) Have you acquired this Claim by assignment? Yes ☐ No ☐

(if yes, attach documents evidencing assignment)

(b) Full Legal Name of original creditor(s): _____

3. **DISPUTE OF VALUATION OF CLAIM FOR VOTING AND/OR DISTRIBUTION PURPOSES:**

(Any Claims denominated in a foreign currency shall be converted to Canadian dollars at the Bank of Canada Canadian Dollar noon exchange rate in effect as of the date of the Initial Order.)

We hereby disagree with the value of our Claim as set out in the Notice of Claim dated _____, as set out below:

Type of Claim (i.e. Claim against Applicant or Director/Officer)	**Claim per Notice of Claim**		**Disputed for**		**Claim per Creditor**	
	Voting	Distribution	Voting	Distribution	Voting	Distribution
_____	$	$	☐	☐	$	$

(Insert particulars of Claim per Notice of Claim and the value of your claim as asserted by you.)

4. **REASONS FOR DISPUTE:**

(Provide full particulars of the Claim and supporting documentation, including amount, description of transaction(s) or agreement(s) giving rise to the Claim, name of any guarantor(s) which has guaranteed the Claim, and amount of Claim allocated thereto, date and number of all invoices, particulars of all credits, discounts, etc. claimed. The particulars provided must support the value of the Claim as stated by you in item 3, above.)

_____

_____

_____

_____

_____

_____

This Notice of Dispute of Claim must be returned to and received by the Monitor by no later than **5:00 p.m. (Toronto Time) on March 28, 2013**, the Claims Bar Date, at the following address by prepaid registered mail, courier, personal delivery, facsimile transmission or email:

Duff & Phelps Canada Restructuring Inc., Court-appointed Monitor of SkyLink Aviation Inc.

Claims Process

333 Bay Street
14th Floor
Toronto, Ontario M5H 2R2
Attention: Robert Kofman/David Sieradzki
Telephone: (416) 932-6228/(416) 932-6030
Fax: (647) 497-9490/(647) 497-9470
Email bobby.kofman@duffandphelps.com/david.sieradzki@duffandphelps.com

Dated at _____ this _____ day of _____, 2013

SCHEDULE "E"

Court File No. ●

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

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

AND IN THE MATTER OF A PLAN OF COMPROMISE AND ARRANGEMENT OF SKYLINK AVIATION INC.

NOTICE OF REVISION OR DISALLOWANCE

TO: **[insert name and address of creditor]**

The Applicant has reviewed your Proof of Claim dated _____, 2013, and has revised or rejected your Claim in respect of _____ for the following reasons:

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

Subject to further dispute by you in accordance with the provisions of the Claims Procedure Order, your Claim will be allowed as follows:

Prefiling Claim per Proof of Claim	Revised/Rejected For Voting/Distribution	Allowed as Revised for Voting/Distribution

Restructuring Period Claim per Proof of Claim	Revised/ Rejected For Voting/Distribution	Allowed as Revised For Voting/Distribution

Director/ Officer Claim per Proof of Claim	Revised/ Rejected For Voting/Distribution	Allowed as Revised For Voting/Distribution

If you intend to dispute this Notice of Revision or Disallowance, you must notify the Monitor of such intent by delivery to the Monitor of a Notice of Dispute of Revision or Disallowance in accordance with the Claims Procedure Order such that it is received by the Monitor by no later than seven (7) Calendar Days after you receive such Notice of Revision or Disallowance at the following address by prepaid registered mail, courier, personal delivery, facsimile transmission, email or telephone:

Duff & Phelps Canada Restructuring Inc., Court-appointed Monitor of SkyLink Aviation Inc.

Claims Process

333 Bay Street
14th Floor
Toronto, Ontario M5H 2R2
Attention: Robert Kofman/David Sieradzki
Telephone: (416) 932-6228/(416) 932-6030
Fax: (647) 497-9490/(647) 497-9470
Email bobby.kofman@duffandphelps.com/david.sieradzki@duffandphelps.com

If you do not deliver a Notice of Dispute of Revision or Disallowance in accordance with the Claims Procedure Order, the value of your Claim shall be deemed to be as set out in this Notice of Revision or Disallowance.

DATED at _____ this _____ day of _____, 2013..

SCHEDULE "F"

Court File No. ●

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

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

AND IN THE MATTER OF A PLAN OF COMPROMISE AND ARRANGEMENT OF SKYLINK AVIATION INC.

NOTICE OF DISPUTE OF REVISION OR DISALLOWANCE

---

1. **PARTICULARS OF CREDITOR**

(a) Full Legal Name of Creditor: _____

(b) Full Mailing Address of Creditor: _____

_____

_____

_____

(c) Telephone Number of Creditor: _____

(d) Facsimile Number of Creditor: _____

(e) E-mail Address of Creditor: _____

(f) Attention (Contact Person): _____

2. **PARTICULARS OF ORIGINAL CREDITOR FROM WHOM YOU ACQUIRED CLAIM, IF APPLICABLE:**

(a) Have you acquired this Claim by assignment? Yes ☐ No ☐

(if yes, attach documents evidencing assignment)

(b) Full Legal Name of original creditor(s): _____

3. **DISPUTE OF REVISION OR DISALLOWANCE OF CLAIM FOR VOTING AND/OR DISTRIBUTION PURPOSES:**

(Any Claims denominated in a foreign currency shall be converted to Canadian dollars at the Bank of Canada Canadian Dollar noon exchange rate in effect as of the date of the Initial Order.)

We hereby disagree with the value of our Claim as set out in the Notice of Revision or Disallowance dated _____, as set out below:

Type of Claim (i.e. Claim against Applicant or Director/Officer)	**Claim per Notice of Claim**		**Disputed for**		**Claim per Creditor**	
	Voting	Distribution	Voting	Distribution	Voting	Distribution
_____	$	$	☐	☐	$	$

(Insert particulars of Claim per Notice of Revision or Disallowance, and the value of your Claim as asserted by you).

4. **REASONS FOR DISPUTE:**

(Provide full particulars of the Claim and supporting documentation, including amount, description of transaction(s) or agreement(s) giving rise to the Claim, name of any guarantor(s) which has guaranteed the Claim, and amount of Claim allocated thereto, date and number of all invoices, particulars of all credits, discounts, etc. claimed. The particulars provided must support the value of the Claim as stated by you in item 3, above.)

_____

_____

_____

_____

_____

_____

_____

_____

If you intend to dispute the Notice of Revision or Disallowance, you must notify the Monitor of such intent by delivery to the Monitor of a Notice of Dispute of Revision or Disallowance in accordance with the Claims Procedure Order such that it is received by the Monitor by no later than seven (7) Calendar Days after you receive such Notice of Revision or Disallowance at the following address by prepaid registered mail, courier, personal delivery, facsimile transmission, email or telephone:

Duff & Phelps Canada Restructuring Inc., Court-appointed Monitor of SkyLink Aviation Inc.

Claims Process

333 Bay Street
14th Floor
Toronto, Ontario M5H 2R2
Attention: Robert Kofman/David Sieradzki
Telephone: (416) 932-6228/(416) 932-6030
Fax: (647) 497-9490/(647) 497-9470
Email bobby.kofman@duffandphelps.com/david.sieradzki@duffandphelps.com

Dated at _____ this _____ day of _____, 2013.

SCHEDULE "G"

PROOF OF CLAIM INSTRUCTION LETTER FOR THE CLAIMS PROCEDURE FOR UNKNOWN UNSECURED CREDITORS OF SKYLINK AVIATION INC. (the "Applicant")

CLAIMS PROCEDURE

By Order of the Ontario Superior Court of Justice (Commercial List) dated March 8, 2013 (as such Order may be amended from time to time the "**Claims Procedure Order**") under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "**CCAA**"), the Applicant and Duff & Phelps Canada Restructuring Inc., in its capacity as Court-appointed Monitor of the Applicant (the "**Monitor**"), have been authorized to conduct a claims procedure (the "**Claims Procedure**"). A copy of the Claims Procedure Order and other public information concerning these proceedings can be obtained from the Monitor's website at: http://www.duffandphelps.com/services/restructuring/Pages/RestructuringCases.aspx.

This letter provides general instructions for completing a Proof of Claim form. Defined terms not defined within this instruction letter shall have the meaning ascribed thereto in the Claims Procedure Order.

The Claims Procedure is intended to identify and determine the amount of any claims against the Applicant and the Directors or Officers of the Applicant, whether unliquidated, contingent or otherwise, that are to be affected in the plan of compromise and arrangement being pursued by the Applicant under the CCAA. Please review the Claims Procedure Order for the full terms of the Claims Procedure.

All notices and inquiries with respect to the Claims Procedure should be directed to the Monitor by prepaid registered mail, courier, personal delivery, facsimile transmission or email at the address below:

Duff & Phelps Canada Restructuring Inc., Court-appointed Monitor of SkyLink Aviation Inc.

Claims Process

333 Bay Street
14th Floor
Toronto, Ontario M5H 2R2
Attention: Robert Kofman/David Sieradzki
Telephone: (416) 932-6228/(416) 932-6030
Fax: (647) 497-9490/(647) 497-9470
Email bobby.kofman@duffandphelps.com/david.sieradzki@duffandphelps.com

FOR CREDITORS SUBMITTING A PROOF OF CLAIM

If you believe that you have a Claim against the Applicant or a Director or Officer of the Applicant and you have not already received a Notice of Claim in respect of such Claim, you must complete and file a Proof of Claim form with the Monitor. All Proofs of Claim for Prefiling Claims (i.e. Claims against the Applicant arising prior to March 8, 2013) and all Director/Officer Claims **must be received by the Monitor before 5:00 p.m. (Toronto Time) on March 28, 2013** (the "**Claims Bar Date**"), unless the Monitor and the Applicant agree in writing or the Court orders that the Proof of Claim be accepted after that date. If you do not file a Proof of Claim in respect of any such Claims by the Claims Bar Date, you shall not be entitled to vote at any meeting of creditors regarding the plan of compromise and arrangement being proposed by the Applicant or participate in any distribution under such plan in respect of such Claims and any such Claims shall be forever extinguished and barred.

All Proofs of Claim for Restructuring Period Claims (i.e. Claims against the Applicant arising on or after March 8, 2013) **must be received by the Monitor on the date that is seven (7) Calendar Days after termination, repudiation or resiliation of the agreement or other event giving rise to the Restructuring Period Claim.** (the "**Restructuring Period Claims Bar Date**"), unless the Monitor and the Applicant agree in writing or the Court orders that the Proof of Claim be accepted after that date. If you do not file a Proof of Claim in respect of any such Restructuring Period Claims by the Restructuring Period Claims Bar Date, you shall not be entitled to vote at any meeting of creditors regarding the plan of compromise and arrangement being proposed by the Applicant or participate in any distribution under such plan in respect of such Claims and any such Claims you may have against the Applicant and/or any of the Directors and Officers of the Applicant shall be forever extinguished and barred.

All Claims denominated in a foreign currency shall be converted to Canadian dollars at the Bank of Canada United States/Canadian Dollar noon exchange rate in effect as of the date of the Initial Order.

ADDITIONAL FORMS

Additional Proof of Claim forms can be obtained from the Monitor's website at http://www.duffandphelps.com/services/restructuring/Pages/RestructuringCases.aspx or by contacting the Monitor.

DATED this _____ day of _____, 2013.

SCHEDULE "H"

Court File No. ●

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

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

AND IN THE MATTER OF A PLAN OF COMPROMISE AND ARRANGEMENT OF SKYLINK AVIATION INC.

PROOF OF CLAIM

---

1. **PARTICULARS OF CREDITOR**

(a) Full Legal Name of Creditor: _____

(b) Full Mailing Address of Creditor: _____

_____

_____

_____

(c) Telephone Number of Creditor: _____

(d) Facsimile Number of Creditor: _____

(e) E-mail Address of Creditor: _____

(f) Attention (Contact Person): _____

2. **PARTICULARS OF ORIGINAL CREDITOR FROM WHOM YOU ACQUIRED CLAIM, IF APPLICABLE:**

(a) Have you acquired this Claim by assignment? Yes ☐ No ☐

(if yes, attach documents evidencing assignment)

(b) Full Legal Name of original creditor(s): _____

3. **PROOF OF CLAIM**

THE UNDERSIGNED CERTIFIES AS FOLLOWS:

(a) That I am a Creditor of/hold the position of _____ of the Creditor and have knowledge of all the circumstances connected with the Claim described herein;

(b) That I have knowledge of all the circumstances connected with the Claim described and set out below;

(c) The Applicant and/or the Director(s) or Officer(s) of the Applicant was and still is indebted to the Creditor as follows *(Any Claims denominated in a foreign currency shall be converted to Canadian dollars at the Bank of Canada Canadian Dollar noon exchange rate in effect as of the date of the Initial Order.)*

(i) Prefiling Claims against the Applicant:

$_____

(ii) Restructuring Period Claims against the Applicant:

$_____

(iii) Director/Officer Claims against the Directors and/or Officers of the Applicant:

$_____

(iv) TOTAL CLAIM:

$_____

Total of (i), (ii) and (iii)

4. **NATURE OF CLAIM AGAINST THE APPLICANT**

(CHECK AND COMPLETE APPROPRIATE CATEGORY)

☐ Unsecured Claim of $_____

☐ Secured Claim of $ _____

In respect of this debt, I hold security over the assets of the Applicant valued at $_____, the particulars of which security and value are attached to this Proof of Claim form.

(If the Claim is secured, provide full particulars of the security, including the date on which the security was given the value for which you ascribe to the assets charged by your security, the basis for such valuation and attach a copy of the security documents evidencing the security.)

5. **PARTICULARS OF CLAIM:**

The particulars of the undersigned's total Claim (including Prefiling Claims, Restructuring Period Claims, and Director/Officer Claims) are attached.

(Provide full particulars of the Claim and supporting documentation, including amount, description of transaction(s) or agreement(s) giving rise to the Claim, name of any guarantor(s) which has guaranteed the Claim, and amount of Claim allocated thereto, date and number of all invoices, particulars of all credits, discounts, etc. claimed. If a claim is made against any Directors or Officer, specify the applicable Directors or Officers and the legal basis for the Claim against them.).

6. **FILING OF CLAIM**

For Prefiling Claims, this Proof of Claim must be returned to and received by the Monitor by **5:00 p.m. (Toronto Time) on the Claims Bar Date (March 28, 2013)**.

For Restructuring Period Claims, Claim must be returned to and received by the Monitor by **5:00 p.m. (Toronto Time) on the date that is seven (7) Calendar Days after termination, repudiation or resiliation of the agreement or other event giving rise to the Restructuring Period Claim**.

In both cases, completed forms must be delivered by prepaid registered mail, courier, personal delivery, facsimile transmission or email at the address below to the Monitor at the following address:

Duff & Phelps Canada Restructuring Inc., Court-appointed Monitor of SkyLink Aviation Inc.

Claims Process

333 Bay Street
14th Floor
Toronto, Ontario M5H 2R2
Attention: Robert Kofman/David Sieradzki
Telephone: (416) 932-6228/(416) 932-6030
Fax: (647) 497-9490/(647) 497-9470
Email bobby.kofman@duffandphelps.com/david.sieradzki@duffandphelps.com

Dated at _____ this _____ day of _____, 2013.

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 AND ARRANGEMENT OF SKYLINK AVIATION INC.

Court File No.: _____

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding commenced at Toronto

CLAIMS PROCEDURE ORDER

Goodmans LLP
Barristers & Solicitors

Bay Adelaide Centre
333 Bay Street, Suite 3400
Toronto, Canada M5B 2M6

Robert J. Chadwick (LSUC# 35165K)
Logan Willis (LSUC# 53894K)

Tel: 416.979.2211
Fax: 416.979.1234

Lawyers for the Applicant

\6159409

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Court File No. CV-09-8396-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE	)	WEDNESDAY, THE 28th DAY
	)	
MADAM JUSTICE PEPALL	)	OF JULY, 2010

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 CANWEST GLOBAL COMMUNICATIONS CORP., AND THE OTHER APPLICANTS LISTED ON SCHEDULE "A"

APPLICANTS

PLAN SANCTION ORDER

THIS MOTION made by Canwest Global Communications Corp. ("**Canwest**") and the other Applicants listed on Schedule "A" hereto (collectively, the "**Applicants**") and the Partnerships listed on Schedule "B" hereto (collectively, the "**Partnerships**" and, together with the Applicants, the "**CMI Entities**", and each a "**CMI Entity**"), pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**") for an order sanctioning the restated consolidated plan of compromise, arrangement and reorganization accepted for filing by this Court on June 23, 2010, and as restated on July 16 2010 (the "**Plan**") concerning, affecting and involving Canwest, Canwest Media Inc. ("**CMI**"), Canwest Television GP Inc., Canwest Television Limited Partnership, Canwest Global Broadcasting Inc./Radiodiffusion Canwest Global Inc., Fox Sports World Canada Holdco Inc., Fox Sports World Canada Partnership, National Post Holdings Ltd., The National Post Company/La Publication National Post, MBS Productions Inc., Yellow Card Productions Inc., Global Centre Inc. and 4501063 Canada Inc., as the Plan may be further amended, varied or supplemented by the CMI Entities from time to time in accordance with the terms thereof and the Meeting Order, which is attached as Schedule "C" hereto, and pursuant to section 191 of the *Canada Business Corporations Act,* R.S.C. 1985, c. C-44, as amended (the "**CBCA**") for an order amending the

articles of Canwest and giving effect to the changes and transactions arising therefrom, was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the Affidavit of Thomas C. Strike sworn July 20, 2010 (the "**Strike Affidavit**"), the Sixteenth Report dated July 9, 2010 (the "**Monitor's 16th Report**") of FTI Consulting Canada Inc. in its capacity as Court-appointed monitor of the CMI Entities (the "**Monitor**") and the Seventeenth Report dated July 21, 2010 of the Monitor (the "**Monitor's 17th Report**") and on hearing the submissions of counsel for the CMI Entities, the Special Committee of the board of directors of Canwest, the Monitor, the *ad hoc* committee of holders of 8% senior subordinated notes due 2012 issued by CMI (the "**Ad Hoc Committee**"), CIBC Asset-Based Lending Inc. ("**CIBC**"), the Management Directors of the Applicants, Shaw Communications Inc. ("**Shaw**"), the *ad hoc* group of Existing Shareholders (the "**Shareholder Group**") and such other counsel as were present, no one else appearing although duly served with the Motion Record as appears from the Affidavit of Service, filed.

DEFINITIONS

1. **THIS COURT ORDERS** that any capitalized terms not otherwise defined in this Plan Sanction Order shall have the meanings ascribed to them in the Plan.

SERVICE AND MEETINGS

2. **THIS COURT ORDERS** that the time for service of the Notice of Motion and the Motion Record herein be and is hereby abridged and that the motion is properly returnable today and service upon any interested party other than those parties served is hereby dispensed with.

3. **THIS COURT ORDERS** that there has been good and sufficient service and delivery of the Meeting Order and the Meeting Materials (as as defined in the Meeting Order) to all Affected Creditors.

4. **THIS COURT ORDERS** that the Meetings were duly convened and held, all in conformity with the CCAA and the Orders of the Court made in these proceedings, including the Meeting Order.

SANCTION OF THE PLAN

5. **THIS COURT ORDERS AND DECLARES** that (a) the Plan has been approved by the Required Majority in conformity with the CCAA; (b) the CMI Entities have complied with the provisions of the CCAA and the Orders of the Court made in these proceedings in all respects; (c) the Court is satisfied that the CMI Entities have not done or purported to do anything that is not authorized by the CCAA; and (d) the CMI Entities have acted in good faith and with due diligence, and the Plan and all the terms and conditions of, and matters and transactions contemplated by, the Plan are fair and reasonable.

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

APPROVALS AND AUTHORIZATIONS

7. **THIS COURT ORDERS** that the Plan Emergence Agreement and all schedules thereto including the form of the PIF Schedule appended thereto is hereby approved, and the Monitor and the Plan Sponsor shall not incur any liability whatsoever with respect to (a) amounts to be paid out of the Plan Implementation Fund pursuant to the Plan Emergence Agreement or the Plan, (b) any costs or expenses incurred in connection with, in relation to or as a result of any payment made, required to be made or not made from the Plan Implementation Fund, or (c) any deficiency in the Plan Implementation Fund or any specific Account (as defined in the Plan Emergence Agreement) in the PIF Schedule provided that New Canwest and CTLP shall be liable for any such deficiency in accordance with section 5.1 of the Plan Emergence Agreement. The parties to the Plan Emergence Agreement are hereby authorized and directed to finalize the PIF Schedule in accordance with the provisions of the Plan Emergence Agreement.

PLAN IMPLEMENTATION

8. **THIS COURT ORDERS** that any two Directors or Officers are hereby authorized and directed to take all actions determined by such Directors and Officers to be necessary or appropriate in the sole opinion of such Directors and Officers to enter into, adopt, execute, deliver, implement and consummate the contracts, instruments, releases, all other agreements or documents to be created or which are to come into effect in connection with the Plan and the Plan Emergence Agreement and all matters contemplated under the Plan and the

Plan Emergence Agreement involving corporate, partnership or other action of or on behalf of the CMI Entities, and all such actions of the Directors and Officers are hereby approved and will occur in accordance with, and as contemplated by, the Plan and the Plan Emergence Agreement, in all respects and for all purposes without any requirement of further action by the shareholders or other security holders of the CMI Entities or any of the other Directors or Officers. Further, to the extent not previously given, all necessary approvals to take any such action shall be and are hereby deemed to have been obtained from the Directors and Officers or the shareholders or other security holders of the relevant CMI Entities, as applicable, including the deemed passing by any class of shareholders of any resolution or special resolution, and no shareholders' agreement, partnership agreement or agreement between a shareholder or partner and another Person limiting in any way the taking of any such steps or actions contemplated by the Plan shall be effective and shall be of, and is hereby deemed to have, no force or effect.

9. **THIS COURT ORDERS** that the Monitor and the CMI Entities are hereby authorized and directed to take all steps and actions, and to do all things, determined by the Monitor or the CMI Entities, respectively, to be necessary or appropriate to implement the Plan and the Plan Emergence Agreement in accordance with their respective terms and as contemplated thereby, and to enter into, execute, deliver, implement and consummate all of the steps, transactions and agreements, as required by the Monitor or the CMI Entities, respectively, contemplated by the Plan and the Plan Emergence Agreement.

10. **THIS COURT ORDERS** that the Plan and all associated steps, compromises, transactions, arrangements, assignments, releases and the restructuring to be effected thereby are hereby approved, and upon the delivery of the Monitor's Certificate to the CMI Entities, the Ad Hoc Committee and the Plan Sponsor in accordance with section 6.4 of the Plan, shall be deemed to be implemented, shall be binding and effective in accordance with the provisions of the Plan, and shall enure to the benefit of and be binding upon the CMI Entities, all Affected Creditors, and all other Persons affected by the Plan.

11. **THIS COURT ORDERS** that the Monitor shall file with the Court a copy of the Monitor's Certificate referred to in paragraph 10 above as soon as reasonably practicable on or forthwith following the Plan Implementation Date after delivery thereof and shall post a copy of the Monitor's Certificate, once filed, on the Website.

TRANSACTIONS TO BE COMPLETED PRIOR TO THE PLAN IMPLEMENTATION DATE

12. **THIS COURT ORDERS** that effective upon the appointment of a third party firm as administrator of the CH Plan pursuant to the Plan, CTLP shall be released from any and all Claims as administrator of the CH Plan up to and including such date.

13. **THIS COURT ORDERS** that CMI is hereby authorized and directed to and shall cause 4414616 Canada to be dissolved pursuant to section 210(3) of the CBCA. CMI is hereby authorized and directed to and shall assume all debts, obligations and other liabilities of 4414616 Canada, if any, and upon such assumption, 4414616 Canada shall deemed to be fully released and discharged from all such debts, obligations and other liabilities. CMI is hereby authorized and directed to execute and file in the name of 4414616 Canada any elections, designations, returns or other document with federal or provincial tax authorities as may be necessary or appropriate.

14. **THIS COURT AUTHORIZES AND DIRECTS** the CMI Entities to take all necessary steps to cause the name "Canwest" to be removed from the corporate, business, trade, or partnership names of any of the CMI Entities and their Subsidiaries (other than the CTLP Plan Entities, CW Investments and their respective Subsidiaries and the Subsidiaries of 4501071 Canada).

15. **THIS COURT ORDERS** that the registered offices of 4501071 Canada, Canwest Finance, Canwest, CMI, National Post Holdings, National Post and Multisound Publishers shall be changed to c/o Osler, Hoskin & Harcourt LLP, PO Box 50, 1 First Canadian Place, Toronto, Ontario, M5X 1B8 and the CMI Entities (excluding the CTLP Plan Entities) are hereby authorized and directed to take all steps necessary to give effect to this paragraph 15, including, if necessary with respect to any provincially governed CMI Entity, the continuance of such CMI Entity under the laws of Canada or Ontario.

TRANSACTIONS TO BE COMPLETED ON THE PLAN IMPLEMENTATION DATE BEGINNING AT THE EFFECTIVE TIME

16. **THIS COURT ORDERS** that the steps to be taken and the compromises and releases to be effected on the Plan Implementation Date, including the steps, compromises and

releases set out in paragraphs 17 to 61 below, are and shall be deemed to occur and be effected in the sequential order contemplated in section 5.5 of the Plan on the Plan Implementation Date, beginning at the Effective Time. The relief ordered in paragraphs 17 to 61 hereof is conditional upon, and shall not be effective until, the occurrence of the Plan Implementation Date.

17. **THIS COURT ORDERS** that the Cash Collateral Agreement shall be and is hereby deemed to be terminated and all obligations thereunder of the parties thereto shall be and are hereby deemed to be released, discharged and extinguished with prejudice.

18. **THIS COURT ORDERS** that National Post and National Post Holdings are hereby authorized and directed to and shall repay to CMI from the proceeds of the National Post Transaction all advances or loans made to them by CMI from and after the Filing Date.

19. **THIS COURT ORDERS** that the Plan Implementation Fund shall be established and funded in accordance with the Plan and the Plan Emergence Agreement to be held by the Monitor in accordance with paragraph 73 below.

20. **THIS COURT ORDERS** that the CTLP Limited Partnership Agreement shall be amended in accordance with section 5.5(d) of the Plan.

21. **THIS COURT ORDERS** that (a) all Claims relating to guarantees granted by any CMI Entity or any other Canwest Subsidiary (including Irish Holdco and Ireland Nominee) to the Noteholders and/or the Trustee, (b) the guarantees referred to in sub-paragraph (a) and any other security granted by any such CMI Entity or Canwest Subsidiary to the Noteholders and/or the Trustee, and (c) all rights of indemnity and subrogation arising under such guarantees and other security, shall be and are hereby deemed to be fully released and discharged, and, in consideration of such release and discharge of Irish Holdco, each of Irish Holdco and the Collateral Agent shall be and are hereby deemed to have released and discharged any security granted to it or for its benefit in respect of the Secured Intercompany Note, and Irish Holdco shall further be and is hereby deemed to have fully and finally released with prejudice the CMI Entities and Ireland Nominee from their obligations to pay any interest then accrued and unpaid on the Secured Intercompany Note and the Unsecured Intercompany Note and from the guarantees granted by the CMI Entities and Ireland Nominee in connection with the Secured Intercompany Note and the Unsecured Intercompany Note.

22. **THIS COURT ORDERS** that all contract defaults arising as a result of the CCAA Proceedings and the implementation of the Plan shall be and are hereby deemed to be cured.

23. **THIS COURT ORDERS** that CTLP is hereby authorized and directed to and shall pay or cause to be paid the CH Plan Settlement Amount to the CH Plan by way of certified cheque or wire transfer in immediately available funds payable to the CH Plan Trustee for the account of the CH Plan.

24. **THIS COURT ORDERS** that (a) the Retiree Terminal Deficiency Claim shall be and is hereby deemed to be fully and finally satisfied, discharged, and released and the CTLP Plan Entities shall be and are hereby deemed to be released of and from any liability in connection therewith; (b) the CEP Terminal Deficiency Claim shall be and is hereby deemed to be fully and finally satisfied, discharged and released with prejudice and the CTLP Plan Entities shall be and are hereby deemed to be released of and from any liability in connection therewith; (c) the CEP CH Plan Grievance shall be and is hereby deemed to be fully and finally satisfied and withdrawn with prejudice for all purposes, and the CEP, on behalf of the Current and Former Members, shall be and is hereby deemed to fully and finally release and forever discharge with prejudice the CMI Entities from any and all Claims in relation to or arising in connection with the CH Plan; and (d) the Claims in relation to the CH Plan against the Directors and Officers shall be and are hereby deemed to be fully and finally satisfied, discharged and released with prejudice for the purpose of the Claims Procedure Order and all other purposes, and the CEP on behalf of the Current and Former Members shall be and is hereby deemed to fully and finally release and forever discharge with prejudice the Directors and Officers from any and all Claims, including any Claims against the Directors or Officers arising from or in relation to the CH Plan.

25. **THIS COURT ORDERS** that the CMI Entities are hereby authorized and directed to and shall cause each of 4501063 Canada, MBS Productions and Global Centre to be dissolved under section 210(3) of the CBCA or section 237 of the OBCA, as applicable. In connection therewith, and as a consequence thereof:

(a) each of 4501063 Canada, MBS Productions and Global Centre are hereby authorized and directed to and shall distribute all of its respective assets, rights and properties to CMI, including, in the case of 4501063 Canada, the shares it

holds in GP Inc., and, in all cases, any Canwest/CMI Group Intercompany Receivables held by such corporation and such assets, rights, and properties shall vest in CMI in accordance with paragraph 75 hereof; and

(b) all debts, liabilities and other obligations of each of 4501063 Canada, MBS Productions and Global Centre shall be assumed by CMI, upon which assumption, each of 4501063 Canada, MBS Productions and Global Centre shall be deemed to be fully released and discharged with prejudice from all such debts, liabilities and other obligations.

26. **THIS COURT ORDERS** that in furtherance of the dissolutions set out at paragraph 25 above, CMI is hereby, in the case of each such corporation, authorized and directed to execute and file in the name of such corporation any elections, designations, returns or other document with federal or provincial tax authorities as may be necessary or appropriate.

27. **THIS COURT ORDERS** that Canwest is hereby authorized and directed to and shall transfer or cause to be transferred the Trademarks, the Copyrights and Other IP, the Other Canwest Assets and any and all Canwest/CMI Group Intercompany Receivables owing to it to CMI (and the Trademarks, Copyrights and Other IP, the Other Canwest Assets and any and all Canwest/CMI Group Intercompany Receivables shall vest in CMI in accordance with paragraph 76 hereof) in consideration for the issuance of one (1) common share of CMI. Canwest is hereby authorized and directed to and shall assign or cause to be assigned the Trademarks Licence Agreement, the Trademarks Licence, and the CW Media Trademarks Licence Agreements to CMI and CMI is hereby authorized and directed to and shall be deemed to assume Canwest's liabilities and obligations under the Trademarks Licence Agreement, the Trademarks Licence, the CW Media Trademarks Licence Agreements and under section 6.4 of the Omnibus Transition and Reorganization Agreement.

28. **THIS COURT ORDERS** that all Claims and Unaffected Claims against the CTLP Plan Entities excluding: (a) Intercompany Claims (other than the Fireworks Claim), (b) the Post-Filing Claims against the CTLP Plan Entities, and (c) the obligation of CTLP to pay the CH Plan Settlement Amount, shall be and are hereby deemed to be Claims and Unaffected Claims, as the case may be, against CMI on the following basis:

(i) CMI is hereby authorized and directed to and shall assume the Fireworks Claim for consideration equal to $1;

(ii) CMI is hereby authorized and directed to and shall assume and become liable in the stead of the CTLP Plan Entities to the holders of such Claims and Unaffected Claims against the CTLP Plan Entities to pay the Assumption Consideration Amount;

(iii) as consideration for the assumption by CMI referred to in this paragraph 28 of the obligations to pay distributions, or make payments from the Plan Implementation Fund, in respect of such Claims and Unaffected Claims against CTLP, CTLP is hereby authorized and directed to and shall concurrently with such assumption pay to CMI an amount equal to the CTLP Assumption Consideration Amount, which shall be satisfied as follows:

(A) by a reduction in the amount, if any, owing under the CTLP-CMI Receivable; and

(B) to the extent that the CTLP Assumption Consideration Amount exceeds the amount of the CTLP-CMI Receivable, by the issuance of the CTLP Assumption Consideration Note;

(iv) as consideration for the assumption by CMI referred to in this paragraph 28 of the obligations to pay distributions, or make payments from the Plan Implementation Fund in respect of such Claims and Unaffected Claims against each other CTLP Plan Entity, each such CTLP Plan Entity is hereby authorized and directed to and shall concurrently with such assumption issue an Other CTLP Plan Entity Assumption Consideration Note; and

(v) the holders of such Claims and Unaffected Claims shall be deemed to have no further claims against the CTLP Plan Entities and any such Claims and Unaffected Claims against the CTLP Plan Entities shall be and are hereby

released, extinguished and forever barred with prejudice as against the CTLP Plan Entities.

29. **THIS COURT ORDERS** that the assumption by CMI of all of the debts, obligations and other liabilities of the Canwest Subsidiaries provided for in the Plan be and is hereby authorized and approved.

30. **THIS COURT ORDERS** that pursuant to and in accordance with the Plan the Court Charges and the Existing Security shall be and are hereby deemed to be released, terminated and discharged as they relate to (a) the New Canwest Assets; (b) the CW Investments Shares; (c) the assets of the CTLP Plan Entities; (d) the CTLP Assumption Consideration Note, if any; and (e) the Other CTLP Plan Entity Assumption Consideration Notes, if any, and any Canwest/CMI Group Intercompany Receivables owing to CMI by a CTLP Plan Entity, provided, however, that from and after the Plan Implementation Date, the Administration Charge shall apply and extend only to the Ordinary Creditors Pool and the Plan Implementation Fund.

31. **THIS COURT ORDERS** that all amounts owing by Canwest and the Canwest Subsidiaries (excluding the CTLP Group Entities) to a CTLP Plan Entity, immediately prior to the forgiveness referred to in this paragraph 31, shall be and are hereby deemed to be forgiven and released.

32. **THIS COURT ORDERS** that CMI is hereby authorized and directed to and shall be deemed to contribute the Other CTLP Plan Entity Assumption Consideration Notes, if any, and any Canwest/CMI Group Intercompany Receivables owing to it (other than amounts owing to it by CTLP) to the capital of CTLP and CTLP shall be deemed to acquire the same.

33. **THIS COURT ORDERS** that CMI is hereby authorized and directed to and shall be deemed to transfer and assign the New Canwest Assets to New Canwest which shall vest in New Canwest in accordance with paragraph 77 hereof and New Canwest is hereby authorized and directed to and shall be deemed to assume the New Canwest Liabilities. Upon the assumption by New Canwest of the New Canwest Liabilities, none of the CMI Entities (other than the CTLP Plan Entities) or the Directors and Officers shall have any further obligation or liability in respect of any of the New Canwest Liabilities and the CMI Entities (other than the CTLP Plan Entities) and the Directors and Officers shall be and are hereby deemed to be fully

released and discharged with prejudice from the New Canwest Liabilities. To the extent that CMI does not have legal or beneficial title to any of the New Canwest Assets immediately prior to the transfer of the New Canwest Assets to New Canwest and such legal and beneficial title of such New Canwest Assets is held by any one of the CMI Entities, such CMI Entity shall be and is hereby deemed to transfer to CMI all of its legal or beneficial interest in such New Canwest Assets immediately prior to the transfer of the New Canwest Assets by CMI to New Canwest.

34. **THIS COURT ORDERS** that New Canwest is hereby directed to and shall assume the defence and responsibility for the conduct of the Insured Litigation, including (a) the payment of the Insured Litigation Deductibles with respect thereto and (b) responsibility for the day-to-day case management of the Insured Litigation, including, without limitation, providing instructions to counsel, making employees available for examinations for discovery, providing documents, and providing witnesses at trial. New Canwest shall pay all Insured Litigation Deductibles in the same manner and to the same extent that Canwest, CMI, or any of the CTLP Plan Entities would otherwise have been required to pay such deductibles in respect of the Insured Litigation. For greater certainty, New Canwest shall not assume any liability of Canwest, CMI, or any of the CTLP Plan Entities with respect to the Insured Litigation beyond any obligation to make payment of any Insured Litigation Deductibles assumed in accordance with this paragraph 34, and distribution of any insurance proceeds received by New Canwest, and New Canwest shall not be responsible for any amounts payable by Canwest, CMI, or any of the CTLP Plan Entities with respect to such litigation, except to the extent that insurance proceeds are available and in such cases shall assist as reasonably necessary including making Employees available as necessary, at New Canwest's cost.

35. **THIS COURT ORDERS AND DIRECTS** that all Transfer Taxes shall be paid by New Canwest, subject to any applicable election available to reduce or eliminate such Transfer Taxes.

36. **THIS COURT ORDERS** that the Broadcast Licences held by GP Inc. as general partner and CMI as limited partner carrying on business as CTLP, shall be "surrendered" to the CRTC following the issuance of new broadcasting licences by the CRTC to GP Inc. and New Canwest carrying on business as CTLP.

37. **THIS COURT ORDERS** that in consideration for the transfer to New Canwest by CMI of the Canwest/CMI Group Intercompany Receivables owing to CMI by CTLP, the CTLP Assumption Consideration Note, if any, and any amounts receivable by CMI under the Shared Services Agreement and/or the Omnibus Transition and Reorganization Agreement, New Canwest shall concurrently with such transfer issue the New Canwest Note to CMI.

38. **THIS COURT ORDERS** that in consideration for the transfer to New Canwest by CMI of all other New Canwest Assets, New Canwest shall concurrently with such transfer issue one (1) million Class A common shares in New Canwest to CMI and shall be deemed to assume the New Canwest Liabilities.

39. **THIS COURT ORDERS** that all shares issued by New Canwest to CMI pursuant to paragraph 38 above shall be and are hereby deemed to be validly issued and outstanding as fully-paid and non-assessable shares.

40. **THIS COURT ORDERS** that as determined by CIBC and CMI prior to the Plan Implementation Date, the CIT Credit Agreement and the CIT Facility shall be repaid in full (which payment shall include payment of all fees, expenses and interest properly charged pursuant to the terms of the CIT Credit Agreement and CIT Facility) and terminated and any existing letters of credit issued under the CIT Credit Agreement and the CIT Facility shall be cash collateralized, replaced or addressed by the issuance of new back-to-back letters of credit.

41. **THIS COURT ORDERS** that the Canwest Articles of Reorganization substantially in the form attached as Schedule "D" hereto, are hereby approved, and further, pursuant to and in accordance with the Plan and section 191 of the CBCA, the articles of Canwest are hereby amended in accordance with the Canwest Articles of Reorganization and Canwest is hereby authorized and directed to file the Canwest Articles of Reorganization with the Director (as defined in the CBCA) on or about the Plan Implementation Date.

42. **THIS COURT ORDERS** that the Canwest New Shares and the Canwest New Preferred Shares into which the Existing Shares are changed shall be and are hereby deemed to have been validly created, issued and outstanding as fully-paid and non-assessable shares as of the Effective Time.

43. **THIS COURT ORDERS** that Canwest is hereby authorized and directed to and shall deliver to the Transfer Agent on the Plan Implementation Date the transfer notice contemplated by the terms of the Canwest New Preferred Shares.

44. **THIS COURT ORDERS AND DIRECTS** that the Shaw Designated Entity shall, following the delivery to the Transfer Agent of the notice pursuant to paragraph 43 above, purchase all of the Canwest New Preferred Shares held by the Existing Shareholders and shall pay $11,000,000 to the Transfer Agent for distribution to such holders of the Canwest New Preferred Shares as of the Effective Time in consideration for the transfer to the Shaw Designated Entity of all of the issued and outstanding Canwest New Preferred Shares created pursuant to the Canwest Articles of Reorganization free and clear of all Encumbrances (as hereinafter defined).

45. **THIS COURT ORDERS AND DIRECTS** that the Shaw Designated Entity shall donate and surrender the Canwest New Preferred Shares acquired by it to Canwest for cancellation, and Canwest is hereby authorized and directed to and shall cancel such Canwest New Preferred Shares upon the surrender and donation thereof.

46. **THIS COURT ORDERS** that Canwest and CMI shall be and are hereby deemed to provide the Plan Sponsor with an irrevocable direction to pay the Subscription Price net of the Noteholder Pool to the Monitor and the Plan Sponsor is hereby directed to and shall pay the Subscription Price net of the Noteholder Pool to the Monitor.

47. **THIS COURT ORDERS AND DIRECTS** that the Plan Sponsor shall pay the portion of the Subscription Price equal to the Noteholder Pool to CMI and CMI is hereby authorized and directed to and shall establish the Noteholder Pool therefrom.

48. **THIS COURT ORDERS** pursuant to and in accordance with the Plan, CMI shall be and is hereby authorized and directed to distribute on the Plan Implementation Date from the Noteholder Pool to the Trustee, for the benefit of the Beneficial Noteholders, by way of wire transfer an amount equal to the Noteholder Pool in accordance with the wire transfer instructions provided by the Trustee to CMI.

49. **THIS COURT ORDERS AND DIRECTS** that the Trustee shall remit the Noteholder Pool to The Depository Trust & Clearing Corporation for distribution to each

Beneficial Noteholder of such Beneficial Noteholders' Noteholder Pro Rata Amount as of the Distribution Record Date in accordance with the policies, rules and regulations of the Depository.

50. **THIS COURT ORDERS** that upon receipt by the Trustee of the wire transfer of the Noteholder Pool as contemplated in paragraph 48 above, the CMI Entities shall have and shall be deemed to have no further liability or obligation to any of the Noteholders or the Trustee in respect of the Notes or the distributions contemplated by paragraphs 48 and 49 above.

51. **THIS COURT ORDERS AND DECLARES** that the distributions received by the Beneficial Noteholders and/or the Trustee on behalf of the Beneficial Noteholders under paragraphs 48 and 49 above on account of amounts not representing principal or unpaid and accrued interest to the Filing Date shall constitute amounts paid in lieu of interest accrued in respect of the Notes from and after the Filing Date.

52. **THIS COURT ORDERS** that CMI is hereby authorized and directed to and shall transfer and assign to 7316712 Canada all of the issued and outstanding shares of New Canwest, the New Canwest Note, and the CW Investments Shares and such transfer and assignment is hereby authorized and approved and all such shares of New Canwest, the New Canwest Note and the CW Investments Shares shall vest in 7316712 Canada in accordance with paragraph 79 hereof.

53. **THIS COURT ORDERS** that the Initial Directors, the Directors and Officers of GP Inc. and the Directors and Officers of the Subsidiaries controlled by CTLP shall resign and are hereby deemed to have resigned and to be replaced by directors and officers nominated by 7316712 Canada.

54. **THIS COURT ORDERS** that all Directors and Officers and any committee members of Canwest including the Special Committee, as applicable, and of CMI, National Post Holdings, CW Investments (other than the Shaw nominees) and their respective Subsidiaries and of 4501071 Canada shall resign and are hereby deemed to have resigned.

55. **THIS COURT ORDERS** that CMI is hereby authorized and directed to and shall be deemed to assign and transfer all of its rights and obligations under the Shareholders

Agreement to 7316712 Canada contemporaneously with the transfer of the CW Investments Shares to 7316712 Canada.

56. **THIS COURT ORDERS** that all Equity Compensation Plans shall be and are hereby deemed to be cancelled without compensation to their participants.

57. **THIS COURT ORDERS** that in addition to the releases referred to in paragraphs 12, 21 and 24 above, all of the releases set out in paragraphs 82 and 84 below shall be and shall be deemed to be effected and all Affected Claims and other matters and claims released pursuant to paragraphs 82 and 84 below shall be and shall be hereby deemed to be satisfied extinguished, released and forever barred with prejudice.

58. **THIS COURT ORDERS** that the Employees of the CTLP Group Entities shall continue to be employed by their existing employer within CTLP Group Entities on the Plan Implementation Date. Further, to the extent that Persons having existing independent contracts (written or oral) with one of the CTLP Group Entities on the Plan Implementation Date provide services to one or more of the CTLP Group Entities, such CTLP Group Entity shall continue to retain such Persons as independent contractors on the Plan Implementation Date.

59. **THIS COURT ORDERS** that all security interests in, and pledges of, the Irish Holdco Preference "A" Shares, granted by CMI, together with any Court Charges and the Existing Security in relation to such shares, shall be and are hereby deemed to be fully released and discharged with prejudice.

60. **THIS COURT ORDERS AND DIRECTS** that Irish Holdco shall redeem and shall be deemed to redeem 345,063 of the Irish Holdco Preference "A" Shares for the Irish Holdco Aggregate Redemption Price.

61. **THIS COURT ORDERS AND DIRECTS** that Irish Holdco shall fully satisfy its obligation to pay the Irish Holdco Aggregate Redemption Price by set-off of the full principal amount owing under (a) the Secured Intercompany Note and (b) the Unsecured Intercompany Note and by set-off of $72,306,685 of the amount owing under the Irish Holdco Intercompany Receivable, so that after the completion of the foregoing set-off, CMI's obligations under the Secured Intercompany Note and under the Unsecured Intercompany Note shall be and shall be

deemed to be satisfied in full and the Irish Holdco Intercompany Receivable shall be and shall be deemed to be reduced to $315.

COMPROMISE OF CLAIMS AND EFFECT OF PLAN

62. **THIS COURT ORDERS AND DECLARES** that pursuant to and in accordance with the Plan, any and all Affected Claims against Canwest, CMI, Yellow Card and the CTLP Plan Entities, and all Intercompany Claims against the CTLP Plan Entities not affected or otherwise dealt with by the provisions of section 5.5 of the Plan and that are owed, immediately after giving effect to paragraph 61 above, to Canwest or its Subsidiaries (other than the CTLP Group Entities and CW Investments and its Subsidiaries) (as determined immediately after giving effect to paragraph 61 above)) shall be and are hereby forever compromised, discharged and released with prejudice, and the ability of any Person to proceed against Canwest, CMI, Yellow Card and the CTLP Plan Entities in respect of or relating to any such Affected Claims and Intercompany Claims shall be and shall be deemed forever discharged, extinguished, released and restrained, and all proceedings with respect to, in connection with or relating to such Affected Claims and Intercompany Claims are hereby permanently stayed against the Plan Entities, subject only to the rights of Affected Creditors to receive distributions pursuant to the Plan and this Plan Sanction Order in respect of their Affected Claims, in the manner and to the extent provided for in the Plan.

63. **THIS COURT ORDERS** that, without limiting the provisions of the Claims Procedure Order or the Meeting Order, any Claims for which a CMI Notice of Dispute or a CMI Proof of Claim has not been filed by the CMI Claims Bar Date or the Restructuring Period Claims Bar Date, as applicable, whether or not a holder of such Claim has received notice of the claims process established by the Claims Procedure Order, shall be and are hereby forever barred, extinguished and released with prejudice. Nothing in the Plan extends or shall be interpreted as extending or amending the CMI Claims Bar Date or the Restructuring Period Claims Bar Date, as applicable, or gives or shall be interpreted as giving any rights to any Person in respect of Claims that have been barred or extinguished pursuant to the Claims Procedure Order or the Meeting Order.

64. **THIS COURT ORDERS** that each Affected Creditor is hereby deemed to have consented and agreed to all of the provisions in the Plan, in its entirety, and each Affected

Creditor is hereby deemed to have executed and delivered to the Plan Entities all consents, releases, assignments and waivers, statutory or otherwise, required to implement and carry out the Plan in its entirety.

65. **THIS COURT ORDERS** that on the Plan Implementation Date, following completion of the steps in the sequence set forth in section 5.5 of the Plan, all debentures, Notes, certificates, agreements, invoices and other instruments evidencing Affected Claims shall not entitle any holder thereof to any compensation or participation other than as expressly provided for in the Plan and this Plan Sanction Order and shall be and are hereby deemed to be cancelled and shall be and are hereby deemed to be null and void.

ESTABLISHMENT OF THE POOLS AND DISTRIBUTIONS AND PAYMENTS BY THE MONITOR

66. **THIS COURT ORDERS** that the Monitor shall receive and hold the Subscription Price net of the Noteholder Pool subject to the Administration Charge in trust for the benefit of the Affected Creditors of the Plan Entities (other than the Noteholders) in accordance with the Plan. The Monitor shall divide that part of the Subscription Price which it receives into and shall establish the Ordinary Creditors Pool, including the Ordinary CMI Creditors Sub-Pool and the Ordinary CTLP Creditors Sub-Pool and the Convenience Class Pool.

67. **THIS COURT ORDERS** that pursuant to and in accordance with the Plan, the Monitor on behalf of the CMI Entities shall be and is hereby authorized to make distributions on one or more Distribution Dates as may be set by the Monitor from time to time from the Convenience Class Pool to each Convenience Class Creditor with a Proven Distribution Claim on the Distribution Record Date or a Convenience Class Claim that subsequently becomes a Proven Distribution Claim by way of cheque in an amount equal to the lesser of (a) $5,000 and (b) the value of such Convenience Class Creditor's Proven Distribution Claim, sent by prepaid ordinary mail to the last known address for such Convenience Class Creditor.

68. **THIS COURT ORDERS** that pursuant to and in accordance with the Plan, the Monitor on behalf of the CMI Entities shall be and is hereby authorized to make distributions on one or more Distribution Dates as may be set by the Monitor from time to time from the Ordinary CMI Creditors Sub-Pool to each Ordinary CMI Creditor holding a Proven Distribution

Claim as of the Distribution Record Date or a Claim that subsequently becomes a Proven Distribution Claim by way of cheque or wire transfer in an amount equal to the aggregate of such creditor's Ordinary CMI Creditor Pro Rata Amount of the Ordinary CMI Creditors Sub-Pool, sent by prepaid ordinary mail to the last known address for such Ordinary CMI Creditor.

69. **THIS COURT ORDERS** that pursuant to and in accordance with the Plan, the Monitor on behalf of the CMI Entities shall be and is hereby authorized to make distributions on one or more Distribution Dates as may be set by the Monitor from time to time from the Ordinary CTLP Creditors Sub-Pool to each Ordinary CTLP Creditor holding a Proven Distribution Claim as of the Distribution Record Date or a Claim that subsequently becomes a Proven Distribution Claim by way of cheque or wire transfer in an amount equal to the aggregate of such creditor's Ordinary CTLP Creditor Pro Rata Amount of the Ordinary CTLP Creditors Sub-Pool, sent by prepaid ordinary mail to the last known address for such Ordinary CTLP Creditor.

70. **THIS COURT ORDERS** that an Affected Creditor holding an Unresolved Claim shall not be entitled to receive a distribution under the Plan in respect of any portion thereof unless and until such Unresolved Claim becomes a Proven Distribution Claim in accordance with the Claims Procedure Order, the Meeting Order and the Plan.

71. **THIS COURT ORDERS** that on or after the Plan Implementation Date the Monitor shall make a determination based on the value of Proven Distribution Claims against the Plan Entities as at the Plan Implementation Date as to which Ordinary Creditors that did not file Convenience Class Claim Declarations with the Monitor by 5:00 p.m. (Toronto time) on July 15, 2010 would receive a larger distribution if they had filed Convenience Class Claim Declarations and such Ordinary Creditors will be deemed to have made valid Convenience Class Claim Declarations and the Monitor shall deal with such Ordinary Creditors as Convenience Class Creditors in all respects, including, for greater certainty, for the purposes of making distributions under the Plan.

72. **THIS COURT ORDERS** that all distributions and payments by the Monitor to the Ordinary Creditors and the Convenience Class Creditors under the Plan are for the account of the CMI Entities and the fulfilment of their obligations under the Plan.

73. **THIS COURT ORDERS** that the Plan Implementation Fund shall be held in trust by the Monitor, to be used by the Monitor in accordance with the Plan and the Plan Emergence Agreement.

74. **THIS COURT ORDERS AND DECLARES** that any distributions under the Plan or this Plan Sanction Order shall not constitute a "distribution" for the purposes of section 107 of the Corporations Tax Act (Ontario), section 22 of the *Retail Sales Tax Act* (Ontario), section 117 of the *Taxation Act*, 2007 (Ontario), section 34 of the *Income Tax Act* (British Columbia), section 104 of the *Social Service Tax Act* (British Columbia), section 49 of the *Alberta Corporate Tax Act*, section 22 of *The Income Tax Act (Manitoba)*, section 73 of *The Tax Administration and Miscellaneous Taxes Act* (Manitoba), section 14 of *An Act respecting the Ministère du Revenu (Québec)*, section 85 of *The Income Tax Act*, 2000 (Saskatchewan), section 48 of *The Revenue and Financial Services Act* (Saskatchewan) and section 56 of the *Income Tax Act* (Nova Scotia) or any other similar provincial or territorial tax legislation (collectively, the "**Tax Statutes**"), and the Monitor in making any such payments is not "distributing", nor shall be considered to "distribute" nor to have "distributed", such funds for the purpose of the Tax Statutes, and the Monitor shall not incur any liability under the Tax Statutes in respect of its making any payments ordered or permitted under the Plan and this Plan Sanction Order, and is hereby forever released, remised and discharged from any claims against it under or pursuant to the Tax Statutes or otherwise at law, arising in respect of payments made under the Plan and this Plan Sanction Order and any claims of this nature are hereby forever barred.

VESTING

75. **THIS COURT ORDERS** that, in connection with and subject to the dissolutions of 4501063 Canada, MBS Productions and Global Centre and the distribution of their assets, rights and properties to CMI set out in paragraph 25 above, any Canwest/CMI Group Intercompany Receivables held by such corporation, and such assets, rights and properties shall be vested into CMI free and clear from all security interests (whether contractual, statutory or otherwise), hypothecs, mortgages, trusts or deemed trusts (whether contractual, statutory or otherwise), liens, executions, levies, charges, pledges, title retention agreements, adverse claims or interests, options to acquire, rights of first refusal to purchase, rights of first offer to purchase, or other financial or monetary claims, whether or not they have attached or been perfected,

registered or filed and whether secured, unsecured or otherwise including, without limiting the generality of the forgoing (a) the Court Charges, (b) all charges, security interests or claims evidenced by registrations pursuant to the *Personal Property Security Act* (Ontario) or any other personal property registry system, and (c) the Existing Security (collectively, "**Encumbrances**").

76. **THIS COURT ORDERS** that, in connection with and subject to the transfer to CMI of the Trademarks, the Copyrights and Other IP, the Other Canwest Assets and any and all Canwest/CMI Group Intercompany Receivables owing to Canwest set out in paragraph 27, the Trademarks, the Copyrights and Other IP, the Other Canwest Assets and any and all Canwest/CMI Group Intercompany Receivables owing to Canwest shall be vested into CMI free and clear from all Encumbrances.

77. **THIS COURT ORDERS** that in connection with and subject to the transfer of the New Canwest Assets to New Canwest set out in paragraph 33, the New Canwest Assets shall be vested into New Canwest free and clear from all Encumbrances.

78. **THIS COURT ORDERS** that upon delivery by CMI of the Transfer Notice and payment of $11,000,000 by the Shaw Designated Entity to the Transfer Agent pursuant to paragraph 44 above, the Shaw Designated Entity shall acquire all of the issued and outstanding Canwest New Preferred Shares free and clear from all Encumbrances.

79. **THIS COURT ORDERS** that in connection with and subject to the transfer and assignment by CMI of all of the issued and outstanding shares of New Canwest, the New Canwest Note, and the CW Investments Shares set out in paragraph 52 above, all of the issued and outstanding shares of New Canwest, the New Canwest Note and the CW Investments Shares shall be transferred to and vested in 7316712 Canada free and clear from all Encumbrances.

80. **THIS COURT ORDERS AND DECLARES** that the *Bulk Sales Act*, R.S.O. 1990, c. B-14 and similar legislation in other Provinces and section 6 of the *Retail Sales Tax Act*, R.S.O. 1990, c. R-31 and any equivalent or applicable legislation under any province or territory do not apply to the transactions contemplated in the Plan.

81. **THIS COURT ORDERS** that, notwithstanding:

(a) the pendency of the CCAA Proceedings and the declarations of insolvency made in the CCAA Proceedings; and

(b) any federal or provincial law;

the transactions contemplated in the Plan, the payments or distributions made in connection with the restructuring and recapitalization of the CMI Entities, whether before or after the Filing Date, and any action taken in connection therewith, including, without limitation, under this Plan Sanction Order, shall not be void or voidable and do not constitute nor shall they be deemed to be a fraudulent preference, assignment, fraudulent conveyance, transfer at undervalue or other challengeable transaction under any applicable federal or provincial Law, and the transactions contemplated in the Plan, the payments or distributions made in connection with the restructuring and recapitalization of the CMI Entities, whether before or after the Filing Date, and any action taken in connection therewith, do not constitute conduct meriting an oppression remedy and shall be binding on an interim receiver, receiver, liquidator or trustee in bankruptcy appointed in respect of Canwest or any of its Subsidiaries.

RELEASES

82. **THIS COURT ORDERS** that pursuant to and in accordance with section 7.3(a) of the Plan, on the Plan Implementation Date, without limiting in any way the releases and discharges of all Claims provided for in paragraphs 12, 21 and 24 of this Plan Sanction Order, Canwest, the CMI Entities and the Canwest Subsidiaries and each of their respective present and former shareholders, the Directors and Officers, members of the Special Committee or any pension or other committee or governance counsel, financial advisors (including RBC and Genuity), legal counsel and agents, the Monitor and its counsel, FTI, the Chief Restructuring Advisor, the Initial Directors, the Retiree Representative Counsel, the Retiree Representatives, CIBC and the Plan Sponsor and the present and former directors, officers and agents of each (collectively, the "**Released Parties**") shall be and shall be deemed to be released and discharged with prejudice from any and all demands, claims, actions, causes of action, counterclaims, suits, debts, sums of money, accounts, covenants, damages, judgments, expenses, executions, liens and other recoveries on account of any indebtedness, liability, obligation, demand or cause of action of whatever nature that any Person (including any Person who may claim contribution or indemnification against or from them) may be entitled to assert, including any and all Claims in

respect of statutory liabilities of Directors, Officers, and any alleged fiduciary (whether acting as a director, officer, member of the Special Committee or a pension or other committee or governance counsel or acting in any other capacity in connection with the administration of the CH Plan or any other pension or benefit plan of any of the CMI Entities) whether known or unknown, matured or unmatured, direct, indirect or derivative, foreseen or unforeseen, existing or hereafter arising, based in whole or in part on any act or omission, transaction, dealing or other occurrence existing or taking place on or prior to the Plan Implementation Date relating to, arising out of or in connection with any claim, including any claim arising out of (i) the restructuring, disclaimer, resiliation, breach or termination of any contract, lease, agreement or other arrangement, whether written or oral, (ii) the business and affairs of Canwest, any of the CMI Entities or any of the Canwest Subsidiaries, (iii) the administration or management of the CH Plan or any other pension or benefit plans, (iv) the Plan, (v) the CCAA Proceedings and the Initial Order, (vi) any transaction referenced in the Support Agreement, the Subscription Agreement, the Shaw Support Agreement, the CTLP Limited Partnership Agreement or the Plan Emergence Agreement, and (vii) the Canwest Articles of Reorganization and related transactions, provided however that nothing in this paragraph 82 shall release or discharge:

(a) Canwest or any of the Canwest Subsidiaries (other than the CTLP Plan Entities) from or in respect of (x) any Unaffected Claim or (y) its obligations to Affected Creditors under the Plan or under any Order;

(b) a Released Party if the Released Party is adjudged by the express terms of a judgment rendered on a final determination on the merits to have committed fraud or wilful misconduct or to have been grossly negligent or, in the case of Directors, in respect of any claim referred to in section 5.1(2) of the CCAA;

(c) any Claim (other than a Claim of a Noteholder or the Trustee) against a CMI Entity which is not a Plan Entity, and any Affected Creditor shall be allowed to continue to assert such Claim against National Post Holdings, National Post, and any National Post Consolidated Bankruptcy Estate or against any such other CMI Entity which is not a Plan Entity; and

(d) claims of creditors against Canwest Subsidiaries which are not CMI Entities.

For greater certainty and notwithstanding sub-paragraphs (a), (b), (c) and (d) above, all Claims including all Restructuring Period Claims filed against the Directors and Officers pursuant to the Claims Procedure Order or otherwise and all other claims against the Directors and Officers of Canwest and the Canwest Subsidiaries shall be and shall be deemed to be discharged, released and forever barred with prejudice, and the Directors and Officers shall have no further liability in respect thereto.

83. **THIS COURT ORDERS** that pursuant to and in accordance with the Plan, the ability of any Person to proceed against the Directors and Officers and the Initial Directors in respect of or relating to any Affected Claims shall be and shall be deemed to be forever discharged, extinguished, released and restrained with prejudice.

84. **THIS COURT ORDERS** that pursuant to and in accordance with section 7.3(b) of the Plan, at the Effective Time, the Noteholder Released Parties shall be and shall be deemed to be released and discharged with prejudice from any and all demands, claims, actions, causes of action, counterclaims, suits, debts, sums of money, accounts, covenants, damages, judgments, expenses, executions, liens and other recoveries on account of any indebtedness, liability, obligation, demand or cause of action of whatever nature that any Person (including any Person who may claim contribution or indemnification against or from them) may be entitled to assert whether known or unknown, matured or unmatured, direct, indirect or derivative, 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 Effective Time relating to, arising out of or in connection with the Notes (including any guarantee obligations under the Notes or the Indenture), the recapitalization of the CMI Entities, the Plan, the CCAA Proceedings, the Support Agreement and the Shaw Support Agreement and any other actions or matters related directly or indirectly to the foregoing; provided that nothing in this paragraph 84 will release or discharge any of the Noteholder Released Parties in respect of their obligations under the Plan and provided further that nothing in this paragraph 84 shall release or discharge a Noteholder Released Party if the Noteholder Released Party is adjudged by the express terms of a judgment rendered on a final determination on the merits to have committed fraud or wilful misconduct, or to have been grossly negligent.

ACCESS TO PAST EMPLOYEES AND RECORDS

85. **THIS COURT ORDERS** that following the Plan Implementation Date:

(a) New Canwest and CTLP shall make available to the Monitor on a reasonable basis up to five (5) management or other employees of New Canwest or the CTLP Group Entities, to be agreed upon between the Monitor and the Plan Sponsor, in order to assist the Monitor in carrying out its duties as set forth in the Plan Emergence Agreement, the Plan and this Plan Sanction Order (including, for greater certainty, the determination, resolution, litigation and/or settlement of Unresolved Claims of Affected Creditors and the windup, dissolution, liquidation, abandonment or bankruptcy of any Remaining Canwest Entities) until the discharge of the Monitor;

(b) New Canwest and CTLP shall make available to the Monitor on a reasonable basis the books and records of the CTLP Plan Entities and CW Investments and their respective Subsidiaries in its possession; and

(c) the Monitor shall make available to New Canwest on a reasonable basis the books and records of the Remaining Canwest Entities in its possession until the discharge of the Monitor.

THE MONITOR

86. **THIS COURT ORDERS** that the Monitor, in addition to its prescribed rights and obligations under the CCAA and the powers provided to the Monitor herein, shall be and is hereby authorized, directed and empowered to perform its functions and fulfil its obligations under the Plan to facilitate the implementation of the Plan.

87. **THIS COURT ORDERS** that the Monitor shall be and is hereby authorized, directed and empowered to perform its functions and fulfil its obligations under the Plan Emergence Agreement, including to (a) administer and distribute the Plan Implementation Fund, (b) receive the Subscription Price net of the Noteholder Pool, (c) establish and hold the Ordinary Creditors Pool, including the Ordinary CMI Creditors Sub-Pool, the Ordinary CTLP Creditors Sub-Pool and the Convenience Class Pool, (d) resolve any Unresolved Claims, (e) effect the

distributions in respect of Proven Distribution Claims to the Ordinary Creditors and the Convenience Class Creditors and pay the Unaffected Claims (including without limitation, to resolve any unresolved Unaffected Claims) in accordance with the Plan and the Plan Emergence Agreement, (f) effect the liquidation, bankruptcy, winding-up or dissolution of Canwest and certain of its remaining Canwest Subsidiaries including, for the avoidance of doubt, the foreign Canwest Subsidiaries, (g) to act, if required, as trustee in bankruptcy, liquidator, receiver or a similar official of such entities, (h) liquidate any assets of the CMI Entities (other than the CTLP Plan Entities), including the Winnipeg Condo, not transferred to New Canwest pursuant to the Plan, and to contribute any net proceeds realized therefrom to the Plan Implementation Fund, (i) take all appropriate steps to collect all refunds, dividends, distributions or other amounts payable to Canwest or CMI, (j) implement a claims process to determine and resolve any Post-Filing Claim which are to be paid from the Plan Implementation Fund and (k) perform such other functions as the Court may order from time to time.

88. **THIS COURT ORDERS** that the Monitor shall be and is hereby authorized, directed and empowered to file on or after the Plan Implementation Date assignments in bankruptcy under the BIA for National Post and National Post Holdings and FTI shall be and is hereby authorized, directed and empowered to apply for the consolidation of and to act as trustee in bankruptcy of such entities, including the National Post Consolidated Bankruptcy Estate, if any.

89. **THIS COURT ORDERS AND DECLARES** that the actions and conduct of the Monitor in the CCAA Proceedings are hereby approved and that the Monitor has satisfied all of its obligations up to and including the date of this Plan Sanction Order, and that in addition to the protections in favour of the Monitor as set out in the Initial Order and the CCAA, 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 its duties under the Plan or as requested by the CMI Entities 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 with prejudice and the Monitor shall have no liability in respect thereof.

90. **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 (including regarding the administration of the Plan Implementation Fund) and such further order securing, as security for costs, the full indemnity costs of the Monitor in connection with any proposed action or proceeding as the Court hearing the motion for leave to proceed may deem just and appropriate.

91. **THIS COURT ORDERS** that upon fulfilment of its obligations under the Plan and the Plan Emergence Agreement, the Monitor shall be and is hereby authorized and directed to apply to Court for its discharge.

THE CHIEF RESTRUCTURING ADVISOR

92. **THIS COURT ORDERS** that the Chief Restructuring Advisor shall be and is hereby discharged and released with prejudice from its obligations on the Plan Implementation Date.

POST-FILING CLAIMS PROCESS

93. **THIS COURT ORDERS** that the process to solicit, identify and quantify Post-Filing Claims (other than Intercompany Claims) outlined in the Monitor's 17th Report (the "**Post-Filing Claims Procedure**") is hereby approved and the Monitor is authorized to take all steps and actions and do all things determined by the Monitor to be necessary or appropriate to carry out the Post-Filing Claims Procedure pursuant to the terms of the Post-Filing Claims Procedure Order issued by this Court as of the date hereof.

ADDITIONAL PROVISIONS

94. **THIS COURT ORDERS** that Canwest is hereby directed and authorized to apply to the TSX Venture Exchange to have the securities of Canwest listed on such exchange delisted from such exchange, which delisting shall be effective on or about the Effective Time on the Plan Implementation Date.

95. **THIS COURT ORDERS** that, subject to the performance by the CMI Entities of their obligations under the Plan, all obligations, contracts, agreements, leases or other arrangements to which any of the CMI Entities is a party shall be and remain in full force and effect, unamended, as at the Plan Implementation Date, unless disclaimed or resiliated or deemed to be disclaimed or resiliated by the CMI Entities pursuant to the Claims Procedure Order or the Meeting Order, and no party to any such obligation or agreement shall on or following the Plan Implementation Date, accelerate, terminate, refuse to renew, rescind, refuse to perform or otherwise disclaim or resiliate its obligations thereunder, or enforce or exercise (or purport to enforce or exercise) any right or remedy under or in respect of any such obligation or agreement, by reason:

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

(b) that the CMI Entities have sought or obtained relief or have taken steps as part of the Plan, the Initial Order or under the CCAA;

(c) of any default or event of default arising as a result of the financial condition or insolvency of the CMI Entities;

(d) of the effect upon the CMI Entities of the completion of any of the transactions contemplated under the Plan, including the transfer of the New Canwest Assets to New Canwest; or

(e) of any compromises, settlements, restructurings or releases effected pursuant to the Plan.

96. **THIS COURT ORDERS** that from and after the Plan Implementation Date any and all Persons shall be and are hereby stayed from commencing, taking, applying for or issuing or continuing any and all steps or proceedings, including without limitation, administrative hearings and orders, declarations or assessments, commenced, taken or proceeded with or that may be commenced, taken or proceeded with against any Released Party in respect of all Claims

and any matter which is released pursuant to paragraphs 12, 21 and 24 of this Plan Sanction Order and section 7.3 of the Plan.

97. **THIS COURT ORDERS** that section 36.1 of the CCAA, sections 95 to 101 of the BIA and any other federal or provincial Law relating to preferences, fraudulent conveyances or transfers at undervalue, shall not apply to the Plan or to any payments or distributions made in connection with the restructuring and recapitalization of the CMI Entities, whether before or after the Filing Date, including to any and all of the payments, distributions or transactions contemplated by and to be implemented pursuant to the Plan.

98. **THIS COURT ORDERS** that from and after the Plan Implementation Date the Noteholders and the Trustee shall have no Claims against National Post Holdings, National Post and the National Post Consolidated Bankruptcy Estate, if any, and that the Claims Procedure Order, the CMI Claims Bar Date, the Meeting Order and the Restructuring Period Claims Bar Date shall apply to resolve all Claims against National Post Holdings, National Post or the National Post Consolidated Bankruptcy Estate, if any.

99. **THIS COURT DECLARES** that, after the Effective Time, the Applicants which are CTLP Plan Entities shall no longer be Applicants in the CCAA Proceedings, the stay of proceedings created pursuant to the Initial Order shall be terminated in respect of the CTLP Plan Entities and the Monitor shall be discharged from its duties as the Monitor of the CTLP Plan Entities, provided that in connection with the CTLP Plan Entities, the Monitor's powers and functions with respect to the resolution and administration of Unresolved Claims, making distributions under the Plan and duties under the Plan Emergence Agreement and the CCAA, including determining, resolving and paying Unaffected Claims related to the CTLP Plan Entities shall continue.

100. **THIS COURT ORDERS** that this Plan Sanction Order shall have full force and effect in all provinces and territories of Canada and abroad as against all persons and parties against whom it may otherwise be enforced.

101. **THIS COURT ORDERS** that the CMI Entities, the Monitor and the Plan Sponsor may apply to this Court for advice and direction, or to seek relief in respect of, any matters arising from or under the Plan, the Plan Emergence Agreement and this Plan Sanction

Order, including without limitation the interpretation of this Plan Sanction Order, the Plan and the Plan Emergence Agreement or the implementation thereof, and for any further Order that may be required, on notice to any party likely to be affected by the Order sought or on such notice as this Court orders.

102. **THIS COURT ORDERS AND REQUESTS** the aid and recognition (including assistance pursuant to section 17 of the CCAA) of any court or any judicial, regulatory or administrative body in any province or territory of Canada and any judicial, regulatory or administrative tribunal or other court constituted pursuant to the Parliament of Canada or the legislature of any province or territory or any court or any judicial, regulatory or administrative body of the United States and the states or other subdivisions of the United States and of any other nation or state to act in aid of and to be complementary to this court in carrying out the terms of this Plan Sanction Order.

Pepall, J

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

JUL 28 2010

PER / PAR: JSJ

SCHEDULE "A"

APPLICANTS

1. Canwest Global Communications Corp.
2. Canwest Media Inc.
3. MBS Productions Inc.
4. Yellow Card Productions Inc.
5. Canwest Global Broadcasting Inc./Radiodiffusion Canwest Global Inc.
6. Canwest Television GP Inc.
7. Fox Sports World Canada Holdco Inc.
8. Global Centre Inc.
9. Multisound Publishers Ltd.
10. Canwest International Communications Inc.
11. Canwest Irish Holdings (Barbados) Inc.
12. Western Communications Inc.
13. Canwest Finance Inc./Financiere Canwest Inc.
14. National Post Holdings Ltd.
15. Canwest International Management Inc.
16. Canwest International Distribution Limited
17. Canwest MediaWorks Turkish Holdings (Netherlands)
18. CGS International Holdings (Netherlands)
19. CGS Debenture Holding (Netherlands)
20. CGS Shareholding (Netherlands)
21. CGS NZ Radio Shareholding (Netherlands)
22. 4501063 Canada Inc.
23. 4501071 Canada Inc.
24. 30109, LLC
25. CanWest MediaWorks (US) Holdings Corp.

SCHEDULE "B"

PARTNERSHIPS

1. Canwest Television Limited Partnership
2. Fox Sports World Canada Partnership
3. The National Post Company/La Publication National Post

SCHEDULE "C"

RESTATED CONSOLIDATED PLAN OF COMPROMISE, ARRANGMENT AND REORGANIZATION OF THE CMI ENTITIES

Court File No. CV-09-8396-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

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

AND IN THE MATTER OF
A PLAN OF COMPROMISE OR ARRANGEMENT OF
CANWEST GLOBAL COMMUNICATIONS CORP. AND THE OTHER ENTITIES
LISTED ON SCHEDULE A HERETO

APPLICANTS

RESTATED CONSOLIDATED PLAN OF COMPROMISE, ARRANGEMENT AND REORGANIZATION

pursuant to the *Companies' Creditors Arrangement Act* and the *Canada Business Corporations Act*
concerning, affecting and involving

CANWEST GLOBAL COMMUNICATIONS CORP., CANWEST MEDIA INC., CANWEST TELEVISION GP INC., CANWEST TELEVISION LIMITED PARTNERSHIP, CANWEST GLOBAL BROADCASTING INC./RADIODIFFUSION CANWEST GLOBAL INC., FOX SPORTS WORLD CANADA HOLDCO INC., FOX SPORTS WORLD CANADA PARTNERSHIP, NATIONAL POST HOLDINGS LTD., THE NATIONAL POST COMPANY/LA PUBLICATION NATIONAL POST, MBS PRODUCTIONS INC., YELLOW CARD PRODUCTIONS INC., GLOBAL CENTRE INC. AND 4501063 CANADA INC.

As of June 23, 2010

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CONSOLIDATED PLAN OF COMPROMISE, ARRANGEMENT AND REORGANIZATION

This is the consolidated plan of compromise, arrangement and reorganization of Canwest Global Communications Corp., Canwest Media Inc., Canwest Television GP Inc., Canwest Television Limited Partnership, Canwest Global Broadcasting Inc./Radiodiffusion Canwest Global Inc., Fox Sports World Canada Holdco Inc., Fox Sports World Canada Partnership, National Post Holdings Ltd., The National Post Company/La Publication National Post, MBS Productions Inc., Yellow Card Productions Inc., Global Centre Inc. and 4501063 Canada Inc. pursuant to the *Companies' Creditors Arrangement Act* (Canada) and the *Canada Business Corporations Act*.

ARTICLE 1
INTERPRETATION

1.1 Definitions

In the Plan, unless otherwise stated or the context otherwise requires:

"**30109**" means 30109, LLC, a limited liability company governed by the laws of Delaware.

"**4414616 Canada**" means 4414616 Canada Inc., a corporation governed by the CBCA.

"**4501063 Canada**" means 4501063 Canada Inc., a corporation governed by the CBCA.

"**4501071 Canada**" means 4501071 Canada Inc., a corporation governed by the CBCA.

"**7316712 Canada**" means 7316712 Canada Inc., a corporation governed by the CBCA, a wholly-owned subsidiary of Shaw that is a "Canadian" (as defined in the Direction) designated by Shaw pursuant to the provisions of section 9.5(h) of the Subscription Agreement.

"**Ad Hoc Committee**" means the informal *ad hoc* committee of certain Noteholders represented by its legal counsel, Goodmans LLP, as such committee may be constituted from time to time.

"**Administration Charge**" means the charge created under paragraph 33 of the Initial Order, not to exceed $15,000,000, as security for the reasonable professional fees and disbursements of the Monitor, counsel to the Monitor, the Chief Restructuring Advisor, counsel and the financial advisor to the CMI Entities, counsel and the financial advisor to the Special Committee, counsel to the Directors of the Applicants and counsel and the financial advisor to the Ad Hoc Committee.

"**Affected Claims**" means Claims other than Unaffected Claims.

"**Affected Creditor**" means any Person having an Affected Claim and includes the transferee or assignee of a transferred or assigned Affected Claim who is recognized as an Affected Creditor by the relevant CMI Entity and the Monitor in accordance with the Claims Procedure Order, or a trustee, executor, liquidator, receiver, receiver and manager, or other Person acting on behalf of or through such Person, including, for greater certainty, and without duplication, a Noteholder and the Trustee.

"**April 28 Severance Schedule**" means the schedule delivered by CMI to the Plan Sponsor on April 28, 2010, setting out certain severance obligations in respect of certain Employees of CMI and as revised on April 29, 2010 and June 14, 2010, and as may be updated from time to time.

"**April 28 Severance Schedule Employees**" means those Employees of CMI identified in the April 28 Severance Schedule.

"**Applicants**" means, collectively, the applicants under the Initial Order, as listed on Schedule A hereto, and "**Applicant**" means any one of them.

"**Assumption Consideration Amount**" has the meaning set out in Section 5.5(k)(ii).

"**Bankruptcy Costs**" means the costs and disbursements of the Monitor (both in its capacity as the Monitor and as trustee in bankruptcy), its legal counsel and advisors provided for in the Plan Emergence Agreement which are required after the Plan Implementation Date to bankrupt, liquidate, wind-up, or dissolve Canwest, CMI and certain of their remaining Subsidiaries (including for the avoidance of doubt Fireworks Entertainment Inc., Canwest Entertainment Inc., CEID (Canada) I Inc. and CEID (Canada) II Inc.), but not including National Post, National Post Holdings, and the Subsidiaries of 4501071 Canada.

"**BIA**" means the *Bankruptcy and Insolvency Act* (Canada).

"**Beneficial Noteholder**" means a beneficial or entitlement holder of Notes holding such Notes in a securities account with the Depository, a Depository participant or other securities intermediary, including for greater certainty, such Depository participant or other securities intermediary only if and to the extent such Depository participant or other securities intermediary holds Notes as principal and for its own account.

"**Broadcast Licences**" means the broadcasting licences issued by the CRTC to CMI as limited partner and GP Inc. as general partner carrying on business as CTLP as listed on Schedule D.2.

"**Business**" means the free-to-air television broadcast business and subscription-based specialty television business carried on by Canwest and certain Canwest Subsidiaries.

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

"**Business-Related Post-Filing Claims**" means Post-Filing Claims incurred by the CMI Entities in connection with the Business or the management or provision of head office and corporate services to and/or for the benefit of CTLP Group Entities.

"**Canwest**" means Canwest Global Communications Corp., a corporation governed by the CBCA.

"**Canwest Articles of Reorganization**" means the articles of reorganization referred to in Section 5.2B to be filed by Canwest pursuant to section 191 of the CBCA.

"**Canwest Broadcasting**" means Canwest Global Broadcasting Inc./Radiodiffusion Canwest Global Inc., a corporation governed by the laws of Quebec.

"**Canwest/CMI Group Intercompany Receivables**" means, in respect of Canwest or any Subsidiary that is neither a CTLP Group Entity nor a CWI Group Entity (including any investee entity), the amounts, if any, owing as of the Effective Time to Canwest or such Subsidiary from any given CTLP Group Entity and/or any given CWI Group Entity (including any investee entity), Men TV General Partnership and/or Mystery Partnership (other than any such amounts owing under the Shared Services Agreement and/or the Omnibus Transition and Reorganization Agreement), and includes, for the avoidance of doubt, the CMI-CTLP Receivable.

"**Canwest Communications**" means Canwest International Communications Inc., a corporation governed by the laws of Barbados.

"**Canwest Finance**" means Canwest Finance Inc./Financière Canwest Inc., a corporation governed by the laws of Quebec.

"**Canwest International**" means Canwest International Management Inc., a corporation governed by the laws of Barbados.

"**Canwest International Distribution**" means Canwest International Distribution Limited, a corporation governed by the laws of Ireland.

"**Canwest Irish Holdco**" means Canwest Irish Holdings (Barbados) Inc., a corporation governed by the laws of Barbados.

"**Canwest MediaWorks Turkish Holdings**" means Canwest MediaWorks Turkish Holdings (Netherlands) B.V., a corporation governed by the laws of the Netherlands.

"**Canwest MediaWorks US**" means Canwest MediaWorks Holdings Corp., a corporation governed by the laws of Delaware.

"**Canwest New Shares**" means collectively, the Canwest New Multiple Voting Shares, the Canwest New Subordinate Voting Shares and the Canwest New Non-Voting Shares.

"**Canwest New Multiple Voting Shares**" means the new multiple voting shares to be created under Canwest Articles of Reorganization.

"**Canwest New Non-Voting Shares**" means the new non-voting shares to be created under the Canwest Articles of Reorganization.

"**Canwest New Preferred Shares**" means the new non-voting preference shares to be created under the Canwest Articles of Reorganization.

"**Canwest New Subordinate Voting Shares**" means the new subordinate voting shares to be created under the Canwest Articles of Reorganization.

"**Canwest Publishing**" means Canwest Publishing Inc./Publications Canwest Inc., a corporation governed by the CBCA.

"**Canwest Subsidiaries**" means, collectively, Subsidiaries of Canwest other than (a) CW Investments and its Subsidiaries, and (b) Subsidiaries of 4501071 Canada.

"**Cash**" means all cash, certificates of deposits, bank deposits, commercial paper, treasury bills, bills of exchange and other cash equivalents of the Plan Entities, other than the cash, certificates of deposits, bank deposits, commercial paper, treasury bills, bills of exchange and other cash equivalents held at the Effective Time by CTLP and GP Inc. and their Subsidiaries after giving effect to the steps set out in Section 5.5, and for greater certainty "Cash" includes the net proceeds of sale from the Corporate Jet, the Red Deer Property, but excludes the proceeds of sale of the National Post Transaction remaining after National Post has repaid to CMI all post-filing amounts loaned by CMI to National Post, if any. For greater certainty, "Cash" shall exclude monies needed by CTLP to pay the CH Plan Settlement Amount in accordance with Article 5 of the Plan.

"**Cash Collateral Agreement**" means the use of cash collateral and consent agreement dated as of September 23, 2009 between Canwest, CMI, certain Subsidiaries of CMI and certain Noteholders, as amended by the amendment agreement dated as of December 14, 2009, the amendment agreement No. 2 dated as of January 29, 2010, the amendment agreement No. 3 dated as of February 11, 2010, the amendment agreement No. 4 dated as of April 15, 2010 and the amendment agreement No. 5 dated as of May 3, 2010.

"**CBCA**" means the *Canada Business Corporations Act*.

"**CCAA**" means the *Companies' Creditors Arrangement Act* (Canada).

"**CCAA Proceedings**" means the proceedings under the CCAA commenced by the Applicants pursuant to a notice of application dated October 6, 2009 in which the Initial Order was made.

"**CEP**" means the Communications, Energy and Paperworkers Union of Canada.

"**CEP CH Plan Grievance**" means CEP policy grievance (No. 1100-2009-03) dated July 20, 2009.

"**CEP Counsel**" means CaleyWray LLP.

"**CEP Representative Order**" means the Order of the Court made on October 27, 2009 authorizing CEP to represent Current and Former Members of the CEP including for the purpose of advancing, settling or compromising claims of the Current and Former Members in the CCAA Proceedings, and authorizing CEP Counsel to act as counsel to the CEP and the Current and Former Members in the CCAA Proceedings.

"**CEP Retirees**" means all former employees of the CMI Entities (or their predecessors, as applicable) who were represented by the CEP when they were so employed and who are not entitled to benefits under the CH Plan, or the surviving spouses of such former employees, if applicable.

"**CEP Terminal Deficiency Claim**" means the Claim filed on November 17, 2009 under the Claims Procedure Order by CEP on behalf of the Current and Former Members in the amount of $15,438,739 in respect of the terminal deficiency in the CH Plan.

"**CGS Debenture**" means CGS Debenture Holding (Netherlands) B.V., a corporation governed by the laws of the Netherlands.

"**CGS International**" means CGS International Holdings (Netherlands) B.V., a corporation governed by the laws of the Netherlands.

"**CGS NZ Radio**" means CGS NZ Radio Shareholding (Netherlands) B.V., a corporation governed by the laws of the Netherlands.

"**CGS Shareholding**" means CGS Shareholding (Netherlands) B.V., a corporation governed by the laws of the Netherlands.

"**CH Plan**" means the "Global Communications Limited Retirement Plan for CH Employees", a defined benefit pension plan for full-time and part-time employees who worked at CHCH-TV, sponsored by CTLP and registered under the PBSA.

"**CH Plan Settlement Agreement**" means the settlement agreement made on April 16, 2010 among Canwest, CMI, CTLP, the Retiree Representative Counsel, the Retiree Representatives and the CEP on behalf of the Current and Former Members in respect of the CEP Terminal Deficiency Claim, the Retiree Terminal Deficiency Claim and the CEP CH Plan Grievance.

"**CH Plan Settlement Amount**" means the amount of $350,000 to be paid on the Plan Implementation Date by CTLP to the CH Plan pursuant to the CH Plan Settlement Agreement.

"**CH Plan Trustee**" means RBC Dexia Investor Services Trust, in its capacity as trustee of the CH Plan.

"**Chief Restructuring Advisor**" means, collectively, Mr. Hap S. Stephen and Stonecrest Capital Inc.

"**CIBC**" means CIBC Asset-Based Lending Inc. (formerly known as "CIT Business Credit Canada Inc.").

"**CIT Credit Agreement**" means the credit agreement dated as of May 22, 2009, as amended, among CMI, the guarantors named therein, the lenders party thereto from time to time and CIBC in its capacity as agent with respect to the CIT Facility and approved in the Initial Order, as it may be further amended, supplemented or otherwise modified from time to time.

"**CIT Facility**" means the asset-based loan facility, secured by a first priority security interest in all property, assets and undertaking of CMI, including the DIP Charge, and the guarantors named in the CIT Credit Agreement, including its conversion to a debtor-in-possession financing arrangement pursuant to the Initial Order.

"**Claim**" means (a) any right or claim of any Person against one or more of the CMI Entities, whether or not asserted, in connection with any indebtedness, liability or obligation of any kind whatsoever of one or more of the CMI Entities in existence on the Filing Date, including on account of Wages and Benefits, and any accrued interest thereon and costs payable in respect thereof to and including the Filing Date, whether or not such right or claim is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, unsecured, perfected, unperfected, present, future, known, or unknown, by guarantee, surety or otherwise, and whether or not such right is executory or anticipatory in nature, including the right or ability of any Person to advance a claim for contribution or

indemnity or otherwise with respect to any matter, action, cause or chose in action, whether existing at present or commenced in the future, which indebtedness, liability or obligation is based in whole or in part on facts which existed prior to the Filing Date, and includes any other claims that would have been claims provable in bankruptcy had the applicable CMI Entity become bankrupt on the Filing Date; (b) any Restructuring Period Claim; and (c) any right or claim of any Person against one or more of the Directors or Officers of one or more of the Applicants or any of them, that relates to a Claim described in paragraph (a) of this definition or a Restructuring Period Claim howsoever arising for which one or more of the Directors or Officers of an Applicant are by statute or otherwise by law liable to pay in their capacity as a Director or Officer or in any other capacity.

"**Claims Procedure Order**" means the Order made October 14, 2009 in respect of the procedures governing the determination of Claims for voting and distribution purposes, as such Order was amended on November 30, 2009 and as it may be further amended and supplemented from time to time.

"**Class**" means a class of Affected Creditors established for the purpose of voting on the Plan as set out in Section 3.2.

"**CMI**" means Canwest Media Inc., a corporation governed by the CBCA.

"**CMI-CTLP Receivable**" means the amount, if any, owing by CTLP to CMI as of the Effective Time, which amount for the avoidance of doubt, excludes any Canwest/CMI Group Intercompany Receivable transferred to CMI under Sections 5.5(k) or 5.5(l).

"**CMI Claims Bar Date**" means 5:00 p.m. on November 19, 2009, except where a Notice of Claim was sent by one of the CMI Entities after October 22, 2009 pursuant to the Claims Procedure Order, in which case, pursuant to the Order made on November 30, 2009 amending the Claims Procedure Order, the CMI Claims Bar Date in respect of such Claim is 5:00 p.m. on December 17, 2009.

"**CMI Entities**" means, collectively, the Applicants, CTLP, Fox Sports and National Post and "**CMI Entity**" means any one of them.

"**CMI Notice of Dispute of Claim**" shall have the meaning ascribed thereto in the Claims Procedure Order.

"**CMI Proof of Claim**" shall have the meaning ascribed thereto in the Claims Procedure Order.

"**Collateral Agency Agreement**" means the intercreditor and collateral agency agreement dated as of October 13, 2005 among certain of the CMI Entities and the Collateral Agent, as amended by the credit confirmation and amendment to the intercreditor and collateral agency agreement dated as of May 22, 2009, and as further amended by the credit confirmation and amendment to the intercreditor and collateral agency agreement dated as of October 1, 2009.

"**Collateral Agent**" means CIBC Mellon Trust Company, in its capacity as collateral agent under the Collateral Agency Agreement.

"**Conditions Precedent**" means the conditions precedent to the transactions contemplated in the Plan as set out in Section 6.3.

"**Continued Support Payment**" means (a) in the event that the Plan Implementation Date occurs on or before September 30, 2010, $0, and (b) in the event that the Plan Implementation Date occurs after September 30, 2010, the product of US$2,900,000 multiplied by the number of months elapsed after September 30, 2010 and prior to the Plan Implementation Date; provided that if the Plan Implementation Date occurs prior to the end of a month, the payment in (b) in respect of such partial month shall be pro-rated based on the number of days elapsed in such month (to but excluding the Plan Implementation Date).

"**Convenience Class Claim**" means (a) any Claim of an Affected Creditor of a Plan Entity, other than a Noteholder, in an amount that is less than or equal to $5,000, and (b) any Claim of an Affected Creditor of a Plan Entity, other than a Noteholder, in an amount in excess of $5,000 that the relevant Affected Creditor has validly elected to value at $5,000 for purposes of the Plan in accordance with Section 3.7.

"**Convenience Class Claim Declaration**" means an executed declaration substantially in the form attached hereto as Schedule E.

"**Convenience Class Creditor**" means an Affected Creditor with a Convenience Class Claim.

"**Convenience Class Pool**" means the aggregate amount taken from the Subscription Price sufficient to pay in full all Convenience Class Claims.

"**Copyrights and Other IP**" means all copyrights and other intellectual property owned by Canwest or CMI including those set out in Schedule D.6.

"**Corporate Jet**" means the 1988 British Aerospace model BAE 125 Series 800A airplane known in the airline industry as a Hawker 800A , Serial No. 258123 and Canadian registration C-GCGS, together with the engines, propellers and avionics.

"**Court**" means the Ontario Superior Court of Justice (Commercial List).

"**Court Charges**" means, collectively, the Administration Charge, the Directors Charge, the DIP Charge, the KERP Charge and the Investor Charge.

"**CRTC**" means the Canadian Radio-television and Telecommunications Commission.

"**CTLP**" means Canwest Television Limited Partnership, a limited partnership established by CMI, as limited partner, and GP Inc., as general partner, and governed by the laws of the Province of Manitoba.

"**CTLP Assumption Consideration Amount**" means that portion of the Assumption Consideration Amount relating to Claims against CTLP.

"**CTLP Assumption Consideration Note**" has the meaning set out in Section 5.5(k)(iii).

"**CTLP Limited Partnership Agreement**" means the amended and restated limited partnership agreement dated as of December 31, 2008 governing CTLP.

"**CTLP-CMI Receivable**" means the amount, if any, owing by CMI to CTLP as of the Effective Time.

"**CTLP Group Entities**" means CTLP, GP Inc., and each Subsidiary thereof, and "**CTLP Group Entity**" means any one of them.

"**CTLP Plan Entities**" means CTLP, GP Inc., Canwest Broadcasting, Fox Sports Holdco, and Fox Sports, and "**CTLP Plan Entity**" means any one of them.

"**Current and Former Members**" has the meaning ascribed thereto in the CEP Representative Order.

"**CWI Group Entities**" means CW Investments and each Subsidiary thereof, and "**CWI Group Entity**" means any one of them.

"**CW Investments**" means CW Investments Co., an unlimited liability company governed by the laws of Nova Scotia.

"**CW Investments Shares**" means the 352,986 Class A Common Shares and 666 Class A Preferred Shares of CW Investments owned by CMI.

"**CW Media Holdings**" means CW Media Holdings Inc.

"**CW Media Trademarks Licence Agreements**" means, collectively, the trademarks licence agreement dated August 13, 2007 between Canwest and CW Media Holdings and the trademarks licence agreement dated August 13, 2007 between Canwest and AA Acquisition Corp. (now CW Media Inc.).

"**Depository**" means The Depository Trust & Clearing Corporation or a successor as custodian for its participants, as applicable, and any nominee thereof.

"**DIP Charge**" means the charge in favour of CIBC as agent and lender in respect of the CIT Facility as created under paragraph 46 of the Initial Order.

"**Direction**" means the *Direction to the CRTC (Ineligibility of Non-Canadians)* issued by the Governor General in Council pursuant to section 26 of the *Broadcasting Act* (Canada).

"**Directors Charge**" means the charge in favour of the Directors and Officers created under paragraph 22 of the Initial Order, not to exceed an aggregate amount of $20,000,000, as security for the indemnity granted in favour of the Directors and Officers under paragraph 21 of the Initial Order.

"**Directors and Officers**" means, collectively, all current and former directors and officers (or their respective estates) of one or more of the CMI Entities and/or any of their Subsidiaries and, individually, any one of them, a "**Director**" or "**Officer**".

"**Distribution Date**" means the dates from time to time on or after the Plan Implementation Date set by the Monitor to effect distributions from the Ordinary Creditors Pool in respect of the Proven Distribution Claims of Ordinary Creditors, and the Convenience Class Pool in respect of the Proven Distribution Claims of Convenience Class Creditors.

"**Distribution Record Date**" means the date that is five (5) Business Days prior to the Plan Implementation Date.

"**Effective Time**" means 12:05 a.m. (Toronto time) on the Plan Implementation Date.

"**Employees**" means (a) all active or inactive employees employed by CTLP including, any employees on disability leave, maternity leave, statutory leave or other absence, and (b) any active or inactive employees of Canwest or CMI including any employees on disability leave, maternity leave, statutory leave or other absence, to be transferred to CTLP.

"**Equity Claims**" means any Claim (a) of the Existing Shareholders (i) constituting an equity claim under section 2(1) of the CCAA, (ii) arising from any shareholder agreement in connection with or related to the Existing Shares, or (b) of any Person who is a beneficiary under or the holder or owner of any option, restricted share unit or other security issued pursuant to an Equity Compensation Plan.

"**Equity Compensation Plan**" means any of the equity compensation plans established by one or more of the Applicants, as more particularly set out on Schedule F.

"**Excluded Claim**" means those Claims identified as "Excluded Claims" under the Claims Procedure Order.

"**Existing Security**" means the security held by the Collateral Agent.

"**Existing Shareholders**" means, collectively, holders of the Existing Shares immediately prior to the Effective Time on the Plan Implementation Date.

"**Existing Shares**" means, collectively, the Multiple Voting Shares, Subordinate Voting Shares and Non-Voting Shares.

"**Filing Date**" means October 6, 2009.

"**Fireworks Claim**" means any and all amounts, liabilities and other obligations owing to Fireworks Entertainment Inc. by Canwest Broadcasting.

"**Fireworks Indemnity**" means, collectively, the four indemnity agreements between Canwest and each of Fireworks Entertainment Inc., Canwest Entertainment Inc., CEID (Canada) I Inc. and CEID (Canada) II Inc. each dated November 19, 2009 which have been provided to the Fireworks Trustee in Bankruptcy pursuant to which Canwest: (a) unconditionally guaranteed the payment of all of the reasonable fees and disbursements (including the reasonable fees and disbursements of legal counsel), which FTI may incur in acting as trustee in bankruptcy in respect of each such Canwest Subsidiary; and (b) agreed to indemnify FTI from and against all Claims (as defined in such indemnity agreements) and all liability, costs and expenses (including

reasonable fees and disbursements) incurred in connection with the enforcement of each such indemnity agreement.

"**Fireworks Trustee in Bankruptcy**" means FTI in its capacity as trustee in bankruptcy of each of Fireworks Entertainment Inc., Canwest Entertainment Inc., CEID (Canada) I Inc. and CEID (Canada) II Inc.

"**FTI**" means FTI Consulting Canada Inc. and any of its affiliates, partners, officers, directors, employees, agents and subcontractors.

"**Fox Sports**" means Fox Sports World Canada Partnership, a general partnership governed by the laws of Ontario.

"**Fox Sports Holdco**" means Fox Sports World Canada Holdco Inc., a corporation governed by the CBCA.

"**Genuity**" means Canaccord Genuity, the global capital markets division of Canaccord Financial Inc., in its capacity as financial advisor to the Special Committee.

"**Genuity Engagement Letter**" means the engagement letter between Genuity and Canwest dated May 29, 2009 retaining Genuity as financial advisor to the Special Committee, as amended by letter agreement dated November 30, 2009.

"**Global Centre**" means Global Centre Inc., a corporation governed by the OBCA.

"**Governmental Entity**" means any (a) multinational, federal, provincial, territorial, state, regional, municipal, local or other government, governmental or public department, central bank, court, tribunal, arbitral body, commission, board, bureau or agency; (b) subdivision, agent, commission, board, or authority of any of the entities listed in paragraph (a) of this definition; or (c) quasi-governmental or private body exercising any regulatory, expropriation or taxing authority under or, for the account of, any of the entities listed in paragraph (a) of this definition.

"**GP Inc.**" means Canwest Television GP Inc., a corporation governed by the CBCA and the general partner of CTLP.

"**Head Office Lease**" means the lease agreement between Portage & Main Development Ltd., nominee for and on behalf of Bentall Properties Ltd. and Canadian National Railway Company, as landlord, and Canwest, as tenant, dated June 1, 1995, as amended and extended, in respect of floors 31 to 33 of Canwest Place, 201 Portage Avenue, Winnipeg, Manitoba.

"**Houlihan**" means Houlihan Lokey Howard & Zukin Capital, Inc. in its capacity as financial advisory to the Ad Hoc Committee.

"**Houlihan Engagement Letter**" means the engagement letter between Houlihan, Goodmans LLP, in its capacity as counsel to the Ad Hoc Committee, and CMI, on behalf of itself and its wholly-owned subsidiaries, dated March 24, 2009.

"**Indenture**" means, collectively, the trust indenture dated as of November 18, 2004 among 3815668 Canada Inc. (now CMI), the guarantors named therein and the Trustee, pursuant to

which the Notes were issued, as amended by the first supplemental indenture thereto dated as of November 18, 2004, the second supplemental indenture thereto dated as of August 30, 2005, the third supplemental indenture thereto dated as of August 31, 2005, the fourth supplemental indenture thereto dated as of September 1, 2005, the fifth supplemental indenture thereto dated as of May 31, 2006, the sixth supplemental indenture thereto dated as of August 29, 2008, the seventh supplemental indenture dated as of September 1, 2008, the eighth supplemental indenture dated as of April 2, 2009, the ninth supplemental indenture dated as of June 29, 2009, and the tenth supplemental indenture dated as of September 30, 2009, and as such trust indenture may be further amended, supplemented or otherwise modified from time to time in accordance with its terms.

"**Initial Directors**" means the initial directors of New Canwest appointed at the time of incorporation of New Canwest under the CBCA.

"**Initial Order**" means the Order made October 6, 2009 pursuant to which the CMI Entities were provided protection under the CCAA, as amended, restated or varied from time to time.

"**Insured Litigation**" means the insured litigation notices and claims involving Canwest, CMI, CTLP, GP Inc., Canwest Broadcasting, Fox Sports Holdco and/or Fox Sports, and in respect of insured litigation claims for libel, slander and/or defamation arising in the ordinary course of business, all of which relate to the Business and comprise notices and claims that are Excluded Claims as set out in the schedule delivered to Shaw on June 7, 2010 and as further updated from time to time.

"**Insured Litigation Deductibles**" means any remaining deductibles under insurance policies maintained by or on behalf of Canwest, CMI, CTLP, GP Inc., Canwest Broadcasting, Fox Sports Holdco and/or Fox Sports, in respect of the Insured Litigation.

"**Intercompany Claim**" means any claim of Canwest or any Subsidiary thereof against any CMI Entity.

"**Investor Charge**" means the charge created by an Order made on February 19, 2010 to secure the payment to the Plan Sponsor of termination fees pursuant to section 4.6 of the Subscription Agreement and the expense reimbursement payable to the Plan Sponsor pursuant to section 9.2 of the Subscription Agreement.

"**Irish Holdco**" means Canwest MediaWorks Ireland Holdings, an unlimited liability company governed by the laws of Ireland.

"**Irish Holdco Aggregate Redemption Price**" means $690,126,000.

"**Irish Holdco Intercompany Receivable**" means the amount of $72,307,000, constituting an unsecured intercompany loan owing by CMI to Irish Holdco.

"**Irish Holdco Preference "A" Shares**" means the Redeemable Preference "A" Shares in the capital of Irish Holdco.

"**Ireland Nominee**" means Canwest Ireland Nominee Limited, a company governed by the laws of Ireland.

"**ITA**" means the *Income Tax Act* (Canada).

"**KERPs**" means the key employee retention plans for certain Employees of the CMI Entities approved under paragraph 62 of the Initial Order.

"**KERP Charge**" means the charge in favour of the KERP Participants as created under paragraph 64 of the Initial Order.

"KERP Participants" means the employees of the CMI Entities that have been granted KERPs in the Initial Order.

"**Labour Parties**" means collectively the Retiree Representatives, Retiree Representative Counsel, the CEP and CEP Counsel on behalf of the Current and Former Members.

"**Law**" means any and all statutes, regulations, statutory rules, orders, judgments, decrees and terms and conditions or any grant of approval, permission, authority, permit or licence of any court, Governmental Entity, statutory body or self-regulatory authority.

"**Limited Partnership Units**" means all of the limited partnership units held by CMI in CTLP.

"**Management and Administrative Services Agreement**" means the management and administrative services agreement dated August 15, 2007 between Canwest MediaWorks Inc. (now CMI) and CW Media Inc.

"**MBS Productions**" means MBS Productions Inc., a corporation governed by the CBCA.

"**Meeting**" means a meeting of a Class of Affected Creditors held pursuant to the Meeting Order and includes any meeting resulting from an adjournment thereof.

"**Meeting Order**" means an Order to be made classifying the Affected Creditors for voting purposes, directing the calling and holding of the Noteholder Meeting, the Ordinary Creditors Meeting and any other meetings of Affected Creditors, setting the date of the Plan Sanction Hearing and expanding the Monitor's powers in relation to the Meetings, as such Order may be amended from time to time.

"**Monitor**" means FTI, in its capacity as the monitor of the CMI Entities appointed pursuant to the Initial Order and any successor thereto appointed in accordance with any further Order.

"**Monitor's Certificate**" means the Certificate to be delivered by the Monitor substantially in the form of Schedule G.

"**Multiple Voting Shares**" means any and all multiple voting shares in the capital of Canwest that are issued and outstanding immediately prior to the Effective Time.

"**Multisound Publishers**" means Multisound Publishers Ltd., a corporation governed by the CBCA.

"**National Post**" means National Post Company/La Publication National Post, a general partnership established under the laws of Ontario.

"**National Post Consolidated Bankruptcy Estate**" means the bankruptcy estate of National Post and National Post Holdings resulting from the consolidation of the bankruptcy estates of National Post and National Post Holdings pursuant to Section 5.6.

"**National Post Holdings**" means National Post Holdings Ltd., a corporation governed by the OBCA.

"**National Post Transaction**" means the transaction approved by the Court on October 30, 2009 as part of the Transition and Reorganization Agreement whereby the assets and newspaper business of the National Post were transferred as a going concern to a new wholly-owned subsidiary of Publishing LP (New National Post).

"**New Canwest**" means a body corporate to be incorporated by CMI under the CBCA prior to the Plan Implementation Date as a wholly-owned subsidiary of CMI.

"**New Canwest Articles of Incorporation**" means the articles of incorporation of New Canwest, substantially in the form attached as Schedule B.

"**New Canwest Assets**" means the assets, property and undertakings listed in Schedule D.1.

"**New Canwest By-Laws**" means the by-laws of New Canwest, substantially in the form attached as Schedule C.

"**New Canwest Liabilities**" means the debts, liabilities and obligations listed in Schedule D.3.

"**New Canwest Note**" means a demand note of New Canwest issued in favour of CMI having a principal amount equal to the aggregate principal amount of the Canwest/CMI Group Intercompany Receivables owing to CMI by CTLP, the CTLP Assumption Consideration Note and any amounts receivable by CMI under the Shared Services Agreement and/or the Omnibus Transition and Reorganization Agreement.

"**New National Post**" means National Post Inc., a corporation governed by the CBCA.

"**Non-Voting Shares**" means any and all non-voting shares in the capital of Canwest that are issued and outstanding immediately prior to the Effective Time.

"**Noteholder**" means the Depository with whom Notes are registered or an account is held for a Depository participant, another securities intermediary holding Notes for the account of another Person, or a Beneficial Noteholder, as applicable.

"**Noteholders Class**" means the Class of Affected Creditors comprised of the Noteholders and the Trustee.

"**Noteholder Meeting**" means the Meeting of the Noteholders Class called to consider and vote on the Plan.

"**Noteholder Pool**" means the amount taken from the Subscription Price equal to the sum of (a) US$440 million plus (b) the Continued Support Payment.

"**Noteholder Pro Rata Amount**" means each Beneficial Noteholder's *pro rata* share of the Noteholder Pool calculated based upon such Beneficial Noteholder's Proven Distribution Claim relative to the total Proven Distribution Claims of all Beneficial Noteholders.

"**Noteholder Released Parties**" has the meaning set out in Section 7.3(b).

"**Noteholder Voting Record Date**" means June 28, 2010.

"**Notes**" means the 8% senior subordinated notes due 2012 that are issued and outstanding under the Indenture.

"**OBCA**" means the *Business Corporations Act* (Ontario).

"**Omnibus Transition and Reorganization Agreement**" means the agreement among Canwest, CMI, CTLP, National Post, Publishing LP and Canwest Publishing dated as of June 8, 2010, as approved by the Court.

"**Order**" means any order of the Court in the CCAA Proceedings.

"**Ordinary CMI Creditors**" means the Ordinary Creditors, other than Ordinary CTLP Creditors, including Ordinary Creditors having Claims against one or more of the Directors and Officers of the Plan Entities other than the CTLP Plan Entities.

"**Ordinary CMI Creditor Pro Rata Amount**" means, at the relevant time, the proportion that each Ordinary CMI Creditor's Proven Distribution Claim bears to the total of Proven Distribution Claims and Unresolved Claims of all Ordinary CMI Creditors.

"**Ordinary CMI Creditors Sub-Pool**" means an amount equal to one-third (1/3) of the Ordinary Creditors Pool net of the fees and costs incurred by the Monitor on a solicitor and own client full indemnity basis to resolve Unresolved Claims of Ordinary Creditors and effect distributions from and after the Plan Implementation Date in the event that there are insufficient funds to cover such fees and costs in the Plan Implementation Fund.

"**Ordinary Creditors**" means those Affected Creditors of the Plan Entities who are not Noteholders and do not have a Convenience Class Claim, which for greater certainty includes all Creditors having Claims against one or more of the Directors and Officers.

"**Ordinary Creditors Class**" means the Class of creditors comprised of Ordinary Creditors.

"**Ordinary Creditors Meeting**" means the meeting of the Ordinary Creditors Class called to consider and vote on the Plan.

"**Ordinary Creditors Pool**" means an amount taken from the Subscription Price equal to the difference between (a) the sum of (i) $38 million, plus (ii) in the event that there are any Restructuring Period Claims relating to either (A) the termination of arrangements made before the Filing Date with the existing management employees of Canwest and the Canwest Subsidiaries listed in the Plan Emergence Agreement who will not become employees of New Canwest, GP Inc., CTLP or one of their respective Subsidiaries or otherwise will not remain as employees of the Business following the Effective Time or (B) the disclaimer, resiliation,

termination, repudiation or renegotiation of terms agreed to by Canwest and the Plan Sponsor of any material contracts or agreements of the CMI Entities that will not remain following the Effective Time as ongoing obligations of New Canwest or any of its Subsidiaries, an additional cash amount equal to the amount that is required to maintain the recovery rate (*pro rata* as among the Ordinary Creditors) that would otherwise be received by the Ordinary Creditors, assuming there were no such Restructuring Period Claims arising from (A) and (B) above, and (b) the amount of the Convenience Class Pool.

"**Ordinary Creditors Proven Voting Claim**" means, a Proven Voting Claim of an Affected Creditor of a Plan Entity, other than a Noteholder.

"**Ordinary CTLP Creditors**" means the Ordinary Creditors having Claims against any one of the CTLP Plan Entities, which for greater certainty includes Ordinary Creditors having Claims against one or more of the Directors and Officers of the CTLP Plan Entities.

"**Ordinary CTLP Creditor Pro Rata Amount**" means, at the relevant time, the proportion that each Ordinary CTLP Creditor's Proven Distribution Claim bears to the total of Proven Distribution Claims and Unresolved Claims of all Ordinary CTLP Creditors.

"**Ordinary CTLP Creditors Sub-Pool**" means an amount equal to two-thirds (2/3) of the Ordinary Creditors Pool net of the fees and costs incurred by the Monitor on a solicitor and own client full indemnity basis to resolve Unresolved Claims of Ordinary Creditors and effect distributions from and after the Plan Implementation Date in the event that there are insufficient funds to cover such fees and costs in the Plan Implementation Fund.

"**Other Canwest Assets**" means the assets listed on Schedule D.5.

"**Other CTLP Plan Entity Assumption Consideration Note**" has the meaning set out in Section 5.5(k)(iv).

"**Other PIF Assets**" means Tax refunds of the Plan Entities (other than the CTLP Plan Entities), the Winnipeg Condo, and any and all dividends, distributions or other amounts payable to a Plan Entity (other than the CTLP Plan Entities) from any estate in bankruptcy or liquidation of any Canwest Subsidiary (including any dividend or distribution payable to CMI from National Post Holdings, National Post and/or the National Post Consolidated Bankruptcy Estate).

"**PBSA**" means the *Pension Benefit Standards Act* (Canada).

"**Person**" means any individual, corporation, limited or unlimited liability company, general or limited partnership, association, trust, unincorporated organization, joint venture, government or any agency or instrumentality thereof or any other entity or any successor or legal representative thereof.

"**PIF Schedule**" means the PIF Schedule appended as a schedule to the Plan Emergence Agreement.

"**Plan**" means this consolidated plan of compromise under the CCAA, including the Schedules hereto, as amended, supplemented or replaced from time to time.

"**Plan Emergence Agreement**" means the Plan Emergence Agreement to be entered into on or prior to a date which is at least 23 days prior to the Meetings by Canwest, CMI, the Plan Sponsor and the Monitor as contemplated by the Subscription Agreement together with all Schedules thereto.

"**Plan Entities**" means Canwest, CMI, the CTLP Plan Entities, 4501063 Canada, MBS Productions, Yellow Card and Global Centre.

"**Plan Implementation Date**" means the day on which the Monitor delivers the Monitor's Certificate to the CMI Entities, the Ad Hoc Committee and the Plan Sponsor pursuant to Section 6.4.

"**Plan Implementation Fund**" means the fund established pursuant to the Plan and the Plan Emergence Agreement consisting of the Cash, the Other PIF Assets and further contributions from Shaw, if any, as provided for in the Plan Emergence Agreement (which for the avoidance of doubt does not include amounts from the Subscription Price) to be maintained in one or more segregated accounts by the Monitor and to be used by the Monitor, to pay, *inter alia*, the costs and expenses to be incurred by the Monitor, its legal counsel and any advisors retained by the Monitor from and after the Plan Implementation Date to perform any of its statutory or Court-ordered duties including (a) to resolve any Unresolved Claims and to make any distributions in respect of any Unresolved Claims that have become Proven Distribution Claims pursuant to Section 4.4, (b) to make distributions under the Plan including the costs of wire transfers and the issuance of cheques (provided, for greater certainty, that the Monitor shall not fund the actual distributions from the Plan Implementation Fund), (c) to determine and pay Unaffected Claims (including termination and severance amounts as set out on the April 28 Severance Schedule together with accrued and unpaid vacation pay in respect of April 28 Severance Schedule Employees and amounts secured by the Court Charges but excluding the CH Plan Settlement Amount), (d) to pay the costs of legal counsel to the Directors and Officers in connection with the determination and resolution of Unaffected Claims and Unresolved Claims against the Directors and Officers, including to fund the resolution of Restructuring Period Claims or insured Claims against the Directors or Officers to the extent that such Restructuring Period Claims or insured Claims are not released or extinguished under Section 7.3, (e) to pay the Bankruptcy Costs, and (f) to pay the fees and expenses charged by the replacement administrator for the CH Plan appointed by the Superintendent of Financial Institutions (but for great certainty such fees and expenses shall not include fees and expenses for the provision of services in relation to the administration of the CH Plan or the investment of the assets of the CH Plan where such fees and expenses have, in the normal course, been paid from the assets of the CH Plan, such as fees payable to the CH Plan Trustee, to the investment manager in respect of CH Plan assets, to the actuary for the CH Plan and to any pension consultant for pension plan administration services), to the extent that such claims are described in and specifically funded pursuant to the Plan Emergence Agreement.

"**Plan Sanction Hearing**" means the Court hearing at which the Applicants' motion for approval and sanction of the Plan will be heard.

"**Plan Sponsor**" means Shaw and 7316712 Canada.

"**Post-Filing Claim**" means any indebtedness, liability or obligation of any kind that arises after the Filing Date from or in respect of (a) any executory contract or unexpired lease that has not been restructured, terminated, repudiated or resiliated by a CMI Entity, (b) the supply of services or goods, or funds advanced, to any of the CMI Entities on or after the Filing Date, or (c) all amounts to be remitted to a tax authority pursuant to paragraph 9 of the Initial Order during the period after the Filing Date to but excluding the Plan Implementation Date; provided that "Post-Filing Claim" shall not include any Claim or Restructuring Period Claim or any Unaffected Claim.

"**Proven Distribution Claims**" means Claims of Affected Creditors as finally determined for distribution purposes in accordance with the Claims Procedure Order, the Meeting Order and the Plan.

"**Proven Voting Claim**" means the Claim of an Affected Creditor of any of the Plan Entities as finally determined for purposes of voting at a Meeting, in accordance with the Claims Procedure Order, the CCAA, the Meeting Order and the Plan, provided that a Claim which is an Unresolved Claim will be dealt with pursuant to Sections 3.10 and 3.11.

"**Publishing LP**" means Canwest Limited Partnership/Canwest Société en Commandite, a limited partnership governed by the laws of the Province of Ontario.

"**RBC**" means RBC Dominion Securities Inc., a member company of RBC Capital Markets, in its capacity as financial advisor to the CMI Entities.

"**RBC Engagement Letter**" means the engagement letter between RBC and Canwest dated December 10, 2008, as amended by a letter dated January 20, 2009, as further amended by a letter dated October 5, 2009 and as further amended by a letter dated as of December 10, 2009.

"**Red Deer Property**" means the real property located at 2840 Bremner Avenue in Red Deer, Alberta together with the single commercial building situated thereon and certain related assets. The Red Deer Property is legally described as Lot 10A Block 14 Plan 7922866 excepting thereout all mines and minerals. The Red Deer Property is located in the neighbourhood of Bower, in the City of Red Deer, in the Province of Alberta, just north of the Bower Mall, and fronting onto Bremner Avenue. The property consists of one lot measuring 350 ft x 250 ft, with the site area totalling 2.01 acres.

"**Released Parties**" has the meaning set out in Section 7.3(a).

"**Representative Counsel Order**" means the Order made on October 27, 2009 appointing the Retiree Representatives as representatives for the Retirees, including without limitation for the purpose of settling or compromising claims by the Retirees in the CCAA Proceedings, and appointing the Retiree Representative Counsel to represent the Retirees in the CCAA Proceedings.

"**Required Majority**" means that number of Affected Creditors of the Plan Entities representing at least a majority in number of the Proven Voting Claims, whose Affected Claims represent at least two-thirds in value of the Proven Voting Claims of (a) the Ordinary Creditors and Convenience Class Creditors who validly vote (in person or by proxy or who are deemed to vote

pursuant to the Plan and the Meeting Order) on the resolution approving the Plan at the Ordinary Creditors Meeting, and (b) the Beneficial Noteholders who provide a proxy, ballot or other instructions for voting or otherwise validly vote at the Noteholder Meeting as provided for in the Meeting Order.

"**Restructuring Period Claim**" means any right or claim of any Person against one or more of the CMI Entities in connection with any indebtedness, liability or obligation of any kind whatsoever owed by one or more of the CMI Entities to such Person arising out of the restructuring, disclaimer, resiliation, termination or breach after the Filing Date of any contract, lease or other agreement, whether written or oral, and whether such restructuring, disclaimer, resiliation, termination or breach took place or takes place before or after the date of the Claims Procedure Order; provided that a "Restructuring Period Claim" does not include any Excluded Claim.

"**Restructuring Period Claims Bar Date**" means July 9, 2010.

"**Retirees**" means collectively:

(a) all former employees of the CMI Entities (or their predecessors, as applicable), or the surviving spouses of such former employees if applicable, who are in receipt of a pension from a registered or unregistered pension plan sponsored by a CMI Entity;

(b) all former employees of the CMI Entities (or their predecessors, as applicable), or the surviving spouses of such former employees if applicable, who are entitled to receive a deferred vested pension from a registered or unregistered pension plan sponsored by a CMI Entity; and

(c) all former employees of the CMI Entities (or their predecessors, as applicable), or the surviving spouses of such former employees if applicable, who were, immediately before October 6, 2009, entitled to receive non-pension benefits from a CMI Entity,

but excluding the CEP Retirees in the CCAA Proceeding, including without limitation, for the purpose of settling or compromising claims by the Retirees in the CCAA Proceedings.

"**Retiree Representative Counsel**" means Cavalluzzo, Hayes, Shilton, McIntyre & Cornish LLP, in its capacity as representative counsel on behalf of all Retirees other than any Retiree who opted out of such representation in accordance with the procedures set out in the Representative Counsel Order.

"**Retiree Representatives**" means David Cremasco, Rose Stricker and Lawrence Schnurr as appointed under the Representative Counsel Order.

"**Retiree Terminal Deficiency Claim**" means the Claim filed on November 17, 2009 by the Retiree Representative Counsel on behalf of the Retirees in the approximate amount of $10,244,733 in respect of the terminal deficiency in the CH Plan.

"**Sanction Order**" means the Order to be made by the Court under the CCAA sanctioning the Plan, as such Order may be amended.

"**Second Amended and Restated Recapitalization Transaction Term Sheet**" means the term sheet attached to the Support Agreement.

"**Secured Intercompany Note**" means the senior secured interest bearing promissory note issued on October 1, 2009 by CMI to Irish Holdco evidencing $187,263,126.45 loaned to CMI by Irish Holdco, plus accrued and unpaid interest thereon.

"**Shared Services**" means services provided under the Shared Services Agreement.

"Shared Services Agreement" means the Agreement on Shared Services and Employees between Canwest, Publishing LP, CMI, Canwest Publishing, CTLP and National Post, dated October 26, 2009 and approved by the Court on October 30, 2009 and attached as schedule "A" to the Transition and Reorganization Agreement.

"**Shareholders Agreement**" means the shareholders agreement in respect of CW Investments as amended and restated as of January 4, 2008.

"**Shaw**" means Shaw Communications Inc., a corporation governed by the *Business Corporations Act* (Alberta).

"**Shaw Designated Entity**" means a wholly-owned subsidiary of Shaw designated by Shaw to acquire the Canwest New Preferred Shares.

"**Shaw Support Agreement**" means the support agreement made as of February 11, 2010 between Canwest, Shaw and certain Noteholders, as amended by the amendment agreement made as of May 3, 2010 and as may be further amended, supplemented or otherwise modified from time to time.

"**Special Committee**" means the special committee of the board of directors of Canwest.

"**Stonecrest Engagement Letter**" means the engagement letter between the Chief Restructuring Advisor and Canwest dated June 30, 2009, as amended on December 17, 2009 and March 25, 2010.

"**Subordinate Voting Shares**" means the subordinate voting shares in the capital of Canwest that are issued and outstanding immediately prior to the Effective Time.

"**Subscription Agreement**" means the subscription agreement, including the term sheet attached as schedule "A" thereto, between Canwest and Shaw, dated as of February 11, 2010, as amended by the amendment agreement to the subscription agreement made as of May 3, 2010, as such agreement may be further amended, supplemented or otherwise modified from time to time.

"**Subscription Price**" means the aggregate of: (a) the sum of (i) $38 million plus (ii) in the event that there are Restructuring Period Claims relating (A) to the termination of arrangements made before the Filing Date with existing management employees of Canwest and the Canadian Subsidiaries listed in the Plan Emergence Agreement who will not become employees of New

Canwest, GP Inc., CTLP or Subsidiaries thereof will not remain as employees of the Business following the Effective Time or (B) the disclaimer, resiliation, termination, repudiation or renegotiation of terms as agreed to by Canwest and the Plan Sponsor of any material contracts and agreements of the CMI Entities that will not remain following the Effective Time as ongoing obligations of New Canwest or any of the Canwest Subsidiaries, an additional amount equal to the amount that is required to maintain the recovery rate (*pro rata* as among the Ordinary Creditors) that would otherwise be received by Ordinary Creditors, assuming there were no such Restructuring Period Claims arising from (A) and (B) above; and (b) the sum of (i) US $440 million plus (ii) the Continued Support Payment.

"**Subsidiary**", in respect of a Person, means (a) any corporation or company of which at least a majority of the outstanding securities having by the terms thereof ordinary voting power to elect a majority of the board of directors of such corporation or company is at the time directly, indirectly or beneficially owned or controlled by the Person or one or more of its Subsidiaries; (b) any general or limited partnership of which, at the time, the Person or one or more of its Subsidiaries directly, indirectly or beneficially own or control at least a majority of the voting interests (however designated) thereof, or otherwise control such partnership; and (c) any other Person of which at least a majority of the voting interests (however designated) are at the time directly, indirectly or beneficially owned or controlled by the Person or one or more of its Subsidiaries (and in respect of a trust that has not issued any voting interests, the beneficiaries of which are owned or controlled by the Person or one or more of its Subsidiaries).

"**Support Agreement**" means the support agreement dated October 5, 2009 between Canwest CMI, certain subsidiaries of CMI and certain Noteholders, as amended by the amendment agreement made as of January 29, 2010, the amendment agreement made as of February 11, 2010, the amendment agreement No. 3 made as of April 15, 2010, and the amendment agreement No. 4 made as of May 3, 2010, attaching and incorporating therein the Second Amended and Restated Recapitalization Transaction Term Sheet, and as it may be further amended, supplemented or otherwise modified from time to time in accordance with its terms.

"**Tax**" or "**Taxes**" means any and all Canadian and foreign taxes, duties, fees, pending assessments, reassessments and other governmental charges, duties, impositions and liabilities of any kind whatsoever (including any claims by Her Majesty the Queen, Her Majesty the Queen in right of Canada, Her Majesty the Queen in right of any province or territory of Canada, Canada Revenue Agency and any similar revenue or taxing authority of any province or territory of Canada), including all interest, penalties, fines and additions with respect to such amounts.

"**Tax Matters Agreement**" means an agreement between, among others, Canwest, CMI, New Canwest, and the Plan Sponsor governing various matters relating to Taxes in respect of the Plan, including the filing of elections and returns, the allocation of income of CTLP and the allocation of the purchase price for assets transferred under the Plan, among other things.

"**Trademarks**" means all registered and unregistered trademarks owned by Canwest or CMI, and any goodwill associated therewith, including those set out in Schedule D.4.

"**Trademarks Licence**" means the trademarks licence granted by Canwest to Canwest (Canada) Inc., Canwest Publishing, Canwest Books Inc., and Publishing LP, as described in section 6.3(a) of the Omnibus Transition and Reorganization Agreement, with such licence being governed by

the same terms and conditions contained in the Trademarks Licence Agreement, as amended by the Omnibus Transition and Reorganization Agreement, along with the obligations of Canwest under section 6.3(b) of the Omnibus Transition and Reorganization Agreement.

"**Trademarks Licence Agreement**" means the trademarks licence agreement dated October 13, 2005 between Canwest, CanWest MediaWorks (Canada) Inc. (now known as Canwest (Canada) Inc.), as general partner for and on behalf of CanWest MediaWorks Limited Partnership (now Publishing LP), CanWest MediaWorks (Canada) Inc. (now Canwest (Canada) Inc.) and CanWest MediaWorks Income Fund, as amended by the Omnibus Transition and Reorganization Agreement.

"**Transfer Agent**" means Computershare Trust Company of Canada.

"**Transfer Taxes**" means all land transfer taxes, goods and services taxes, provincial and retail sales taxes and other similar taxes which arise in relation to the transfer of the New Canwest Assets to New Canwest.

"**Transition and Reorganization Agreement**" means the agreement among Canwest, Publishing LP, CMI, Canwest Publishing, CTLP and National Post dated as of October 26, 2009 as approved by the Court on October 30, 2009.

"**Trustee**" means The Bank of New York Mellon, in its capacity as trustee under the Indenture.

"**Unaffected Claims**" means:

(a) any Claims arising from or under the Stonecrest Engagement Letter, including claims of the Chief Restructuring Advisor;

(b) any Claims arising from or under the Genuity Engagement Letter;

(c) any Claims arising from or under the RBC Engagement Letter;

(d) any Claims arising from or under the Houlihan Engagement Letter;

(e) any Claims of the KERP Participants arising from or under the KERPs;

(f) any Claims of the April 28 Severance Schedule Employees arising from or under the termination and severance obligations as set out on the April 28 Severance Schedule together with the accrued and unpaid vacation pay of the April 28 Severance Schedule Employees;

(g) any Claims up to the Plan Implementation Date secured by any of the Court Charges;

(h) any claim against any Director that cannot be compromised due to the provisions of section 5.1(2) of the CCAA;

(i) any portion of a Claim for which the applicable CMI Entities are fully insured, including the Insured Litigation;

(j) any Claims of The Bank of Nova Scotia arising from the provision of cash management services to the CMI Entities;

(k) any Claims held by CIBC and its assigns, if any, in respect of the CIT Facility and pursuant to the CIT Credit Agreement;

(l) any Claims in respect of any payments referred to in sections 6(3), 6(5) and 6(6) of the CCAA;

(m) any Post-Filing Claims;

(n) Intercompany Claims, other than (i) Claims arising under the Secured Intercompany Note, the Unsecured Intercompany Note and the Irish Holdco Intercompany Receivable, (ii) Claims of 4501063 Canada, MBS Productions or Global Centre, (iii) the CTLP-CMI Receivable, (iv) the CMI-CTLP Receivable, (v) the Canwest/CMI Group Intercompany Receivables, and (vi) the Fireworks Claim;

(o) the obligation of CTLP to pay the CH Plan Settlement Amount; and

(p) claims of the Fireworks Trustee in Bankruptcy under the Fireworks Indemnity.

"**Undeliverable Distribution**" has the meaning set out in Section 4.10.

"**Unresolved Claim**" means a Claim that at the relevant time is disputed or otherwise unresolved and has not been accepted for purposes of voting on and/or receiving distributions under the Plan and is not barred pursuant to the Claims Procedure Order.

"**Unsecured Intercompany Note**" means the unsecured promissory note dated October 1, 2009, issued by CMI to Irish Holdco evidencing $430,556,189.08 loaned to CMI by Irish Holdco plus accrued and unpaid interest thereon.

"**US Dollars**" or "**US$**" means dollars denominated in the lawful currency of the United States of America.

"**Wages and Benefits**" means all outstanding wages, salaries and employee benefits (including employee medical, dental, disability, life insurance and similar benefit plans or arrangements, incentive plans, share or other compensation plans and employee assistance programs and employee or employer contributions in respect of pension and other benefits), vacation pay, commissions, bonuses and other incentive payments, payments under collective bargaining agreements, and employee and director expenses and reimbursements, in each case incurred in the ordinary course of business and consistent with existing compensation policies and arrangements of the CMI Entities.

"**Website**" means http://cfcanada.fticonsulting.com/cmi/.

"**Western Communications**" means Western Communications Inc., a corporation governed by the CBCA.

"**Winnipeg Condo**" means the condominium with a civic address of 1003 – 141 Wellington Crescent, Winnipeg, Manitoba, being unit 59 in the condominium project known as River Parke.

"**Yellow Card**" means Yellow Card Productions Inc., a corporation governed by the OBCA.

1.2 Construction

In the Plan, unless otherwise stated or the context otherwise requires:

(a) the division of the Plan into Articles and Sections and the use of headings are for convenience of reference only and do not affect the construction or interpretation of the Plan;

(b) the words "hereunder", "hereof" and similar expressions refer to the Plan and not to any particular Article, Section or Schedule and references to "Articles", "Sections", and "Schedules" are to Articles and Sections of, and Schedules to the Plan;

(c) words importing the singular include the plural and *vice versa* and words importing any gender include all genders;

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

(e) a reference to any statute is to that statute as now enacted or as the statute may from time to time be amended, re-enacted or replaced, and includes any regulation made thereunder;

(f) a reference to any agreement, indenture or other document is to that document as amended, supplemented, restated or replaced from time to time;

(g) unless otherwise specified, all references to dollar amounts or to the symbol "$" are references to Canadian dollars;

(h) unless otherwise specified, all references to time herein and in any document issued pursuant hereto mean local time in Toronto, Ontario, and any reference to an event occurring on a Business Day shall mean prior to 5:00 p.m. on such Business Day; and

(i) unless otherwise specified, the time period within or following which any payment is to be made or act is to be done shall be calculated by excluding the day on which the period commences and including the day on which the period ends and by extending the period to the next succeeding Business Day if the last day of the period is not a Business Day; whenever any payment to be made or action to be taken under the Plan is required to be made or to be taken on a day

other than a Business Day, such payment shall be made or action taken on the next succeeding Business Day.

1.3 Currency Conversion

All Affected Claims (other than the Claims of the Noteholders) which are denominated in US Dollars shall be converted into Canadian dollars on the basis of the average US/Canadian dollar noon rate of exchange, as quoted by the Bank of Canada, over the ten Business Day period preceding the filing of the Plan as part of the CCAA Proceedings. All Affected Claims (other than the Claims of the Noteholders) denominated in a currency other than lawful money of Canada or the United States are to be converted into Canadian dollars on the basis of the average noon rate of exchange for exchange of such currency into Canadian dollars, as quoted by the Bank of Canada, over the ten Business Day period preceding the date of filing of the Plan. For greater certainty, the Proven Distribution Claims of the Noteholders and all amounts to be distributed to the Noteholders pursuant to the Plan shall be paid in US Dollars.

1.4 CMI Claims Bar Date and Restructuring Period Claims Bar Date

Nothing in the Plan extends or shall be interpreted as extending or amending the CMI Claims Bar Date or Restructuring Period Claims Bar Date, or gives or shall be interpreted as giving any rights to any Person in respect of Claims that have been barred or extinguished pursuant to the Claims Procedure Order, the Meeting Order, the Plan and/or the Sanction Order.

1.5 Interest

Interest shall not accrue or be paid on any Affected Claims after the Filing Date, and no Affected Claims shall be entitled to interest accruing on or after the Filing Date.

1.6 Schedules

The following are the Schedules to the Plan:

Schedule A	—	Applicants
Schedule B	—	New Canwest Articles of Incorporation
Schedule C	—	New Canwest By-Laws
Schedule D.1	—	New Canwest Assets
Schedule D.2	—	Broadcast Licences
Schedule D.3	—	New Canwest Liabilities
Schedule D.4	—	Trademarks
Schedule D.5	—	Other Canwest Assets
Schedule D.6	—	Copyrights and Other IP
Schedule D.7	—	CTLP Pension Plans
Schedule D.8	—	CTLP Group Benefit Plans
Schedule E	—	Convenience Class Claim Declaration
Schedule F	—	Equity Compensation Plans
Schedule G	—	Monitor's Certificate

ARTICLE 2
PURPOSE, EFFECT OF PLAN AND OPERATIONS

2.1 Purpose of Plan

Subject to the specific provisions hereof, the purpose of the Plan is (a) to effect a compromise and settlement of all Affected Claims against the Plan Entities as finally determined in accordance with the Claims Procedure Order, the Meeting Order, the CCAA and the Plan; (b) to facilitate the closing of the transactions contemplated in the Subscription Agreement; (c) to effect a restructuring of the Plan Entities to enable the Business to continue on a going concern basis as a viable and competitive participant in the Canadian television broadcasting industry; (d) to facilitate the continuation of substantial employment; and (e) to maintain for the general public broad access to and choice of news, public and other information and entertainment programming from public media. The Plan is put forward in the expectation that stakeholders generally will derive a greater benefit from the continued operation of the Business by New Canwest than would result from a bankruptcy or liquidation of the Business.

2.2 Persons Affected

The Plan provides for the compromise, discharge and/or release at the Effective Time of Affected Claims against the Plan Entities, Intercompany Claims against the CTLP Group Entities, a release and discharge of Canwest and the Canwest Subsidiaries in respect of all claims pertaining to the Notes, and a release of all claims and Affected Claims against the Directors and Officers and a restructuring of the Business. The Plan will become effective at the Effective Time on the Plan Implementation Date in accordance with the steps and sequence set out in Section 5.5 and shall be binding on and enure to the benefit of the CMI Entities, the Affected Creditors, the Directors and Officers and all other Persons named or referred to in, or subject to, the Plan. For purposes of the Plan, all Affected Creditors shall receive the treatment provided in the Plan on account of their Affected Claims.

2.3 Unaffected Claims

The Plan does not affect the Unaffected Claims (including, for great certainty, Post-Filing Claims). Persons with Unaffected Claims will not be entitled to vote or receive any distributions under the Plan in respect of such claims. Unaffected Claims shall be dealt with in accordance with Section 4.6. Nothing in the Plan shall affect any CMI Entity's rights and defences, both legal and equitable, with respect to any Unaffected Claim (including, for great certainty, any Post-Filing Claim), including all rights with respect to legal and equitable defences or entitlements to set-offs and recoupments against such claims.

2.4 Business Operations

Subject to the terms of the Subscription Agreement, Shaw Support Agreement and Support Agreement, the CMI Entities shall continue to operate the Business during the CCAA Proceedings until the Plan Implementation Date in the ordinary course of business in accordance with the Initial Order and other Orders, having regard to their insolvency and the CCAA Proceedings.

ARTICLE 3
CLASSIFICATION OF CREDITORS, VOTING CLAIMS AND RELATED MATTERS

3.1 Claims Procedure

The procedure for determining the validity and quantum of the Affected Claims for voting and distribution purposes under the Plan shall be governed by the Claims Procedure Order, the Meeting Order, the CCAA and the Plan.

3.2 Classes of Creditors

For purposes of voting on the Plan, there shall be two classes of Affected Creditors: (a) the Noteholders Class; and (b) the Ordinary Creditors Class. For purposes of voting on the Plan, Convenience Class Creditors shall be deemed to be in, and shall be deemed to vote in and as part of, the Ordinary Creditors Class.

3.3 Meetings

The Meetings shall be held in accordance with the CCAA, the Claims Procedure Order, the Meeting Order, the Plan and any further Order. The only Persons entitled to attend a Meeting are the Monitor and its legal counsel and advisors; the Plan Sponsor and its legal counsel and advisors; CIBC and its legal counsel and advisors; those Persons, including the holders of proxies, ballots or other voting instruments, entitled to vote at a Meeting and their legal counsel and advisors; the CMI Entities and the Chief Restructuring Advisor, and their respective legal counsel and advisors, including RBC; the Directors and Officers, including members of the Special Committee, their legal counsel and advisors, including Genuity; members of the Ad Hoc Committee, its legal counsel and Houlihan; the Trustee and its legal counsel; and any Beneficial Noteholder. Any other Person may be admitted on invitation of the chair of a Meeting.

3.4 Voting by Noteholders

Only the Beneficial Noteholders as of the Noteholder Voting Record Date will be entitled to provide instructions relating to voting in the Noteholders Class. The solicitation of votes from and the procedures for voting by the Beneficial Noteholders shall be conducted in accordance with the Meeting Order. Each Beneficial Noteholder shall be entitled to one (1) vote as a member of the Noteholders Class, which vote shall have a value equal to the principal and accrued and unpaid interest to the Filing Date owing under the Notes held by such Beneficial Noteholder.

3.5 Voting by the Ordinary Creditors Class

Each Affected Creditor with an Ordinary Creditors Proven Voting Claim shall be entitled to one vote as a member of the Ordinary Creditors Class, which vote shall have a value equal to the dollar value of its Ordinary Creditors Proven Voting Claims.

3.6 Voting of Convenience Class Claims

Each Convenience Class Creditor with a Proven Voting Claim shall be deemed to vote in favour of the Plan in respect of its Convenience Class Claim as a member of the Ordinary Creditors

Class, which vote shall have a dollar value equal to the lesser of $5,000 and the actual dollar value of such Convenience Class Creditor's Proven Voting Claim.

3.7 Election to be Treated as a Convenience Class Claim

Affected Creditors (excluding Noteholders) with Proven Distribution Claims in excess of $5,000 that wish to elect to have their Proven Distribution Claims treated as Convenience Class Claims must deliver a duly completed and executed Convenience Class Claim Declaration to the Monitor prior to 5:00 p.m. (Toronto time) on July 15, 2010, in which case such Proven Distribution Claim shall be treated for all purposes as a Convenience Class Claim in the amount of $5,000.

3.8 Parties Not Entitled to Vote

Affected Creditors having claims against National Post, National Post Holdings, Western Communications, Multisound Publishers, 4501071 Canada, CGS Shareholding, CGS NZ Radio, CGS International, CGS Debenture, Canwest MediaWorks US, Canwest MediaWorks Turkish Holdings, Canwest Irish Holdco, Canwest International, Canwest International Distribution, Canwest Communications, Canwest Finance, or 30109 shall not vote on the Plan in respect of such claims. The Labour Parties shall have no vote in respect of the Retiree Terminal Deficiency Claim or the CEP Terminal Deficiency Claim. Any person having an Unaffected Claim, an Intercompany Claim or an Equity Claim shall not be entitled to vote at any Meeting in respect of such Unaffected Claim, Intercompany Claim or Equity Claim, as applicable.

3.9 Fractions

An Affected Creditor's Proven Voting Claim shall not include fractional numbers and Proven Voting Claims shall be rounded down to the nearest whole Canadian dollar amount without compensation.

3.10 Voting of Unresolved Claims

Subject to Section 3.11, each Affected Creditor of a Plan Entity (other than a Noteholder) holding an Unresolved Claim shall be entitled to attend the Ordinary Creditors Meeting and shall be entitled to one vote at such Meeting. The Monitor shall keep a separate record of votes cast by Affected Creditors holding Unresolved Claims and shall report to the Court with respect thereto at the Plan Sanction Hearing. The votes cast in respect of any Unresolved Claim shall not be counted for any purpose unless, until and only to the extent that such Unresolved Claim is finally determined to be a Proven Voting Claim.

3.11 Order to Establish Procedure for Valuing Voting Claims

The procedure for valuing claims and resolving Unresolved Claims for voting purposes shall be as set forth in the Claims Procedure Order, the Meeting Order, the CCAA and the Plan. The CMI Entities and the Monitor shall have the right to seek the assistance of the Court in valuing any Unresolved Claim in accordance with the Claims Procedure Order, the Meeting Order, the CCAA and the Plan, if required, to ascertain the result of any vote on the Plan.

3.12 Approval by Creditors

In order to be approved, the Plan must receive an affirmative vote by the Required Majority.

3.13 Assignment of Ordinary Creditor Claims and Convenience Class Creditor Claims Prior to the Ordinary Creditors Meeting

An Ordinary Creditor or a Convenience Class Creditor may transfer or assign the whole of its Claim prior to the Ordinary Creditors Meeting in accordance with paragraph 45 of the Claims Procedure Order, provided that the CMI Entities and the Monitor shall not be obliged to deal with any such transferee or assignee as an Ordinary Creditor or a Convenience Class Creditor in respect thereof, including allowing such transferee or assignee to vote at the Ordinary Creditors Meeting, unless actual notice of the transfer or assignment, together with satisfactory evidence of such transfer or assignment, has been received by the Monitor prior to 5:00 p.m. on the day that is at least ten (10) Business Days prior to the date of the Ordinary Creditors Meeting and acknowledged in writing by the Monitor and the relevant CMI Entity. Thereafter, such transferee or assignee shall, for all purposes in accordance with the Claims Procedure Order, the Meeting Order, the CCAA and the Plan constitute an Ordinary Creditor or a Convenience Class Creditor, as applicable, and shall be bound by any and all notices previously given to the transferor or assignor in respect of such Claim. Such transferee or assignee shall not be entitled to set-off, apply, merge, consolidate, or combine any Claims assigned or transferred to it against or on account or in reduction of any amounts owing by such transferee or assignee to any of the CMI Entities. For greater certainty, the CMI Entities and the Monitor shall not recognize partial transfers or assignments of Claims by Ordinary Creditors or Convenience Class Creditors.

ARTICLE 4
DISTRIBUTIONS AND PAYMENTS

4.1 Distributions to Noteholders

On the Plan Implementation Date, CMI shall distribute forthwith in accordance with the Plan, to the Trustee, on behalf of the Beneficial Noteholders, an amount equal to the Noteholder Pool by way of wire transfer (in accordance with the wire transfer instructions provided by the Trustee to CMI). Upon receipt by the Trustee of the wire transfer of the Noteholder Pool as contemplated in this Section 4.1, the CMI Entities shall have no further liability or obligation to any of the Noteholders or the Trustee in respect of the Notes or the distributions contemplated in this Section 4.1. The Trustee shall remit the Noteholder Pool to the applicable Depository for distribution to each Beneficial Noteholder of such Beneficial Noteholders' Pro Rata Amount as of the Distribution Record Date in accordance with the policies, rules and regulations of the Depository.

4.2 Distributions to Convenience Class Creditors

On one or more Distribution Dates as may be set by the Monitor from time to time, the Monitor on behalf of the CMI Entities shall distribute, from the Convenience Class Pool, to each Convenience Class Creditor with a Proven Distribution Claim on the Distribution Record Date or a Convenience Class Claim that subsequently becomes a Proven Distribution Claim an amount in cash equal to the lesser of (a) $5,000 and (b) the value of such Convenience Class Creditor's

Proven Distribution Claim sent by prepaid ordinary mail to the last known address for such Convenience Class Creditor.

For greater certainty, Persons having Claims against National Post, National Post Holdings, 4501071 Canada, Western Communications, Multisound Publishers, CGS Shareholding, CGS NZ Radio, CGS International, CGS Debenture, Canwest MediaWorks US, Canwest MediaWorks Turkish Holdings, Canwest Irish Holdco, Canwest International, Canwest International Distribution, Canwest Communications, Canwest Finance or 30109 shall not receive any distribution from the Convenience Class Pool in respect of such Claims.

4.3 Distributions to Ordinary Creditors

For purposes of distributions, Ordinary CMI Creditors shall receive distributions from the Ordinary CMI Creditors Sub-Pool and the Ordinary CTLP Creditors shall receive distributions from the Ordinary CTLP Creditors Sub-Pool. The Monitor shall distribute, on behalf of the CMI Entities, on one or more Distribution Dates as may be set by the Monitor from time to time:

(a) to each Ordinary CMI Creditor holding a Proven Distribution Claim as of the Distribution Record Date or a Claim that subsequently becomes a Proven Distribution Claim an amount that, together with any distributions previously made on account of such Claims is equal to the aggregate of such creditor's Ordinary CMI Creditor Pro Rata Amount of the Ordinary CMI Creditors Sub-Pool; and

(b) to each Ordinary CTLP Creditor holding a Proven Distribution Claim as of the Distribution Record Date or a Claim that subsequently becomes a Proven Distribution Claim an amount that, together with any distributions previously made on account of such Claims is equal to the aggregate of such creditor's Ordinary CTLP Creditor Pro Rata Amount of the Ordinary CTLP Creditors Sub-Pool.

All distributions shall be made by cheque and sent by prepaid ordinary mail to the last known address for such Ordinary Creditor. For greater certainty, the Monitor shall not be obligated to make any distribution to the Ordinary Creditors until all Unresolved Claims without a dollar value have been finally resolved for distribution purposes.

For greater certainty, the Labour Parties shall not receive any distributions from the Ordinary Creditors Pool or the Convenience Class Pool in respect of the Retiree Terminal Deficiency Claim or the CEP Terminal Deficiency Claim, and Persons having Claims against National Post, National Post Holdings, 4501071 Canada, Western Communications, Multisound Publishers, CGS Shareholding, CGS NZ Radio, CGS International, CGS Debenture, Canwest MediaWorks US, Canwest MediaWorks Turkish Holdings, Canwest Irish Holdco, Canwest International, Canwest International Distribution, Canwest Communications, Canwest Finance or 30109 shall not receive any distribution from the Ordinary Creditors Pool or the Convenience Class Pool in respect of such Claims.

4.4 Distributions Regarding Unresolved Claims

An Affected Creditor holding an Unresolved Claim will not be entitled to receive a distribution under the Plan in respect of any portion thereof unless and until such Unresolved Claim becomes a Proven Distribution Claim.

4.5 Plan Implementation Fund

On and/or after the Plan Implementation Date, the Monitor shall receive from the Plan Entities (other than the CTLP Group Entities) the Cash and the Other PIF Assets and such further contributions, if any, as provided in the Plan Emergence Agreement, to constitute the Plan Implementation Fund to be administered by the Monitor in accordance with the Plan Emergence Agreement and the Sanction Order.

4.6 Payment of Unaffected Claims

The Claims listed in paragraphs (a) to (g) inclusive and (j) and (k) in the definition of Unaffected Claims shall be paid forthwith on or after the Plan Implementation Date by the Monitor, on behalf of the CMI Entities, from the Plan Implementation Fund in accordance with the Plan Emergence Agreement. To the extent that the value of an Unaffected Claim is at issue, the Monitor shall attempt to resolve such Unaffected Claim and may seek the advice and direction of the Court in connection therewith. Any outstanding Post-Filing Claims which are not New Canwest Liabilities or Post-Filing Claims of the CTLP Group Entities shall be paid by the Monitor, on behalf of the CMI Entities, from the Plan Implementation Fund in accordance with the Plan Emergence Agreement. With respect to the Claims listed in paragraph (l) of the definition of Unaffected Claims, such Unaffected Claims shall be paid in full from the Plan Implementation Fund within six months after the date of the Sanction Order.

4.7 Allocation of Distributions

All distributions made by the Monitor and CMI pursuant to the Plan shall be made first in consideration for the outstanding principal amount of each Claim and secondly in consideration of accrued and unpaid interest and penalties.

4.8 Cancellation of Certificates and Notes

Following completion of the steps in the sequence set forth in Section 5.5, all debentures, Notes, certificates, agreements, invoices and other instruments evidencing Affected Claims will not entitle any holder thereof to any compensation or participation other than as expressly provided for in the Plan and will be cancelled and will be null and void.

4.9 Taxes

In connection with the Plan and all distributions hereunder, the CMI Entities shall, to the extent applicable, comply with all Tax withholding and reporting requirements imposed by any Law of a federal, state, provincial, local, or foreign taxing authority, and all distributions hereunder shall be subject to, and made net of, any such withholding and reporting requirements. Notwithstanding any other provision of the Plan: (a) each Affected Creditor that is to receive a distribution pursuant to the Plan shall have sole and exclusive responsibility for the satisfaction

and payment of any Tax obligations imposed by any Governmental Entity, including income, withholding and other Tax obligations, on account of such distribution, and (b) no distribution shall be made to or on behalf of such Affected Creditor pursuant to the Plan unless and until such Affected Creditor has made arrangements satisfactory to the Monitor for the payment and satisfaction of any such Tax obligations which could result in a Tax liability for the Monitor and/or CMI Entities. Any distributions to be distributed pursuant to the Plan shall, pending the implementation of such arrangements, be treated as Undeliverable Distributions pursuant to Section 4.10. In connection with the payment in consideration for the transfer of the Canwest New Preferred Shares, the Shaw Designated Entity shall, to the extent applicable, comply with all Tax withholding and reporting requirements imposed by any Law of a federal, state, provincial, local, or foreign taxing authority, and all distributions hereunder shall be subject to, and made net of, any such withholding and reporting requirements.

4.10 Undeliverable Distributions

If a distribution to an Ordinary Creditor, or a Convenience Class Creditor, in respect of its Proven Distribution Claim is returned as undeliverable (each, an "**Undeliverable Distribution**"), no further delivery will be required unless and until the Monitor is notified in writing of such Affected Creditor's then current address. Any obligation to an Affected Creditor relating to an Undeliverable Distribution will expire six (6) months after the date of such distribution, after which date any liability to such Affected Creditor under the Plan will be forever barred, discharged, released and extinguished with prejudice and without compensation and the amount of such Undeliverable Distribution shall be deposited into the Plan Implementation Fund. In addition, following that date, the CMI Entities and the Monitor shall not be liable to the Affected Creditor or any other Person for any damages related to the Undeliverable Distribution. No interest shall be payable in respect of an Undeliverable Distribution.

4.11 Assignment of Ordinary Claims Subsequent to the Ordinary Creditors Meeting

An Ordinary Creditor may transfer or assign the whole of its Claim after the Ordinary Creditors Meeting provided that the Monitor shall not be obliged to make distributions to any such transferee or assignee or otherwise deal with such transferee or assignee as an Ordinary Creditor in respect thereof unless actual notice of the transfer or assignment, together with satisfactory evidence of such transfer or assignment, has been received by the Monitor prior to 5:00 p.m. on the day that is at least ten (10) Business Days prior to the initial Distribution Date and acknowledged in writing by the Monitor and the relevant CMI Entity. Thereafter, such transferee or assignee shall, for all purposes in accordance with the Claims Procedure Order constitute an Ordinary Creditor and shall be bound by notices given and steps in respect of such Ordinary Creditor's Claim. For greater certainty, the Monitor shall not recognize partial transfers or assignments of Ordinary Creditors' Claims. A transferee or assignee of an Ordinary Creditor's Claim shall not be entitled to set-off, apply, merge, consolidate, or combine any such Claims assigned or transferred to it against or on account or in reduction of any amounts owing by such transferee or assignee to any of the CMI Entities. For greater certainty, a Convenience Class Creditor shall not be entitled to transfer or assign its Convenience Class Claim after delivering to the Monitor its Convenience Class Claim Declaration. Nothing in this Section 4.11 restricts the ability of a Noteholder to transfer all or part of its holdings of Notes subsequent to the Meeting but prior to the Effective Time.

4.12 Treatment of Equity Claims

(a) The Existing Shareholders will not be entitled to any distributions under the Plan or any other compensation from the CMI Entities on account of their Equity Claims in connection with or as a result of the transactions contemplated by the Plan.

(b) On the Plan Implementation Date, all Equity Compensation Plans of Canwest will be terminated, and any outstanding options, restricted share units or other equity-based awards outstanding thereunder will be terminated and cancelled, and the participants therein shall not be entitled to any distributions under the Plan or any other compensation on account of any Equity Claims in connection therewith.

4.13 Treatment of Intercompany Claims

Notwithstanding Sections 4.2 to 4.4, any Person having an Intercompany Claim shall not be entitled to any distribution under the Plan.

ARTICLE 5
RESTRUCTURING AND PLAN IMPLEMENTATION

5.1 Corporate and Other Authorizations

The adoption, execution, delivery, implementation and consummation of all matters contemplated under the Plan and the Plan Emergence Agreement involving corporate or other action of the CMI Entities will occur and be effective as of the Plan Implementation Date in the sequence set out in Section 5.5, and will be authorized and approved under the Plan and by the Court, where appropriate, as part of the Sanction Order, in all respects and for all purposes without any requirement of further action by the shareholders of any CMI Entity or any of the Directors or Officers. All necessary approvals to take actions, if required, shall be deemed to have been obtained from the Directors and Officers or the shareholders of the relevant CMI Entities, including the deemed passing by any class of shareholders of any resolution or special resolution and no shareholders' agreement or agreement between a shareholder and another Person limiting in any way the taking of any such steps or actions contemplated by the Plan shall be effective and shall be deemed to have no force or effect.

5.2A Incorporation of New Canwest

Prior to the Plan Implementation Date, CMI will incorporate New Canwest under the CBCA as a wholly-owned subsidiary of CMI and will cause New Canwest to issue one (1) Class A common share to CMI for $1. The incorporating documentation shall include the New Canwest Articles of Incorporation and the New Canwest By-Laws. The Initial Directors will be individuals to be nominated by CMI.

5.2B Canwest Reorganization

On the Plan Implementation Date, in accordance with Section 5.5, the articles of Canwest will be amended pursuant to the Canwest Articles of Reorganization as follows:

(a) To reorganize the authorized capital of Canwest into an unlimited number of Canwest New Multiple Voting Shares, Canwest New Subordinate Voting Shares and Canwest New Non-Voting Shares, and an unlimited number of Canwest New Preferred Shares, the terms of which shall provide for the mandatory transfer to the Shaw Designated Entity of the Canwest New Preferred Shares held by the Existing Shareholders for an aggregate amount equal to $11,000,000 for distribution to the Existing Shareholders upon the delivery by Canwest to the Transfer Agent of the transfer notice contemplated by the terms of the Canwest New Preferred Shares.

(b.1) At the Effective Time, each Multiple Voting Share held by an Existing Shareholder shall be changed into one (1) Canwest New Multiple Voting Share and one (1) Canwest New Preferred Share.

(b.2) At the Effective Time, each Subordinate Voting Share held by an Existing Shareholder shall be changed into one (1) Canwest New Subordinate Voting Share and one (1) Canwest New Preferred Share.

(b.3) At the Effective Time, each Non-Voting Share held by an Existing Shareholder shall be changed into one (1) Canwest New Non-Voting Share and one (1) Canwest New Preferred Share.

5.3 CH Plan Administrator

Prior to the Plan Implementation Date, CMI and CTLP will apply to the Superintendent of Financial Institutions under section 29.1 of the PBSA to remove CTLP as administrator of the CH Plan and appoint a third party firm in its stead to effect an orderly wind-up of the CH Plan.

5.4 4414616 Canada

On or prior to the Plan Implementation Date, CMI shall cause 4414616 Canada to be dissolved pursuant to section 210(3) of the CBCA. CMI shall assume all debts, obligations and other liabilities of 4414616 Canada, if any, and upon such assumption, 4414616 Canada shall be fully released and discharged from all such debts, obligations and other liabilities. CMI shall have a power of attorney in respect of 4414616 Canada coupled with an interest to execute and file in the name of 4414616 Canada any elections with federal or provincial tax authorities as may be necessary or appropriate.

5.5 Steps To Be Taken on the Plan Implementation Date

Each of the following transactions contemplated by and provided for under the Plan will be consummated and effected and shall for all purposes be deemed to occur on the Plan Implementation Date, in the sequence specified in this Section 5.5, commencing at the Effective Time. Therefore all of the actions, documents, agreements and funding necessary to implement all of the following transactions must be in place and be final and irrevocable prior to the Effective Time and shall then be held in escrow and shall be released and deemed to take effect in the order specified below without any further act or formality and no other act or formality shall be required:

(a) The Cash Collateral Agreement shall be deemed to be terminated and all obligations thereunder shall be released, discharged and extinguished with prejudice.

(b) National Post and National Post Holdings shall repay to CMI from the National Post Transaction proceeds all advances or loans made to them from CMI from and after the Filing Date.

(c) The Plan Implementation Fund shall be established and funded in accordance with the Plan and the Plan Emergence Agreement and held in trust by the Monitor, to be used by the Monitor in accordance with the Plan and the Plan Emergence Agreement.

(d) The CTLP Limited Partnership Agreement shall be amended to provide that all income and losses of CTLP that would be calculated for the purposes of the ITA, or any other relevant taxation legislation of any province or other jurisdiction, and all other items of income, gain, loss, deduction, recapture and credit of CTLP (including any income arising as a result of the settlement or compromise of debts), that are allocable for purposes of the ITA or any other relevant taxation legislation of any province or other jurisdiction, earned, realized or otherwise included in the income of CTLP up to the time of the transfer by CMI to New Canwest of its units of CTLP as set out below, will be allocated to CMI as a former limited partner in CTLP except that such allocation will not include amounts otherwise allocable to GP Inc.

(e) All Claims relating to guarantees granted by any CMI Entity or any other Canwest Subsidiary (including Irish Holdco and Ireland Nominee) to the Noteholders and/or the Trustee, such guarantees and any other security granted by any such CMI Entity or Canwest Subsidiary to the Noteholders and/or the Trustee, and all rights of indemnity and subrogation arising thereunder, shall be fully released and discharged, and, in consideration of such release and discharge of Irish Holdco, each of Irish Holdco and the Collateral Agent shall be deemed to have released and discharged any security granted to it or for its benefit in respect of the Secured Intercompany Note, and Irish Holdco shall further be deemed to have fully and finally released with prejudice the CMI Entities and Ireland Nominee from their obligations to pay any interest then accrued and unpaid on the Secured Intercompany Note and the Unsecured Intercompany Note and from the guarantees granted by the CMI Entities and Ireland Nominee to Irish Holdco in connection with the Secured Intercompany Note and the Unsecured Intercompany Note.

(f) All contract defaults arising as a result of the CCAA Proceedings and the implementation of the Plan shall be deemed to be cured.

(g) CTLP shall pay or cause to be paid the CH Plan Settlement Amount to the CH Plan by way of certified cheque or wire transfer in immediately available funds payable to the CH Plan Trustee for the account of the CH Plan.

(h) (i) The Retiree Terminal Deficiency Claim shall be deemed to be fully and finally satisfied, discharged, and released and the CTLP Plan Entities shall be released of any liability in connection therewith; (ii) the CEP Terminal Deficiency Claim shall be deemed to be fully and finally satisfied, discharged and released with prejudice and the CTLP Plan Entities shall be released of any liability in connection therewith; (iii) the CEP CH Plan Grievance shall be deemed to be fully and finally satisfied and withdrawn with prejudice for all purposes, and the CEP, on behalf of the Current and Former Members, shall be deemed to fully and finally release and forever discharge with prejudice the CMI Entities from any and all Claims in relation to or arising in connection with the CH Plan and any and all Claims arising from or in relation to the CH Plan; and (iv) the Claims in relation to the CH Plan against the Directors and Officers shall be deemed to be fully and finally satisfied, discharged and released with prejudice for the purpose of the Claims Procedure Order and all other purposes, and the CEP on behalf of the Current and Former Members shall be deemed to fully and finally release and forever discharge with prejudice the Directors and Officers from any and all Claims, including the Claims against the Directors and Officers arising from or in relation to the CH Plan.

(i) Each of 4501063 Canada, MBS Productions and Global Centre will commence dissolution under section 210(3) of the CBCA or section 237 of the OBCA, as applicable. In connection therewith, and as a consequence thereof:

(i) each such company shall distribute all of its assets, rights and properties to CMI, including, in the case of 4501063 Canada, the shares it holds in GP Inc., and, in all cases, any Canwest/CMI Group Intercompany Receivables held by such corporation, and such assets, rights and properties shall be vested into CMI free and clear of any liens, charges and encumbrances, including the Court Charges and the Existing Security, pursuant to a vesting provision in the Sanction Order; and

(ii) all debts, liabilities and other obligations of each such corporation shall be assumed by CMI, upon which assumption, such corporation shall be fully released and discharged from all such debts, liabilities and other obligations.

CMI shall, in the case of each such corporation, have a power of attorney coupled with an interest, to execute and file in the name of such corporation any elections with federal or provincial tax authorities as may be necessary or appropriate.

(j) Canwest shall transfer or cause to be transferred the Trademarks, the Copyrights and Other IP, the Other Canwest Assets and any and all Canwest/CMI Group Intercompany Receivables owing to it to CMI in consideration for the issuance of one (1) common share of CMI. Canwest shall assign or cause to be assigned the Trademarks Licence Agreement, the Trademarks Licence, and the CW Media Trademarks Licence Agreements to CMI and CMI shall assume Canwest's liabilities and obligations under the Trademarks Licence Agreement, the

Trademarks Licence, the CW Media Trademarks Licence Agreements and under section 6.4 of the Omnibus Transition and Reorganization Agreement.

(k) All Claims and Unaffected Claims against the CTLP Plan Entities excluding: (i) Intercompany Claims (other than the Fireworks Claim), (ii) the Post-Filing Claims against the CTLP Plan Entities, and (iii) the obligation of CTLP to pay the CH Plan Settlement Amount, shall be deemed to be Claims against CMI on the following basis:

(i) CMI shall assume the Fireworks Claim for consideration equal to $1;

(ii) CMI shall assume and become liable in the stead of the CTLP Plan Entities to pay the amount ultimately determined to be payable to the holders of such Claims and Unaffected Claims against the CTLP Plan Entities either as a distribution in accordance with the Plan or a payment from the Plan Implementation Fund (which amount shall be hereinafter referred to as the "**Assumption Consideration Amount**");

(iii) as consideration for the assumption by CMI referred to in this Section 5.5(k) of the obligations to pay distributions, or make payments from the Plan Implementation Fund, in respect of such Claims and Unaffected Claims against CTLP, CTLP shall concurrently with such assumption pay to CMI an amount equal to the CTLP Assumption Consideration Amount, which shall be satisfied as follows:

(A) by a reduction in the amount, if any, owing under the CTLP-CMI Receivable; and

(B) to the extent that the CTLP Assumption Consideration Amount exceeds the amount of the CTLP-CMI Receivable, by the issuance of a demand note in favour of CMI with a principal amount equal to the excess (the "**CTLP Assumption Consideration Note**").

(iv) as consideration for the assumption by CMI referred to in this Section 5.5(k) of the obligations to pay distributions, or make payments from the Plan Implementation Fund in respect of such Claims and Unaffected Claims against each other CTLP Plan Entity, each such CTLP Plan Entity shall concurrently with such assumption issue a demand note in favour of CMI with a principal amount equal to $1 in respect of the Fireworks Claim and in each other case the amount of the Assumption Consideration Amount, if any, relating to such Claims and Unaffected Claims against it (each such note, an "**Other CTLP Plan Entity Assumption Consideration Note**"); and

(v) the holders of such Claims and Unaffected Claims shall have no further claims against the CTLP Plan Entities.

(l) The Court Charges and the Existing Security shall be released as they relate to (i) the New Canwest Assets; (ii) the CW Investments Shares; (iii) the assets of the CTLP Plan Entities; (iv) the CTLP Assumption Consideration Note; and (v) the Other CTLP Plan Entity Assumption Consideration Notes and any Canwest/CMI Group Intercompany Receivables owing to CMI by a CTLP Plan Entity.

(m) All amounts owing by Canwest and the Canwest Subsidiaries (excluding the CTLP Group Entities) to a CTLP Plan Entity, immediately prior to the transaction referred to in this Section 5.5(m), shall be forgiven and released.

(n) CMI shall contribute the Other CTLP Plan Entity Assumption Consideration Notes and any Canwest/CMI Group Intercompany Receivables owing to it (other than amounts owing to it by CTLP) to the capital of CTLP.

(o) CMI shall transfer and assign the New Canwest Assets to New Canwest and New Canwest shall assume the New Canwest Liabilities without recourse to the CMI Entities other than the CTLP Plan Entities. Upon the assumption by New Canwest of the New Canwest Liabilities, none of the CMI Entities (other than the CTLP Plan Entities) or the Directors and Officers shall have any further obligation or liability in respect of any of the New Canwest Liabilities and the CMI Entities (other than the CTLP Plan Entities) and the Directors and Officers shall be fully released and discharged with prejudice from the New Canwest Liabilities. To the extent that CMI does not have legal or beneficial title to the New Canwest Assets immediately prior to the transfer of the New Canwest Assets to New Canwest and such legal and beneficial title of such New Canwest Assets is held by any one of the CMI Entities, such CMI Entity shall be deemed to transfer to CMI all of its legal or beneficial interest in such New Canwest Assets immediately prior to the transfer of the New Canwest Assets by CMI to New Canwest. The transfer of the New Canwest Assets to New Canwest shall be free from any liens, charges and encumbrances including the Court Charges and the Existing Security, pursuant to a vesting provision in the Sanction Order.

(p) New Canwest shall assume the defence and responsibility for the conduct of the Insured Litigation, including the payment of the Insured Litigation Deductibles with respect thereto and responsibility for the day-to-day case management of the Insured Litigation. Such case management responsibilities are to include, without limitation, providing instructions to counsel, making employees available for examinations for discovery, providing documents, and providing witnesses at trial. New Canwest shall pay all Insured Litigation Deductibles in the same manner and to the same extent that Canwest, CMI, or any of the CTLP Plan Entities would otherwise have been required to pay such deductibles in respect of the Insured Litigation. For greater certainty, New Canwest will not assume liability of Canwest, CMI, or any of the CTLP Plan Entities with respect to the Insured Litigation beyond payment of any Insured Litigation Deductibles assumed in accordance with this Section 5.5 and distribution of any insurance proceeds received by New Canwest, and New Canwest will not be responsible for any amounts payable by Canwest, CMI, or any of the CTLP Plan Entities with respect to such litigation, except to the extent that insurance proceeds are

available and in such cases shall assist as reasonably necessary including making Employees available as necessary, at New Canwest's cost.

(q) All Transfer Taxes shall be paid by New Canwest, subject to any applicable election available to reduce or eliminate such Transfer Taxes.

(r) The Broadcast Licences held by GP Inc. as general partner and CMI as limited partner carrying on business as CTLP will be "surrendered" to the CRTC following the issuance of new broadcasting licences by the CRTC to GP Inc. and New Canwest carrying on business as CTLP.

(s) In consideration for the transfer to New Canwest by CMI of the Canwest/CMI Group Intercompany Receivables owing to CMI by CTLP, the CTLP Assumption Consideration Note and any amounts receivable by CMI under the Shared Services Agreement and/or the Omnibus Transition and Reorganization Agreement, New Canwest will concurrently with such transfer issue the New Canwest Note to CMI.

(t) In consideration for the transfer to New Canwest by CMI of all other New Canwest Assets, New Canwest will concurrently with such transfer issue one (1) million Class A common shares in New Canwest to CMI and will assume the New Canwest Liabilities.

(u) As determined by CIBC and CMI prior to the Plan Implementation Date, the CIT Credit Agreement and the CIT Facility will be repaid and terminated and any existing letters of credit issued under the CIT Credit Agreement and the CIT Facility will be cash collateralized, replaced or addressed by issuing new back-to-back letters of credit.

(v) The Canwest Articles of Reorganization shall become effective.

(w) Canwest shall deliver to the Transfer Agent the transfer notice contemplated by the terms of the Canwest New Preferred Shares.

(x) The Shaw Designated Entity will, following the delivery to the Transfer Agent of the notice pursuant to Section 5.5(w), purchase all of the Canwest New Preferred Shares held by the Existing Shareholders and will pay $11,000,000 to the Transfer Agent for distribution to such holders of the Canwest New Preferred Shares as of the Effective Time, in consideration for the transfer to the Shaw Designated Entity of all of the issued and outstanding Canwest New Preferred Shares created pursuant to the Canwest Articles of Reorganization.

(y) The Shaw Designated Entity will donate and surrender the Canwest New Preferred Shares acquired by it to Canwest for cancellation.

(z) Canwest and CMI shall be deemed to provide the Plan Sponsor with an irrevocable direction to pay the Subscription Price net of the Noteholder Pool to the Monitor and the Plan Sponsor shall pay the Subscription Price net of the

Noteholder Pool to the Monitor. The Monitor shall receive and hold the Subscription Price net of the Noteholder Pool in trust for the benefit of the Affected Creditors of the Plan Entities (other than the Noteholders) in accordance with the Plan. The Monitor shall divide that part of the Subscription Price which it receives into and shall establish the Ordinary Creditors Pool, including the Ordinary CMI Creditors Sub-Pool and the Ordinary CTLP Creditors Sub-Pool and the Convenience Class Pool.

(aa) The Plan Sponsor shall pay the portion of the Subscription Price equal to the Noteholder Pool to CMI and CMI shall establish the Noteholder Pool therefrom.

(bb) As consideration for the Subscription Price for the acquisition from CMI, pursuant to a vesting provision in the Sanction Order, all of the issued and outstanding shares of New Canwest, the New Canwest Note, and the CW Investments Shares shall be transferred to and vested in 7316712 Canada free and clear from any liens, charges and encumbrances, including the Court Charges and the Existing Security, pursuant to a vesting provision in the Sanction Order.

(cc) The Initial Directors, and the Directors and Officers of GP Inc. and of the Subsidiaries controlled by CTLP shall be deemed to have resigned and shall be replaced by directors and officers nominated by 7316712 Canada.

(dd) All Directors and Officers and any committee members of Canwest including the Special Committee, as applicable, CMI, National Post Holdings, CW Investments (other than the Shaw nominees) and their respective Subsidiaries and of 4501071 Canada shall be deemed to have resigned.

(ee) Contemporaneously with the transfer of the CW Investments Shares to 7316712 Canada, CMI shall assign and transfer all of its rights and obligations under the Shareholders Agreement to 7316712 Canada.

(ff) All Equity Compensation Plans will be cancelled without compensation to their participants.

(gg) In addition to the releases referred to in Sections 5.5(e) and 5.5(h) and Section 6.3(d), all of the releases set out in Section 7.3 will be effected and all Affected Claims and other matters and claims to be released by Section 7.3 shall be satisfied extinguished, released and forever barred with prejudice.

(hh) The Employees of the CTLP Group Entities shall continue to be employed by one of the CTLP Group Entities. To the extent that Persons having existing contracts (written or oral) with one of the CTLP Group Entities on the Plan Implementation Date provide services to one of the CTLP Group Entities, such CTLP Group Entity shall continue to retain such Persons as independent contractors.

(ii) All security interests in, and pledges of, the Irish Holdco Preference "A" Shares, granted by CMI, including any Court Charges and the Existing Security, shall be deemed to be fully released and discharged.

(jj) Irish Holdco shall redeem 345,063 of the Irish Holdco Preference "A" Shares for the Irish Holdco Aggregate Redemption Price.

(kk) Irish Holdco shall fully satisfy its obligation to pay the Irish Holdco Aggregate Redemption Price by set-off of the full principal amount owing under (i) the Secured Intercompany Note and (ii) the Unsecured Intercompany Note and by set-off of the $72,306,685 of the amount owing under the Irish Holdco Intercompany Receivable, so that after the completion of the set-off herein, CMI's obligations under the Secured Intercompany Note and the Unsecured Intercompany Note shall be satisfied in full and the Irish Holdco Intercompany Receivable will be reduced to $315.

5.6 National Post and National Post Holdings

(a) The Noteholders shall not receive any distributions under the Plan from National Post or National Post Holdings. On the Plan Implementation Date, all Claims which the Noteholders have against National Post or National Post Holdings shall be barred, released and forever discharged with prejudice.

(b) On the Plan Implementation Date, National Post Holdings and National Post shall deliver to the Monitor assignments in bankruptcy under the BIA naming the Monitor as Trustee in Bankruptcy. The Trustee in Bankruptcy shall apply for an order consolidating the bankruptcy estates of National Post Holdings and National Post to create the National Post Consolidated Bankruptcy Estate.

(c) The Claims Procedure Order, the CMI Claims Bar Date, and the Restructuring Period Claims Bar Date shall continue to apply in respect of the determination of Claims against National Post Holdings, National Post and the National Post Consolidated Bankruptcy Estate, if any, for voting purposes and distributions in such estates and only Ordinary Creditors having Proven Distribution Claims against National Post Holdings, National Post and the National Post Consolidated Bankruptcy Estate, if any, shall be entitled to receive distributions from National Post Holdings, National Post or the National Post Consolidated Bankruptcy Estate.

(d) The remaining proceeds of sale from the National Post Transaction after the repayment by National Post of the advances made by CMI to National Post from and after the Filing Date shall be vested in the Trustee in Bankruptcy of the estates of National Post Holdings, National Post, or the National Post Consolidated Bankruptcy Estate, if any, free and clear of all Court Charges and the Existing Security.

5.7 Post-Implementation Matters

(a) The Monitor shall complete the resolution of the Unresolved Claims in accordance with the Claims Procedure Order, the Meeting Order, the Sanction Order, the Plan and the Plan Emergence Agreement and complete any remaining

distributions to Affected Creditors of the Plan Entities holding Proven Distribution Claims.

(b) In addition to the bankruptcy of National Post and National Post Holdings, following the Plan Implementation Date, the Sanction Order shall empower and authorize the Monitor in its discretion under the Sanction Order to assign into bankruptcy under the BIA, or effect a liquidation, winding-up or dissolution of Canwest and any Canwest Subsidiaries which remain as such following the completion of the transfer by CMI of the shares in New Canwest and the CW Investments Shares to 7316712 Canada and to take any steps necessary or incidental thereto, including effecting any required change of name where permitted. The Proven Distribution Claims of Ordinary Creditors who do not receive a distribution from the Ordinary Creditors Pool or the Convenience Class Pool in respect of any such remaining Canwest Subsidiaries being wound-up, liquidated or dissolved shall continue to remain outstanding against such remaining entities but shall be released as against the Plan Entities and the Directors and Officers. The Sanction Order shall also authorize the Monitor to act as trustee in bankruptcy, liquidator, receiver or similar official in respect to any such bankruptcy, liquidation, winding-up or dissolution.

(c) The Monitor shall be empowered and authorized to retain such advisors and legal counsel in Canada and in other jurisdictions as it deems necessary and advisable and to pay for such advisors and counsel from the Plan Implementation Fund.

ARTICLE 6
SANCTION ORDER AND PLAN IMPLEMENTATION

6.1 Application for Sanction Order

If the Plan is approved by the Requisite Majority, the Applicants shall apply to the Court for the Sanction Order. The CMI Entities shall use their commercially reasonable efforts to obtain the Sanction Order on or before August 27, 2010. Subject to the Sanction Order being granted and the satisfaction or waiver by the applicable Parties of the Conditions Precedent set out in Section 6.3, the Plan will be implemented by the CMI Entities as provided in Section 5.5.

6.2 Effect of Sanction Order

In addition to sanctioning the Plan, the Applicants will seek a Sanction Order that will, without limitation to any other terms that it may contain:

(a) confirm that the Meetings have been duly called and held in accordance with the Meeting Order;

(b) declare that (i) the Plan has been approved by the Required Majority in conformity with the CCAA; (ii) the CMI Entities have complied with the provisions of the CCAA and the Orders in all respects; (iii) the Court is satisfied that the CMI Entities have not done or purported to do anything that is not

authorized by the CCAA; and (iv) the Plan and the transactions contemplated thereby are fair and reasonable;

(c) declare that as of the Plan Implementation Date, the Plan and all associated steps, compromises, transactions, arrangements, assignments, releases and the restructuring effected thereby are approved, binding and effective as herein set out upon the CMI Entities, all Affected Creditors and all other Persons affected by the Plan;

(d) declare that the steps to be taken and the compromises and releases to be effected on the Plan Implementation Date are deemed to occur and be effected in the sequential order contemplated by Section 5.5 on the Plan Implementation Date, beginning at the Effective Time;

(e) authorize (i) the winding-up and dissolution of 4501063 Canada, MBS Productions and Global Centre under section 210(3) of the CBCA or section 237 of the OBCA, as applicable, (ii) the transfer of all of the assets, rights and properties of each such corporation, including, in the case of 4501063 Canada, the shares that it holds in GP Inc., and, in all cases, any Canwest/CMI Group Intercompany Receivables held by such corporation, to CMI on the Plan Implementation Date and that such assets, rights and properties shall vest in CMI free and clear of any liens, charges and encumbrances, including the Court Charges and the Existing Security, and (iii) the assumption by CMI of all of the debts, obligations and other liabilities of 4501063 Canada, MBS Productions and Global Centre;

(f) authorize and approve the assumption by CMI of all of the debts, obligations and other liabilities of the Canwest Subsidiaries provided for in the Plan.

(g) authorize and approve the transfer and assignment by CMI of the New Canwest Assets to New Canwest and vest the New Canwest Assets in New Canwest free and clear of all liens, charges and encumbrances, including the Court Charges and the Existing Security;

(h) declare that all shares issued by New Canwest to CMI pursuant to the Plan shall have been validly issued;

(i) authorize and approve the assumption by New Canwest of all of the New Canwest Liabilities and declare that upon such assumption, CMI shall have no further obligation in respect of the New Canwest Liabilities and CMI shall be forever released and discharged from the New Canwest Liabilities;

(j) authorize and approve of the transfer and assignment by CMI of all of the issued and outstanding shares of New Canwest, the New Canwest Note and the CW Investments Shares to 7316712 Canada and vest in 7316712 Canada such assets free and clear of all liens, charges and encumbrances, including the Court Charges and the Existing Security;

(k) declare that the compromises, arrangements, discharges and the releases referred to in Sections 5.5(e) and 5.5(h), Section 6.3(d) and Section 7.3 are approved and shall become binding and effective in accordance with the Plan;

(l) terminate and discharge the Court Charges and the Existing Security on the Plan Implementation Date, provided however that from and after the Plan Implementation Date, the Administration Charge shall only apply and extend to the Ordinary Creditors Pool and the Plan Implementation Fund;

(m) compromise, discharge and release Canwest, CMI, Yellow Card and the CTLP Plan Entities, from any and all Affected Claims and compromise, discharge and release the CTLP Plan Entities from all Intercompany Claims not affected or otherwise dealt with by the provisions of Section 5.5 and that are owed, immediately after Section 5.5(kk) to Canwest or its Subsidiaries (other than the CTLP Group Entities and CW Investments and its Subsidiaries) (as determined immediately after Section 5.5(kk)) and declare that the ability of any Person to proceed against Canwest, CMI, Yellow Card and the CTLP Plan Entities in respect of or relating to any such Affected Claims and Intercompany Claims shall be forever discharged, extinguished, released and restrained, and all proceedings with respect to, in connection with or relating to such Affected Claims and Intercompany Claims shall be permanently stayed against the Plan Entities, subject only to the right of Affected Creditors to receive distributions pursuant to the Plan in respect of their Affected Claims;

(n) declare that any Claims for which a CMI Notice of Dispute or a CMI Proof of Claim has not been filed by the CMI Claims Bar Date or the Restructuring Period Claims Bar Date, as applicable, shall be forever barred, extinguished and released with prejudice;

(o) declare that, subject to the performance by the CMI Entities of the obligations under the Plan, all obligations, contracts, agreements, leases or other arrangements to which any one of the CMI Entities is a party shall be and remain in full force and effect, unamended, as at the Plan Implementation Date, unless disclaimed or resiliated by any of the CMI Entities pursuant to the Claims Procedure Order or the Meeting Order, and no party to any such obligation or agreement shall on or following the Plan Implementation Date, accelerate, terminate, refuse to renew, rescind, refuse to perform or otherwise disclaim or resiliate its obligations thereunder, or enforce or exercise (or purport to enforce or exercise) any right or remedy under or in respect of any such obligation or agreement, by reason:

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

(ii) that the CMI Entities have sought or obtained relief or have taken steps as part of the Plan or under the CCAA;

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

(iv) of the effect upon the CMI Entities of the completion of any of the transactions contemplated under the Plan, including the transfer of the New Canwest Assets to New Canwest; or

(v) of any compromises, settlements, restructurings and releases effected pursuant to the Plan;

(p) remove the name "Canwest" from the corporate, business, trade, or partnership names of any of the CMI Entities and their Subsidiaries other than the CTLP Plan Entities and change the registered office of the CMI Entities governed by the CBCA other than the CTLP Plan Entities to Toronto, Ontario;

(q) approve the Plan Emergence Agreement and all schedules thereto including the PIF Schedule, and declare that the Monitor and the Plan Sponsor shall have no liability in respect of amounts to be paid out of the Plan Implementation Fund pursuant to the Plan Emergence Agreement and the Plan, or for any costs or expenses associated therewith, or for any deficiencies in the Plan Implementation Fund;

(r) authorize the Monitor to perform its functions and fulfil its obligations under the Plan to facilitate the implementation of the Plan and expand the powers of the Monitor to perform its obligations under the Plan and the Plan Emergence Agreement, including to (i) administer and distribute the Plan Implementation Fund, (ii) receive the Subscription Price net of the Noteholder Pool, (iii) establish and hold the Ordinary Creditors Pool, including the Ordinary CMI Creditors Sub-Pool, the Ordinary CTLP Creditors Sub-Pool and the Convenience Class Pool, (iv) resolve any Unresolved Claims, (v) effect the distributions in respect of Proven Distribution Claims to the Ordinary Creditors and the Convenience Class Creditors and pay the Unaffected Claims (including without limitation, to resolve any unresolved Unaffected Claims) in accordance with the Plan and the Plan Emergence Agreement, (vi) effect the liquidation, bankruptcy, winding-up or dissolution of Canwest and certain of its remaining Canwest Subsidiaries including, for the avoidance of doubt, the foreign Canwest Subsidiaries, (vii) authorize the Monitor, if required, to act as trustee in bankruptcy, liquidator, receiver or a similar official of such entities, (viii) liquidate any assets of the CMI Entities (other than the CTLP Plan Entities), including the Winnipeg Condo, not transferred to New Canwest pursuant to the Plan, and to contribute any net proceeds realized therefrom to the Plan Implementation Fund, (ix) take all appropriate steps to collect all refunds, dividends, distributions or other amounts payable to Canwest or CMI, (x) implement a claims process to determine and resolve any Post-Filing Claim which is to be paid from the Plan Implementation Fund, and (xi) such other powers as may be granted by the Court from time to time;

(s) declare that all distributions and payments by the Monitor to the Ordinary Creditors and the Convenience Class Creditors under the Plan are for the account of the CMI Entities and the fulfillment of the CMI Entities' obligations under the Plan;

(t) declare that, after the Effective Time, the Applicants which are CTLP Plan Entities shall no longer be Applicants in the CCAA Proceedings; provided that in connection with the CTLP Plan Entities, the Monitor's powers and functions with respect to the resolution and administration of Unresolved Claims, making distributions under the Plan and duties under the Plan Emergence Agreement and the CCAA, including determining, resolving and paying Unaffected Claims related to the CTLP Plan Entities shall continue;

(u) authorize the Monitor to file on or after the Plan Implementation Date assignments in bankruptcy under the BIA for National Post and National Post Holdings and authorize FTI to apply for the consolidation of and to act as trustee in bankruptcy of such entities, including the National Post Consolidated Bankruptcy Estate, if any;

(v.1) provide that the Noteholders and the Trustee shall have no Claims against National Post Holdings, National Post and the National Post Consolidated Bankruptcy Estate, if any, and that the Claims Procedure Order, the CMI Claims Bar Date, the Meeting Order and the Restructuring Period Claims Bar Date shall apply to resolve all Claims against National Post Holdings, National Post or the National Post Consolidated Bankruptcy Estate, if any;

(v.2) pursuant to section 191 of the CBCA, declare that the articles of Canwest be amended pursuant to the Canwest Articles of Reorganization;

(v.3) declare that the Existing Shares are validly changed into Canwest New Shares and the Canwest New Preferred Shares and such Canwest New Shares and Canwest New Preferred Shares shall be validly created, issued and outstanding as fully-paid and non-assessable as of the Effective Time;

(v.4) declare that the Shaw Designated Entity, upon payment of $11,000,000 to the Transfer Agent, shall acquire all of the issued and outstanding Canwest New Preferred Shares, free and clear of all liens, charges, adverse claims and encumbrances, including the Court Charges and the Existing Security;

(w) declare that the Stay of Proceedings under the Initial Order continues until the discharge of the Monitor;

(x) provide that section 36.1 of the CCAA, sections 95 to 101 of the BIA and any other federal or provincial Law relating to preferences, fraudulent conveyances or transfers at undervalue, shall not apply to the Plan or to any payments or distributions made in connection with the restructuring and recapitalization of the CMI Entities, whether before or after the Filing Date, including to any and all of

the payments, distributions or transactions contemplated by and to be implemented pursuant to the Plan;

(y) provide that the Chief Restructuring Advisor shall be discharged and released from its obligations on the Plan Implementation Date;

(z) discharge and release any liability of Directors and Officers and the Initial Directors in accordance with the release set out in Section 7.3(a) and declare that the ability of any Person to proceed against them in respect of or relating to any Affected Claims shall be forever discharged, extinguished, released and restrained;

(aa) confirm the releases contemplated in Sections 5.5(e) and 5.5(h), Section 6.3(d) and Section 7.3;

(bb) stay the commencing, taking, applying for or issuing or continuing any and all steps or proceedings, including, without limitation, administrative hearings and orders, declarations or assessments, commenced, taken or proceeded with or that may be commenced, taken or proceeded with against any Released Party in respect of any matter released pursuant to Sections 5.5(e) and 5.5(h) and Section 7.3;

(cc) authorize the Applicants, the Monitor and the Plan Sponsor to apply to the Court for advice and direction in respect of any matter arising from or under the Plan and/or the Plan Emergence Agreement; and

(dd) authorize and direct the Monitor to apply to the Court for its discharge.

6.3 Conditions to Plan Implementation

The implementation of the Plan is subject to the satisfaction or waiver of the following Conditions Precedent prior to or at the Effective Time (provided that, for greater certainty, the Condition Precedent set out in Section 6.3(f) cannot be waived):

(a) the Plan, the Sanction Order, and all definitive legal documentation in connection with all of the foregoing shall be in a form agreed by Canwest, CMI, the Ad Hoc Committee and the Plan Sponsor;

(b) the Plan shall have been approved and sanctioned by the Court, and the Sanction Order shall be in full force and effect and all applicable appeal periods in respect thereof shall have expired and any appeals therefrom shall have been finally disposed of by the applicable appellate court;

(c) there shall not exist or have occurred any default or event of default (other than those defaults or events of default that are remedied or waived and other than an event of default arising from a breach of section 5(b) of the Cash Collateral Agreement which does not result in another event of default) under the CIT Credit Agreement or the Cash Collateral Agreement;

(d) CTLP shall have ceased to be the administrator of the CH Plan, a third party firm shall have been appointed in its place, and CTLP shall be released from any and all Claims as administrator of the CH Plan;

(e) the Court shall have approved the Omnibus Transition and Reorganization Agreement and the transactions contemplated therein shall have become effective;

(f) Canwest, CMI, New Canwest, GP Inc., the Plan Sponsor and the Monitor shall have entered into the Plan Emergence Agreement and shall all have agreed to the final PIF Schedule;

(g) Canwest, CMI, New Canwest and the Plan Sponsor shall have entered into the Tax Matters Agreement;

(h) CMI shall, immediately prior to the Effective Time, own, directly or indirectly, a minimum of 35.33% of the outstanding equity shares of CW Investments and CW Investments shall, at the Effective Time, own substantially all of the assets that it owned as at October 5, 2009;

(i) all filings under applicable Laws shall have been made and any material regulatory consents or approvals that are required in connection with the transactions contemplated by the Plan, including the issue of the Broadcast Licences, shall have been obtained, including under the *Competition Act* (Canada) and the *Broadcasting Act* (Canada), on terms satisfactory to CMI and the Plan Sponsor;

(j) there shall be no liabilities or contingent liabilities of any of the CTLP Plan Entities in respect of any registered pension plans, except for (i) those registered pension plans listed on Schedule D.7, and (ii) any multi-employer pension plans in which any of the CTLP Plan Entities are required to contribute pursuant to a collective bargaining agreement;

(k) the Trustee shall have delivered to CMI in writing wire instructions no later than three (3) Business Days prior to the Plan Implementation Date;

(l) all conditions of closing under the Subscription Agreement, Shaw Support Agreement and Support Agreement shall have been satisfied or waived by the applicable parties in accordance with the terms of the Subscription Agreement, Shaw Support Agreement or Support Agreement, and the Subscription Agreement, Shaw Support Agreement or Support Agreement shall not have been terminated. For greater certainty, the conditions precedent in this Section 6.3(l) may be waived only upon the consent of all Parties who benefit from the particular condition precedent in the Subscription Agreement, the Shaw Support Agreement or the Support Agreement that remains unsatisfied as at the Effective Time;

(m) the Monitor shall have received from the Plan Sponsor the Subscription Price net of the Noteholder Pool to be held in escrow until the Monitor's Certificate is delivered; and

(n) CIBC and CMI shall have entered into arrangements satisfactory to the parties for the repayment and termination of the CIT Credit Agreement and the CIT Facility, and for the cash collateralization, replacement or issuance of new back-to-back letters of credit.

6.4 Monitor's Certificate

Upon the satisfaction or waiver of the Conditions Precedent, Canwest, the Plan Sponsor and the Ad Hoc Committee shall so advise the Monitor in writing and the Monitor shall deliver to the CMI Entities, the Ad Hoc Committee and the Plan Sponsor the Monitor's Certificate substantially in the form of Schedule G. On or forthwith following the Plan Implementation Date, the Monitor shall file such Monitor's Certificate with the Court and shall post a copy of same, once filed, on the Website.

6.5 Outside Date

If the Conditions Precedent are not satisfied on or before September 30, 2010, unless such date is extended in accordance with the Subscription Agreement, Shaw Support Agreement and Support Agreement, the Plan and the Sanction Order shall cease to have any further force or effect and will not be binding on any Person.

ARTICLE 7
EFFECT OF THE PLAN

7.1 Effect of the Plan Generally

Following completion of the steps in the sequence set forth in Section 5.5, the Plan will constitute: (a) full, final and absolute settlement, and a release, extinguishment and discharge of all indebtedness, liabilities and obligations of or in respect of all (i) Affected Claims except Intercompany Claims against the Plan Entities; (ii) in the case of the CTLP Plan Entities, all Intercompany Claims not affected or otherwise dealt with by the provisions of Section 5.5 and that are owed, immediately after Section 5.5(kk) to Canwest or its Subsidiaries (other than the CTLP Group Entities and CW Investments and its Subsidiaries) (determined immediately after Section 5.5(kk)); (iii) in the case of the Noteholders, Claims of the Noteholders against Canwest and the Canwest Subsidiaries including any interest and costs accruing and unpaid thereon; and (iv) Equity Claims; and (b) a reorganization of the Business.

7.2 Prosecution of Judgments

From and after the completion of the steps to be taken at the Effective Time as set out in Section 5.5, no step or proceeding may be taken in respect of any action, suit, judgment, execution, cause of action or similar proceeding in connection with any Affected Claim against the Plan Entities and any such proceedings will be deemed to have no further effect against any Plan Entity or any of its assets and will be released, discharged, dismissed or vacated without

cost to the Plan Entities. Any Plan Entity may apply to the Court or any court of competent jurisdiction to obtain a discharge or dismissal, if necessary, of any such proceedings without notice to the Affected Creditor.

7.3 Released Parties

(a) On the Plan Implementation Date, and without limiting in any way the releases and discharges of all Claims provided for in Sections 5.5(e) and 5.5(h) and Section 6.3(d), Canwest, the CMI Entities and the Canwest Subsidiaries and each of their respective present and former shareholders, the Directors and Officers, members of the Special Committee or any pension or other committee or governance counsel, financial advisors (including RBC and Genuity), legal counsel and agents, the Monitor and its counsel, FTI, the Chief Restructuring Advisor, the Initial Directors, the Retiree Representative Counsel, the Retiree Representatives, CIBC and the Plan Sponsor and the present and former directors, officers and agents of each (collectively, the "**Released Parties**") will be released and discharged from any and all demands, claims, actions, causes of action, counterclaims, suits, debts, sums of money, accounts, covenants, damages, judgments, expenses, executions, liens and other recoveries on account of any indebtedness, liability, obligation, demand or cause of action of whatever nature that any Person (including any Person who may claim contribution or indemnification against or from them) may be entitled to assert, including any and all Claims in respect of statutory liabilities of Directors, Officers, and any alleged fiduciary (whether acting as a director, officer, member of the Special Committee or a pension or other committee or governance counsel or acting in any other capacity in connection with the administration of the CH Plan or any other pension or benefit plan of any of the CMI Entities) whether known or unknown, matured or unmatured, direct, indirect or derivative, foreseen or unforeseen, existing or hereafter arising, based in whole or in part on any act or omission, transaction, dealing or other occurrence existing or taking place on or prior to the Plan Implementation Date relating to, arising out of or in connection with any claim, including any claim arising out of (i) the restructuring, disclaimer, resiliation, breach or termination of any contract, lease, agreement or other arrangement, whether written or oral, (ii) the business and affairs of Canwest, any of the CMI Entities or any of the Canwest Subsidiaries, (iii) the administration or management of the CH Plan or any other pension or benefit plans, (iv) the Plan, (v) the CCAA Proceedings, (vi) any transaction referenced in the Support Agreement, the Subscription Agreement, the Shaw Support Agreement, the CTLP Limited Partnership Agreement or the Plan Emergence Agreement, and (vii) the Canwest Articles of Reorganization and related transactions, provided however that nothing in this Section 7.3 will release or discharge:

(A) Canwest or any of the Canwest Subsidiaries (other than the CTLP Plan Entities) from or in respect of (x) any Unaffected Claim or (y) its obligations to Affected Creditors under the Plan or under any Order;

(B) a Released Party if the Released Party is adjudged by the express terms of a judgment rendered on a final determination on the merits to have committed fraud or wilful misconduct or to have been grossly negligent or, in the case of Directors, in respect of any claim referred to in section 5.1(2) of the CCAA;

(C) any Claim (other than a Claim of a Noteholder or the Trustee) against a CMI Entity which is not a Plan Entity, and any Affected Creditor shall be allowed to continue to assert such Claim against National Post Holdings, National Post, and any National Post Consolidated Bankruptcy Estate or against any such other CMI Entity which is not a Plan Entity; and

(D) claims of creditors against Canwest Subsidiaries which are not CMI Entities.

For greater certainty and notwithstanding sub-paragraphs A, B, C and D above, all Claims including all Restructuring Period Claims filed against the Directors and Officers pursuant to the Claims Procedure Order or otherwise and all other claims against the Directors and Officers of Canwest and the Canwest Subsidiaries shall be discharged, released and forever barred with prejudice, and the Directors and Officers shall have no further liability in respect thereto.

(b) At the Effective Time, the Noteholders, the Ad Hoc Committee, the Trustee and each of their respective present and former shareholders, officers, directors, legal counsel, agents and Houlihan, (collectively, the "**Noteholder Released Parties**") will be released and discharged from any and all demands, claims, actions, causes of action, counterclaims, suits, debts, sums of money, accounts, covenants, damages, judgments, expenses, executions, liens and other recoveries on account of any indebtedness, liability, obligation, demand or cause of action of whatever nature that any Person (including any Person who may claim contribution or indemnification against or from them) may be entitled to assert whether known or unknown, matured or unmatured, direct, indirect or derivative, 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 Effective Time relating to, arising out of or in connection with the Notes (including any guarantee obligations under the Notes or the Indenture), the recapitalization of the CMI Entities, the Plan, the CCAA Proceedings, the Support Agreement and the Shaw Support Agreement and any other actions or matters related directly or indirectly to the foregoing; provided that nothing in this Section 7.3(b) will release or discharge any of the Noteholder Released Parties in respect of their obligations under the Plan and provided further that nothing in this Section 7.3(b) will release or discharge a Noteholder Released Party if the Noteholder Released Party is adjudged by the express terms of a judgment rendered on a final determination on the merits to have committed fraud or wilful misconduct, or to have been grossly negligent.

7.4 Guarantees and Similar Covenants

No Person who has a Claim under any guarantee, surety, indemnity or similar covenant in respect of any Claim that is compromised under the Plan or who has any right to claim over in respect of, or to be subrogated to the rights of, any Person in respect of a Claim that is compromised under the Plan will be entitled to any additional rights beyond the rights of the Affected Creditor whose Claim is compromised under the Plan.

7.5 Consents, Waivers and Agreements

At the Effective Time, each Affected Creditor will be deemed to have consented and agreed to all of the provisions of the Plan, in its entirety. Without limitation to the foregoing, each Affected Creditor will be deemed:

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

(b) to have waived any default by or rescinded any demand for payment against any CMI Entity that has occurred on or prior to the Plan Implementation Date pursuant to, based upon or as a result of any provision, express or implied, in any agreement or other arrangement, written or oral, existing between such Affected Creditor and such CMI Entity with respect to an Affected Claim;

(c) to have agreed that, if there is any conflict between the provisions, express or implied, of any agreement or other arrangement, written or oral, existing between such Affected Creditor and any CMI Entity with respect to an Affected Claim as at the Plan Implementation Date and the provisions of the Plan, then the provisions of the Plan take precedence and priority and the provisions of such agreement or other arrangement are amended accordingly; and

(d) from and after the Effective Time, such Affected Creditor shall be deemed to have waived any and all defaults of the CMI Entities (except defaults under the securities, contracts, instruments, releases and other documents delivered under the Plan or entered into in connection therewith or pursuant thereto) then existing or previously committed by the CMI Entities or caused by the CMI Entities, directly or indirectly, or non-compliance with any covenant, warranty, representation, term, provision, condition or obligation, express or implied, in any contract, credit document, agreement for sale, lease or other agreement, written or oral, and any and all amendments or supplements thereto, existing between such Affected Creditor and the CMI Entities arising from the filing by the Applicants under the CCAA or the transactions contemplated by the Plan and the failure by any CMI Entity to receive any consent from such Affected Creditor to any transaction contemplated by the Plan, including a default arising therefrom under a covenant relating to any affiliate or a Canwest Subsidiary other than the CMI Entities, and any and all notices of default and demands for payment under any instrument, including any guarantee arising from such default, shall be deemed to have been rescinded.

7.6 Multiple Affected Claims

At the Effective Time, for distribution purposes under the Plan, in respect of all Affected Creditors and their rights in respect of Affected Claims: (a) all guarantees and indemnities of a Plan Entity of the payment or performance by another Plan Entity with respect to any Affected Claim will be deemed eliminated and cancelled; and (b) any Affected Claim against a Plan Entity and all guarantees and indemnities by a Plan Entity of any such Affected Claim will be treated as a single Affected Claim against the Plan Entities.

For greater certainty, the treatment of Affected Claims as provided in this Section 7.6 will not affect the legal and corporate structures of the CMI Entities or cause any CMI Entity to be liable for any Claim for which it is not otherwise liable.

ARTICLE 8
GENERAL

8.1 Amendments

Before and during each Meeting, the CMI Entities may at any time and from time to time, amend the Plan by written instrument and the Monitor shall post such amendment on the Website, subject to the receipt of the prior written consent to such amendment of the Plan Sponsor and the Ad Hoc Committee. The CMI Entities will give reasonable written notice to all Affected Creditors present at each Meeting of the details of any such amendment prior to the vote being taken to approve the Plan. After the Meetings, the CMI Entities may at any time and from time to time amend the Plan by written instrument if (a) the Court, the CMI Entities, the Ad Hoc Committee and the Plan Sponsor, or (b) the Monitor, the CMI Entities, the Plan Sponsor and the Ad Hoc Committee without the need for obtaining an Order, consent to such amendment and determine that such amendment would not be materially prejudicial to the interests of the Affected Creditors under the Plan or is necessary to give effect to the full intent of the Plan or the Sanction Order, provided that the CMI Entities shall give reasonable written notice of the details of any such amendment to Affected Creditors that have filed a notice of appearance in the CCAA Proceedings and shall post such notice on the Website. The Applicants will file a copy of any amendment to the Plan with the Court, but no notice will be provided to Affected Creditors, other than as provided in this Section 8.1, and no additional vote of the Affected Creditors will be necessary to give effect to such amendment to the Plan.

8.2 Non-Consummation of the Plan

If the Sanction Order is not issued, the Plan will be null and void in all respects and any claim, settlement, compromise or assignment embodied in the Plan, any restructuring, termination, disclaimer or resiliation of executory contracts, any releases effected by the Plan and any document or agreement executed pursuant to the Plan will be deemed null and void. If the Sanction Order is not issued or subsequently the Plan is not implemented, nothing contained in the Plan, and no act taken in preparation for implementation of the Plan will: (a) constitute or be deemed to constitute a waiver or release of any Claims by or against any CMI Entity or any Person; (b) prejudice in any manner, the rights of any CMI Entity or any Person in any further proceedings involving a CMI Entity; or (c) constitute an admission of any sort by any CMI Entity or any other Person, including in respect of the classification of creditors.

8.3 Contracts and Leases

Except as otherwise provided in the Plan, as of the Effective Time, each Plan Entity shall be deemed to have ratified each executory contract and unexpired lease to which it is a party (other than in respect of Claims arising from such contract or lease which for greater certainty will be Affected Claims of which are compromised pursuant to the Plan), unless such contract or lease: (a) was previously disclaimed, resiliated or terminated by such Plan Entity; (b) previously expired or terminated pursuant to its own terms; or (c) was amended as evidenced by a written agreement with the Plan Entity and in such case, the amended contract or lease shall be deemed ratified.

8.4 Preferential Transactions

Section 36.1 of the CCAA, sections 95 to 101 of the BIA and any federal or provincial Law relating to preferences, fraudulent conveyances or transfers at undervalue shall not apply to the Plan or to any payments or distributions made in connection with the restructuring and recapitalization of the CMI Entities, whether made before or after the Filing Date, including to any and all transactions contemplated by and to be implemented pursuant to the Plan.

8.5 Severability of Plan Provisions

If, prior to the Effective Time, any provision of the Plan is held by the Court to be invalid, void or unenforceable, the Court, at the request of the Applicants and subject to the consent of the Monitor, the Plan Sponsor and the Ad Hoc Committee, may alter and interpret such provision to make it valid or enforceable to the maximum extent practicable, consistent with the original purpose of such provision, and such provision will then be applicable as altered or interpreted and the remainder of the provisions of the Plan will remain in full force and effect and will in no way be invalidated by such alteration or interpretation.

8.6 Deeming Provisions

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

8.7 Paramountcy

Except with respect to the Unaffected Claims, from and after the Effective Time, any conflict between the Plan and the covenants, warranties, representations, terms, conditions, provisions or obligations, expressed or implied, of any contract, mortgage, security agreement, indenture, trust indenture, loan agreement, commitment letter, agreement for sale, bylaws of the CMI Entities, lease or other agreement, written or oral and any and all amendments or supplements thereto existing between one or more of the Affected Creditors and the CMI Entities as at the Plan Implementation Date will be deemed to be governed by the terms, conditions and provisions of the Plan and the Sanction Order, which shall take precedence and priority.

8.8 Set-Off

The law of set-off applies to all Affected Claims.

8.9 Responsibilities of the Monitor

FTI is acting in its capacity as Monitor in the CCAA Proceedings with respect to the CMI Entities and not in its personal or corporate capacity and will not be responsible or liable for any obligations of any CMI Entity under the Plan or otherwise, including with respect to the making of distributions or the receipt of any distribution by an Affected Creditor pursuant to the Plan or the Plan Emergence Agreement. The Monitor will have the powers and protections granted to it by the Plan, the CCAA, the Initial Order, the Meeting Order, the Sanction Order and any other Order.

8.10 Different Capacities

Persons who are affected by the Plan may be affected in more than one capacity. Unless expressly provided herein to the contrary, a Person will be entitled to participate hereunder in each such capacity in accordance with the Meeting Order. Any action taken by a Person in one capacity will not affect such Person in any other capacity, unless otherwise provided in the Meeting Order, or unless expressly agreed by the Person in writing.

8.11 Further Assurances

At the request of the CMI Entities, each of the Persons named or referred to in, or subject to, the Plan will execute and deliver all such documents and instruments and do all such acts and things as may be necessary or desirable to carry out the full intent and meaning of the Plan and to give effect to the transactions contemplated herein, notwithstanding any provision of the Plan that deems any transaction or event to occur without further formality.

8.12 Governing Law

The Plan will be governed by and construed in accordance with the Laws of the Province of Ontario and the Laws of Canada applicable therein.

8.13 Notices

Any notice or communication in respect of a notice of dispute of claim filed with the Monitor must be delivered to the Monitor in accordance with the Claims Procedure Order. Any other notice or other communication to be delivered or filed hereunder must be in writing and reference the Plan and may, subject as hereinafter provided, be made or given by personal delivery, ordinary mail, facsimile or by e-mail (scanned copy) addressed to the respective parties as follows:

(a) if to the Applicants:

Canwest Global Communications Corp.
3100 Canwest Place
201 Portage Avenue
Winnipeg MB R3B 3L7

Attention: General Counsel
Fax No.: (204) 947-9841

E-mail: rleipsic@canwest.com

with a copy to:

Osler, Hoskin & Harcourt LLP
Box 50
1 First Canadian Place
Toronto, ON M5X 1B8

Attention: Edward A. Sellers / Tracy C. Sandler
Fax No.: (416) 862-6666
E-mail: esellers@osler.com / tsandler@osler.com

(b) if to the Trustee:

The Bank of New York
101 Barclay Street
New York, New York 10286
United States

Attention: Vanessa Mack
Fax No.: (212) 815-5803
E-mail: vanessa.mack@bnymellon.com

(c) if to the Ad Hoc Committee:

Goodmans LLP
Bay Adelaide Centre
333 Bay Street, Suite 3400
Toronto, ON M5H 2S7

Attention: Robert Chadwick / Celia Rhea
Fax No.: (416) 979-1234
Email: rchadwick@goodmans.ca / crhea@goodmans.ca

(d) if to any other Affected Creditor:

to the known address (including facsimile number or e-mail) for such Affected Creditor or the address for such Affected Creditor specified in the notice of dispute of claim filed by such Affected Creditor in the CCAA Proceedings.

(e) if to the Monitor:

FTI Consulting Canada Inc.
TD Waterhouse Tower
79 Wellington Street West
Suite 2010, P.O. Box 104
Toronto, ON M5K 1G8

Attention: Greg Watson
Fax No.: (416) 649-8101
E-mail: greg.watson@fticonsulting.com

with a copy to:

Stikeman Elliott LLP
5300 Commerce Court West
199 Bay Street
Toronto, ON M5L 1B9

Attention: David Byers
Fax No.: (416) 947-0866
E-mail: dbyers@stikeman.com

(f) if to the Plan Sponsor:

Shaw Communications Inc. and
7316712 Canada Inc.
Suite 900
630 – 3rd Avenue SW,
Calgary, AB T2P 4L4

Attention: Steve Wilson/Peter Johnson
Fax No.: (403) 716-6544
E-mail: steve.wilson@sjrb.ca/peter.johnson@sjrb.ca

with a copy to:

Davies Ward Phillips & Vineberg LLP
One First Canadian Place
100 King Street West
P.O. Box 63
44th Floor
Toronto, ON M5X 1B1

Attention: Vincent Mercier / Robin Schwill
Fax No.: 416-863-0871
E-mail: vmercier@dwpv.com / rschwill@dwpv.com

or to such other address as any party may from time to time notify the others in accordance with this Section 8.13. All such communications that are delivered will be deemed to have been

received on the day of delivery. All such communications that are sent by facsimile or e-mail (scanned copy) will be deemed to be received on the day sent if sent before 5:00 p.m. on a Business Day and otherwise will be deemed to be received on the Business Day next following the day upon which such facsimile or e-mail (scanned copy) was sent. Any notice or other communication sent by mail will be deemed to have been received on the fifth Business Day after the date of mailing. The unintentional failure by any CMI Entity to give a notice contemplated hereunder will not invalidate any action taken by any Person pursuant to the Plan.

Dated as of the 23rd day of June, 2010.

SCHEDULE A

APPLICANTS

CANWEST GLOBAL COMMUNICATIONS CORP.
CANWEST MEDIA INC.
MBS PRODUCTIONS INC.
YELLOW CARD PRODUCTIONS INC.
CANWEST GLOBAL BROADCASTING INC./RADIODIFFUSION CANWEST GLOBAL INC.
CANWEST TELEVISION GP INC.
FOX SPORTS WORLD CANADA HOLDCO INC.
GLOBAL CENTRE INC.
MULTISOUND PUBLISHERS LTD.
CANWEST INTERNATIONAL COMMUNICATIONS INC.
CANWEST IRISH HOLDINGS (BARBADOS) INC.
WESTERN COMMUNICATIONS INC.
CANWEST FINANCE INC./FINANCIÈRE CANWEST INC.
NATIONAL POST HOLDINGS LTD.
CANWEST INTERNATIONAL MANAGEMENT INC.
CANWEST INTERNATIONAL DISTRIBUTION LIMITED
CANWEST MEDIAWORKS TURKISH HOLDINGS (NETHERLANDS) B.V.
CGS INTERNATIONAL HOLDINGS (NETHERLANDS) B.V.
CGS DEBENTURE HOLDING (NETHERLANDS) B.V.
CGS SHAREHOLDING (NETHERLANDS) B.V.
CGS NZ RADIO SHAREHOLDING (NETHERLANDS) B.V.
4501063 CANADA INC.
4501071 CANADA INC.
30109, LLC
CANWEST MEDIAWORKS (US) HOLDINGS CORP.

SCHEDULE B

NEW CANWEST ARTICLES OF INCORPORATION

FORM 1 – ARTICLES OF INCORPORATION

Item 3	See attached Schedule A
Item 4	The shares of the Corporation shall be subject to the restriction on the transfer of securities set out under other provisions, if any.
Item 5	Minimum of 1; Maximum of 10
Item 6	None
Item 7	See attached Schedule B

SCHEDULE A
TO THE ARTICLES OF INCORPORATION

The Corporation is authorized to issue an unlimited number of class A Common, an unlimited number of Class B Common and an unlimited number of Preferred shares each subject to the rights, privileges, restrictions and conditions as set forth below:

1. The class A Common shares and the Class B Common shares shall be subject to the following rights, privileges, restrictions and conditions:

   (a) The holders of class A Common shares shall be entitled to receive notice of, attend at and vote at all meetings of shareholders on the basis of one (1) vote for each class A Common share held;

   (b) Subject to the provisions of the Canada *Business Corporations Act*, the holders of Class B Common shares shall not be entitled to receive notice of, attend at or vote at any meetings of shareholders;

   (c) The holders of class A Common shares and Class B Common shares shall be entitled to receive dividends as and when declared by the Corporation. Dividends may be paid on the class A Common shares (to the complete exclusion of the Class B Common shares), or on the Class B Common shares (to the complete exclusion of the class A Common shares), or in part on each such class;

   (d) Upon the liquidation or dissolution of the Corporation, the holders of class A Common shares and Class B Common shares shall, subject to the rights, privileges, restrictions and conditions attaching to any other class of shares of the Corporation, be entitled to share, pro rata, according to the number of class A Common shares and Class B Common shares held, in the remaining property of the Corporation; and

   (e) Except as hereinbefore provided, class A Common shares and Class B Common shares shall rank pari passu with each other.

2. The Preferred shares shall be subject to the following rights, privileges, restrictions and conditions:

   (a) The redemption price (the "**Redemption Price**") with respect to each Preferred share shall be fixed by the directors at the time of the first issuance of any such Preferred shares and shall equal the amount obtained when the difference, if positive, between:

      (i) the fair market value, at the time of the first issuance of any Preferred shares, of all consideration received by the Corporation in connection with such issuance (whether or not, in connection with such issuance, the Corporation also issues or gives any non-share consideration in exchange for the consideration received) and

      (ii) the fair market value of any non-share consideration issued by the Corporation for the consideration received is divided by the number of

Preferred shares so issued. The Redemption Price may be adjusted in accordance with the provisions of any written agreement between the Corporation and the subscriber for any such Preferred shares;

(b) The holders of Preferred shares shall be entitled to receive and the Corporation shall pay thereon, as and if declared by the board of directors, out of the moneys of the Corporation properly applicable to the payment of dividends, non-cumulative dividends at a rate to be determined by the directors upon the first issuance of any such shares. In respect of the fiscal year of the Corporation in which a particular Preferred share is issued, such dividends in respect thereof shall accrue from the date of allotment of such Preferred share. The board of directors shall be entitled from time to time to declare part of the said non-cumulative dividend for any fiscal year, notwithstanding that such dividend for such fiscal year shall not be declared in full. If within three (3) months after the expiration of any fiscal year of the Corporation the board of directors in its discretion shall not declare any dividend on the Preferred shares for such fiscal year, or shall only declare a part of the said non-cumulative dividend, then the rights of the holders of the Preferred shares to such dividend for such fiscal year shall, as to the undeclared part thereof, be forever extinguished. The holders of the Preferred shares shall not be entitled to any dividends other than or in excess of the non-cumulative dividends hereinbefore provided for;

(c) In the event of the liquidation, dissolution or winding up of the Corporation or other distribution of assets or property of the Corporation among shareholders for the purpose of winding-up its affairs, the holders of Preferred shares shall be entitled to receive from the assets and property of the Corporation, a sum equivalent to the Redemption Price plus all declared but unpaid dividends thereon, in respect of each Preferred share held by them respectively, before any amount shall be paid or any property or assets of the Corporation distributed to the holders of any class of common shares or any other class or series of shares ranking junior to the Preferred shares. After payment to the holders of the Preferred shares of the amount so payable to them as hereinbefore provided for, they shall not be entitled to share any further in the distribution of the assets or property of the Corporation;

(d) Subject to the provisions of the Canada *Business Corporations Act*, the Corporation may, upon giving notice as hereinafter provided, redeem at any time the whole or from time to time any part of the then outstanding Preferred shares on payment for each share to be redeemed of the Redemption Price plus all declared but unpaid dividends thereon. In case a part only of the then outstanding Preferred shares is at any time to be redeemed, the Preferred shares so to be redeemed shall be selected from the outstanding Preferred shares held by each holder as nearly (disregarding fractions), as may be in proportion to his total holding of such shares;

(e) In the case of redemption of Preferred shares under the provisions of clause (d) hereof, the Corporation shall at least thirty (30) days before the date specified for redemption mail or deliver to each person who at the date of mailing or delivery is a holder of Preferred shares to be redeemed, a notice in writing of the intention of

the Corporation to redeem such Preferred shares. In case of mailing, such notice shall be mailed by letter, postage prepaid, addressed to the holder at such holder's address as it appears on the records of the Corporation or in the event of the address of any such holder not so appearing, then to the last known address of such holder. Such notice shall specify (i) the number of Preferred shares that the Corporation desires to redeem; (ii) the business day (the "Redemption Date") on which the Corporation desires to redeem the Preferred shares; (iii) the amount of all declared but unpaid dividends with respect to the Preferred shares to be redeemed; and (iv) the place or places of redemption;

On or after the Redemption Date, the Corporation shall pay or cause to be paid in respect of each Preferred share to be redeemed, to or to the order of the holders of the Preferred shares to be redeemed, the Redemption Price thereof plus all declared but unpaid dividends thereon, if any, on presentation and surrender at the registered office of the Corporation or any other place designated in such notice of the certificates representing the Preferred shares called for redemption. Such payment shall be made by cheque payable at par at any branch of the Corporation's bankers for the time being in Canada. If a part only of the shares represented by any certificate are to be redeemed, a new certificate for the balance shall be issued at the expense of the Corporation. From and after the Redemption Date the holders of the Preferred shares called for redemption shall cease to be entitled to dividends and shall not be entitled to exercise any of the rights of shareholders in respect thereof unless payment of the Redemption Price plus all declared but unpaid dividends thereon shall not be made upon presentation of certificates in accordance with the foregoing provisions, in which case the rights of the holders shall remain unaffected. The Corporation shall have the right at any time after the mailing of notice of its intention to redeem any Preferred shares to deposit the Redemption Price plus all declared but unpaid dividends thereon, if any, of the shares so called for redemption with respect to such of the said shares represented by certificates as have not at the date of such deposit been surrendered by the holders thereof in connection with such redemption to a special account in any chartered bank or any trust company in Canada named in such notice, to be paid without interest to or to the order of the respective holders of such Preferred shares called for redemption upon presentation and surrender to such bank or trust company of the certificates representing same. Upon such deposit being made or upon the date specified for redemption in such notice, whichever is the later, the Preferred shares in respect whereof such deposit shall have been made shall be redeemed and the rights of the holders thereof after such deposit or such redemption date, as the case may be, shall be limited to receiving, without interest, their proportionate part of the total Redemption Price plus all declared but unpaid dividends thereon, if any, so deposited against presentation and surrender of the said certificates held by them respectively;

(f) Subject to the provisions of the Canada *Business Corporations Act*, the Corporation may purchase at any time the whole or from time to time any part of the then outstanding Preferred shares on payment for each share to be purchased of the Redemption Price thereof plus all declared but unpaid dividends thereon, if

any. The provisions of clauses (d) and (e) above shall apply mutatis mutandis to any such purchase;

(g) A holder of Preferred shares shall, subject to the provisions of clause (h) below, be entitled by written notice given to the Corporation at its registered office in Alberta, to require the Corporation at the option of such holder, to either redeem or purchase all or any of the issued and outstanding Preferred shares held by such holder. The holder shall tender with such notice to the Corporation at its registered office a share certificate or certificates representing the Preferred shares which the registered holder desires to have the Corporation redeem or purchase together with a request in writing specifying (i) that the registered holder desires to have the Preferred shares represented by such certificate or certificates redeemed or purchased by the Corporation and, if part only of the Preferred shares represented by such certificate or certificates is to be redeemed or purchased, the number thereof to be so redeemed or purchased; and (ii) the business day (the "Redemption Date") on which the holder desires to have the Corporation redeem or purchase such Preferred shares;

Unless waived by the Corporation, the Redemption Date shall be not less than thirty (30) days after the day on which the request in writing is given to the Corporation. Upon receipt of a share certificate or certificates representing the Preferred shares which the registered holder desires to have the Corporation redeem or purchase together with such a request, the Corporation shall on the Redemption Date redeem such Preferred shares by paying to such registered holder the Redemption Price per Preferred share for each such share being redeemed or purchased plus all declared but unpaid dividends thereon. Such payment shall be made by cheque payable at par at any branch of the Corporation's bankers for the time being in Canada. If a part only of the shares represented by any certificate be redeemed or purchased a new certificate for the balance shall be issued at the expense of the Corporation. The said Preferred shares shall be redeemed or purchased on the Redemption Date and from and after the Redemption Date such shares shall cease to be entitled to dividends and the holder thereof shall not be entitled to exercise any of the rights of holders of Preferred shares in respect thereof unless payment of the Redemption Price per Preferred share plus all declared but unpaid dividends thereon is not made on the Redemption Date, in which event the rights of the holder of the said Preferred shares shall remain unaffected;

(h) In the event that a redemption or purchase by the Corporation of those Preferred shares specified in the written notice given to it by a holder of Preferred shares pursuant to the provisions of clause (g) above cannot be complied with without contravening a provision or provisions of the Canada *Business Corporations Act* or some other applicable legislation, then the Corporation shall only redeem or purchase, as the case may be, such proportion (if any, and disregarding fractions) of the issued and outstanding Preferred shares held by each holder thereof as can be redeemed or purchased without causing such contravention and the Corporation shall redeem or purchase the balance of the outstanding Preferred shares in respect of which the Corporation has received notices for redemption or

purchase on a pro rata basis, disregarding fractions, at such time or times as such redemption or purchase can be made without causing the Corporation to be in contravention of the Canada *Business Corporations Act* or some other applicable legislation;

(i) If it is determined at any time subsequent to the date of issue of a Preferred share and prior to its redemption or purchase by the Corporation, that the Redemption Price of that share exceeded or was exceeded by the fair market value as at such date of the consideration received therefor (herein the "Fair Market Value of the Consideration"), then (i) if the Redemption Price exceeded the Fair Market Value of the Consideration, then as and from such determination the Redemption Price shall be reduced by the amount required to eliminate such excess; and (ii) if the Redemption Price is exceeded by the Fair Market Value of the Consideration, then as and from such determination the Redemption Price shall be increased by the amount required to eliminate such excess or the Corporation shall forthwith issue that number of Preferred shares as may be required to eliminate such excess;

If it is determined at any time subsequent to the date of issue of a Preferred share and subsequent to its redemption or purchase by the Corporation, that the Redemption Price of that share exceeded or was exceeded by the Fair Market Value of the Consideration as at such date, then (i) if the Redemption Price exceeded the Fair Market Value of the Consideration, then the holder of that Preferred share shall forthwith pay to the Corporation an amount equal to such excess; and (ii) if the Redemption Price is exceeded by the Fair Market Value of the Consideration, then the Corporation shall forthwith pay to the holder of that Preferred share an amount equal to such excess or shall issue that number of Preferred shares as may be required to eliminate such excess;

(j) Subject to the provisions of the Canada *Business Corporations Act*, the holders of Preferred shares shall not be entitled to receive notice of, attend at or vote at any meetings of shareholders;

3. Notwithstanding anything herein expressed or implied to the contrary, no dividend shall be declared or paid on any common shares of the Corporation if such declaration or payment would cause the realizable value of the assets of the Corporation to be less than the aggregate of:

(a) its liabilities;

(b) the stated capital of all issued and outstanding shares of the Corporation; and

(c) the amount the Corporation would be required to pay on a complete redemption or purchase of any issued and outstanding Preferred shares of the Corporation.

SCHEDULE B
TO THE ARTICLES OF INCORPORATION

The directors may appoint one (1) or more additional directors of the Corporation, who shall hold office for a term expiring not later than the close of the next annual meeting of shareholders, provided the total number of directors so appointed may not exceed one-third (1/3) of the number of directors elected at the previous annual meeting of shareholders.

Securities of the Corporation, other than non-convertible debt securities, may not be transferred unless:

(a) in the case of shares, the consent of the directors of the Corporation is obtained; or

(b) the consent of shareholders holding not less than 50% of the shares entitled to vote at such time is obtained;

provided that this restriction shall not apply to applicable securities, other than shares, if such securities are subject to restrictions on transfer contained in a security holders' agreement.

The consent of the directors or the shareholders in this section may be evidenced (i) by a resolution of the directors or shareholders, as the case may be, or (ii) by an instrument or instruments in writing signed by all of the directors, or signed by shareholders holding shares entitling the holders thereof to vote at least 50% of the shares entitled to vote at such time, as the case may be.

The Board of Directors may from time to time delegate to such one or more of the directors and officers of the Corporation as may be designated by the Board all or any of the powers conferred on the Board above to such extent and in such manner as the Board shall determine at the time of each such delegation.

NOTE: The above provisions should be included under "Other provisions", as it refers to transfer of securities and not shares only. This is in conformity with Industry Canada's policies.

SCHEDULE C

NEW CANWEST BY-LAWS

BY-LAW NO. 1

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[NAME OF CORPORATION]

BY-LAW NO. 1

A by-law relating generally to the conduct of the affairs of the Corporation.

INTERPRETATION

1. Interpretation.

In this by-law and all other by-laws of the Corporation, unless the context otherwise specifies or requires:

(a) "Act" means the Canada *Business Corporations Act*, R.S.C. 1985, c. C-44 as from time to time amended and every statute that may be substituted therefor and, in the case of such substitution, any references in the by-laws of the Corporation to provisions of the Act shall be read as references to the substituted provisions therefor in the new statute or statutes;

(b) "Regulations" means the Regulations under the Act as published or from time to time amended and every regulation that may be substituted therefor and, in the case of such substitution, any references in the by-laws of the Corporation to provisions of the Regulations shall be read as references to the substituted provisions therefor in the new regulations;

(c) "by-law" means any by-law of the Corporation from time to time in force and effect;

(d) all terms which are contained in the by-laws and which are defined in the Act or the Regulations shall have the meanings given to such terms in the Act or the Regulations;

(e) words importing the singular number only shall include the plural and vice versa and words importing a specific gender shall include the other gender; and

(f) the headings used in the by-laws are inserted for reference purposes only are not to be considered or taken into account in construing the terms or provisions thereof or to be deemed in any way to clarify, modify or explain the effect of any such terms or provisions.

REGISTERED OFFICE AND SEAL

2. (a) Registered Office.

The registered office of the Corporation shall be in the province in Canada specified in its articles. The place and address of the registered office within such province may be changed from time to time by the directors.

(b) Seal.

The Corporation may, but need not, adopt a corporate seal, and may change a corporate seal that is adopted. Any corporate seal adopted for the Corporation shall be such as the board of directors may by resolution from time to time approve.

DIRECTORS

3. Number and Duties.

Subject to any unanimous shareholder agreement, the directors shall manage, or supervise the management of, the business and affairs of the Corporation. The board of directors may consist of the number of directors set out in the articles of the Corporation or, where a minimum and maximum number is provided for in the articles, such number of directors as may be determined from time to time by ordinary resolution of the shareholders or if the resolution of the shareholders empowers the directors to determine such number, then by resolution of the directors. Subject to the Act, at least twenty-five per cent of the directors shall be resident Canadians. However, subject to the Act, if the Corporation has less than four directors, at least one director shall be a resident Canadian. If the Corporation is a distributing corporation and any of its securities remain outstanding and are held by more than one person, at least two of the directors shall not be officers or employees of the Corporation or any affiliate of the Corporation. In exercising his or her powers and discharging his or her duties each director shall (a) act honestly and in good faith with a view to the best interests of the Corporation and (b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.

4. Term of Office.

A director's term of office (subject to (a) the provisions of the articles of the Corporation; (b) the provisions of the Act; (c) any unanimous shareholder agreement; and (d) any expressly stated term of office) shall be from the date on which the director is elected or appointed until the annual meeting next following.

5. Vacation of Office.

A director of the Corporation ceases to hold office when the director: (a) becomes bankrupt; (b) is found to be of unsound mind by a court in Canada or elsewhere; (c) by notice in writing to the Corporation, resigns, which resignation shall be effective at the time it is received by the Corporation or at the time specified in the notice, whichever is later; (d) dies; (e) is removed from office by the shareholders in accordance with paragraph 6; or (f) if required to hold shares issued by the Corporation to be qualified as a director, ceases to hold such shares.

6. Election and Removal.

Subject to Section 107 of the Act, the shareholders of the Corporation shall elect, at the first meeting of shareholders and at each succeeding annual meeting at which an election of directors is required, directors to hold office for a term expiring not later than the close of the

next annual meeting of shareholders following the election. A director not elected for an expressly stated term ceases to hold office at the close of the first annual meeting of shareholders following the director's election, but, if qualified, is eligible for re-election. If directors are not elected at a meeting of shareholders, the incumbent directors continue in office until their successors are elected. Provided always that, subject to Section 109 of the Act, the shareholders of the Corporation may, by ordinary resolution passed at a special meeting of shareholders, remove any director or directors from office and a vacancy created by the removal of a director may be filled at the meeting of the shareholders at which the director is removed.

7. Committees of Directors.

The directors may appoint from among their number a committee or committees and subject to Section 115 of the Act may delegate to any such committee any of the powers of the directors. Subject to the by-laws and any resolution of the board of directors, any committee of directors may meet for the transaction of business, adjourn and otherwise regulate its meetings as it sees fit and may from time to time adopt, amend or repeal rules or procedures in this regard. Subject to the Act, except to the extent otherwise determined by the board of directors or, failing such determination, as determined by such committee of directors, the provisions of paragraphs 8 to 15, inclusive, shall apply, mutatis mutandis, to such committee.

MEETINGS OF DIRECTORS

8. Place of Meeting.

Meetings of the directors may be held within or outside Canada.

9. Notice.

A meeting of directors may be convened by the Chairperson of the Board, the Vice-Chairperson of the Board, the Managing Director, the Chief Executive Officer if he is a director, the President if he is a director, a Vice-President who is a director or any two directors at any time, and the Secretary, when directed or authorized by any of such officers or any two directors, shall convene a meeting of directors. The notice of any meeting convened as aforesaid need not specify the purpose of or the business to be transacted at the meeting, except for any of the matters set out in Section 115(3) of the Act.

Notice of any such meeting shall be served in the manner specified in paragraph 60 of this by-law not less than two days (exclusive of the day on which the notice is delivered or sent but inclusive of the day for which notice is given) before the meeting is to take place; provided always that a director may in any manner waive notice of a meeting of directors (whether before or after such meeting) and attendance of a director at a meeting of directors shall constitute a waiver of notice of the meeting except where a director attends a meeting for the express purpose of objecting to the transaction of any business on the grounds that the meeting is not lawfully called; provided further that meetings of directors may be held at any time without notice if all the directors are present (except where a director attends a meeting for the express purpose of objecting to the transaction of any business on the grounds that the meeting is not

lawfully called) or if all of the absent directors waive notice before or after the date of such meeting.

If the first meeting of the directors following the election of directors by the shareholders is held immediately thereafter, then for such meeting or for a meeting of the directors at which a director is appointed to fill a vacancy in the board, no notice shall be necessary to such elected or appointed directors or directors in order to legally constitute the meeting, provided that a quorum of the directors is present.

10. Omission of Notice.

The accidental omission to give notice of any meeting of directors to, or the non-receipt of any notice by, any person shall not invalidate any resolution passed or any proceeding taken at such meeting.

11. Adjournment.

Any meeting of directors may be adjourned from time to time by the Chairperson of the meeting, with the consent of the meeting, to a fixed time and place. Notice of any adjourned meeting of directors is not required to be given if the time and place of the adjourned meeting is announced at the original meeting. Any adjourned meeting shall be duly constituted if held in accordance with the terms of the adjournment and a quorum is present thereat. The directors who formed a quorum at the original meeting are not required to form the quorum at the adjourned meeting. If there is no quorum present at the adjourned meeting, the original meeting shall be deemed to have terminated forthwith after its adjournment. Any business may be brought before or dealt with at any adjourned meeting which might have been brought before or dealt with at the original meeting in accordance with the notice calling the same.

12. Quorum.

A majority of the number of directors fixed under paragraph 3 shall form a quorum for the transaction of business and, notwithstanding any vacancy among the directors, a quorum of directors may exercise all the powers of directors. No business shall be transacted at a meeting of directors unless a quorum of the board of directors is present and, except as otherwise permitted or restricted by the Act, at least twenty-five per cent of the directors present are resident Canadians or, if the Corporation has less than four directors, at least one of the directors present is a resident Canadian.

13. Telephone Participation.

A director may, in accordance with the Regulations, if any, and if all of the directors of the Corporation consent, participate in a meeting of directors or of a committee of directors by means of such telephonic, electronic or other communication facility that permits all participants to communicate adequately with each other during the meeting. A director participating in such a meeting by such means is deemed to be present at that meeting.

14. Voting.

Questions arising at any meeting of the board of directors shall be decided by a majority of votes. In case of an equality of votes the Chairperson of the meeting in addition to his or her original vote shall have a second or casting vote.

15. Resolution in Lieu of Meeting.

Notwithstanding any of the provisions of this by-law, but subject to the Act or any unanimous shareholder agreement, a resolution in writing, signed by all of the directors entitled to vote on that resolution at a meeting of the directors is as valid as if it had been passed at a meeting of the directors.

REMUNERATION OF DIRECTORS

16. Remuneration of Directors.

The remuneration to be paid to the directors shall be such as the board of directors shall from time to time determine and such remuneration shall be in addition to the salary paid to any officer or employee of the Corporation who is also a member of the board of directors. The board of directors may also award special remuneration to any director undertaking any special services on the Corporation's behalf other than the routine work ordinarily required of a director by the Corporation and the confirmation of any such resolution or resolutions by the shareholders shall not be required. The directors shall also be entitled to be paid their travelling and other expenses properly incurred by them in connection with the affairs of the Corporation.

SUBMISSION OF CONTRACTS OR TRANSACTIONS TO SHAREHOLDERS FOR APPROVAL

17. Submission of Contracts or Transactions to Shareholders for Approval.

The board of directors in its discretion may submit any contract, act or transaction for approval or ratification at any annual meeting of the shareholders or at any special meeting of the shareholders called for the purpose of considering the same and, subject to the provisions of Section 120 of the Act, any such contract, act or transaction that shall be approved or ratified or confirmed by a resolution passed by a majority of the votes cast at any such meeting (unless any different or additional requirement is imposed by the Act or by the Corporation's articles or any other by-law) shall be as valid and as binding upon the Corporation and upon all the shareholders as though it had been approved, ratified or confirmed by every shareholder of the Corporation.

FOR THE PROTECTION OF DIRECTORS AND OFFICERS

18. Conflict of Interest.

In supplement of and not by way of limitation upon any rights conferred upon directors and officers by the Act, no director or officer shall be disqualified by his or her office from, or vacate his or her office by reason of, holding any office or place of profit under the Corporation or under any body corporate in which the Corporation shall be a shareholder; nor

shall any director or officer be liable to account to the Corporation or any of its shareholders or creditors for any profit arising from any such office or place of profit; and, subject to the provisions of Section 120 of the Act, no contract or arrangement entered into by or on behalf of the Corporation in which any director or officer shall be in any way directly or indirectly interested shall be avoided or voidable and no director or officer shall be liable to account to the Corporation or any of its shareholders or creditors for any profit realized by or from any such contract or arrangement by reason of any fiduciary relationship. A director or officer of the Corporation who is a party to a material contract or transaction or proposed material contract or transaction with the Corporation, or is a director or an officer, or an individual acting in a similar capacity of, or has a material interest in, any person who is a party to a material contract or transaction or proposed material contract or transaction with the Corporation shall disclose the nature and extent of such interest at the time and in the manner provided in the Act. Except as provided in the Act, no such director of the Corporation shall vote on any resolution to approve such contracts or transactions but each such director may be counted to determine the presence of a quorum at the meeting of directors where such vote is being taken.

19. For the Protection of Directors and Officers.

Except as otherwise provided in the Act, no director or officer for the time being of the Corporation shall be liable for the acts, receipts, neglects or defaults of any other director or officer or employee or for joining in any receipt or act for conformity or for any loss, damage or expense happening to the Corporation through the insufficiency or deficiency of title to any property acquired by the Corporation or for or on behalf of the Corporation or for the insufficiency or deficiency of any security in or upon which any of the moneys of or belonging to the Corporation shall be placed out or invested or for any loss or damage arising from the bankruptcy, insolvency or tortious act of any person, including any person with whom or which any moneys, securities or effects shall be lodged or deposited or for any loss, conversion, misapplication or misappropriation of or any damage resulting from any dealings with any moneys, securities or other assets belonging to the Corporation or for any other loss, damage or misfortune whatever which may happen in the execution of the duties of his or her respective office or trust or in relation thereto unless the same shall happen by or through his or her failure to exercise the powers and to discharge the duties of his office honestly and in good faith with a view to the best interests of the Corporation and in connection therewith to exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances. The directors for the time being of the Corporation shall not be under any duty or responsibility in respect of any contract, act or transaction whether or not made, done or entered into in the name or on behalf of the Corporation, except such as shall have been submitted to and authorized or approved by the board of directors. If any director or officer of the Corporation shall be employed by or shall perform services for the Corporation otherwise than as a director or officer or shall have an interest in a person which is employed by or performs services for the Corporation, the fact of his or her being a shareholder, director or officer of the Corporation shall not disentitle such director or officer or such person, as the case may be, from receiving proper remuneration for such services.

20. Indemnities to Directors and Officers.

Subject to the provisions of Section 124 of the Act, the Corporation shall indemnify a director or officer, a former director or officer, or another individual who acts or acted at the Corporation's request as a director or officer, or an individual acting in a similar capacity of another entity, against all costs, charges and expenses, including an amount paid to settle an action or satisfy a judgment, reasonably incurred by the individual in respect of any civil, criminal or administrative action or proceeding to which the individual is involved because of that association with the Corporation or other entity, if (a) the individual acted honestly and in good faith with a view to the best interests of the Corporation or, as the case may be, to the best interests of the other entity for which the individual acted as director or officer or in a similar capacity at the Corporation's request; and (b) in the case of a criminal or administrative action or proceeding that is enforced by a monetary penalty, the individual had reasonable grounds for believing that the individual's conduct was lawful. The Corporation shall also indemnify any such person in such other circumstances as the Act or law permits or requires. Nothing in this by-law shall limit the right of any person entitled to indemnity to claim indemnity apart from the provisions of this by-law to the extent permitted by the Act or law. The Corporation may also purchase insurance for the benefit of any or all directors and/or officers or other individuals referred to above against any such liability.

OFFICERS

21. Appointments Generally.

The board of directors may annually or oftener as may be required appoint a Chairperson of the Board, a Vice-Chairperson of the Board, a Chief Executive Officer, a President, one or more Vice-Presidents, a Secretary, a Treasurer, one or more Assistant Secretaries, one or more Assistant Treasurers, a Managing Director, a General Manager, a General Counsel or a Comptroller. Notwithstanding the foregoing, each incumbent officer shall continue in office until the earliest of (a) the officer's resignation, which resignation shall be effective at the time a written resignation is received by the Corporation or at the time specified in the resignation, whichever is later, (b) the appointment of the officer's successor, (c) the officer ceasing to be a director or resident Canadian if such is a necessary qualification of the officer's appointment, (d) the meeting at which the board of directors annually appoints the officers of the Corporation, (e) the officer's removal, and (f) the officer's death. A director may be appointed to any office of the Corporation but none of the officers except the Chairperson of the Board, the Vice-Chairperson of the Board and the Managing Director need be a member of the board of directors. Two or more of such offices may be held by the same person. In case and whenever the same person holds the offices of Secretary and Treasurer, he may but need not be known as the Secretary-Treasurer. The board of directors may from time to time appoint such other officers and agents as it shall deem necessary who shall have such authority and shall perform such duties as may from time to time be prescribed by the board of directors. The board of directors may from time to time and subject to the provisions of the Act, vary, add to or limit the duties and powers of any officer.

22. Remuneration and Removal.

The remuneration of all officers appointed by the board of directors shall be determined from time to time by resolution of the board of directors. The fact that any officer or employee is a director or shareholder of the Corporation shall not disqualify such officer or employee from receiving such remuneration as may be determined. All officers, in the absence of agreement to the contrary, shall be subject to removal by resolution of the board of directors at any time, with or without cause.

23. Powers and Duties.

All officers shall sign such contracts, documents or instruments in writing as require their respective signatures and shall respectively have and perform all powers and duties incident to their respective offices and such other powers and duties respectively as may from time to time be assigned to them by the board of directors.

24. Duties May be Delegated.

In case of the absence or inability to act of any officer of the Corporation or for any other reason that the board of directors may deem sufficient, the board of directors may delegate all or any of the powers of such officer to any other officer or to any director for the time being.

25. Chairperson of the Board.

The Chairperson of the Board (if any) shall, when present, preside as Chairperson at all meetings of the directors, any committee of directors and the shareholders.

26. Vice-Chairperson of the Board.

If the Chairperson of the Board is absent or is unable or refuses to act, the Vice-Chairperson of the Board (if any) shall, when present, preside as chairperson at all meetings of the directors, any committee of directors and the shareholders.

27. Chief Executive Officer.

The Chief Executive Officer shall be the chief executive officer of the Corporation who shall exercise general supervision over the affairs of the Corporation. The Chief Executive Officer shall be vested with and may exercise all the powers and shall perform all the duties of the Chairperson of the Board and/or the Vice-Chairperson of the Board if none be appointed or if the Chairperson of the Board and the Vice-Chairperson of the Board are absent or are unable or refuse to act; provided, however, that unless the Chief Executive Officer is a director, he or she shall not preside as Chairperson at any meeting of directors or of any committee of directors or, subject to paragraph 44 of this by-law, at any meeting of shareholders.

28. President.

The President shall be vested with and may exercise all the powers and shall perform all the duties of the Chief Executive Officer in the absence or inability or refusal to act of the Chief Executive Officer; provided, however, that a President who is not a director shall not preside as Chairperson at any meeting of directors or of any committee of directors or, subject to paragraph 44 of this by-law, at any meeting of shareholders.

29. Vice-President.

The Vice-President or, if more than one, the Vice-Presidents, in order of seniority, shall be vested with all the powers and shall perform all the duties of the President in the absence or inability or refusal to act of the President; provided, however, that a Vice-President who is not a director shall not preside as Chairperson at any meeting of directors or of any committee of directors or, subject to paragraph 44 of this by-law, at any meeting of shareholders.

30. Secretary.

The Secretary shall give or cause to be given notices for all meetings of the directors, any committee of directors and the shareholders when directed to do so and shall have charge of the minute and record books of the Corporation and, subject to the provisions of paragraph 51 of this by-law, of the records (other than accounting records) referred to in Section 20 of the Act. The Secretary shall, when present, act as secretary of meetings of the board of directors and of the shareholders.

31. Treasurer.

Subject to the provisions of any resolution of the board of directors, the Treasurer (or any other person holding a similar function) shall have the care and custody of all the funds and securities of the Corporation and shall deposit the same in the name of the Corporation in such bank or banks or with such other depositary or depositaries as the board of directors may direct.

32. Assistant Secretary and Assistant Treasurer.

The Assistant Secretary or, if more than one, the Assistant Secretaries in order of seniority, and the Assistant Treasurer or, if more than one, the Assistant Treasurers in order of seniority, shall respectively perform all the duties of the Secretary and the Treasurer, respectively, in the absence or inability or refusal to act of the Secretary or the Treasurer, as the case may be.

33. Managing Director.

The Managing Director shall be a member of the board of directors, and a resident Canadian and shall exercise such powers and have such authority as may be delegated to the Managing Director by the board of directors in accordance with the provisions of Section 115 of the Act.

34. General Manager.

The board of directors may from time to time appoint a General Manager and may delegate to such General Manager full power to manage and direct the business and affairs of the Corporation (except such matters and duties as by law must be transacted or performed by the board of directors and/or by the shareholders) and to employ and discharge agents and employees of the Corporation or may delegate to the General Manager any lesser authority. The General Manager shall conform to all lawful orders given by the board of directors and shall at all reasonable times give to the directors or any of them all information they may require regarding the affairs of the Corporation. Any agent or employee appointed by the General Manager shall be subject to discharge by the board of directors.

35. Vacancies.

If the office of any officer of the Corporation shall be or become vacant by reason of death, resignation, disqualification or otherwise, the board of directors may appoint a person to fill such vacancy.

SHAREHOLDERS' MEETINGS

36. Annual Meeting.

Subject to the provisions of Section 133 of the Act, the annual meeting of the shareholders shall be held on such day in each year and at such time as the board of directors may determine.

37. Special Meetings.

Special meetings of the shareholders may be convened by order of the Chairperson of the Board, the Vice-Chairperson of the Board, the Managing Director, the Chief Executive Officer if a director, the President if a director, a Vice-President if a director or by the board of directors at any date and time.

38. Place of Meetings.

Meetings of shareholders shall be held at any place within Canada that the board of directors determines, or at any place outside Canada if such place is specified in the articles or all the shareholders entitled to vote at the meeting agree that the meeting is to be held at that place. A shareholder who attends a meeting of shareholders held outside Canada is deemed to have agreed to it being held outside Canada except when the shareholder attends the meeting for the express purpose of objecting to the transaction of any business on the grounds that the meeting is not lawfully held.

39. Participation in Meeting by Electronic Means.

Any person entitled to attend a meeting of shareholders may participate in the meeting, in accordance with the Regulations, if any, by means of a telephonic, electronic or other communication facility that permits all participants to communicate adequately with each other

during the meeting, if the Corporation makes available such a communication facility. A person participating in a meeting by such means is deemed for the purposes of the Act to be present at the meeting.

40. Meeting Held by Electronic Means.

If the directors or the shareholders of the Corporation call a meeting of shareholders pursuant to the Act, those directors or shareholders, as the case may be, may determine that the meeting shall be held, in accordance with the Regulations, if any, entirely by means of a telephonic, electronic or other communication facility that permits all participants to communicate adequately with each other during the meeting.

41. Notice.

A notice stating the day, hour and place of meeting shall be sent within the period prescribed by the Regulations to each shareholder entitled to vote at such meeting, to each director and to the auditor of the Corporation in the manner specified in paragraphs 60 or 75 of this by-law. Notwithstanding the foregoing, if the Corporation is not a distributing corporation, the notice may be sent not less than 10 days before the date of the meeting. Notice of a meeting at which special business, as defined in Section 135(5) of the Act, is to be transacted shall state (a) the nature of that business in sufficient detail to permit the shareholder to form a reasoned judgment thereon, and (b) the text of any special resolution to be submitted to the meeting. Provided that a meeting of shareholders may be held for any purpose on any day and at any time without notice if all of the shareholders and all other persons entitled to attend such meeting are present in person or, where appropriate, represented by proxy at the meeting (except where a shareholder or other person attends the meeting for the express purpose of objecting to the transaction of any business on the grounds that the meeting is not lawfully called) or if all of the shareholders and all other persons entitled to attend such meeting who are not present in person or, where appropriate, represented by proxy thereat waive notice before or after the date of such meeting. The directors may fix in advance a date as the record date for purposes of determining shareholders entitled to receive notice of a meeting of shareholders or entitled to vote at a meeting of shareholders in accordance with the requirements of Section 134 of the Act and the Regulations.

42. Waiver of Notice.

A shareholder or any other person entitled to attend a meeting of shareholders may in any manner waive notice of a meeting of shareholders (whether before or after such meeting) and their attendance at a meeting of shareholders is a waiver of notice of the meeting, except where they attend a meeting for the express purpose of objecting to the transaction of any business on the grounds that the meeting is not lawfully called.

43. Omission of Notice.

The accidental omission to give notice of any meeting or any irregularity in the notice of any meeting or the non-receipt of any notice by any shareholder or shareholders,

director or directors or the auditor of the Corporation shall not invalidate any resolution passed or any proceedings taken at any meeting of shareholders.

44. Voting.

Every question submitted to any meeting of shareholders shall be decided in the first instance by a show of hands unless a person entitled to vote at the meeting has demanded a ballot. In the case of an equality of votes, the Chairperson of the meeting shall both on a show of hands and on a ballot have a second or casting vote in addition to the vote or votes to which he or she may be otherwise entitled.

Notwithstanding the foregoing, any vote taken at a meeting of shareholders may be held, in accordance with the Regulations, if any, entirely by means of a telephonic, electronic or other communication facility, if the Corporation makes available such a communication facility. Any person participating in a meeting of shareholders by electronic means pursuant to Subsection 132(4) or (5) of the Act and entitled to vote at the meeting may vote, in accordance with the Regulations, if any, by means of the telephonic, electronic or other communication facility that the Corporation has made available for that purpose.

A ballot may be demanded either before or after any vote by show of hands by any person entitled to vote at the meeting. If at any meeting a ballot is demanded on the election of a Chairperson or on the question of adjournment it shall be taken forthwith without adjournment. If at any meeting a ballot is demanded on any other question or as to the election of directors, the vote (subject to Section 152(3) of the Act) shall be taken by ballot in such manner and either at once, later in the meeting or after adjournment as the Chairperson of the meeting directs. The result of a ballot shall be deemed to be the resolution of the meeting at which the ballot was demanded. A demand for a ballot may be withdrawn.

Where two or more persons hold the same share or shares jointly, one of these holders present at a meeting of shareholders may, in the absence of the other or others, vote the share or shares but if two or more of those persons who are present, in person or by proxy, vote, they shall vote as one on the share or shares jointly held by them.

At any meeting unless a ballot is demanded, an entry in the minutes of a meeting to the effect that the Chairperson of the meeting declared a resolution to be carried or defeated is, in the absence of evidence to the contrary, proof of the fact without proof of the number or proportion of the votes recorded in favour of or against the resolution.

45. Chairperson of the Meeting.

In the event that the Chairperson of the Board and the Vice-Chairperson of the Board are absent and the Chief Executive Officer is absent or is not a director and the President is absent or is not a director and there is no Vice-President present who is a director, the persons who are present and entitled to vote shall choose another director as Chairperson of the meeting and if no director is present or if all the directors present decline to take the chair then the persons who are present and entitled to vote shall choose one of their number to be Chairperson.

46. Proxies.

Votes at meetings of shareholders may be given either personally or by proxy or, in the case of a shareholder who is a body corporate or association, by an individual authorized to represent it at meetings of shareholders of the Corporation. At every meeting at which he or she is entitled to vote, every shareholder and/or person appointed by proxy and/or individual so authorized to represent a shareholder who is present in person shall have one vote on a show of hands. Upon a ballot at which he or she is entitled to vote, every shareholder present in person or represented by proxy or by an individual so authorized shall (subject to the provisions, if any, of the articles of the Corporation) have one vote for every share held by him or her.

A proxy shall be executed by the shareholder or the shareholder's attorney authorized in writing or, if the shareholder is a body corporate or association, by an officer or attorney thereof duly authorized and is valid only at the meeting in respect of which it is given or any adjournment thereof.

A person appointed by proxy need not be a shareholder.

Subject to the provisions of the Act and the Regulations, a proxy may be in the following form:

The undersigned shareholder of <> hereby appoints <> of <> or failing such person, <> of <> as the nominee of the undersigned to attend and act for the undersigned and on behalf of the undersigned at the <> meeting of the shareholders of the said Corporation to be held on the <> day of <>, 20<> and at any adjournment or adjournments thereof in the same manner, to the same extent and with the same power as if the undersigned were present at the said meeting or such adjournment or adjournments thereof.

DATED this <> day of <>, 20<>.

_____

Signature of Shareholder

The board of directors may from time to time make regulations regarding the lodging of proxies at some place or places other than the place at which a meeting or adjourned meeting of shareholders is to be held and for particulars of such proxies to be provided before the meeting or adjourned meeting to the Corporation or any agent of the Corporation for the purpose of receiving such particulars and providing that proxies so lodged may be voted upon as though the proxies themselves were produced at the meeting or adjourned meeting and votes given in accordance with such regulations shall be valid and shall be counted. The Chairperson of any meeting of shareholders may, subject to any regulations made as aforesaid, in the Chairperson's discretion accept any legible form of communication as to the authority of any person claiming to vote on behalf of and to represent a shareholder notwithstanding that no proxy conferring such authority has been lodged with the Corporation, and any votes given in accordance with such communication accepted by the Chairperson of the meeting shall be valid and shall be counted.

47. Adjournment.

The Chairperson of any meeting may with the consent of the meeting adjourn the same from time to time to a fixed time and place and no notice of such adjournment need be given to the shareholders unless the meeting is adjourned by one or more adjournments for an aggregate of thirty days or more in which case, subject to Section 135(4) of the Act, notice of the adjourned meeting shall be given as for an original meeting. Any business may be brought before or dealt with at any adjourned meeting for which no notice is required which might have been brought before or dealt with at the original meeting in accordance with the notice calling the same.

Any adjourned meeting shall be duly constituted if held in accordance with the terms of the adjournment and a quorum is present thereat. The persons who formed a quorum at the original meeting are not required to form the quorum at the adjourned meeting. If there is no quorum present at the adjourned meeting, the original meeting shall be deemed to have terminated forthwith after its adjournment.

48. Quorum.

A quorum at any meeting of shareholders (unless a greater number of persons are required to be present or a greater number of shares are required to be represented by the Act or by the articles or any other by-law) shall be persons present not being less than two in number and holding or representing more than twenty per cent of the total number of the issued shares of the Corporation for the time being entitling the holders thereof to vote at such meeting. Notwithstanding the foregoing, if the Corporation has only one shareholder, or only one holder of any class or series of shares, the shareholder present in person or by proxy constitutes a meeting. No business shall be transacted at any meeting unless the requisite quorum be present at the time of the transaction of such business. If a quorum is not present at the time appointed for a meeting of shareholders or within such reasonable time thereafter as the shareholders present may determine, the persons present and entitled to vote may adjourn the meeting to a fixed time and place but may not transact any other business and the provisions of paragraph 46 with regard to notice shall apply to such adjournment.

49. Resolution in Lieu of Meeting.

Notwithstanding any of the provisions of this by-law, a resolution in writing signed by all of the shareholders entitled to vote on that resolution at a meeting of the shareholders is, subject to Section 142 of the Act, as valid as if it had been passed at a meeting of the shareholders.

SECURITIES

50. Issuance of Shares.

Subject to the provisions of Section 25 of the Act, the articles, by-laws and any unanimous shareholder agreement, shares in the capital of the Corporation may be issued by the

board of directors at such times and on such terms and conditions and to such persons or class of persons as the board of directors determines.

51. Certificates.

Certificates for shares and the instrument of transfer, if any, on the reverse side thereof shall (subject to Section 49 of the Act) be in such form as the board of directors may approve and such certificates shall be signed by at least one of the following persons, or the signature shall be printed or otherwise mechanically reproduced on the certificate:

(a) a director or officer of the Corporation;

(b) a registrar, transfer agent or branch transfer agent of the Corporation, or an individual on their behalf; and

(c) a trustee who certifies it in accordance with a trust indenture.

A share certificate containing the signature of a person which is printed, engraved, lithographed or otherwise mechanically reproduced thereon may be issued notwithstanding that the person has ceased to be a director or an officer, as the case may be, of the Corporation and shall be as valid as if the person were a director or an officer, as the case may be, at the date of its issue.

TRANSFER OF SECURITIES

52. Transfer Agent and Registrar.

The board of directors may from time to time appoint or remove one or more transfer agents and/or branch transfer agents and/or registrars and/or branch registrars (which may or may not be the same individual or body corporate) for the securities issued by the Corporation in registered form (or for such securities of any class or classes) and may provide for the registration of transfers of such securities (or such securities of any class or classes) in one or more places and such transfer agents and/or branch transfer agents and/or registrars and/or branch registrars shall keep all necessary books and registers of the Corporation for the registering of such securities (or such securities of the class or classes in respect of which any such appointment has been made). In the event of any such appointment in respect of the shares (or the shares of any class or classes) of the Corporation, all share certificates issued by the Corporation in respect of the shares (or the shares of the class or classes in respect of which any such appointment has been made) of the Corporation shall be countersigned by or on behalf of one of the said transfer agents and/or branch transfer agents and by or on behalf of one of the said registrars and/or branch registrars, if any.

53. Securities Registers.

A central securities register of the Corporation shall be kept at the registered office of the Corporation or at such other office or place in Canada as may from time to time be designated by the board of directors and a branch securities register or registers may be kept at such office or offices of the Corporation or other place or places, either in or outside Canada, as

may from time to time be designated by the board of directors. Such register or registers shall comply with the provisions of Section 50 of the Act.

54. Surrender of Certificates.

Subject to the Act and the provisions of paragraph 52, no transfer of a security issued by the Corporation shall be registered unless the security certificate representing the security to be transferred has been surrendered or, if no security certificate has been issued by the Corporation in respect of such security, unless a duly executed instrument of transfer in respect thereof has been delivered to the Corporation or its transfer agent, as the case may be.

55. Shareholder Indebted to the Corporation.

If so provided in the articles of the Corporation, the Corporation has a lien on a share registered in the name of a shareholder or the shareholder's personal representative for a debt of that shareholder to the Corporation. Such lien on a share of the Corporation may, subject to the Act, be enforced as follows:

(a) where such share is redeemable pursuant to the articles of the Corporation, by redeeming such share and applying the redemption price to such debt;

(b) by purchasing such share for cancellation for a price equal to the book value of such share and applying the proceeds to such debt;

(c) by selling such share to any third party whether or not such party is at arm's length to the Corporation including, without limitation, any officer or director of the Corporation, for the best price which the board of directors in its sole discretion considers to be obtainable for such share and applying the proceeds to such debt;

(d) by refusing to permit the registration of a transfer of such share until such debt is paid; or

(e) by any other means permitted by law.

56. Lost, Apparently Destroyed or Wrongfully Taken Security Certificates.

Subject to the Act, in case of the loss, apparent destruction or wrongful taking of a security certificate, a new certificate may be issued in replacement of the one lost, apparently destroyed or wrongfully taken or a transfer of the securities represented by such certificate may be registered, upon such terms as the board of directors may from time to time prescribe, either generally or in respect of any particular loss, apparent destruction or wrongful taking of a security certificate.

DIVIDENDS

57. Dividends.

The board of directors may from time to time declare and the Corporation may pay dividends on the issued and outstanding shares in the capital of the Corporation subject to the provisions (if any) of the articles of the Corporation.

The board of directors shall not declare and the Corporation shall not pay a dividend if there are reasonable grounds for believing that:

(a) the Corporation is, or would after the payment be, unable to pay its liabilities as they become due; or

(b) the realizable value of the Corporation's assets would thereby be less than the aggregate of its liabilities and stated capital of all classes.

The Corporation may pay a dividend by issuing fully paid shares of the Corporation and, subject to the foregoing, the Corporation may pay a dividend in money or property.

The Corporation may fix a record date for determination of shareholders entitled to receive a dividend in accordance with the requirements of Section 134 of the Act and the Regulations.

In case several persons are registered as the joint holders of any shares, any one of such persons may give effectual receipts for all dividends and payments on account of dividends and/or redemption of shares (if any) subject to redemption.

VOTING SHARES AND SECURITIES IN OTHER BODIES CORPORATE

58. Voting Shares and Securities in Other Bodies Corporate.

All of the shares or other securities carrying voting rights of any other body corporate held from time to time by the Corporation may be voted at any and all meetings of shareholders or holders of other securities (as the case may be) of such other body corporate and in such manner and by such person or persons as the board of directors of the Corporation shall from time to time determine. The duly authorized signing officers of the Corporation may also from time to time execute and deliver for and on behalf of the Corporation proxies and/or arrange for the issuance of voting certificates and/or other evidence of the right to vote in such names as they may determine without the necessity of a resolution or other action by the board of directors.

INFORMATION AVAILABLE TO SHAREHOLDERS

59. Confidential Information Not Available to Shareholders.

Except as provided by the Act, no shareholder shall be entitled to any information respecting any details or conduct of the Corporation's business which in the opinion of the board of directors it would be inexpedient in the interests of the Corporation to communicate to the public.

60. Availability of Corporate Records to Shareholders.

The board of directors may from time to time, subject to rights conferred by the Act, determine whether and to what extent and at what time and place and under what conditions or regulations the documents, books and registers and accounting records of the Corporation or any of them shall be open to the inspection of shareholders and no shareholder shall have any right to inspect any document or book or register or accounting record of the Corporation except as conferred by statute or authorized by the board of directors or by a resolution of the shareholders.

NOTICES

61. Service.

Any notice or document required by the Act, the Regulations, the articles or the by-laws to be sent to any shareholder or director or to the auditor may be sent by prepaid mail addressed to, or may be delivered personally to, any such shareholder at the shareholder's latest address as shown in the records of the Corporation or its transfer agent and to any such director at the director's latest address as shown in the records of the Corporation or in the last notice filed under Section 106 or 113 of the Act, and to the auditor at the auditor's business address; provided always that notice may be waived or the time for the notice may be waived or abridged at any time with the consent in writing of the person entitled thereto. If a notice or document is sent to a shareholder by prepaid mail in accordance with this paragraph and the notice or document is returned on two consecutive occasions because the shareholder cannot be found, it shall not be necessary to send any further notices or documents to the shareholder until the shareholder informs the Corporation in writing of the shareholder's new address.

62. Securities Registered in More Than One Name.

All notices or documents with respect to any securities of the Corporation registered in more than one name shall be given to whichever of such persons is named first in the records of the Corporation and any notice or document so given shall be sufficient notice or delivery to all of the holders of such securities.

63. Persons Becoming Entitled by Operation of Law.

Subject to Section 51 of the Act, every person who by operation of law, transfer or by any other means whatsoever shall become entitled to any securities of the Corporation shall be bound by every notice or document in respect of such securities which, previous to such

person's name and address being entered in the records of the Corporation, shall have been duly given to the person or persons from whom such person derives title to such securities.

64. Deceased Security Holders.

Subject to Section 51 of the Act, any notice or document delivered or sent pursuant to paragraph 60 of this by-law or in accordance with the provisions of paragraphs 75 and 76 of this by-law to the address of any security holder as the same appears in the records of the Corporation shall, notwithstanding that such security holder be then deceased, and whether or not the Corporation has notice of such security holder's decease, be deemed to have been duly served in respect of the securities held by such security holder (whether held solely or with any other person or persons) until some other person be entered in such security holder's stead in the records of the Corporation as the holder or one of the holders thereof and such service shall for all purposes be deemed a sufficient service of such notice or document on such security holder's heirs, the personal representatives of such heirs, or the personal representatives of the estate of such security holder and on all other persons, if any, interested with such security holder in such securities.

65. Signature to Notices.

The signature of any director or officer of the Corporation to any notice or document to be given by the Corporation may be written or mechanically reproduced.

66. Computation of Time.

Where a given number of days' notice or notice extending over a period is required to be given under any provisions of the articles or by-laws of the Corporation, the day of giving or serving the notice or document shall not, unless it is otherwise provided, be counted in such number of days or other period.

67. Proof of Service.

With respect to every notice or document sent by mail it shall be sufficient to prove that the envelope or wrapper containing the notice or other document was properly addressed as provided in paragraph 60 of this by-law and put into a post office or into a letter box. A certificate of a director or an officer of the Corporation in office at the time of the making of the certificate or of a transfer officer of any transfer agent or branch transfer agent of shares of any class of the Corporation as to facts in relation to the sending or delivery of any notice or document to any security holder, director, officer or auditor or publication of any notice or document shall be conclusive evidence thereof and shall be binding on every security holder, director, officer or auditor of the Corporation, as the case may be.

CHEQUES, DRAFTS AND NOTES

68. Cheques, Drafts and Notes.

All cheques, drafts or orders for the payment of money and all notes and acceptances and bills of exchange shall be signed by such director of directors or officer or

officers or person or persons, whether or not officers of the Corporation, and in such manner as the board of directors may from time to time designate.

CUSTODY OF SECURITIES

69. Custody of Securities.

All shares and other securities owned by the Corporation shall be lodged (in the name of the Corporation) with a chartered bank or a trust company or in a safety deposit box or, if so authorized by resolution of the board of directors, with such other depositaries or in such other manner as may be determined from time to time by the board of directors.

All shares and other securities belonging to the Corporation may be issued or held in the name of a nominee or nominees of the Corporation (and if issued or held in the names of more than one nominee shall be held in the names of the nominees jointly with right of survivorship).

EXECUTION OF INSTRUMENTS

70. Execution of Instruments.

Contracts, documents or instruments in writing requiring the signature of the Corporation may be signed by:

(a) any two of the officers appointed pursuant to paragraph 21;

(b) any two directors; or

(c) any one of such officers together with any one director;

and all contracts, documents and instruments in writing so signed shall be binding upon the Corporation without any further authorization or formality. Provided that where one person is the only director and officer of the Corporation, that person may sign such contracts, documents or instruments in writing. The board of directors shall have power from time to time to appoint any director or directors, or any officer or officers, or any other person or persons, on behalf of the Corporation either to sign contracts, documents and instruments in writing generally or to sign specific contracts, documents or instruments in writing.

The corporate seal of the Corporation, if any, may be affixed to contracts, documents and instruments in writing signed as aforesaid or by any director or directors, officer or officers, other person or persons, appointed as aforesaid by the board of directors but any such contract, document or instrument is not invalid merely because the corporate seal, if any, is not affixed thereto.

The term "contracts, documents or instruments in writing" as used in this by-law shall include security certificates, deeds, mortgages, hypothecs, charges, conveyances, transfers and assignments of property real or personal, immovable or movable, agreements, releases, receipts and discharges for the payment of money or other obligations and conveyances, transfers

and assignments of shares, share warrants, stocks, bonds, debentures or other securities and all paper writings.

In particular without limiting the generality of the foregoing:

(a) any two of the officers appointed pursuant to paragraph 21;

(b) any two directors; or

(c) any one of such officers together with any one director;

shall have authority to sell, assign, transfer, exchange, convert or convey any and all shares, stocks, bonds, debentures, rights, warrants or other securities owned by or registered in the name of the Corporation and to sign and execute (under the seal of the Corporation or otherwise) all assignments, transfers, conveyances, powers of attorney and other instruments that may be necessary for the purpose of selling, assigning, transferring, exchanging, converting or conveying any such shares, stocks, bonds, debentures, rights, warrants or other securities. Provided that where one person is the only director and officer of the Corporation, that person shall have such authority.

The signature or signatures of the director or directors of the Corporation and/or of any officer or officers of the Corporation appointed pursuant to paragraph 21 and/or of any other person or persons, appointed as aforesaid by the board of directors may, if specifically authorized by the board of directors, be printed, engraved, lithographed or otherwise mechanically reproduced upon any contracts, documents or instruments in writing or bonds, debentures or other securities of the Corporation executed or issued by or on behalf of the Corporation and all contracts, documents or instruments in writing or bonds, debentures or other securities of the Corporation on which the signature or signatures of any one or more of the foregoing directors or officers or the other persons authorized as aforesaid shall be so reproduced pursuant to such authorization by the board of directors shall be deemed to have been manually signed by each such director, officer or other person whose signature is so reproduced and shall be as valid to all intents and purposes as if they had been signed manually and notwithstanding that any such director, officer or other person whose signature is so reproduced may have ceased to hold office at the date of the delivery or issue of such contracts, documents or instruments in writing or bonds, debentures or other securities of the Corporation.

DIVISIONS

71. Authority to Create Divisions.

The board of directors may cause the business and operations of the Corporation or any part thereof to be divided into one or more divisions based upon character or type of operations, geographical territories, manufactured products, method of distribution, type of product or products manufactured or distributed or upon such other basis of division as the board may from time to time determine to be advisable. In particular, the board may authorize:

(i) the further division of the business and operations of any such division into sub-units and the consolidation of the business and operations of any such divisions or sub-units; and

(ii) the designation of any such division or sub-unit by, and the carrying on of the business and operations of any such division or sub-unit under, a name other than the name of the Corporation.

72. Designation and Appointment of Divisional Officers.

The board of directors may, by resolution, designate and appoint divisional officers assigned to that particular division or a sub-unit of that division provided that any such divisional officer shall not, as such, be an officer of the Corporation. The divisional officers, if any, shall be appointed by the board of directors annually or oftener as may be required. Notwithstanding the foregoing, each incumbent divisional officer shall continue in office until the earliest of (a) the divisional officer's resignation, which resignation shall be effective at the time a written resignation is received by the Corporation or at the time specified in the resignation, whichever is later, (b) the divisional officer's appointment of the divisional officer's successor, (c) the meeting at which the board of directors annually appoints the divisional officers of the Corporation, (d) the divisional officer's death, and (e) the divisional officer's removal by resolution of the board of directors, which removal may be made by the board of directors at any time, with or without cause, without prejudice to such divisional officer's rights under any employment contract or in law. For certainty, the removal of a divisional officer from his or her position as a divisional officer does not of itself constitute a termination of that person's employment with the Corporation. The divisional officers need not be directors and one person may hold more than one divisional office.

73. Duties and Authority of Divisional Officers.

The duties, responsibilities, limitations and remuneration of the divisional officers shall be such as are determined from time to time by the person or persons and/or committee or committees designated by the board of directors of the Corporation having responsibility for the division to which such divisional officer has been appointed. The authority of any such divisional officer shall, however, be limited to acts and transactions relating only to the business and operations which his or her division is authorized to transact and perform, provided, however, that if the same person is also appointed an officer of the Corporation, the foregoing shall not limit his or her acts under the powers and duties of such corporate office.

74. Execution of Instruments.

Contracts or documents requiring the signature of the Corporation and relating only to a particular division of the Corporation may be signed in accordance with paragraph 69 or by any one of the divisional officers appointed pursuant to paragraph 71 with respect to such division. All such contracts or documents so signed shall be binding upon the Corporation without further authorization or formality. The board of directors shall have power from time to time by resolution to appoint any divisional officer or officers appointed pursuant to paragraph

71, or other person or persons, to sign specific contracts or documents on behalf of the Corporation and relating only to a particular division of the Corporation.

Any such divisional signing officer may affix the seal of the Corporation to any such contract or document, and may certify a copy of any instrument, resolution, by-law or other document of the Corporation to be a true copy thereof.

If specifically authorized by a resolution of the board of directors, the signature of any divisional signing officer may be printed, engraved, lithographed or otherwise mechanically reproduced upon all contracts or documents relating only to the division and all such contracts or documents on which the signature of any of the foregoing divisional signing officers have been so reproduced shall be deemed to have been manually signed by the divisional signing officer whose signature is so reproduced and shall be as valid as if signed manually and notwithstanding that the divisional signing officer whose signature is so reproduced may have ceased to hold office at the date of delivery or issue of such contracts or documents.

FINANCIAL YEAR

75. Financial Year.

The financial year of the Corporation shall terminate on such date in each year as the board of directors may from time to time determine.

ELECTRONIC DOCUMENTS

76. Creation and Provision of Information.

Unless the Corporation's articles otherwise provide, and subject to and in accordance with the provisions of Part XX.I of the Act, the Regulations and paragraph 76 of this by-law, the Corporation may satisfy any requirement under the Act or the Regulations to create or provide a notice, document or other information to any person by the creation or provision of an electronic document. Except as provided in Section 252.6 of the Act, "electronic document" means any form of representation of information or of concepts fixed in any medium in or by electronic, optical or other similar means and that can be read or perceived by a person or by any means.

77. Consent and Other Requirements.

Notwithstanding the foregoing paragraph 75, a requirement under the Act or the Regulations to provide a person with a notice, document or other information shall not be satisfied by the provision of an electronic document unless

(a) the addressee has consented, in accordance with the Regulations, and has designated an information system for the receipt of the electronic document; and

(b) the electronic document is provided to the designated information system, unless the Regulations provide otherwise.

The term "information system" means a system used to generate, send, receive, store, or otherwise process an electronic document.

ENACTED this ● day of ●, 20●.

President	Secretary

SCHEDULE D.1

NEW CANWEST ASSETS

The following assets, property and undertakings shall constitute the New Canwest Assets:

1. The Limited Partnership Units.
2. The shares held by CMI in GP Inc.
3. All Canwest/CMI Group Intercompany Receivables owing to CMI by CTLP.
4. The CTLP Assumption Consideration Note.
5. All amounts receivable owed to CMI under the Shared Services Agreement and/or The Omnibus Transition and Reorganization Agreement.
6. The Trademarks and the Copyrights and Other IP.
7. To the extent of any right, title or interest, all broadcast licenses or other independent quasi-judicial or governmental authorizations.
8. Any Cash in excess of the amount constituting the Plan Implementation Fund.
9. Rights of CMI as a participating employer (if a participating employer) under the pension and group benefit plans listed on Schedules D.7 and D.8.
10. Owned or leased real property including transmitter sites, personal property, equipment, intellectual property or information technology which are held by CMI and relate primarily to or are used primarily in connection with the Business including the following leased property to the extent that it was not previously assigned to CTLP: (i) 201 and 203, 361 Victoria Street, Fredericton, NB; (ii) 5 Dethridge Drive, Sydney, NS; (iii) 1401 28th Street, Lethbridge, AB; and (iv) 101, 650 Martin Street, Penticton, BC.
11. CMI's rights under: (i) the Shared Services Agreement and the Omnibus Transition and Reorganization Agreement; (ii) the Trademarks Licence Agreement and the Trademarks Licence; (iii) the CW Media Trademarks Licence Agreements; and (iv) the Management and Administrative Services Agreement.
12. The Other Canwest Assets listed in Schedule D.5.
13. The office lease agreement dated May 1, 2008 between Portage & Main Development Ltd. and CMI in relation to suite number 3000, 201 Portage Avenue, Winnipeg, Manitoba together with any related rooftop licence.

For greater certainty, the New Canwest Assets shall not include the Head Office Lease.

SCHEDULE D.2

BROADCAST LICENCES

Licences to be issued to GP Inc. (the general partner of CTLP) and New Canwest (the limited partner), carrying on business as CTLP upon surrender of the current licences.

PART A

Television Programming Undertakings

The chart on page D-4 outlines the originating television stations, and associated transmitters, involved in this application.

Specialty Programming Undertakings

- DejaView (Category 2)
- MovieTime (Category 2 – formerly known as Lonestar)
- Reality TV (Category 2)

Licences to be issued to GP Inc. (the general partner) and New Canwest (the limited partner), carrying on business as CTLP upon surrender of the current licences.[1]

The current licensee in each case is GP Inc. (the general partner) and CMI (the limited partner), carrying on business as CTLP (herein referred to as "partners of CTLP").

PART B

- Fox Sports World Canada (Category 2)

Licence to be issued to GP Inc. (the general partner) and New Canwest (the limited partner), carrying on business as CTLP, and Fox Sports Holdco, partners in a general partnership carrying on business as Fox Sports.

The current licensee is GP Inc. (the general partner) and CMI (the limited partner), carrying on business as CTLP, and Fox Sports Holdco, partners in a general partnership carrying on business as Fox Sports.

[1] GP Inc. (the general partner of CTLP), will continue to hold a 0.1% partnership interest in CTLP.

PART C

- Men TV (Category 1)

Licence to be issued to GP Inc. (the general partner) and New Canwest (the limited partner), carrying on business as CTLP, and TVA Group Inc., partners in a general partnership carrying on business as Men TV General Partnership.

The current licensee is GP Inc. (the general partner) and CMI (the limited partner), carrying on business as CTLP, and TVA Group Inc., partners in a general partnership carrying on business as Men TV General Partnership.

PART D

- Mystery (Category 1)

Licence to be issued to GP Inc. (the general partner) and New Canwest (the limited partner), carrying on business as CTLP, and TVA Group Inc., partners in a general partnership carrying on business as Mystery Partnership.

The current licensee is GP Inc. (the general partner) and CMI (the limited partner), carrying on business as CTLP, and TVA Group Inc., partners in a general partnership carrying on business as Mystery Partnership.

PART E

- TVtropolis (Analog Speciality – formerly known as Prime TV)

Licence to be issued to GP Inc. (the general partner) and New Canwest (the limited partner), carrying on business as CTLP, and Rogers Communications Inc., partners in a general partnership carrying on business as TVtropolis General Partnership.

The current licensee is GP Inc. (the general partner) and CMI (the limited partner), carrying on business as CTLP, and Rogers Communications Inc., partners in a general partnership carrying on business as TVtropolis General Partnership.

Stations Associated Transmitters

PROV	CITY	STATION	CALL SIGN
BC	VANCOUVER	CHAN	CHAN-TV
BC	VANCOUVER	CHAN	CHAN-DT
BC	CHILLIWACK	CHAN	CHAN-TV-1
BC	BOWEN ISLAND	CHAN	CHAN-TV-2
BC	SQUAMISH	CHAN	CHAN-TV-3
BC	COURTENAY	CHAN	CHAN-TV-4
BC	BRACKENDALE	CHAN	CHAN-TV-5
BC	WILSON CREEK	CHAN	CHAN-TV-6
BC	WHISTLER	CHAN	CHAN-TV-7
BC	100 MILE HOUSE	CHAN	CITM-TV
BC	WILLIAMS LAKE	CHAN	CITM-TV-1
BC	QUESNEL	CHAN	CITM-TV-2
BC	KELOWNA	CHAN	CHKL-TV
BC	PENTICTON	CHAN	CHKL-TV-1
BC	VERNON	CHAN	CHKL-TV-2
BC	REVELSTOKE	CHAN	CHKL-TV-3
BC	OLIVER/OSOYOOS	CHAN	CKKM-TV
BC	SANTA ROSA	CHAN	CISR-TV
BC	GRAND FORKS	CHAN	CISR-TV-1
BC	TRAIL	CHAN	CKTN-TV
BC	CASTLEGAR	CHAN	CKTN-TV-1
BC	TAGHUM	CHAN	CKTN-TV-2
BC	NELSON	CHAN	CKTN-TV-3
BC	CRESTON	CHAN	CKTN-TV-4
BC	KAMLOOPS	CHAN	CHKM-TV
BC	PRITCHARD	CHAN	CHKM-TV-1
BC	PR. GEORGE	CHAN	CIFG-TV
BC	KELOWNA	CHBC	CHBC-TV
BC	PENTICTON	CHBC	CHBC-TV-1
BC	VERNON	CHBC	CHBC-TV-2
BC	OLIVER	CHBC	CHBC-TV-3
BC	SALMON ARM	CHBC	CHBC-TV-4
BC	ENDERBY	CHBC	CHBC-TV-5
BC	CELISTA	CHBC	CHBC-TV-6
BC	SKAHA LAKE (Nk'Wala)	CHBC	CHBC-TV-7
BC	CANOE	CHBC	CHBC-TV-8
BC	APEX MOUNTAIN	CHBC	CHBC-TV-9
BC	REVELSTOKE	CHBC	CHRP-TV-2
AB	CALGARY	CICT	CICT-TV
AB	CALGARY	CICT	CICT-DT
AB	DRUMHELLER	CICT	CICT-TV-1
AB	BANFF	CICT	CICT-TV-2
AB	LETHBRIDGE	CISA	CISA-TV
AB	BURMIS	CISA	CISA-TV-1
AB	BROOKS	CISA	CISA-TV-2
AB	COLEMAN	CISA	CISA-TV-3
AB	WATERTON PARK	CISA	CISA-TV-4
AB	PINCHER CREEK	CISA	CISA-TV-5
AB	EDMONTON	CITV	CITV-TV
AB	EDMONTON	CITV	CITV-DT
AB	RED DEER	CIVT	CITV-TV-1
SA	REGINA	CFRE	CFRE-TV
SA	FORT QU'APPELLE	CFRE	CFRE-TV-2

PROV	CITY	STATION	CALL SIGN
SA	SASKATOON	CFSK	CFSK-TV
MB	WINNIPEG	CKND	CKND-TV
MB	MINNEDOSA	CKND	CKND-TV-2
ON	TORONTO	CIII	CIII-TV-41
ON	TORONTO	CIII	CIII-DT-41
ON	PARIS	CIII	CIII-TV
ON	BANCROFT	CIII	CIII-TV-2
ON	OWEN SOUND	CIII	CIII-TV-4
ON	OTTAWA	CIII	CIII-TV-6
ON	MIDLAND	CIII	CIII-TV-7
ON	S. S. MARIE	CIII	CIII-TV-12
ON	TIMMINS	CIII	CIII-TV-13
ON	STEVENSON	CIII	CIII-TV-22
ON	PETERBOROUGH	CIII	CIII-TV-27
ON	SARNIA (Oil Springs)	CIII	CIII-TV-29
ON	FORT ERIE	CIII	CIII-TV-55
ON	SUDBURY	CIII	CFGC-TV
ON	NORTH BAY	CIII	CFGC-TV-2
QU	MONTREAL	CKMI	CKMI-TV-1
QU	QUEBEC	CKMI	CKMI-TV
QU	SHERBROOKE	CKMI	CKMI-TV-2
NS	HALIFAX	CIHF	CIHF-TV
NB	FREDERICTON	CIHF	CIHF-TV-1
NB	SAINT JOHN	CIHF	CIHF-TV-2
NB	MONCTON	CIHF	CIHF-TV-3
NS	TRURO	CIHF	CIHF-TV-4
NS	WOLFVILLE	CIHF	CIHF-TV-5
NS	BRIDGEWATER	CIHG	CIHF-TV-6
NS	SYDNEY	CIHF	CIHF-TV-7
NS	NEW GLASGOW	CIHF	CIHF-TV-8
NS	SHELBURNE	CIHF	CIHF-TV-9
NS	YARMOUTH	CIHF	CIHF-TV-10
NB	WOODSTOCK	CIHF	CIHF-TV-11
NB	ST STEPHEN	CIHF	CIHF-TV-12
NB	MIRAMICHI	CIHF	CIHF-TV-13
PE	CHARLOTTE TOWN	CIHF	CIHF-TV-14
NS	ANTIGONISH	CIHF	CIHF-TV-15
NS	MULGRAVE	CIHF	CIHF-TV-16

SCHEDULE D.3

NEW CANWEST LIABILITIES

The following liabilities and obligations shall constitute the New Canwest Liabilities:

1. The obligations of CMI at the Plan Implementation Date as the limited partner under the CTLP Limited Partnership Agreement.

2. All amounts payable by CMI under the Shared Services Agreement and/or the Omnibus Transition and Reorganization Agreement, and any future obligations thereunder.

3. The debts, liabilities and other obligations of CMI under all contracts constituting part of the New Canwest Assets, including Other Canwest Assets.

4. The Insured Litigation Deductibles.

5. Business-Related Post-Filing Claims.

6. The liabilities and obligations of CMI under the Trademarks Licence Agreement and the Trademarks Licence and under section 6.4 of the Omnibus Transition and Reorganization Agreement, and the liabilities and obligations of CMI under the CW Media Trademarks Licence Agreements.

7. The liabilities and obligations of CMI as a participating employer (if a participating employer) under the pension and group benefit plans listed on Schedules D.7 and D.8, and including provision of post retirement benefits to Tom Strike, John Maguire and Richard Leipsic as set out on Schedule "A" to their KERPs, together with the thirty (30) day post termination benefits made available to the April 28 Severance Schedule Employees.

8. The liabilities and obligations of CMI under the Management and Administrative Services Agreement.

For greater certainty, the New Canwest Liabilities shall not include any obligations or liabilities under or in respect of the Head Office Lease.

SCHEDULE D.4

TRADEMARKS

1. The corporate name "Canwest".

2. The trademark CANWEST and all registrations and applications for trademarks consisting of or incorporating CANWEST (including the trademarks listed below), and any associated trademarks, including for greater certainty any domain names which consist of or incorporate any such trademarks.

Trademark	Goods	Status	Country	Owner on Record (Name Reporter)	Application Submit Date	Application Number	Registration Date	Registration Number (TMA)
CANWEST	Services	Pending	US	Canwest	12-Dec-07	77350298		
CANWEST	Wares Services	Registered	EU	Canwest	13-Nov-07	6508857	12-Mar-09	6508857
CANWEST	Services	Registered	CAN	Canwest	22-Jul-87	588487	30-Sep-88	345425
CANWEST & DESIGN (Horizontal Reverse Colour) 	Wares Services	Pending	CAN	Canwest	17-Mar-08	1387463		
CANWEST & Design (Horizontal) 	Wares Services	Pending	CAN	Canwest	13-Nov-07	1371544		
CANWEST & DESIGN (Stacked Reverse Colo 	Wares Services	Pending	CAN	Canwest	17-Mar-08	1387462		
CANWEST & DESIGN (Stacked) 	Wares Services	Pending	CAN	Canwest	13-Nov-07	1371539		

CANWEST & DESIGN (Stacked) 	Wares Services	Pending	US	Canwest	13-May-08	77473558		
CANWEST & DESIGN (Stacked)	Wares Services	Registered	EU	Canwest.	13-May-08	6911499	23-Mar-09	6911499
CANWEST & HONEYCOMB DESIGN (Horizontal)	Wares Services	Advertised	EU	Canwest	13-May-08	6911663		
CANWEST & HONEYCOMB DESIGN (Horizontal) 	Wares Services	Pending	US	Canwest	13-May-08	77473523		
CANWEST & HONEYCOMB REVERSE DESIGN (Horizontal)		Advertised	EU	Canwest	15-Sep-08	7233414		
CANWEST & HONEYCOMB REVERSE DESIGN (Stacked) 	Wares Services	Pending	US	Canwest	15-Sep-08	77570161		
CANWEST DESIGN	Wares Services	Allowed	US	Canwest	12-Dec-07	77350392		
CANWEST DESIGN (Design only)		Pending	EU	Canwest	12-Dec-07	65509376		
CANWEST MEDIA	Wares Services	Pending	TUR	Canwest	25--Jun-07			
CANWEST MEDIA	Wares Services	Pending	US	Canwest.	25-Jun-07	77214597		
CANWEST MEDIA	Wares Services	Registered	EU	Canwest	25-Jun-07	6037493	29-Jan-09	6037493
CANWEST MEDIA	Wares Services	Registered	EU	Canwest			9-Feb-09	006037593

CANWEST MEDIA	Wares Services	Approved	CAN	Canwest	02-Mar-07	1338289		
CANWEST MEDIA & DESIGN	Wares Services	Pending	TUR	Canwest	25-Jun-07			
CANWEST MEDIA & DESIGN	Wares Services	Registered	EU	Canwest	25-Jun-07	6037576	9-Feb-09	6037576
CANWEST.COM	Services	Registered	CAN	Canwest	19-Apr-99	1012375	7-Feb-01	540936
CANWESTGLOBAL.COM	Services	Registered	CAN	Canwest	19-Apr-99	1012374	7-Feb-01	540938
CGBI & DESIGN 	Wares Services	Registered	CAN	Canwest	30-Apr-01	1100966	19-Nov-03	595071
CW MEDIA	Wares Services	Allowed	CAN	Canwest	14-Feb-07	1335328		
HONEYCOMB (CANWEST) DESIGN	Wares Services	Allowed	AU	Canwest	19-Dec-07	1216601		
HONEYCOMB (CANWEST) DESIGN	Wares Services	Allowed	EU	Canwest	12-Dec-07	65098376		

SCHEDULE D.5

OTHER CANWEST ASSETS

1. Canwest's interest in the naming and promotion agreement dated October 30, 1998, among Canwest, Canwest Television Inc., Riverside Park Management Inc., and Winnipeg Goldeyes Baseball Club Inc. and any amendment or supplement thereto, together with the related Display Rental Agreement dated February 28, 2006, between Canwest and Jim Pattison Industries Ltd., Re: Canwest Global Park.

2. Canwest's interest in the deed of gift agreement dated May 28, 1998, among Canwest, Canwest Television Inc. and Manitoba Theatre For Young People Inc. and any amendment or supplement thereto, together with the related Display Rental Agreement dated February 28, 2006, between Canwest and Jim Pattison Industries Ltd., Re: Canwest Global Performing Arts Centre.

3. All art work owned by Canwest and/or CMI.

SCHEDULE D.6

COPYRIGHTS AND OTHER IP

Canwest Global Communications Corp.

Type	Title	Registration No.	Owner
Copyright	The Minnedosa Kid	464476	Canwest Global Communications Corp.
Copyright	The CanWest Global Story: The First Twenty Years	464475	Canwest Global Communications Corp.

Canwest Media Inc. (formerly CanWest MediaWorks Inc.)

Type	Title	Registration No.	Owner
Grant of Interest	Stunt	1051367	Canwest Media Inc. (formerly CanWest MediaWorks Inc.)
Grant of Interest	Warrior Class	1051366	Canwest Media Inc. (formerly CanWest MediaWorks Inc.)
Grant of Interest	The Two Coreys	1051365	Canwest Media Inc. (formerly CanWest MediaWorks Inc.)
Grant of Interest	TV Match-Up	1051364	Canwest Media Inc. (formerly CanWest MediaWorks Inc.)
Grant of Interest	TV Made Me Do It	1051363	Canwest Media Inc. (formerly CanWest MediaWorks Inc.)
Grant of Interest	Tube Tales	1051362	Canwest Media Inc. (formerly CanWest MediaWorks Inc.)
Grant of Interest	True Pulp Murder	1051361	Canwest Media Inc. (formerly CanWest MediaWorks Inc.)
Grant of Interest	Stolen Sisters	1051360	Canwest Media Inc. (formerly CanWest MediaWorks Inc.)
Grant of Interest	Still Longshots	1051359	Canwest Media Inc. (formerly

			CanWest MediaWorks Inc.)
Grant of Interest	Stars and Their Idols	1051358	Canwest Media Inc. (formerly CanWest MediaWorks Inc.)
Grant of Interest	Shaye	1051356	Canwest Media Inc. (formerly CanWest MediaWorks Inc.)
Grant of Interest	The Homefront	1051302	Canwest Media Inc. (formerly CanWest MediaWorks Inc.)
Grant of Interest	Painkiller Jane	1051301	Canwest Media Inc. (formerly CanWest MediaWorks Inc.)
Grant of Interest	Renegadepress.com Season IV	1051300	Canwest Media Inc. (formerly CanWest MediaWorks Inc.)
Grant of Interest	Pretty Dangerous Season II	1051299	Canwest Media Inc. (formerly CanWest MediaWorks Inc.)
Grant of Interest	Playing the Odds	1051298	Canwest Media Inc. (formerly CanWest MediaWorks Inc.)
Grant of Interest	Tribute: The Next Best Thing	1051297	Canwest Media Inc. (formerly CanWest MediaWorks Inc.)
Grant of Interest	Making the Cut	1051296	Canwest Media Inc. (formerly CanWest MediaWorks Inc.)
Grant of Interest	The Jane Show Season II	1051295	Canwest Media Inc. (formerly CanWest MediaWorks Inc.)
Grant of Interest	James Bond: The True Story	1051294	Canwest Media Inc. (formerly CanWest MediaWorks Inc.)
Grant of Interest	From the Ground Up with Debbie Travis Season II	1051293	Canwest Media Inc. (formerly CanWest MediaWorks Inc.)
Grant of Interest	From the Ground Up with Debbie Travis Season II	1051292	Canwest Media Inc. (formerly CanWest MediaWorks Inc.)
Grant of Interest	DecAIDS: Anything is Possible	1051291	Canwest Media Inc. (formerly CanWest MediaWorks Inc.)
Grant of Interest	Death In The Forest	1051290	Canwest Media Inc. (formerly CanWest MediaWorks Inc.)
Grant of Interest	The Cure for Love	1051269	Canwest Media Inc. (formerly

			CanWest MediaWorks Inc.)
Grant of Interest	The Bully's Mark	1051268	Canwest Media Inc. (formerly CanWest MediaWorks Inc.)
Grant of Interest	Branded: Saving Our Town	1051267	Canwest Media Inc. (formerly CanWest MediaWorks Inc.)
Grant of Interest	Ad Persuasion, Season II	1051227	Canwest Media Inc. (formerly CanWest MediaWorks Inc.)
Grant of Interest	Are You Smarter than a Canadian Fifth Grader	1053903	Canwest Media Inc. (formerly CanWest MediaWorks Inc.)
Grant of Interest	da Kink in My Dream	1053902	Canwest Media Inc. (formerly CanWest MediaWorks Inc.)
Grant of Interest	TVFlopolis	1053875	Canwest Media Inc. (formerly CanWest MediaWorks Inc.)
Grant of Interest	Real Fight Club	1053519	Canwest Media Inc. (formerly CanWest MediaWorks Inc.)
Grant of Interest	Final 24 II	1053518	Canwest Media Inc. (formerly CanWest MediaWorks Inc.)
Grant of Interest	Final 24 II	1053517	Canwest Media Inc. (formerly CanWest MediaWorks Inc.)
Grant of Interest	Up Against the Wal	1053095	Canwest Media Inc. (formerly CanWest MediaWorks Inc.)
Grant of Interest	The Summit	1052871	Canwest Media Inc. (formerly CanWest MediaWorks Inc.)
Grant of Interest	Hip Hop Hope	1052870	Canwest Media Inc. (formerly CanWest MediaWorks Inc.)
Grant of Interest	Debt Trap	1052868	Canwest Media Inc. (formerly CanWest MediaWorks Inc.)
Grant of Interest	Search & Rescue	1052866	Canwest Media Inc. (formerly CanWest MediaWorks Inc.)
Grant of Interest	Hijacked Future	1052865	Canwest Media Inc. (formerly CanWest MediaWorks Inc.)
Grant of Interest	Til Death Do Us Part (aka	1052564	Canwest Media Inc. (formerly

	Love You To Death)		CanWest MediaWorks Inc.)
Grant of Interest	Blood and Celluloid: Hollywood's Love Affair with the Vampire	1054958	Canwest Media Inc. (formerly CanWest MediaWorks Inc.)
Grant of Interest	Da Kink In My Hair	1043783	Canwest Media Inc. (formerly CanWest MediaWorks Inc.)
Grant of Interest	Da Kink In My Hair	1043782	Canwest Media Inc. (formerly CanWest MediaWorks Inc.)
Grant of Interest	The Best Years	1043729	Canwest Media Inc. (formerly CanWest MediaWorks Inc.)
Grant of Interest	Becoming Human	1043689	Canwest Media Inc. (formerly CanWest MediaWorks Inc.)
Grant of Interest	Be Real With JR Digs	1043688	Canwest Media Inc. (formerly CanWest MediaWorks Inc.)
Grant of Interest	21st Annual Gemini Awards	1043687	Canwest Media Inc. (formerly CanWest MediaWorks Inc.)
Grant of Interest	The 2005 Gemini Awards Gala	1042062	Canwest Media Inc. (formerly CanWest MediaWorks Inc.)
Grant of Interest	The Lodge	1042061	Canwest Media Inc. (formerly CanWest MediaWorks Inc.)
Grant of Interest	Medium Rare	1042060	Canwest Media Inc. (formerly CanWest MediaWorks Inc.)
Grant of Interest	Sabrina's Law	1042059	Canwest Media Inc. (formerly CanWest MediaWorks Inc.)
Grant of Interest	Shattered Dreams	1042058	Canwest Media Inc. (formerly CanWest MediaWorks Inc.)
Grant of Interest	That News Show (aka "The News Show" formerly "And Finally")	1042057	Canwest Media Inc. (formerly CanWest MediaWorks Inc.)
Grant of Interest	Time Bombs	1042056	Canwest Media Inc. (formerly CanWest MediaWorks Inc.)
Grant of Interest	Vanity Insanity, Season II	1042055	Canwest Media Inc. (formerly CanWest MediaWorks Inc.)

Grant of Interest	Breaking Ranks	1042054	Canwest Media Inc. (formerly CanWest MediaWorks Inc.)
Grant of Interest	Corporation in the Classroom	1042053	Canwest Media Inc. (formerly CanWest MediaWorks Inc.)
Grant of Interest	Durham County 401	1042052	Canwest Media Inc. (formerly CanWest MediaWorks Inc.)
Grant of Interest	Durham County 401	1042051	Canwest Media Inc. (formerly CanWest MediaWorks Inc.)
Grant of Interest	Inside The Box	1040528	Canwest Media Inc. (formerly CanWest MediaWorks Inc.)
Grant of Interest	Ad Persuasion	1040527	Canwest Media Inc. (formerly CanWest MediaWorks Inc.)
Grant of Interest	Lost Boys	1040526	Canwest Media Inc. (formerly CanWest MediaWorks Inc.)
Grant of Interest	Rich Nation	1040525	Canwest Media Inc. (formerly CanWest MediaWorks Inc.)
Grant of Interest	Drug Warriors	1040524	Canwest Media Inc. (formerly CanWest MediaWorks Inc.)
Grant of Interest	Somba K'e – Dangerous Rock	1040523	Canwest Media Inc. (formerly CanWest MediaWorks Inc.)
Grant of Interest	Next Great Chef – Season II	1040522	Canwest Media Inc. (formerly CanWest MediaWorks Inc.)
Grant of Interest	FANatical	1040521	Canwest Media Inc. (formerly CanWest MediaWorks Inc.)
Grant of Interest	Risk Takers	1040520	Canwest Media Inc. (formerly CanWest MediaWorks Inc.)
Grant of Interest	Gamer Girlz	1040519	Canwest Media Inc. (formerly CanWest MediaWorks Inc.)
Grant of Interest	Falcon Beach – Season II	1040518	Canwest Media Inc. (formerly CanWest MediaWorks Inc.)
Grant of Interest	Falcon Beach – Season II	1040517	Canwest Media Inc. (formerly CanWest MediaWorks Inc.)

Grant of Interest	The Calgary Stampede: Treaty #7	1040516	Canwest Media Inc. (formerly CanWest MediaWorks Inc.)
Grant of Interest	The Calgary Stampede: At The Heart of Centre Stage	1040515	Canwest Media Inc. (formerly CanWest MediaWorks Inc.)
Grant of Interest	Diary of a Foreign Correspondent (8 episodes)	1037939	Canwest Media Inc. (formerly CanWest MediaWorks Inc.)
Grant of Interest	Very Bad Men (13 episodes)	1037938	Canwest Media Inc. (formerly CanWest MediaWorks Inc.)
Grant of Interest	House & Home Season IX (28 episodes)	1037937	Canwest Media Inc. (formerly CanWest MediaWorks Inc.)
Grant of Interest	Diva On A Dime III – comprising 13 episodes	1037267	Canwest Media Inc. (formerly CanWest MediaWorks Inc.)
Grant of Interest	Dreamwrecks (26 episodes)	1037006	Canwest Media Inc. (formerly CanWest MediaWorks Inc.)
Grant of Interest	Road to Redemption	1036123	Canwest Media Inc. (formerly CanWest MediaWorks Inc.)
Grant of Interest	The Man Who Fought Back	1036005	Canwest Media Inc. (formerly CanWest MediaWorks Inc.)
Grant of Interest	The Novel Life of Jane – comprising 13 episodes	1036004	Canwest Media Inc. (formerly CanWest MediaWorks Inc.)
Grant of Interest	Renegadepress.com – comprising 9 episodes	1036003	Canwest Media Inc. (formerly CanWest MediaWorks Inc.)
Grant of Interest	Ride Guide Bike 2006	1036002	Canwest Media Inc. (formerly CanWest MediaWorks Inc.)
Grant of Interest	Running The Goat (aka Was Wente Right?)	1036001	Canwest Media Inc. (formerly CanWest MediaWorks Inc.)
Grant of Interest	Health Care 911: The Plight of Immigrant Medical Doctors	1035999	Canwest Media Inc. (formerly CanWest MediaWorks Inc.)
Grant of Interest	Are You Smarter Than A Canadian 5th Grader?	1054553	Canwest Media Inc. (formerly CanWest MediaWorks Inc.)

Entities with No Canadian Copyrights on Record

Canwest (Canada) Inc. (formerly CanWest MediaWorks (Canada) Inc.)
Publishing LP (formerly CanWest MediaWorks Limited Partnership)
CanWest MediaWorks Limited Partnership
3848671 Canada Limited
Canwest Publishing Inc./Publications Canwest Inc. (formerly CanWest MediaWorks Publications Inc.)
The National Post Company/La Publication National Post
National Post Inc.
4513401 Canada Inc.
Canwest Media Inc. (formerly CanWest MediaWorks Inc., CanWest Communications Enterprises, Inc. and Keigwin Investments Limited)
3815668 Canada Inc.

SCHEDULE D.7

CTLP PENSION PLANS

	Plan	Sponsor
1.	Retirement Plan for Management and Non-Bargaining Unit Employees of Global Communications Limited	CTLP
2.	CanWest Maritime Television Employees Pension Plan	CTLP
3.	Global Communications Limited Retirement Plan for BCTV Staff	CTLP
4.	Global Communications Limited Retirement Plan for BCTV Senior Management	CTLP
5.	Retirement Plan for Bargaining Unit Employees of Global Communications Limited	CTLP
6.	Global Communications Limited Retirement Plan for CHBC Executive	CTLP
7.	Global Communications Limited Retirement Plan for CHBC Staff	CTLP
8.	Global Communications Limited Retirement Plan for CHBC Management	CTLP
9.	Global Communications Limited Retirement Plan for CICT and CISA Employees	CTLP
10.	Global Communications Limited Retirement Plan for Former WIC-Allarcom Employees	CTLP
11.	Global Communications Limited Retirement Plan for Former WIC Designated Executives	CTLP
12.	Global Communications Limited Employees Pension Plan	CTLP

SCHEDULE D.8

CTLP GROUP BENEFIT PLANS

Group benefit plans providing health, dental, life, AD&D and LTD benefits which include the following contracts/policies:

- Manulife Financial contract number 24132, 24132-A, 24132-C, 24132-D, 24132-E, 24132-F, 24132-J
- Manulife Financial policy number 29704, 29704-A, 29704-C, 29704-D, 29704-E, 29704-F, 29704-J

SCHEDULE E

CONVENIENCE CLASS CLAIM DECLARATION

TO: **Canwest Global Communications Corp. ("Canwest")**

AND TO: **FTI Consulting Canada Inc., in its capacity as the Monitor**

In connection with the consolidated plan of compromise and reorganization of Canwest and Canwest Media Inc. ("**CMI**") and certain of their respective subsidiaries pursuant to the *Companies' Creditors Arrangement Act* (Canada) (the "**Plan**"), the undersigned hereby elects to have its Proven Distribution Claim(s) treated as a Convenience Class Claim.

For purposes of this declaration:

(a) "**Proven Distribution Claim**" means any Claim (as defined in the Plan) against any CMI Entity accepted for purposes of receiving distributions under the Plan in accordance with the Claims Procedure Order (as defined in the Plan) and the Plan;

(b) "**Convenience Class Claim**" means any Proven Distribution Claim in an amount in excess of $5,000 that the undersigned has elected to value at $5,000 for purposes of the Plan;

DATED the day of 2010.

_____

(Entity Name)

_____

(Amount of Claim on Notice of Claim)

_____

(Address)

_____

(Signature)

INSTRUCTIONS

1. *This declaration is to be completed by a person who wishes to elect to have his or her Proven Distribution Claim treated as a Convenience Class Claim.*

Please return completed declaration to FTI Consulting Canada Inc. attention Michelle Grech prior to 5:00 p.m. (Toronto time) on July 15, 2010, by mail at Brookfield Place, 79 Wellington Street West, Suite 2010, Toronto, ON, M4K 1G8, Canada or facsimile (416) 649-8101.

SCHEDULE F

EQUITY COMPENSATION PLANS

1. Canwest Global Communications Corp. Stock Option and Restricted Unit Plan dated November 2, 2007
2. Canwest Global Communications Corp. Amended and Restated Share Compensation Plan
3. Canwest Global Communications Corp. Deferred Share Unit Plan for Non-Executive Directors

SCHEDULE G

MONITOR CERTIFICATE REGARDING SATISFACTION OF CONDITIONS PRECEDENT

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

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

AND IN THE MATTER OF
A PLAN OF COMPROMISE AND REORGANIZATION OF
CANWEST GLOBAL COMMUNICATIONS CORP. AND THE OTHER ENTITIES
LISTED ON SCHEDULE A HERETO

APPLICANTS

CERTIFICATE OF FTI CONSULTING CANADA INC.
AS THE COURT-APPOINTED MONITOR OF THE APPLCIANTS

All capitalized terms not otherwise defined herein shall have the meanings ascribed thereto in the Restated Consolidated Plan of Compromise and Arrangement concerning, affecting and involving Canwest Global Communications Corp., Canwest Media Inc., Canwest Television GP Inc., Canwest Television Limited Partnership, Canwest Global Broadcasting Inc./Radiodiffusion Canwest Global Inc., Fox Sports World Canada Holdco Inc., Fox Sports World Canada Partnership, National Post Holdings Ltd., The National Post Company/La Publication National Post, MBS Productions Inc., Yellow Card Productions Inc., Global Centre Inc. and 4501063 Canada Inc. dated as of June 23, 2010 (the "**Plan**"), as the Plan may be amended, varied or supplemented from time to time in accordance with the terms thereof.

Pursuant to Section 6.4 of the Plan, FTI Consulting Canada Inc. in its capacity as the Monitor of the Applicants, hereby delivers to the CMI Entities, the Plan Sponsor and the Ad Hoc Committee this certificate and certifies that it has been informed in writing by the CMI Entities, the Plan Sponsor and the Ad Hoc Committee that all of the Conditions Precedent set out in Section 6.3 of the Plan have been satisfied or (to the extent permitted by law) waived. Pursuant to the terms of the Plan, the Plan Implementation Date has occurred on this day. This Certificate will be filed with the Court and posted on the Website.

DATED at the City of Toronto, in the Province of Ontario, this _____ day of _____, 2010.

FTI CONSULTING CANADA INC. in its capacity as the Monitor of the CMI Entities

By: _____

Name:

Title:

SCHEDULE "D"

CANWEST ARTICLES OF REORGANIZATION

Industry Canada | Industrie Canada

Canada Business Corporations Act | Loi canadienne sur les sociétés par actions

FORM 14
ARTICLES OF REORGANIZATION
(SECTION 191)

FORMULAIRE 14
CLAUSES DE RÉORGANISATION
(ARTICLE 191)

1 -- Name of Corporation - Dénomination sociale de la société	2 -- Corporation No. - N° de la société
CANWEST GLOBAL COMMUNICATIONS CORP.	2737469

3 -- In accordance with the order for reorganization, the articles of incorporation are amended as follows:

Conformément à l'ordonnance de réorganisation, les statuts constitutifs sont modifiés comme suit :

See annexed Appendix "A", which is incorporated into this form.

Signature	Printed Name - Nom en lettres moulées	4 -- Capacity of - En qualité de	5 -- Tel. No. - N° de tél.

FOR DEPARTMENTAL USE ONLY - À L'USAGE DU MINISTÈRE SEULEMENT

IC 3409 (2003/06)

Canada

CANWEST GLOBAL COMMUNICATIONS CORP.
(the "Corporation")

APPENDIX "A"

TO THE ARTICLES OF REORGANIZATION

Pursuant to the order of the Ontario Superior Court of Justice (Commercial List) (the "Court") sanctioning the restated consolidated plan of compromise, arrangement and reorganization pursuant to the *Companies' Creditors Arrangement Act* (Canada) and the *Canada Business Corporations Act*, as accepted for filing by the Court on June 23, 2010 and as restated on July 16 2010 (the "Plan"), concerning, affecting and involving the Corporation, Canwest Media Inc., Canwest Television GP Inc., Canwest Television Limited Partnership, Canwest Global Broadcasting Inc./Radiodiffusion Canwest Global Inc., Fox Sports World Canada Holdco Inc., Fox Sports World Canada Partnership, National Post Holdings Ltd., The National Post Company/La Publication National Post, MBS Productions Inc., Yellow Card Productions Inc., Global Centre Inc. and 4501063 Canada Inc., the articles of the Corporation are amended, in accordance with and at the relative time contemplated by the provisions of the Plan, as follows:

(a) by creating the following classes of shares in the capital of the Corporation:

(i) an unlimited number of new preferred shares designated as the "New Preferred Shares",

(ii) an unlimited number of new multiple voting shares designated as the "New Multiple Voting Shares",

(iii) an unlimited number of new subordinate voting shares designated as the "New Subordinate Voting Shares", and

(iv) an unlimited number of new non-voting shares designated as the "New Non-Voting Shares";

(b) by attaching to the New Preferred Shares, the New Multiple Voting Shares, the New Subordinate Voting Shares and the New Non-Voting Shares the rights, privileges, restrictions and conditions as set out in Schedule I attached hereto and incorporated herein and making such shares subject to the restrictions on transfer as set out in Schedule II attached hereto and incorporated herein;

(c) by changing:

(i) each issued and outstanding Multiple Voting Share of the Corporation into (A) one New Multiple Voting Share and (B) one New Preferred Share,

(ii) each issued and outstanding Subordinate Voting Share of the Corporation into (A) one New Subordinate Voting Share and (B) one New Preferred Share, and

(iii) each issued and outstanding Non-Voting Share of the Corporation into (A) one New Non-Voting Share and (B) one New Preferred Share;

(d) by providing that the stated capital and paid-up capital of the New Preferred Shares shall be an amount equal to the aggregate paid-up capital of the Corporation for the Multiple Voting Shares, Subordinate Voting Shares and Non-Voting Shares of the Corporation so changed less $1.00, and the stated capital and paid-up capital of the Corporation for the New Multiple Voting Shares, New Subordinate Voting Shares and New Non-Voting Shares shall be equal to $1.00 in the aggregate;

(e) by deleting the authorized but unissued Preference Shares, Series 1 Preference Shares, Series 2 Preference Shares, Multiple Voting Shares, Subordinate Voting Shares and Non-Voting Shares of the Corporation and all of the rights, privileges, restrictions and conditions attaching to such shares; and

(f) by providing that, immediately following the foregoing, the only classes of shares authorized to be issued by the Corporation shall be: (i) an unlimited number of New Preferred Shares, (ii) an unlimited number of New Multiple Voting Shares, (iii) an unlimited number of New Subordinate Voting Shares, and (iv) an unlimited number of New Non-Voting Shares.

SCHEDULE I

A. Rights, Privileges, Restrictions and Conditions attaching to the New Preferred Shares

1. Definitions

Unless the context requires otherwise, capitalized terms used in this Schedule I and not defined herein shall have the meanings given to such terms in Schedule II to these Articles. In addition, the following terms as used in this Schedule I shall have the following meanings:

"Act" means the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, as amended.

"CCAA" means the *Companies' Creditors Arrangement Act* (Canada), R.S.C. 1985, c. C-36, as amended.

"Distribution" has the meaning given to such term in paragraph 5 of this Schedule I.

"Plan" means the restated consolidated plan of compromise, arrangement and reorganization pursuant to the CCAA and the Act, as accepted for filing by the Ontario Superior Court of Justice (Commercial List) on June 23, 2010 and as restated on July 16 2010, concerning, affecting and involving the Corporation, Canwest Media Inc., Canwest Television GP Inc., Canwest Television Limited Partnership, Canwest Global Broadcasting Inc./Radiodiffusion Canwest Global Inc., Fox Sports World Canada Holdco Inc., Fox Sports World Canada Partnership, National Post Holdings Ltd., The National Post Company/La Publication National Post, MBS Productions Inc., Yellow Card Productions Inc., Global Centre Inc. and 4501063 Canada Inc., as such restated consolidated plan of compromise, arrangement and reorganization may be further restated, amended, supplemented or otherwise modified from time to time in accordance with its terms.

"Plan Implementation Date" has the meaning given to such term in the Plan.

"Shaw Designated Entity" means 7316712 Canada Inc.

"Transfer" has the meaning given to such term in paragraph A-7(b) of this Schedule I.

"Transfer Agent" means Computershare Trust Company of Canada.

"Transfer Date" means the date upon which the Transfer Notice is delivered to the Transfer Agent in accordance with paragraph A-7(a).

"Transfer Price" means the Canadian dollar amount per New Preferred Share, rounded down to the next nearest cent, calculated by dividing Cdn.$11,000,000 by the total number of New Preferred Shares issued and outstanding immediately prior to the Transfer.

"Transfer Notice" means the notice advising of the Transfer, substantially in the form attached as Exhibit "A" to this Schedule I.

"Transfer Time" has the meaning given to such term in paragraph A-7(a) of this Schedule I.

2. Dividends

The holders of the New Preferred Shares shall be entitled to receive and the Corporation shall pay thereon, as and when declared by the board of directors out of the moneys of the Corporation properly applicable to the payment of dividends, non-cumulative preferential dividends at a rate per share per annum to be determined by the board of directors. Payment of dividends (less any tax required to be withheld by the Corporation) shall, subject as hereinafter provided, be made by cheque of the Corporation payable at par at any branch in Canada of the Corporation's bankers or in such other manner as the payee may approve. Dividends which are represented by a cheque which has not been presented to the Corporation's bankers for payment or that otherwise remain unclaimed for a period of six years from the date on which they were declared to be payable shall be forfeited to the Corporation. Except with the consent in writing of the holders of all the New Preferred Shares outstanding, no dividends shall at any time be declared and paid, or declared and set aside for payment, on the New Multiple Voting Shares, the New Subordinate Voting Shares, the New Non-Voting Shares or any other shares of the Corporation ranking junior to the New Preferred Shares, in any year, unless the full amount of the dividends declared for such year on the New Preferred Shares then issued and outstanding shall have been paid, or provided for, at the date of such declaration and payment or setting aside of dividends on the New Multiple Voting Shares, the New Subordinate Voting Shares, the New Non-Voting Shares or other shares of the Corporation ranking junior to the New Preferred

Shares. The holders of the New Preferred Shares shall not be entitled to any dividends other than or in excess of the cash dividends hereinbefore provided for.

3. Voting Rights

Except as otherwise provided in the Act, the holders of the New Preferred Shares shall not be entitled to receive notice of, or to attend or to vote at, any meeting of the shareholders of the Corporation.

4. Ranking

The New Preferred Shares will be entitled to a preference over the New Multiple Voting Shares, the New Subordinate Voting Shares and the New Non-Voting Shares and over any other shares of the Corporation ranking junior to the New Preferred Shares with respect to priority in payment of dividends and in the distribution of the Corporation's assets.

5. Liquidation, Dissolution or Winding-up

In the event of the liquidation, dissolution or winding-up of the Corporation, whether voluntary or involuntary, or any other return of capital or distribution of assets of the Corporation among its shareholders for the purpose of winding up its affairs (any such event, the **"Distribution"**), the holders of the New Preferred Shares shall be entitled to receive in respect of each such share, before any distribution of any part of the assets of the Corporation among the holders of the New Multiple Voting Shares, the New Subordinate Voting Shares, the New Non-Voting Shares and any other shares of the Corporation ranking junior to the New Preferred Shares, an amount equal to the sum of (a) the quotient obtained when $11,000,000 is divided by the number of New Preferred Shares that are outstanding immediately prior to the Distribution, and (b) the amount of all dividends (if any) declared on such New Preferred Share and unpaid as of the date of the Distribution. After payment to the holders of the New Preferred Shares of the amount so payable to such holders as herein provided, the holders of the New Preferred Shares shall not be entitled to share in any further distribution of the property or assets of the Corporation.

6. Dissent Rights

The holders of New Preferred Shares shall not be entitled to vote separately as a class, and shall not be entitled to dissent, upon a proposal to amend the articles of the Corporation to:

(a) increase or decrease any maximum number of authorized New Preferred Shares, or increase any maximum number of authorized shares of a class having rights or privileges equal or superior to the New Preferred Shares;

(b) effect an exchange, reclassification or cancellation of the New Preferred Shares; or

(c) create a new class shares equal or superior to the New Preferred Shares.

7. Transfer

(a) On the Plan Implementation Date, in accordance with the provisions of the Plan, including the sequence of actions and events set out in section 5.5 thereof, the Corporation shall cause the Transfer to occur through the delivery by the Corporation of the Transfer Notice to the Transfer Agent (the time when such delivery is made being referred to as the **"Transfer Time"**), at: Computershare Trust Company of Canada, 600, 530 – 8th Avenue SW, Calgary, Alberta T2P 3S8, by facsimile at: (403) 267-6529 or e-mail at: patricia.selby@computershare.com, with a copy to the Shaw Designated Entity at: 7316712 Canada Inc., Suite 900, 630 – 3rd Avenue SW, Calgary, Alberta T2P 4L4, Attention: Vice President, Law, by facsimile at: (403) 716-6544 or e-mail at: peter.johnson@sjrb.ca. The Transfer Notice shall be deemed to be delivered to the Transfer Agent at the relative time contemplated by the Plan, provided that it is sent to the Transfer Agent in accordance with the foregoing in this paragraph A-7(a) by no later than the Effective Time (as defined in the Plan). The delivery of the Transfer Notice to the Transfer Agent shall be deemed to be the delivery of the Transfer Notice to each holder of the New Preferred Shares.

(b) At the Transfer Time, each holder of New Preferred Shares shall transfer, and shall be deemed to have transferred, to the Shaw Designated Entity all of such holder's right, title and interest in and to its New Preferred Shares, and the Shaw Designated Entity shall acquire, and shall be deemed to have acquired, from each such holder of New Preferred Shares all, but not less than all, of the New Preferred Shares held by each such holder (which transfer and acquisition are

referred to herein as the **"Transfer"**); and, at the Transfer Time, each holder of New Preferred Shares shall cease to be a holder of such New Preferred Shares and shall not be entitled to exercise any of the rights of a holder of New Preferred Shares in respect thereof other than the right to receive the Transfer Price for each of its New Preferred Shares, and the holders of the New Preferred Shares as a class shall not be entitled as such to receive notice of or to attend or vote at any meeting of the shareholders of the Corporation.

(c) The Shaw Designated Entity shall, prior to the Transfer Time, deposit with, or otherwise cause to be deposited with, the Transfer Agent funds in the amount of Cdn.$11,000,000 for payment of the aggregate Transfer Price to the holders of the New Preferred Shares and, at the Transfer Time, such deposit shall constitute a full and complete discharge of the Shaw Designated Entity's obligation to pay the Transfer Price to each holder of the New Preferred Shares. On and after the Transfer Time, all such funds deposited with the Transfer Agent shall be held by the Transfer Agent as agent for the holders of the New Preferred Shares, and the deposit of such funds with the Transfer Agent shall be deemed to constitute receipt of payment of the Transfer Price by each holder of the New Preferred Shares for all of the New Preferred Shares transferred by such holder to the Shaw Designated Entity pursuant to the Transfer. All interest on funds deposited with and held by the Transfer Agent shall accrue for the benefit of the Shaw Designated Entity. The holders of the New Preferred Shares transferred to the Shaw Designated Entity pursuant to the Transfer shall be entitled to receive the Transfer Price (without interest) for each New Preferred Share so transferred.

B. Rights, Privileges, Restrictions and Conditions attaching to New Multiple Voting Shares, New Subordinate Voting Shares and New Non-Voting Shares

1. Definitions

Capitalized terms used in this Schedule I and not defined herein shall have the meanings given to such terms in Schedule II to these Articles. In this Schedule I, the following terms shall have the following meanings, unless the context otherwise requires:

"Canadian holder" means a holder of New Multiple Voting Shares, New Subordinate Voting Shares or New Non-Voting Shares who is a Canadian and one or more Canadians beneficially own and Control, directly or indirectly, and otherwise than by way of security only, such shares.

"Conversion Period" means the period of time commencing on the Offer Date and terminating on the Expiry Date.

"Converted Shares" means New Subordinate Voting Shares resulting from the conversion of New Non-Voting Shares into New Subordinate Voting Shares pursuant to paragraph B-8(a).

"equity share" means a New Multiple Voting Share, a New Subordinate Voting Share or a New Non-Voting Share.

"Exclusionary Offer" means a New Subordinate Voting Share Offer, made by an Offeror, that:

(i) must, by reason of requirements of applicable securities legislation or of a stock exchange on which the New Subordinate Voting Shares are listed, be made to all or substantially all of the holders of New Subordinate Voting Shares who are in a province or territory of Canada to which such requirements apply; and

(ii) is not made concurrently with an offer to purchase the New Non-Voting Shares at a price at least equal to the Offer Price and that is identical to the New Subordinate Voting Share Offer in terms of the percentage of outstanding shares of each class to be taken up (exclusive of shares of each class owned immediately before the offer by the Offeror) and the form or forms of consideration offered and in all other material respects (except with respect to the conditions to the Offeror's obligation to take up and pay for New Subordinate Voting Shares that may be attached to the New Subordinate Voting Share Offer), and that has no condition attached other than the right not to take up and pay for New Non-Voting Shares

tendered if no New Subordinate Voting Shares are purchased under the New Subordinate Voting Share Offer.

"Expiry Date" means the last date on which holders of New Subordinate Voting Shares may accept an Exclusionary Offer in accordance with its terms.

"holder" means the holder of New Multiple Voting Shares, New Subordinate Voting Shares or New Non-Voting Shares, as the case may be, registered on the books of the Corporation.

"New Subordinate Voting Share Offer" means an offer to purchase New Subordinate Voting Shares and includes any amendment or variation to a previous offer to purchase New Subordinate Voting Shares except an amendment or variation comprised solely of a change to the conditions to the Offeror's obligations to take up and pay for New Subordinate Voting Shares attached to the New Subordinate Voting Share Offer.

"Non-Canadian holder" means a holder who is not a Canadian holder.

"Offer Date" means the date on which an Exclusionary Offer is made.

"Offeror" means a person that makes an offer to purchase New Subordinate Voting Shares, and includes any Associate or "affiliate" (as defined in the Act) of such person or any other person that is disclosed in the offering document relating to such offer to be acting jointly or in concert with such first mentioned person, but excludes the Corporation.

"Offer Price" means the price per share offered for New Subordinate Voting Shares under a New Subordinate Voting Share Offer.

"Re-Conversion" has the meaning given to it in paragraph B-8(c).

2. Dividends

The New Multiple Voting Shares, the New Subordinate Voting Shares and the New Non-Voting Shares will rank equally with one another and subordinate to the New Preferred Shares as to such dividends as may be declared by the Board of Directors out of funds legally available therefor and all dividends, other than stock dividends payable in equity shares, declared at any

time after the date these articles of amendment become effective will be declared contemporaneously and paid at the same time in the same property and in equal amounts per share on all the New Multiple Voting Shares, all the New Subordinate Voting Shares and all the New Non-Voting Shares at the time outstanding, without preference or priority of one share over another. The Board of Directors may declare separate stock dividends payable in equity shares for each of the New Multiple Voting Shares, New Subordinate Voting Shares and New Non-Voting Shares provided that: (a) such stock dividends shall be declared contemporaneously and paid at the same time and in equal numbers of additional equity shares per share on all the New Multiple Voting Shares, all the New Subordinate Voting Shares and all the New Non-Voting Shares at the time outstanding; (b) such stock dividends shall be paid (i) in New Multiple Voting Shares to the holders of New Multiple Voting Shares, provided that each Canadian holder of New Multiple Voting Shares may elect, in the manner prescribed by the Board of Directors from time to time, to receive such stock dividends in New Subordinate Voting Shares or New Non-Voting Shares and each Non-Canadian holder of New Multiple Voting Shares may elect, in the manner prescribed by the Board of Directors from time to time, to receive such stock dividends in New Non-Voting Shares and absent any election such stock dividends shall be paid in New Multiple Voting Shares to such holder, (ii) in New Subordinate Voting Shares to the Canadian holders of New Subordinate Voting Shares, provided that each Canadian holder of New Subordinate Voting Shares may elect, in the manner prescribed by the Board of Directors from time to time, to receive such stock dividends in New Non-Voting Shares and absent any election such stock dividends shall be paid in New Subordinate Voting Shares to such holder, and (iii) in New Non-Voting Shares to the Non-Canadian holders of New Subordinate Voting Shares and to the holders of New Non-Voting Shares; and (c) the Board of Directors may determine to add different amounts per share to the stated capital account of each such class in respect of any stock dividends.

Canadian holders of New Multiple Voting Shares or New Subordinate Voting Shares who wish to receive stock dividends in the form of additional New Subordinate Voting Shares, as applicable, may be required in the discretion of the Board of Directors to furnish the Transfer Agent with a declaration referred to in paragraph B-7(a).

3. Rights on Liquidation

In the event of the liquidation, dissolution or winding up of the Corporation, whether voluntary or involuntary, the holders of New Multiple Voting Shares, New Subordinate Voting Shares and New Non-Voting Shares will be entitled to receive, after payment of all liabilities of the Corporation and subject to the preferential rights of any class of shares ranking in priority to New Multiple Voting Shares, New Subordinate Voting Shares and New Non-Voting Shares, the remaining assets and property of the Corporation, in equal amounts per share, without preference or priority of one share over another.

4. Voting

The holders of New Multiple Voting Shares and the holders of New Subordinate Voting Shares are entitled to receive notice of any meeting of shareholders of the Corporation and to attend and vote thereat, except those meetings where only the holders of shares of a particular class or of a particular series are entitled to vote. Each New Subordinate Voting Share will entitle the holder thereof to have one vote for each share held and each New Multiple Voting Share will entitle the holder to thereof to have ten votes for each share held. The holders of New Non-Voting Shares are entitled to receive notice of any meeting of shareholders of the Corporation and to attend thereat, except those meetings where only the holders of shares of a particular class or of a particular series are entitled to vote. Subject to the provisions of applicable law, a New Non-Voting Share will not entitle the holder thereof to any right to vote at any meeting of shareholders of the Corporation.

5. Conversion of New Multiple Voting Shares at any Time

(a) *Conversion Right*

A holder of New Multiple Voting Shares has the right, at the holder's opinion, at any time to convert all or part of such New Multiple Voting Shares into (i) fully paid and non-assessable New Subordinate Voting Shares on the basis of one New Subordinate Voting Share for each New Multiple Voting Share so converted, provided, at the time of such conversion, the holder is a Canadian holder, or (ii) fully paid and non-assessable New Non-Voting Shares on the basis of one New Non-Voting Share for each New Multiple Voting Share so converted.

(b) *Conversion Procedure*

The conversion right provided for in paragraph B-5(a) may be exercised by notice in writing given to the Corporation at its registered office and to the transfer agent(s) from time to time for the New Multiple Voting Shares, the New Subordinate Voting Shares and New Non-Voting Shares (the "Transfer Agent"), accompanied by the certificate or certificates representing the New Multiple Voting Shares in respect of which the holder thereof desires to exercise such right of conversion. Such notice must be signed by the holder or its duly authorized attorney and must specify the number of New Multiple Voting Shares which the holder desires to have converted. If less than all the New Multiple Voting Shares represented by any certificate or certificates accompanying any such notice are to be converted, the holder will be entitled to receive, at the expense of the Corporation, a new certificate representing the New Multiple Voting Shares comprised in the certificate or certificates surrendered as aforesaid which are not to be converted. On any conversion of New Multiple Voting Shares, the share certificates representing the New Subordinate Voting Shares or New Non-Voting Shares resulting therefrom will be issued in the name of the holder of the New Multiple Voting Shares converted or, subject to payment by the holder of any stock transfer or other applicable taxes, in the name of such person as the holder may direct in writing, provided that in the case of a conversion into New Subordinate Voting Shares such person furnishes the Transfer Agent with a declaration referred to in paragraph B-7(a). The right of a holder of New Multiple Voting Shares to convert the same into New Subordinate Voting Shares or Non-Voting Shares will be deemed to have been exercised, and the holder of New Multiple Voting Shares to be converted (or any person in whose name such holder of New Multiple Voting Shares will have directed certificates representing New Subordinate Voting Shares or New Non-Voting Shares to be issued) will be deemed to have become a holder of New Subordinate Voting Shares or New Non-Voting Shares, as the case may be, of record for all purposes on the date of surrender of the certificate representing the New Multiple Voting Shares to be converted accompanied by notice in writing as referred to above, notwithstanding any delay in the delivery of the certificate representing the New Subordinate Voting Shares or New Non-Voting Shares into which such New Multiple Voting Shares have been converted provided, in the case of a conversion into New Subordinate Voting Shares, that the holder has delivered a declaration referred to in paragraph B-7(a) if such declaration has been requested by the Corporation prior to the issuance of the certificates evidencing the New Subordinate Voting Shares.

6. Conversion of New Subordinate Voting Shares at any Time

(a) *Conversion Right*

A holder of New Subordinate Voting Shares has the right, at the holder's opinion, at any time to convert all or part of such New Subordinate Voting Shares into fully paid and non-assessable New Non-Voting Shares on the basis of one New Non-Voting Share for each New Subordinate Voting Share so converted.

(b) *Conversion Procedure*

The conversion right provided for in paragraph B-6(a) may be exercised by notice in writing given to the Transfer Agent, accompanied by the certificate or certificates representing the New Subordinate Voting Shares in respect of which the holder thereof desires to exercise such right of conversion. Such notice must be signed by the holder or its duly authorized attorney and must specify the number of New Subordinate Voting Shares which the holder desires to have converted. If less that all the New Subordinate Voting Shares representing by any certificate or certificates accompanying any such notice are to be converted, the holder will be entitled to receive, at the expense of the Corporation, a new certificate representing the New Subordinate Voting Shares comprised in the certificate or certificates surrendered as aforesaid which are not to be converted. On any conversion of New Subordinate Voting Shares, the share certificates representing the New Non-Voting Shares resulting therefrom will be issued in the name of the holder of the New Subordinate Voting Shares converted or, subject to payment by the holder of any stock transfer or other applicable taxes, in such name or names as such holder may direct in writing. The right of a holder of New Subordinate Voting Shares to convert the same into New Non-Voting Shares will be deemed to have been exercised, and the holder of New Subordinate Voting Shares to be converted (or any person or persons in whose name or names such holder of New Subordinate Voting Shares will have directed certificates representing New Non-Voting Shares to be issued) will be deemed to have become a holder of New Non-Voting Shares of record for all purposes on the date of surrender of the certificate representing the New Subordinate Voting Shares to be converted accompanied by notice in writing as referred to above, notwithstanding any delay in the delivery of the certificate representing the New Non-Voting Shares into which such New Subordinate Voting Shares have been converted.

7. Conversion of New Non-Voting Shares Upon Proof of Being Canadian

(a) *Declaration*

As used in this Schedule, "declaration" means a statutory declaration under the *Canada Evidence Act*, or such other form of declaration satisfactory to the Corporation, that a holder is a Canadian holder of the equity shares in respect of which the declaration is being delivered.

(b) *Conversion Right*

A holder of New Non-Voting Shares who is a Canadian holder has the right, at the holder's option, at any time to convert all or a part of such New Non-Voting Shares into fully paid and non-assessable New Subordinate Voting Shares on the basis of one New Subordinate Voting Share for each New Non-Voting Share so converted, provided that the holder furnishes to the Transfer Agent a declaration referred to in paragraph B-7(a).

(c) *Conversion Procedure*

The conversion right provided in paragraph B-7(b) may be exercised by notice in writing given to the Transfer Agent, accompanied by the declaration referred to in paragraph B-7(a) and the certificate or certificates representing the New Non-Voting Shares in respect of which the holder thereof desires to exercise such right of conversion. Such notice must be signed by the holder or its duly authorized attorney and must specify the number of New Non-Voting Shares which the holder desires to have converted. If less than all the New Non-Voting Shares represented by any certificate or certificates accompanying any such notice to be converted, the holder will be entitled to receive, at the expense of the Corporation, a new certificate representing the New Non-Voting Shares comprised in the certificate or certificates surrendered as aforesaid which are not to be converted. On any conversion of New Non-Voting Shares, the share certificates representing the New Subordinate Voting Shares resulting therefrom will be issued in the name of the holder of the New Non-Voting Shares converted or, subject to payment by the registered holder of any stock transfer or other applicable taxes, in the name of such person as the holder may direct in writing, provided that such person furnishes the Transfer Agent with a declaration referred to in paragraph B-7(a). The right of a holder of New Non-Voting Shares to convert the same into New Subordinate Voting Shares will be deemed to have been exercised, and the holder of New Non-Voting Shares to be converted (or any person in whose name such holder of New Non-Voting Shares will have directed certificates representing

New Subordinate Voting Shares to be issued) will be deemed to have become a holder of New Subordinate Voting Shares of record for all purposes on the date of surrender of the certificate representing the New Non-Voting Shares to be converted accompanied by the notice in writing and the declaration as referred to above, notwithstanding any delay in the delivery of the certificate representing the New Subordinate Voting Shares into which such New Non-Voting Shares have been converted.

8. Conversion of New Non-Voting Shares Upon the Making of an Exclusionary Offer

(a) *Conversion Right*

Upon the making of an Exclusionary Offer, a holder of New Non-Voting Shares has the right, at the holder's option, at any time during the Conversion Period to convert all or a part of such New Non-Voting Shares on the terms and conditions set forth herein into fully paid and non-assessable New Subordinate Voting Shares on the basis of one New Subordinate Voting Share for each New Non-Voting Share so converted.

(b) *Conversion Procedure*

The conversion right provided for in paragraph B-8(a) may be exercised by notice in writing given to the Transfer Agent, accompanied by the certificate or certificates representing the New Non-Voting Shares in respect of which the holder thereof desires to exercise such right of conversion. Such notice must be signed by the holder or its duly authorized attorney and must specify the number of New Non-Voting Shares which the holder desires to have converted. If less than all the New Non-Voting Shares represented by any certificate or certificates accompanying any such notice are to be converted, the holder will be entitles to receive, at the expense of the Corporation, a new certificate representing the New Non-Voting Shares comprised in the certificate or certificates surrendered as aforesaid which are not to be converted. On any conversion of New Non-Voting Shares pursuant to the right in paragraph B-8(a), the share certificates representing the New Subordinate Voting Shares resulting therefrom will be issued in the name of the holder of the New Non-Voting Shares converted. The right of a holder of New Non-Voting Shares to convert the same into New Subordinate Voting Shares will be deemed to have been exercised, and the holder of New Non-Voting Shares to be converted will be deemed to have become a holder of New Subordinate Voting Shares of record for all purposes on the date of surrender of the certificate representing the New Non-Voting Shares to be

converted accompanied by notice in writing as referred to above, notwithstanding any delay in the delivery of the certificate representing the New Subordinate Voting Shares into which such New Non-Voting Shares have been converted.

(c) *Further Elections*

An election by a holder of New Non-Voting Shares to exercise the conversion right provided for in paragraph B-8(a) shall also constitute irrevocable elections by such holder:

(i) to deposit the Converted Shares under the Exclusionary Offer (subject to such holder's right subsequently to withdraw such Converted Shares from the Exclusionary Offer in accordance with the terms thereof and applicable law);

(ii) to appoint a Canadian trustee (as designated by the Corporation) as the agent, attorney and attorney-in-fact of the holder with respect to the Converted Shares, with full power of substitution, (such power of attorney being coupled with an interest, being irrevocable) to, in the name of, and on behalf of, the holder during the Conversion Period, vote such Converted Shares at any meeting or meetings (whether annual, special or otherwise) of holders of New Subordinate Voting Shares, and to revoke any and all other authority, whether as agent, attorney, attorney-in-fact, proxy or otherwise, conferred or agreed to be conferred by the holder at any time with respect to the Converted Shares or any of them and to covenant that no subsequent authority, whether as agent, attorney, attorney-in-fact, proxy or otherwise, will be granted with respect thereto by or on behalf of the holder; and

(iii) to exercise the right (which right is hereby granted) to convert (the result of such exercise, a "Re-Conversion") into New Non-Voting Shares all Converted Shares in respect of which such holder exercises the holder's right of withdrawal from the Exclusionary Offer or which are not otherwise ultimately taken up and paid for under the Exclusionary Offer, and any Re-Conversion shall be on the basis of one New Non-Voting

Share for each New Subordinate Voting Share in respect of which the Re-Conversion occurs.

(d) *Re-Conversion*

Any Re-Conversion in respect of Converted Shares which have been withdrawn from the Exclusionary Offer shall be effective at the time the right of withdrawal is exercised. Any Re-Conversion in respect of Converted Shares which have not been taken up and paid for under the Exclusionary Offer shall be effective:

(i) in respect of an Exclusionary Offer for less than all the New Subordinate Voting Shares which is completed, immediately following the time by which the Offeror is required under applicable securities legislation to take up and pay for all shares to be acquired by the Offeror under the Exclusionary Offer; and

(ii) in respect of an Exclusionary Offer which is abandoned or withdrawn, at the time at which the Exclusionary Offer is abandoned or withdrawn.

(e) *Deliveries*

No share certificates representing Converted Shares shall be delivered to or to the order of the holders thereof before such shares have been deposited under the Exclusionary Offer, and the Transfer Agent, on behalf of the holders of the Converted Shares, shall deposit, and the holders of such shares shall be deemed to have irrevocably authorized and directed the Transfer Agent to deposit, under the Exclusionary Offer, the certificate or certificates representing the Converted Shares. Upon completion of the Exclusionary Offer, the Transfer Agent shall deliver or cause to be delivered to the holders entitled thereto all consideration paid by the Offeror under the Exclusionary Offer in respect of Converted Shares. On any Re-Conversion, the Transfer Agent shall deliver to each holder entitled thereto a share certificate representing the New Non-Voting Shares resulting from the Re-Conversion. The Corporation shall make all arrangements with the Transfer Agent necessary or desirable to give effect to this paragraph B-8(e).

(f) *Notice*

As soon as reasonably practicable after the Offer Date, the Corporation shall mail, by prepaid first class mail, to each holder of New Non-Voting Shares a notice advising such holders

that they are entitled to convert their New Non-Voting Shares into New Subordinate Voting Shares under paragraph B-8(a) and the reasons therefor. Such notice shall:

(i) include a description of the procedure to be followed to effect the conversion and to have the Converted Shares tendered under the Exclusionary Offer;

(ii) include the information set out in subparagraphs B-8(c)(i)-(iii); and

(iii) be accompanied by a copy of the Exclusionary Offer and all other material sent to holders of New Subordinate Voting Shares in respect of the offer, and as soon as is reasonably practicable after any additional material, including a notice of variation, is sent to the holders of New Subordinate Voting Shares in respect of the offer, the Corporation shall send a copy of such additional material to each holder of New Non-Voting Shares.

(g) *Press Release*

Before or forthwith after sending any notice referred to in paragraph B-8(f), the Corporation shall cause a press release to be issued to a Canadian and United States national news wire service describing the contents of the notice.

9. Restriction on Issuance or Transfer of Shares to Non-Canadians

(a) *Restriction on Issuance*

The Corporation may not issue New Subordinate Voting Shares to a Non-Canadian. The Transfer Agent shall not register any issuance of New Subordinate Voting Shares in the securities register of the Corporation, unless contemporaneously with the issuance, the holder furnishes the Transfer Agent with a declaration referred to in paragraph B-7(a). Notwithstanding such restriction, if, for whatever reason, the Corporation issues New Subordinate Voting Shares to a Non-Canadian, the Non-Canadian holder shall immediately thereafter convert such New Subordinate Voting Shares into fully paid and non-assessable New Non-Voting Shares in accordance with paragraph B-6. If a Non-Canadian holder fails to convert such New Subordinate Voting Shares, the holder shall be deemed to have converted such shares into New Non-Voting Shares immediately after the issuance thereof on the basis of one New Non-Voting Share for each New Subordinate Voting Share deemed to be so converted.

If New Subordinate Voting Shares are issued to a Non-Canadian, the Non-Canadian holder shall immediately deliver to the Transfer Agent the certificate(s) representing such New Subordinate Voting Shares. Upon receipt of the certificate(s) representing the New Subordinate Voting Shares, the Transfer Agent shall deliver certificate(s), issued in the name of the Non-Canadian holder, representing the New Non-Voting Shares into which such shares have been converted. Any such Non-Canadian holder will be deemed to have become a holder of New Non-Voting Shares of record for all purposes at the time the New Subordinate Voting Shares are issued, notwithstanding any delay in the delivery of the certificates representing the New Subordinate Voting Shares being converted or the New Non-Voting Shares into which such shares have been converted.

(b) *Restriction on Transfer*

A holder may not transfer New Subordinate Voting Shares to a Non-Canadian holder unless such shares are first converted into fully paid and non-assessable New Non-Voting Shares in accordance with paragraph B-6. If the holder fails to convert New Subordinate Voting Shares prior to a transfer referred to in the immediately preceding sentence, the holder shall be deemed to have converted such shares into New Non-Voting Shares immediately prior to such transfer on the basis of one New Non-Voting Share for each New Subordinate Voting Share deemed to be so converted.

The Transfer Agent shall not register any transfer of New Subordinate Voting Shares in the securities register of the Corporation unless contemporaneously with the transfer, the transferee furnishes the Transfer Agent with (i) a declaration referred to in paragraph B-7(a), and (ii) the certificate or certificates representing the New Subordinate Voting Shares to be transferred.

Where the Transfer Agent is not furnished with the declaration but is furnished with the certificate or certificates representing the transferred shares, the Transfer Agent shall register the transfer in the securities register of the Corporation as a conversion by the transferor of such New Subordinate Voting Shares into New Non-Voting Shares and a subsequent transfer by the transferor of New Non-Voting Shares to the transferee. The share certificates representing such New Non-Voting Shares will be issued in the name of the transferee. Thereafter, the transferee will be deemed to have become a holder of New Non-Voting Shares of record for all purposes on

the date of surrender of the certificate or certificates representing the New Subordinate Voting Shares being converted and transferred, notwithstanding any delay in the delivery of the certificate representing the New Non-Voting Shares into which such shares have been converted.

10. Subdivision or Consolidation

None of the New Multiple Voting Shares, the New Subordinate Voting Shares or the New Non-Voting Shares will be subdivided, consolidated, reclassified or otherwise changed unless contemporaneously therewith the shares of such other classes are subdivided, consolidated, reclassified or otherwise changed in the same proportion or the same manner.

11. Restrictions on Additional Issuances

If the Corporation proposes to grant options, rights or warrants to holders of shares of any class, as a class, to acquire additional participating securities (whether voting or not voting), securities convertible into the foregoing, or to make any other distribution of property or assets, then the holders of New Multiple Voting Shares, New Subordinate Voting Shares and New Non-Voting Shares will, for such purpose, be deemed to be holders of shares of the same class of shares. Notwithstanding the foregoing, if the Corporation proposes to grant or distribute options, rights or warrants to acquire additional equity shares or securities convertible into equity shares, the Corporation shall grant or distribute (i) to the holders of New Multiple Voting Shares options, rights or warrants to acquire additional New Multiple Voting Shares or securities convertible into New Multiple Voting Shares, provided that (A) each Canadian holder of New Multiple Voting Shares may elect at the time of exercise or conversion, as the case may be, in the manner prescribed by the Board of Directors from time to time, to acquire in lieu thereof New Subordinate Voting Shares or New Non-Voting Shares and (B) each Non-Canadian holder of New Multiple Voting Shares may elect at the time of exercise or conversion, as the case may be, in the manner prescribed by the Board of Directors from time to time, to acquire in lieu thereof New Non-Voting Shares, (ii) to the Canadian holders of New Subordinate Voting Shares options, rights or warrants to acquire additional New Subordinate Voting Shares or securities convertible into New Subordinate Voting Shares, provided that each Canadian holder of New Subordinate Voting Shares may elect at the time of exercise or conversion, as the case may be, in the manner prescribed by the Board of Directors from time to time, to acquire in lieu thereof New Non-Voting Shares, and (iii) to the Non-Canadian holders of New Subordinate Voting Shares and to the holders of New Non-Voting Shares options, rights or warrants to acquire

additional New Non-Voting Shares or securities convertible into New Non-Voting Shares, provided that such options, rights or warrants or convertible securities entitle the holders of each such class to acquire, per share, the same number of additional New Multiple Voting Shares, New Subordinate Voting Shares or New Non-Voting Shares, as the case may be, or securities convertible into the same.

Canadian holders of New Multiple Voting Shares and New Subordinate Voting Shares who wish to acquire pursuant to this paragraph B-11 additional New Subordinate Voting Shares may be required to furnish the Transfer Agent with a declaration referred to in paragraph B-7(a).

12. Modification

The provisions attaching to the New Multiple Voting Shares as a class, to the New Subordinate Voting Shares as a class, or to the New Non-Voting Shares as a class will not be added to, removed or changed unless the addition, removal or change is first approved by the separate affirmative vote of two-thirds of the votes cast at meetings of the holders of the shares of each such class.

13. Equality

Subject to the foregoing provisions, the New Multiple Voting Shares, the New Subordinate Voting Shares and the New Non-Voting Shares rank equally in all respects and no rights may be conferred upon the holders of the shares of any such class without conferring the same rights on the holders of the other such classes.

Exhibit "A"

Form of Transfer Notice

TO: **COMPUTERSHARE TRUST COMPANY OF CANADA**
600, 530 – 8th Avenue SW,
Calgary, Alberta T2P 3S8

COPY TO: **7316712 CANADA INC.**
900, 630 – 3rd Avenue SW,
Calgary, Alberta T2P 4L4

FROM: **CANWEST GLOBAL COMMUNICATIONS CORP.**

DATE: ●, 2010

All capitalized terms in this Transfer Notice that are not defined herein have the respective meanings given to such terms in the share provisions attaching to the New Preferred Shares of Canwest Global Communications Corp.

In accordance with the share provisions attaching to the New Preferred Shares, Canwest Global Communications Corp. hereby gives notice of the Transfer to the Transfer Agent and the Shaw Designated Entity.

CANWEST GLOBAL COMMUNICATIONS CORP.

By: _____
Name:
Title:

By: _____
Name:
Title:

DATE on which this Transfer Notice is delivered to the Transfer Agent:

_____

TIME on the Transfer Date at which this Transfer Notice is delivered to the Transfer Agent:

_____

SCHEDULE II

Restrictions on Issuance and Transfer of Shares

1. Constrained Share Corporation

In order to enable the Corporation or any of its Associates to qualify under the Broadcasting Act or any other Prescribed Law to obtain or renew a licence to carry on any business, the Corporation is a constrained share corporation and the issue and transfer of its Shares are constrained as hereinafter provided.

1.1 Interpretation

In this Schedule II, all terms which are not otherwise defined have the meanings attributed to those terms in the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44 (the "Act") and in the *Canada Business Corporations Regulations* (the "Regulations"), both as amended from time to time, and words importing the singular include the plural and vice versa and words importing gender include masculine, feminine and neuter genders.

1.2 Definitions

In this Schedule II:

1.2.1 "**Associate**", when used to indicate a relationship with any person, includes

(a) a partner of the person,

(b) a trust or an estate in which the person has a substantial beneficial interest or in respect of which the person serves as a trustee or in a similar capacity,

(c) a spouse, common-law spouse, son, daughter, son-in-law or daughter-in-law of the person,

(d) a relative, not referred to in paragraph (c) above, of the person, or of the person's spouse or common-law spouse, who has the same residence as that person,

(e) a corporation of which that person alone or a person together with one or more Associates as described in this definition has, directly or indirectly, control of more than 50% of the issued voting securities,

(f) a corporation of which an Associate as described in this definition, of the person has, directly or indirectly, control of more than 50% of the issued voting securities, and

(g) a person, with whom the person has entered into an arrangement, a contract, an understanding or an agreement in respect of the voting of shares of a Broadcasting Undertaking or of a corporation that has, directly or indirectly, effective control of a Broadcasting Undertaking, except where that person controls less than one percent of all issued Voting Shares of a corporation whose shares are publicly traded on a stock exchange;

1.2.2 "**Broadcasting Act**" means the *Broadcasting Act* 1991, S.C. 1991, c. 11 together with the regulations thereunder, Orders in Council and Directions pursuant thereto, and the terms of licences issued thereunder, as the same may from time to time be amended, restated, re-enacted, replaced or supplemented;

1.2.3 "**Broadcasting Undertaking**" means any business or undertaking in respect of which the Corporation, or any person over which the Corporation has direct or indirect effective control, has obtained a broadcasting licence under the Broadcasting Act and in respect of which the prior approval of the CRTC is a condition to any Change of Control Transaction;

1.2.4 "**Canadian**" means

(a) a citizen within the meaning of subsection 2(1) of the *Citizenship Act* who is ordinarily resident in Canada,

(b) a permanent resident of Canada within the meaning of subsection 2(1) of the *Immigration Act* who is ordinarily resident in Canada and has been ordinarily resident in Canada for not more than one year after the date on which that person first became eligible to apply for Canadian citizenship;

(c) a Canadian government, whether federal, provincial or local, or an agency thereof, subject to the *Direction to the CRTC (Ineligibility to Hold Broadcasting Licenses)*,

(d) a corporation without share capital where a majority of its directors or, where the corporation has no directors, those performing functions that are similar to the functions performed by directors, as the case may be, are appointed or designated, either by their personal names or by their names of office, by one or more of,

(i) a federal or provincial statute or regulation,

(ii) the Governor in Council or the lieutenant governor in council of a province, or

(iii) a minister of the Crown in right of Canada or a province,

(e) a Qualified Corporation,

(f) a Qualified Mutual Insurance Company,

(g) a Qualified Pension Fund Society, or

(h) a Qualified Co-operative;

1.2.5 "**Canadian holder**" means a holder of New Multiple Voting Shares, New Subordinate Voting Shares or New Non-Voting Shares who is a Canadian and one or more Canadians beneficially own and Control, directly or indirectly and otherwise than by way of security only, such shares;

1.2.6 "**CRTC**" means the Canadian Radio-television and Telecommunications Commission;

1.2.7 "**Change of Control Transaction**" means any act, agreement or transaction that, directly or indirectly, would result in,

(a) a change by whatever means of the effective control of one or more Broadcasting Undertaking,

(b) a person alone or a person together with its Associates (a) who Controls less than 30 per cent of the issued Voting Shares of the Corporation or of a person that has, directly or indirectly, effective control of the Broadcasting Undertaking, having Control of 30 per cent or more of such issued Voting Shares, or (b) who owns less than 50 per cent of the issued Shares of the Corporation or of a person that has, directly or indirectly, effective control of the Broadcasting Undertaking, owning 50 per cent or more of such issued Shares, or

(c) a conflict with the requirements of any of the broadcasting licenses held by the Corporation or its subsidiaries with respect to the ownership or effective control of one or more Broadcasting Undertakings,

in each case, as construed in accordance with or determined pursuant to the Broadcasting Act;

1.2.8 "**Constrained Class**" means the class of persons to any of whom an issue or transfer of Shares may, in the opinion of the directors of the Corporation, adversely affect the ability of the Corporation or any of its Associates to qualify under the Broadcasting Act or any other Prescribed Law to obtain or renew a licence to carry on any business, including, without limitation, a licence to carry on a Broadcasting Undertaking, and shall include, without limiting the generality of the foregoing:

(a) in relation to the determination of Maximum Aggregate Holdings, Non-Canadian holders, and

(b) in relation to the determination of Maximum Individual Holdings, (i) any person together with its Associates who, in the opinion of the directors of the Corporation, either alone or jointly or in concert with any other persons, intend to engage in a Change of Control Transaction without the prior approval of the CRTC (collectively, an "Acquiror") or (ii) any Non-Canadian holder;

1.2.9 "**Control**" means control in any manner that results in control in fact, whether directly through the ownership of securities or indirectly through a trust, agreement or arrangement, the ownership of a corporation or otherwise;

1.2.10 "**effective control**" of a Broadcasting Undertaking includes situations in which,

(a) a person owns, beneficially owns or controls, directly or indirectly, other than by way of security only, a majority of the voting securities of such Broadcasting Undertaking,

(b) a person has the ability to cause such Broadcasting Undertaking or its board of directors to undertake a course of action, or

(c) the CRTC, after a public hearing of an application for a Broadcasting Undertaking, or in respect of an existing Broadcasting Undertaking, determines that a person has such effective control and sets out that determination in a decision or public notice;

1.2.11 "**holder**" means the holder of Shares as registered on the books of the Corporation;

1.2.12 "**Maximum Aggregate Holdings**" means that number of Voting Shares of the Corporation held by Non-Canadian holders that would represent 33⅓% of all Voting Shares of the Corporation then outstanding;

1.2.13 "**Maximum Individual Holdings**" means (i) the maximum number of Shares of the Corporation which any Acquiror may, in the opinion of the directors of the Corporation own, beneficially own or Control, directly or indirectly, without being a party to a Change of Control Transaction, or (ii) the maximum number of Voting Shares of the Corporation that may be issued or transferred to a Non-Canadian holder without Non-Canadian holders, in the aggregate, holding Voting Shares of the Corporation in excess of the Maximum Aggregate Holdings;

1.2.14 "**New Non-Voting Share**" means a Share which is not a Voting Share;

1.2.15 "**Non-Canadian**" means a person or entity that is not a Canadian;

1.2.16 "**Non-Canadian holder**" means a registered holder who is not a Canadian holder;

1.2.17 "**person**" includes an individual, a partnership, a joint venture, an associate, a corporation, a trust, an estate, a trustee, an executor and an administrator, or a legal representative of any of them;

1.2.18 "**Prescribed Law**" means any law of Canada or a province of Canada which is currently or hereafter prescribed pursuant to or referred to in the Act or the Regulations for the purposes of the definition of "constraint" applicable to the Corporation;

1.2.19 "**Qualified Co-operative**" means a co-operative, not less than 80 per cent of the members of which are Canadians, that is established under an Act of Parliament or any provincial legislation relating to the establishment of co-operatives;

1.2.20 "**Qualified Corporation**" means a corporation incorporated or continued under the laws of Canada or a province, where,

(a) the chief executive officer or, where the corporation has no chief executive officer, the person performing functions that are similar to the functions performed by a chief executive officer, and not less than 80 per cent of the members of the board of directors are Canadians,

(b) in the case of a corporation having share capital, Canadians beneficially own and Control, directly or indirectly, in the aggregate and otherwise than by way of security only, not less than 80 per cent of all the issued and outstanding Voting Shares of the corporation, and

(c) in the case of a corporation that is a Subsidiary Corporation of a parent corporation incorporated or continued under the laws of Canada or a province,

(i) Canadians beneficially own and Control, directly or indirectly, in the aggregate and otherwise than by way of security only, not less than 66⅔ per cent of all of the issued and outstanding Voting Shares of the parent corporation,

(ii) the parent corporation, its board of directors, directors or other similar officers do not exercise Control or influence over any programming decisions of the Subsidiary Corporations;

1.2.21 "**Qualified Mutual Insurance Company**" means a mutual insurance company, the head office and principal place of business of which are in Canada and not less than 80 per cent of the board of directors of which and of each committee of the directors of which are Canadians;

1.2.22 "**Qualified Pension Fund Society**" means a pension fund society, not less than 80 per cent of the board of directors of which and of each committee of the directors of which are Canadians, and that is established under *An Act to Incorporate the Pension Fund of the Dominion Bank*, S.C. 1887, c. 55, S.C. 1956, c. 66, *An Act to Incorporate the Pension Fund Society of the Bank of Montreal*, S.C. 1885, c. 13, the *Pension Fund Society Act* or any provincial legislation relating to the establishment of pension fund societies;

1.2.23 "**Shares**" means a Voting Share or other share that represents the residual equity in the earnings of a corporation and includes the preferred shares to which are attached rights to participate in the earnings of the corporation with no upper limit;

1.2.24 "**Subsidiary Corporation**" means a corporation that is Controlled by another corporation; and

1.2.25 "**Voting Share**" means a share of any class of shares of a corporation carrying voting rights under all circumstances or by reason of any event that has occurred and is continuing or by reason of a condition that has been fulfilled, and includes,

(a) a security that is convertible into such a share at the time a calculation of the percentage of shares owned and Controlled by Canadians is made, and

(b) an option or a right to acquire such a share, or the security referred to in clause (i), that is exercisable at the time the calculation referred to in that paragraph is made.

2. Duties of Directors

The directors of the Corporation may, from time to time, refuse to issue a Share or to register a transfer of any Share to a person who is a member of the Constrained Class, where in the opinion of the directors of the Corporation, such issuance or transfer may jeopardize the ability of the Corporation or its subsidiaries to qualify under the Broadcasting Act or any other Prescribed Law to obtain or renew a licence to carry on business, including, without limiting the

generality of the foregoing, the ability of the Corporation or its subsidiaries to maintain its broadcasting licences on terms at least as favourable as those in effect at the relevant time or to obtain any new broadcasting licences or to renew any existing licences on substantially similar terms, and, except as otherwise specifically authorized by the Act or the Regulations, the directors of the Corporation shall not issue a Share and shall refuse to register a transfer of a Share if, to the knowledge of the directors:

(a) the total number of Voting Shares held by or on behalf of persons in the Constrained Class exceeds the Maximum Aggregate Holdings and the transfer or issuance is to a member of the Constrained Class;

(b) the total number of Voting Shares held by or on behalf of persons in the Constrained Class does not exceed the Maximum Aggregate Holdings and the transfer or issuance would cause the number of Voting Shares held by the Constrained Class to exceed the Maximum Aggregate Holdings;

(c) the total number of Shares held by or on behalf of a person in the Constrained Class exceeds the Maximum Individual Holdings and the transfer or issuance is to that person; or

(d) the total number of Shares held by or on behalf of a person in the Constrained Class does not exceed the Maximum Individual Holdings and the transfer or issuance would cause the number of Shares held by that person to exceed the Maximum Individual Holdings.

The directors of the Corporation may refuse to issue a Share and may refuse to register a transfer of a Share in the event that a person does not provide a declaration which may be required pursuant to any of the articles or by-laws of the Corporation.

3. Directors Empowered to Make By-laws

The directors of the Corporation may make, amend or repeal any by-laws they deem necessary or appropriate to administer the constraints provided for herein including by-laws:

(a) to require any person in whose name Shares of the Corporation are registered to furnish a statutory declaration under the *Canada Evidence Act*, or a declaration in such other form as the directors deem appropriate, declaring whether

(i) the shareholder and every person who beneficially owns or Controls such Shares of the Corporation is a Canadian, and

(ii) the shareholder is an Associate of any other shareholder,

and any further facts that the directors consider relevant;

(b) to require any person seeking to have a transfer of a Share registered in his name or to have a Share issued to him to furnish a declaration similar to the declaration a shareholder may be required to furnish under paragraph (a) above; and

(c) to determine the circumstances under which any declarations are required, their form and the time within which they are to be furnished.

4. Opinion of Directors

Where the directors are required pursuant to these share constraints to make a determination or to express an opinion on any matter, such determination or opinion shall be expressed and conclusively evidenced by a resolution of the directors to that effect, duly adopted.

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 CANWEST GLOBAL COMMUNICATIONS CORP., AND THE OTHER APPLICANTS LISTED ON SCHEDULE "A"

APPLICANTS

Court File No: CV-09-8396-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceeding commenced at Toronto

PLAN SANCTION ORDER

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PLAN OF COMPROMISE OR ARRANGEMENT

PURSUANT TO THE
***COMPANIES' CREDITORS ARRANGEMENT ACT* (CANADA)**

concerning, affecting and involving

TELEGLOBE INC.
TELEGLOBE FINANCIAL HOLDINGS LTD.
TELEGLOBE CANADA LIMITED PARTNERSHIP
TELEGLOBE MANAGEMENT SERVICES INC.
TELEGLOBE MARINE, INC.
TELEGLOBE MARINE, L.P.
TELEGLOBE CANADA MANAGEMENT SERVICES INC.
3692795 CANADA INC.
TELEGLOBE VISION CALL CENTER SERVICES, GENERAL PARTNERSHIP

January 26, 2005

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TELEGLOBE MARINE, L.P.
TELEGLOBE CANADA MANAGEMENT SERVICES INC.
3692795 CANADA INC.
TELEGLOBE VISION CALL CENTER SERVICES, GENERAL PARTNERSHIP

ARTICLE 1
INTERPRETATION

1.1 Definitions

In this Plan, including the attached Schedules:

"**7.2% Debentures**" means the 7.2% Debentures due July 20, 2009, issued and outstanding under the 1999 Indenture;

"**7.7% Debentures**" means the 7.7% Debentures due July 20, 2029, issued and outstanding under the 1999 Indenture;

"**8% Debentures**" means the 8% Debentures due October 23, 2026, issued and outstanding under the 1996 Indenture;

"**8.35% Debentures**" means the 8.35% Debentures due June 20, 2003, issued and outstanding under the 1993 Indenture;

"**8.85% Debentures**" means the 8.85% Debentures due November 15, 2002, issued and outstanding under the 1992 Indenture;

"**1992 Indenture**" means that certain indenture, dated as of November 16, 1992, regarding the 8.85% Debentures, among TINC, as successor to Teleglobe Canada Inc., as issuer of the 8.85% Debentures, THUSC, as subsidiary guarantor, and the Canadian Indenture Trustee;

"**1993 Indenture**" means that certain indenture, dated as of April 7, 1993, regarding the 8.35% Debentures, among TINC, as successor to Teleglobe Canada Inc., as issuer of the 8.35% Debentures, THUSC, as subsidiary guarantor, and the Canadian Indenture Trustee;

"**1996 Indenture**" means that certain indenture, dated as of October 23, 1996, regarding the 8% Debentures, among TINC, as successor to Teleglobe Canada Inc., as issuer of the 8% Debentures, THUSC, as subsidiary guarantor, and the Canadian Indenture Trustee;

"**1999 Indenture**" means that certain indenture, dated as of July 20, 1999, regarding the 7.2% Debentures and the 7.7% Debentures, among TINC, as issuer of the 7.2% Debentures and the 7.7% Debentures, THUSC, as subsidiary guarantor, and the U.S. Indenture Trustee;

"**Bondholders**" means the beneficial holders of the Debentures;

"**Bondholder Committee**" means an ad hoc committee of certain Bondholders of the Canadian Debtors;

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

"**Calendar Day**" means any day, including a Saturday, Sunday or statutory holiday in Toronto, Ontario;

"**Canadian Debtors**" means: (A) TINC; (B) Teleglobe Financial Holdings Ltd.; (C) Teleglobe Canada Limited Partnership; (D) Teleglobe Management Services Inc.; (E) Teleglobe Marine, Inc.; (F) Teleglobe Marine, L.P.; (G) Teleglobe Canada Management Services Inc.; (H) 3692795 Canada Inc.; and (I) Teleglobe Vision Call Center Services, General Partnership, and, to the extent the context permits, "**Canadian Debtors**" includes the Interim Receiver acting on behalf of the Canadian Debtors in such capacity pursuant to the Interim Receivership Order, and "**Canadian Debtor**" means any one of them;

"**Canadian Debtors' Claims**" means any and all claims, causes or rights of action (whether by contract, in equity, by way of indemnity, by statute or otherwise), including any claims under any applicable insurance policies, that any of the Canadian Debtors or the Interim Receiver (including derivatively) may have against any Person whatsoever (including any former or present officer, director, shareholder, agent, or advisor of any of the Canadian Debtors), and, for greater certainty, including any and all claims in respect of that certain officers and directors' trust created on May 14, 2002, together with (i) any and all documents in the possession, power or control of any of the Canadian Debtors relating to such claims; and (ii) any rights, powers or privileges (including solicitor / client privilege) associated with such claims; provided that this excludes the claims of the Canadian Debtors arising in respect of the Canadian VarTec Note; and excludes any agreements or matters expressly approved by the Court from and after the Filing Date as part of the CCAA proceedings;

"**Canadian Dollars**" or "**CDN.$**" means dollars denominated in lawful currency of Canada;

"**Canadian Indenture Trustee**" means Montreal Trust Company, as trustee pursuant to the 1992 Indenture, the 1993 Indenture and the 1996 Indenture;

"**Canadian VarTec Note**" means that certain promissory note dated April 2002 in the amount of US$10,000,000 issued by VarTec Telecom, Inc. and/or VarTec Telecom Holding Company in favour of TINC;

"**CCAA**" means the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended;

"**CCAA Proceedings**" means the proceedings in respect of the Canadian Debtors under the CCAA commenced pursuant to the Initial Order;

"**Chair**" means an official of the Monitor designated by the Monitor to preside as the chair of the Meeting;

"**Charge**" means a valid and enforceable security interest, lien, charge, pledge, encumbrance, mortgage, hypothec, adverse claim, title retention agreement or trust agreement of any nature or kind (but excluding any statutory deemed trust or lien for any taxes or levies), on any assets, property or proceeds of sale of any of the Canadian Debtors or a right of ownership on any equipment that is or was leased by any of the Canadian Debtors;

"**Claim**" means any right of any Person against any one or more of the Canadian Debtors in connection with any indebtedness, liability or obligation of any kind of any one or more of the Canadian Debtors, whether liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, unsecured, present, future, known or unknown, by guarantee, surety or otherwise, and whether or not such right is executory in nature, including any claim made or asserted against any one or more of the Canadian Debtors through any affiliate, associate or related Person or the right or ability of any Person to advance a claim for contribution or indemnity or otherwise with respect to any matter, action, cause or chose in action, whether existing at present or commenced in the future, which indebtedness, liability or obligation is based in whole or in part on facts existing prior to the Filing Date or which would have been claims provable in bankruptcy had the affected Canadian Debtor become bankrupt on the Filing Date and any indebtedness, liability or obligation of any kind arising out of the termination of any lease, contract, employment agreement or other agreement or other agreement between the Filing Date and the Plan Implementation Date, including the portion of the Post-Filing Claim, if any, which is compromised in accordance with the Plan; provided however, that "Claim" shall not include an Unaffected Claim;

"**Claims Officer**" means the claims officer, as designated by the Court pursuant to the Order dated November 26, 2004, or any other individual or individuals so designated by the Court;

"**Claims Procedure Order**" means, collectively, the Orders pronounced on November 13, 2002, September 12, 2003 and November 26, 2004, which Orders, *inter alia*, confirm the procedure for determining the Claims of Unsecured Creditors;

"**Core Telecommunications Business**" means the Debtors' North American routed international long distance voice and data telecommunications services business that was the subject of the Purchase Agreement;

"**Court**" means the Superior Court of Justice (Commercial List) in the Province of Ontario;

"**Credit Agreements**" mean, collectively: (i) that certain Facility A 364-Day Revolving Credit Agreement, dated as of July 24, 2000, as amended, supplemented or otherwise modified from time to time, among, *inter alia*, certain of the Debtors and certain lenders; (ii) that certain Facility B 364-Day Revolving Credit Agreement, dated as of July 24, 2000, as amended, supplemented or otherwise modified from time to time, among, *inter alia*, certain of the Debtors and certain lenders; and (iii) that certain Revolving Credit Agreement, dated as of July 23, 2001, among, *inter alia*, certain of the Debtors and certain lenders;

"**Creditor**" means any Person having a Claim against any one or more of the Canadian Debtors to the extent of that Claim and may, where the context requires, include the assignee of a Claim, or a trustee, interim receiver, receiver, receiver and manager, liquidator or other Person acting on behalf of such Person;

"**Debentures**" means collectively: (A) the 7.2% Debentures, (B) the 7.7% Debentures, (C) the 8% Debentures, (D) the 8.35% Debentures, and (E) the 8.85% Debentures;

"**Debtors**" means, collectively, the Canadian Debtors and the U.S. Debtors;

"**Debtors' Claims**" means, collectively, the Canadian Debtors' Claims and the U.S. Estate Claims;

"**Distribution Claim**" of an Unsecured Creditor means the amount of the Claim of such Unsecured Creditor, in each case as finally determined or accepted for distribution purposes in accordance with the provisions of this Plan and the Claims Procedure Order;

"**Distribution Record Date**" means, in respect of any distribution that is to be made pursuant to Article 5.2 of this Plan, the date that is seven (7) Business Days prior to the date on which the distribution in question is to be made;

"**Filing Date**" means May 15, 2002;

"**Final Distribution Date**" means the date upon which the final distribution is made by the Plan Administrator to Creditors holding Distribution Claims entitled thereto in accordance with the priorities and restrictions set forth in this Plan; provided that such date shall not be prior to the date on which all Unresolved Claims have been fully and finally determined in accordance with the Claims Procedure Order and this Plan;

"**Initial Order**" means the Order made in respect of the Canadian Debtors on the Filing Date under the CCAA, as amended, extended or varied from time to time;

"**Intercompany Claim**" means a Claim of any of the Debtors against any other one or more of the Canadian Debtors in relation to inter-corporate advances including any advances prior to or after the date of the Initial Order, save and except only for any intercompany advances provided for or actually advanced relating to or in respect of the Sale Proceeds Allocation Agreement;

"**Interim Administrator**" means Ernst & Young Inc., solely in its capacity as Interim Administrator of the Canadian Debtors appointed pursuant to the Interim Receivership Order;

"**Interim Receiver**" means Kroll Restructuring Ltd., solely in its capacity as Interim Receiver of the Canadian Debtors appointed pursuant to the Interim Receivership Order;

"**Interim Receivership Order**" means the Order of the Court dated February 19, 2003 whereby, *inter alia*, the Interim Receiver was appointed;

"**Lease**" means any lease, sublease, licence, sublicence, agreement to lease, offer to lease or other agreement or arrangement, whether written, oral or otherwise, to which any of the Canadian Debtors is a party in respect of real or personal property, as the case may be, and includes all amendments and supplements thereto and all documents ancillary thereto existing as at the Filing Date;

"**Litigation Protocol**" means the Teleglobe U.S.-Canadian Litigation Protocol, which, in conjunction with the Plan Administration Agreement, shall govern the prosecution, investigation, funding and disposition of all Debtors' Claims and the distribution of any proceeds arising therefrom, a copy of which is attached to this Plan as Schedule "C";

"**Litigation Reserve**" means cash to be held in one account in the aggregate initial amount of 10 million U.S. Dollars which shall be funded from funds equally from the Canadian Debtors and the estates of the U.S. Debtors, which Litigation Reserve can be supplemented from time to time in accordance with this Plan, the Plan Administration Agreement and the Litigation Protocol, established and funded on the Plan Implementation Date for the purpose of satisfying the professional fees and costs associated with the pursuit of the Debtors' Claims;

"**Meeting**" means the meeting of the Unsecured Creditors' Class called for the purpose of considering and voting in respect of this Plan pursuant to the CCAA, as same may be adjourned or rescheduled in accordance with the terms of this Plan;

"**Meeting Order**" means the Order of the Honourable Mr. Justice Farley dated November 26, 2004, as the same may be amended and supplemented, ordering and declaring the procedures to be followed in connection with the Meeting;

"**Monitor**" means Ernst & Young Inc., in its capacity as Court-appointed Monitor pursuant to the Initial Order, and any successor thereof;

"**Net Proceeds**" means, for the purpose of Article 5.1 of this Plan, the quantum of the proceeds in question net of all adjustments, taxes, Reserves, holdbacks, withholdings and costs, including the remuneration and disbursements of the Plan Administrator or the

Interim Receiver, as the case may be, together with the remuneration and costs of the respective professional advisors, that arise in connection with and relate to such proceeds, or to which such proceeds are subject;

"**Operating Reserve**" means cash from the Canadian Debtors to be set aside on the Plan Implementation Date, or as soon as practicable thereafter, and held by the Plan Administrator which shall be available and used exclusively to pay the reasonable and necessary post-Plan Implementation Date expenses incurred in connection with this Plan, the Plan Administration Agreement or the within proceedings by the Canadian Debtors, or for which the Canadian Debtors, the Plan Administrator or the Plan Committee is responsible under this Plan, including any respective professional fees incurred after the Plan Implementation Date and any professional fees incurred after the Filing Date that remain unpaid following the Plan Implementation Date; provided, however, that: (i) any funds remaining in the Operating Reserve after payment in full of all items identified above shall become available for distribution on account of any other payments required or permitted to be made under the Plan; and (ii) for greater certainty, all expenses in respect of the pursuit of the Debtors' Claims are to be paid from the Litigation Reserve and not from the Operating Reserve;

"**Order**" means any order of the Court in the CCAA Proceedings;

"**Persons**" includes all of the Canadian Debtors' current and former shareholders and directors, creditors, customers, employees, retirees, pension plans, suppliers, contractors, lenders, factors, customs brokers, purchasing agents, landlords and lessors (including equipment lessors and lessors of real property and immoveables), sub-landlords, tenants, sub-tenants, licensors and licensees (including software or source code licensors and licensees), issuers of permits or holders of permits, grantors of indefeasible rights of use or holders of indefeasible rights of use, joint venture partners, partners, the federal and provincial Crown, municipalities or any other entity exercising executive, legislative, judicial, regulatory or administrative functions of or pertaining to government in Canada, the United States of America or elsewhere, and any corporation or other entity owned or controlled by or which is the agent of any of the foregoing, and any other person, firm, corporation or entity wherever situate or domiciled, and "**Person**" means any one of them;

"**Plan**" or "**Canadian Plan**" means this plan of compromise or arrangement filed by the Interim Receiver, on behalf of the Canadian Debtors, under the CCAA, as such Plan may be amended, varied or supplemented by the Interim Receiver or the creditors of the Canadian Debtors from time to time in accordance with its terms;

"**Plan Administration Agreement**" means the Agreement between the Debtors (or their successors, as the case may be), the Plan Administrator and the Plan Committee, specifying the rights, duties and responsibilities of and to be performed by the Plan Administrator under this Plan and the U.S. Plan, in substantially the form set forth in Schedule "A" hereto;

"**Plan Administrator**" means the Person designated pursuant to Article 6.1 of the Plan and approved by the Court pursuant to the Sanction Order to administer this Plan as it relates to the Canadian Debtors in accordance with the terms of the Plan Administration

Agreement and to take such other actions as may be authorized under the Plan Administration Agreement, and any successor Plan Administrator thereto as may be appointed by the Plan Committee subsequent to the Plan Implementation Date in accordance with Section 2.7 of the Plan Administration Agreement;

"**Plan Committee**" means the committee as implemented under Article 7.1 of this Plan.

"**Plan Implementation Date**" means the Business Day on which the conditions to this Plan as set out in the Plan have been satisfied, fulfilled or waived, which date shall not be more than 180 Calendar Days after the date of the Sanction Order unless otherwise ordered by the Court;

"**Post-Filing Claims**" means any claims against any one of the Canadian Debtors that arose from the provision of authorized goods and services provided or otherwise incurred on or after May 15, 2002 through to and including the Plan Implementation Date in the ordinary course of business and which claims have finally been accepted or determined in accordance with the provisions of the Claims Procedure Order, but specifically excluding any Claim arising after the Filing Date as a result of the termination or repudiation of any contract, agreement or lease pursuant to the Initial Order or subsequent Orders of the Court;

"**Post-Filing Claims Reserve**" means the cash in the aggregate amount sufficient to pay holders of Post-Filing Claims up to the maximum amount as provided for in Article 3.3 herein;

"**Proof of Claim**" means a proof of claim filed by an Unsecured Creditor in accordance with the Claims Procedure Order;

"**Proven Voting Claim**" means the amount of a Claim of a Creditor finally determined or accepted for voting purposes in accordance with the provisions of the Claims Procedure Order and this Plan.

"**Purchase Agreement**" means the purchase agreement dated as of September 18, 2002, whereby the Core Telecommunications Business was sold by certain of the Debtors to TLGB Acquisition L.L.C., which agreement, and the transactions contemplated therein, was approved by, *inter alia*: (A) the Court on October 2, 2002; and (B) the U.S. Bankruptcy Court on October 9, 2002, as such agreement may have been amended from time to time;

"**Reserves**" means, collectively, the Operating Reserve, the Unresolved Claims Reserve the Litigation Reserve and the Post-Filing Claims Reserve;

"**Sale Proceeds Allocation Agreement**" means that certain Sale Proceeds Allocation Agreement entered into by and between the Canadian Debtors and the U.S. Debtors, a copy of which is attached hereto as Schedule "B";

"**Sanction Order**" means an Order proposed to be made in the CCAA Proceedings to, among other things, sanction this Plan and direct and approve the completion of all documents, agreements and other matters necessary in order to implement this Plan, as

such Order may be amended, varied or modified by the Court from time to time, and having substantially the effect set out in Article 8.2 of this Plan;

"**Secured Claim**" means any Claim that has the benefit of a Charge and which Claim is entitled to be proven, and has been proven, as a secured claim pursuant to the provisions of the Claims Procedure Order, this Plan and the CCAA (including Sections 18.3, 18.4 and 18.5 of the CCAA), but excluding the unsecured portion, if any, of such Secured Claim;

"**Secured Creditors**" means all Persons holding Secured Claims, and "**Secured Creditor**" means any one of them;

"**Stay Period**" means the period from and including the Filing Date to and including the later of February 15, 2005 or such other date as may be ordered by the Court from time to time;

"**Teleglobe Lending Syndicate**" means those lenders, whether by origination or assignment, to certain of the Debtors pursuant to the Credit Agreements;

"**THUSC**" means Teleglobe Holdings (U.S.) Corporation;

"**TINC**" means Teleglobe Inc.;

"**U.S. Bankruptcy Court**" means the United States Bankruptcy Court for the District of Delaware;

"**U.S. Debtors**" means: (A) THUSC; (B) Teleglobe Holding Corp.; (C) Teleglobe Investment Corp.; (D) Teleglobe Telecom Corporation; (E) Teleglobe Communications Corporation; (F) Teleglobe USA Inc.; (G) Optel Telecommunications, Inc.; (H) Teleglobe Puerto Rico, Inc., and (I) Teleglobe Luxembourg LLC and "**U.S. Debtor**" means any one of them;

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

"**U.S. Estate Claims**" means any and all claims, causes or rights of action (whether by contract, in equity, by way of indemnity, by statute or otherwise) including any claims under any applicable insurance policies that any of the U.S. Debtors (including derivatively) may have against any person whatsoever (including any former or present officer, director, shareholder, agent, or advisor of any of the U.S. Debtors); provided that this excludes the claims of the U.S. Debtors arising in respect of the U.S. VarTec Notes or any preference actions commenced by the U.S. Debtors.

"**U.S. Indenture Trustee**" means The Bank of New York, as trustee pursuant to the 1999 Indenture;

"**U.S. Plan**" means the Plan of the U.S. Debtors pursuant to Chapter 11 of the U.S. Bankruptcy Code, as such plan may be amended, varied or supplemented by the U.S. Debtors from time to time in accordance with its terms;

"**U.S. VarTec Notes**" means all notes issued by VarTec Telecom, Inc. and/or VarTec Telecom Holding Company in favour of: (A) any of the Canadian Debtors, other than TINC; or (B) any of the U.S. Debtors;

"**Unaffected Claims**" has the meaning given to such term in Section 3.3 herein;

"**Unaffected Creditors**" means all Persons holding Unaffected Claims, but only to the extent of such Unaffected Claims, and "**Unaffected Creditor**" means any one of them;

"**Unresolved Claim**" means any Claim, or any Proof of Claim, that is in dispute pursuant to the Claims Procedure Order, Meeting Order or this Plan, or the right of any Person against any one of the Canadian Debtors in connection with any indebtedness, liability or obligation of a Canadian Debtor which is conditional on the occurrence of an event, whether or not such event has occurred as of the date of the Initial Order or occurs as a result of the implementation of, or any action taken pursuant to, the Initial Order or this Plan;

"**Unresolved Claims Reserve**" means cash, in one or more separate accounts, in the aggregate amount sufficient to pay each holder of an Unresolved Claim: (A) the amount of cash that such holder would have been entitled to receive under this Plan if such Unresolved Claim had been a Distribution Claim on the Plan Implementation Date; or (B) such lesser amount as the Court may determine;

"**Unsecured Creditors**" means all Persons holding Claims, and "**Unsecured Creditor**" means any one of them; and

"**Unsecured Creditors' Class**" means the class of Unsecured Creditors established under this Plan.

1.2 Certain Rules of Interpretation

In this Plan and any Schedules hereto:

(i) all references to currency are to U.S. Dollars, except as otherwise indicated;

(ii) the division of this Plan into articles, sections, subsections and clauses and the insertion of headings and a table of contents are for convenience of reference only and shall not affect the construction or interpretation of this Plan. The terms "this Plan", "hereof", "hereunder", "herein" and similar expressions refer to this Plan and not to any particular article, section, subsection or clause and include any plan supplemental hereto. Unless otherwise indicated, any reference in this Plan to an article, section, subsection, clause or schedule refers to the specified article, section, subsection, clause or schedule of or to this Plan;

(iii) the use of words in the singular or plural, or with a particular gender, shall not limit the scope or exclude the application of any provision of this Plan

or a schedule hereto to such Person (or Persons) or circumstances as the context otherwise permits;

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

(v) unless otherwise specified, all references to time herein and in any document issued pursuant hereto mean local time in Toronto, Ontario and any reference to an event occurring on a Business Day shall mean prior to 5:00 p.m., on such Business Day. Unless otherwise specified, the time period within or following which any payment is to be made or act is to be done shall be calculated by excluding the day on which the period commences and including the day on which the period ends and by extending the period to the next succeeding Business Day if the last day of the period is not a Business Day. Whenever any payment to be made or action to be taken under this Plan is required to be made or to be taken on a day other than a Business Day, such payment shall be made or action taken on the next succeeding Business Day;

(vi) unless otherwise specified, where any reference to an event occurring within any number of "days" appears in this Plan, such reference means Calendar Days and not Business Days; and

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

1.3 Schedules

The following Schedules are attached to and form part of this Plan:

Schedule "A"	Plan Administration Agreement
Schedule "B"	Sale Proceeds Allocation Agreement
Schedule "C"	Litigation Protocol

ARTICLE 2
PURPOSE AND EFFECT OF THE PLAN

2.1 Purpose

The purpose of this Plan is:

(i) to provide for payment in respect of the Claims against the Canadian Debtors;

(ii) to distribute the proceeds from the realization of the property, assets and undertaking of the Canadian Debtors, including the proceeds of the sale of the Core Telecommunications Business; and

(iii) in conjunction with the U.S. Plan, provide for the further investigation and prosecution of the Debtors' Claims and funding for such matters, and for the cost-effective and efficient consolidation of the investigation and realization of the Debtors' Claims among affected creditors of the Debtors such that affected creditors of both the Canadian Debtors and the U.S. Debtors have an opportunity to participate in the Debtors' Claims in the manner described herein.

2.2 Consolidated Plan

This Plan is presented by the Interim Receiver, on behalf of the Canadian Debtors, to the Unsecured Creditors on a joint and consolidated basis for the sole purpose of permitting Unsecured Creditors to vote on the Plan and receive distributions under the Plan but not otherwise.

2.3 Affected Creditors

This Plan will be implemented under the CCAA and will become effective on, and be binding on and after, the Plan Implementation Date on the Canadian Debtors and all Creditors, including the Unsecured Creditors, and all other Persons in accordance with its terms.

2.4 Unaffected Creditors

Notwithstanding any other provision or term of this Plan, Unaffected Creditors shall not be affected by this Plan. Notwithstanding the consolidation of certain Claims against the Canadian Debtors for certain purposes under this Plan, Claims which are Unaffected Claims of any particular Canadian Debtor shall remain the obligation solely of such Canadian Debtor and shall not hereby or hereunder become obligations of any other Canadian Debtor.

ARTICLE 3
CLASSIFICATION OF CREDITORS

3.1 Class of Claims

The sole class for the purpose of considering and voting on this Plan shall be comprised of all Unsecured Creditors.

3.2 Claims Procedure

Creditors shall prove their respective Claims, vote in respect of the Plan, and receive the distributions provided for, under and pursuant to each of the Claims Procedure Order, the Meeting Order and this Plan. Without limitation, the procedure for determining the validity and

quantum of the Claims for voting and distribution purposes shall be governed by the Meeting Order and the Claims Procedure Order.

3.3 Unaffected Claims

This Plan does not compromise, release or otherwise affect the Claims of:

(i) Secured Creditors to the extent of the secured portion of such Person's Secured Claim, unless such Claims are otherwise provided for in this Plan;

(ii) the Monitor, the Interim Receiver, the Interim Administrator and their respective Canadian counsel, the Claims Officer, the Creditor Professionals (as that term is defined in the Interim Receivership Order) or the legal, accounting and financial advisers to the Canadian Debtors incurred for or in connection with the CCAA Proceedings, including developing and giving effect to this Plan;

(iii) any Unsecured Creditors holding Post-Filing Claims to a maximum aggregate amount established by the Monitor, with the consent of counsel to the Teleglobe Lending Syndicate or Bondholder Committee, prior to the Plan Implementation Date, and, for greater certainty, the aggregate of such Post-Filing Claims in excess of this amount, on a *pro rata* basis, shall be treated as Claims in accordance with the terms of this Plan; and

(iv) any Person whose Claims cannot be compromised in accordance with the CCAA with respect to and to the extent of such Claims.

All of the foregoing Claims of those Persons set out in this Article 3.3, inclusive, are collectively referred to as the "**Unaffected Claims**" and any one of them is an "**Unaffected Claim**".

ARTICLE 4
TREATMENT OF CREDITORS

4.1 Treatment of Creditors

For purposes of this Plan, the Creditors shall receive the treatment provided in this Plan on account of their Claims, except to the extent that they are Unaffected Creditors, and on the Plan Implementation Date the Claims affected by this Plan will be compromised in accordance with the terms of this Plan.

4.2 Unsecured Creditors' Class

(a) *Voting Rights for Unsecured Creditors*

Subject to this Plan, the Claims Procedure Order and the Meeting Order, each Unsecured Creditor having a Proven Voting Claim shall be entitled to vote in the Unsecured Creditors' Class to the extent of the amount which is equal to its Proven Voting Claim, as finally determined in accordance with the Claims Procedure Order.

(b) *Intercompany Claims*

Notwithstanding any term herein, the holders of Intercompany Claims shall not have any vote in respect of such Claims and will not receive, and hereby waive and release their entitlement to, any distribution of property under this Plan on account of their respective Intercompany Claims, except as contemplated by the Sale Proceeds Allocation Agreement or in connection with distributions in respect of Claims held by others. Without limiting the corporate or transaction steps need to complete the implementation of the Plan, the Intercompany Claims may be reorganized, converted into equity or otherwise dealt with as part of the implementation of the Plan.

(c) *U.S. VarTec Notes*

No Unsecured Creditor shall have any entitlement to any of the proceeds of the U.S. VarTec Notes, and each Unsecured Creditor (in such capacity) hereby waives and releases any right, title or interest it has, or may hereafter have, in respect of the U.S. VarTec Notes and the proceeds thereof.

4.3 Unaffected Creditors

Each Creditor who has an Unaffected Claim shall not be entitled to vote or to receive any distribution under this Plan in respect of such Unaffected Claim. All Unaffected Claims shall be brought current as to arrears of principal and interest (which, for greater certainty, shall not include any amounts due by reason of any acceleration or purported acceleration of indebtedness as a consequence of the CCAA Proceedings) as soon as practicable after the Plan Implementation Date.

4.4 Different Capacities

Creditors whose Claims are affected by this Plan may be affected in more than one capacity and such Creditors may have both affected Claims and Unaffected Claims. Unless expressly provided herein to the contrary, each such Creditor shall be entitled to participate hereunder in each such capacity. Any action taken by a Creditor in any one capacity shall not affect the Creditor in any other capacity, unless expressly agreed by the Creditor in writing or unless the Claims overlap or are otherwise duplicative.

4.5 Currency

For the purposes hereof and for purposes of voting and the payment of Distribution Claims, all Claims denominated in a currency other than U.S. Dollars will be converted into U.S. dollars at the noon spot rate of exchange quoted by the Bank of Canada as at the Filing Date. For greater certainty: (A) the noon spot rate of exchange for the conversion of Canadian Dollars into U.S. Dollars as at the Filing Date was CDN.$1.5559:U.S.$1; and (B) all Distribution Claims shall be paid in U.S. Dollars. Cash payments to be made pursuant to this Plan shall be made by cheques drawn on a domestic bank or by wire transfer from a domestic bank, at the option of the Plan Administrator.

4.6 Interest

Interest shall not accrue or be paid on any Claim (other than a Claim of an Unaffected Creditor) from and after the Filing Date.

4.7 Duplicate Claims

No Person who has a Claim under any guarantee, surety, indemnity or similar covenant in respect of any Claim which is compromised under this Plan or who has any right to claim over in respect of or to be subrogated to the rights of any Person (including one of the Canadian Debtors) in respect of a Claim that is compromised under this Plan shall be entitled to any greater rights than the Creditor whose Claim was compromised under this Plan. An Unsecured Creditor who has Claims against more than one of the Canadian Debtors in respect of the same debt or obligation shall only be entitled to assert one Claim in respect of such debt or obligation, and any duplicate Claim filed by such an Unsecured Creditor will be disallowed so that only a single Claim remains. An Unsecured Creditor who has Claims against one or more of the Canadian Debtors and also against one or more of the U.S. Debtors in respect of the same debt or obligation shall be entitled to assert such Claims in respect of such debt or obligation under this Plan and the U.S. Plan; provided that, with respect to entitlement to any proceeds arising from the Debtors' Claims, there shall be no duplicative Claims and such entitlements shall be governed by the terms of the Litigation Protocol.

4.8 Essential Agreements

Each of: (A) the Sale Proceeds Allocation Agreement; (B) the Litigation Protocol; and (C) the Plan Administration Agreement, is a fundamental part of this Plan, and each of which is entered into by the Debtors: (i) in consideration of the distributions and other benefits provided pursuant to this Plan; and (ii) for the reasons noted in this Plan and in such agreements. The Unsecured Creditors, in approving this Plan, are also approving each of these agreements, and the terms, provisions and releases contemplated therein. The entry of the Sanction Order shall constitute the Court's approval, as of the Plan Implementation Date, of the aforementioned agreements and the terms, provisions and releases contained therein.

4.9 Insurance

The compromise of Claims in accordance with this Plan shall not affect the right of any Person to recover from any available insurance coverage in respect of all or any part of such Claims or to assert all or any part of such Claims against the applicable insurers; provided, however, that all Claims of such insurers against the Canadian Debtors, including Claims in respect of subrogated claims and in respect of the deductibles under such insurance coverage, if any, shall be compromised as Claims in accordance with the terms of this Plan.

4.10 Unresolved Claims

A Person holding an Unresolved Claim will not be entitled to receive a distribution under this Plan in respect thereof unless and until such Unresolved Claim becomes a Distribution Claim. The fact that a Proof of Claim is accepted for voting purposes will not preclude the Plan Administrator from disputing the Proof of Claim for distribution purposes.

ARTICLE 5
DISTRIBUTIONS

5.1 Distributions to All Unsecured Creditors

All Unsecured Creditors will share *pro rata* in the following consideration, to the extent of their Distribution Claims, subject to the Operating Reserve, the Litigation Reserve, the Unresolved Claims Reserve and the Post-Filing Claims Reserve:

(i) the Net Proceeds allocated to the Canadian Debtors in accordance with the Sale Proceeds Allocation Agreement, including the Net Proceeds of the Core Telecommunications Business;

(ii) the Net Proceeds derived from the Canadian VarTec Note;

(iii) the Net Proceeds realized by the Plan Administrator and available for distribution to Unsecured Creditors in accordance with the terms of this Plan, the Plan Administration Agreement and the Litigation Protocol, including with respect to the Debtors' Claims; and

(iv) any other Net Proceeds realized or received in respect of the realization and disposition of the Canadian Debtors' respective assets.

Notwithstanding the foregoing, Unsecured Creditors with *de minimus* Distribution Claims of U.S.$50 or less, will not receive any distributions under this Plan.

Subject to final resolution of all outstanding matters, funds remaining in the Operating Reserve, the Litigation Reserve, the Unresolved Claims Reserve and the Post-Filing Claims Reserve shall be distributed to Unsecured Creditors with Distribution Claims in accordance with the terms of this Plan.

5.2 Timing of Distributions

Within 150 Calendar Days of the Plan Implementation Date, the Monitor will calculate the aggregate amount of cash to be received by each Unsecured Creditor holding one or more Distribution Claims. The Plan Administrator, on behalf of the Canadian Debtors, will rely upon such calculations in making distributions to Unsecured Creditors holding Distribution Claims. The Monitor shall hold all funds of the Canadian Debtors pending the first distribution under the Plan (excluding funds advanced with respect to the Operating Reserve or the Litigation Reserve) proposed and made by the Plan Administrator.

Distributions to Unsecured Creditors in respect of their Distribution Claims will be made in U.S. dollars. The first distribution shall be made within 150 Calendar Days of the Plan Implementation Date by the Plan Administrator, with the assistance of the Monitor, on behalf of the Canadian Debtors, in accordance with the terms of this Plan and the Plan Administration Agreement; provided that such distributions shall be subject to the Operating Reserve, the Litigation Reserve, the Unresolved Claims Reserve and the Post-Filing Claims Reserve. The balance of any payments required to be made by the Canadian Debtors under the Plan will be made from time to time and subject to the Plan Administration Agreement. The Plan

Administrator may employ or contract with other entities to assist in or make the distributions required by this Plan without further Order of the Court.

5.3 Operating Reserve

On the Plan Implementation Date, or as soon as practicable thereafter, the Plan Administrator, with prior approval from the Plan Committee and the Monitor, shall create and fund the Operating Reserve. In the event that the Plan Committee and/or the Monitor do not approve of the Operating Reserve proposed by the Plan Administrator and the parties do not otherwise agree, the parties shall have the right to apply to the Court for directions.

The Operating Reserve shall be held by the Plan Administrator and not released except: (i) in accordance with a further Order of the Court; or (ii) with the consent of the Monitor, the Plan Administrator and the Plan Committee.

5.4 Unresolved Claims Reserve

Within 150 Calendar Days of the Plan Implementation Date, the Plan Administrator, with prior approval of the Plan Committee and the Monitor, shall create and fund the Unresolved Claims Reserve for distribution to Creditors holding Unresolved Claims. In the event that the Plan Committee and/or the Monitor do not approve of the Unresolved Claims Reserve proposed by the Plan Administrator and the parties do not otherwise agree, the parties shall have the right to apply to the Court for directions.

If an Unresolved Claim is ultimately disallowed, in whole or in part, in accordance with the Claims Procedure Order, the cash reserved in respect of such Unresolved Claim or the appropriate portion thereof in accordance with the Claims Procedure Order will become available for distribution by the Plan Administrator to the Unsecured Creditors with Distribution Claims as at the Plan Implementation Date by making a further distribution of cash to such Unsecured Creditors on a *pro rata* basis, provided that the amounts to be distributed makes such distribution economically practical (as determined by the Plan Administrator with the prior approval of the Plan Committee and the Monitor, acting reasonably).

The Unresolved Claims Reserve, and any part thereof, shall be released by the Plan Administrator from time to time with the prior approval of the Court.

5.5 Post-Filing Claims Reserve

On the Plan Implementation Date, or as soon as practicable thereafter, the Monitor, with the consent of counsel to the Teleglobe Lending Syndicate or the Bondholder Committee, shall fund and create the Post-Filing Claims Reserve for distribution to holders of Post-Filing Claims. In the event that counsel to the Teleglobe Lending Syndicate or the Bondholder Committee do not approve of the Post-Filing Claims Reserve proposed by the Monitor and the parties do not otherwise agree, the parties shall have the right to apply to the Court for directions.

The Post-Filing Claims Reserve shall be held by the Monitor pending distribution in respect of any Post-Filing Claims. Any funds remaining in the Post-Filing Claims Reserve, after resolution of all Post-Filing Claims, shall be paid over to the Plan Administrator and thereafter form part of

the Operating Reserve, or be available for distribution to the Unsecured Creditors pursuant to the terms of this Plan.

5.6 Allocation of Distributions

All distributions made to Unsecured Creditors pursuant to this Plan shall be applied first in payment of the outstanding principal amount of such Distribution Claim, and, only after the principal portion of any such Distribution Claim is satisfied in full, to any portion of such Distribution Claim comprising accrued and unpaid interest (but solely to the extent that interest is an allowable portion of such Distribution Claim pursuant to this Plan or otherwise). In the event that the principal amount of all Distribution Claims has been paid in full, each Unsecured Creditor shall, at the request of the Plan Administrator, be responsible for providing a representation and warranty with respect to its residency for purposes of the *Income Tax Act* (Canada). If any Unsecured Creditor fails to provide satisfactory evidence that it is a resident of Canada for purposes of the *Income Tax Act* (Canada), then the Plan Administrator shall have the right to:

(i) assume and otherwise consider such Unsecured Creditor to be a non-resident of Canada for the purposes of the *Income Tax Act* (Canada); and

(ii) withhold any non-resident withholding tax that would be imposed under the *Income Tax Act* (Canada) based on such assumption from any amounts payable to such Unsecured Creditor under this Plan,

until such time as such Unsecured Creditor provides satisfactory evidence to the contrary to the Plan Administrator, unless the non-resident withholding tax has already been remitted to the Canada Customs Revenue Agency.

5.7 Distributions to Bondholders

Distributions under this Plan on account of the Distribution Claims of the Bondholders arising from or in respect of the Debentures shall be made to the Canadian Indenture Trustee and the U.S. Indenture Trustee, as applicable, as disbursing agent for such Distribution Claims, for further distribution by such indenture trustee to the Bondholders. Any such further distributions shall be made by the Canadian Indenture Trustee or the U.S. Indenture Trustee, as applicable, pursuant to the 1992 Indenture, 1993 Indenture, 1996 Indenture or the 1999 Indenture, respectively, and the Plan: (i) first, to the Canadian Indenture Trustee and the U.S. Indenture Trustee, as applicable, for application to any unpaid fees, compensation, expenses (including such indenture trustee's reasonable professional fees and expenses), disbursements and advances to the extent provided in the applicable indenture; and (ii) thereafter, on account of the Distribution Claims of the Bondholders.

5.8 Transfer of Claims; Record Date for Distributions

Claims, including Proven Voting Claims, Distribution Claims and Unresolved Claims, may be sold, transferred or assigned at any time by the holder thereof, whether prior or subsequent to the Plan Implementation Date, provided that, subject to the provisions of the Meeting Order:

(i) none of the Canadian Debtors, the Interim Receiver, the Interim Administrator, the Plan Committee, the Plan Administrator or the Monitor shall be obligated to deal with or to recognize the purchaser, transferee or assignee of the Claim as the Creditor in respect thereof unless and until written notice of the sale, transfer or assignment is provided to the Plan Administrator, or the Monitor, as applicable, such notice to be in form and substance satisfactory to the Plan Administrator or Monitor, acting reasonably;

(ii) only holders of record of Proven Voting Claims (including, for greater certainty, holders of Debentures) as at November 30, 2004 shall be entitled to attend, vote or otherwise participate at such meeting of Creditors; provided, however, that: (A) for the purposes of determining whether this Plan has been approved by a majority in number of the Unsecured Creditors, only the vote of the transferor or the transferee, whichever holds the highest dollar value of such Proven Voting Claims, will be counted, and, if such value shall be equal, only the vote of the transferee will be counted; and (B) if a Proven Voting Claim has been transferred to more than one transferee, for purposes of determining whether this Plan has been approved by a majority in number of the Unsecured Creditors, only the vote of the transferee with the highest value of such Proven Voting Claim will be counted; and

(iii) only holders of record of Distribution Claims (including, for greater certainty, holders of Debentures) as at the close of business on a Distribution Record Date shall have the right to participate in the corresponding distribution.

5.9 Delivery of Distributions in General

Distributions to Unsecured Creditors (other than Bondholders, to whom Section 5.7 applies) shall be made: (A) at the addresses set forth in the Proofs of Claim filed by such Unsecured Creditors; or (B) if applicable, at the addresses set forth in any written notices of address change delivered to the Monitor or the Plan Administrator after the date on which any related Proof of Claim was filed.

5.10 No De Minimus Distributions

Other than in respect of a final distribution, no distribution in an amount less than U.S.$50.00 shall be made on account of any Distribution Claim.

5.11 Undeliverable Distributions

If a distribution to any Unsecured Creditor is returned as undeliverable, no further distributions shall be made to such Unsecured Creditor unless and until the Plan Administrator is notified in writing of such Unsecured Creditor's then current address. Undeliverable distributions shall remain in the possession of the Canadian Debtors pursuant to this Plan for the benefit of each Unsecured Creditor in question until such time as a distribution becomes deliverable, provided that, if the Unsecured Creditor in question does not notify the Plan

Administrator of such Unsecured Creditor's then current address within four (4) months after the date on which the distribution is issued, such Unsecured Creditor's right and entitlement to the undeliverable distribution shall be treated as an unclaimed cash or distribution pursuant to Section 11.7 of this Plan. Moreover, any distribution cheques that have not been negotiated within four (4) months of issuance shall be canceled and any right or entitlement to such distribution shall be treated as an unclaimed cash or distribution pursuant to Section 11.7 of this Plan. In such cases, any cash held for distribution on account of such Claims shall become the property of the Canadian Debtors and shall, if applicable, be returned to the Canadian Debtors by the Canadian Indenture Trustee or the U.S. Indenture Trustee, as the case may be, and, in any event, be distributed in accordance with the terms of this Plan.

ARTICLE 6
PLAN ADMINISTRATOR

6.1 Appointment of Plan Administrator

The Interim Receiver, on behalf of the holders of Claims against the Debtors, in consultation with counsel to each of the Teleglobe Lending Syndicate and the Bondholders, has designated Ms. Kathy Morgan to serve as the Plan Administrator pursuant to the Plan Administration Agreement and this Plan. The Unsecured Creditors, in approving this Plan, are approving the appointment of Ms. Kathy Morgan as Plan Administrator. Ms. Kathy Morgan shall serve as Plan Administrator until her resignation or discharge, and the appointment of a successor Plan Administrator, each in accordance with the terms of the Plan Administration Agreement.

6.2 Plan Administration Agreement

The powers, obligations, functions, rights, duration, compensation and all manner of acting of the Plan Administrator shall be as set out in this Plan and in the Plan Administration Agreement. The Plan Administrator shall be bound by, and act at all times in accordance with, the terms of this Plan, the Plan Administration Agreement and the Litigation Protocol, including with respect to: (i) its compensation; (ii) its oversight by the Plan Committee generally, and with respect to the Debtors' Claims specifically; (iii) subject to the Claims Procedure Order, its authority to object to, and to settle, Unresolved Claims; (iv) insurance coverage for itself and for the Plan Committee, and for their respective agents, representatives, employees or independent contractors, and for the Canadian Debtors; and (v) its discharge / resignation. The Canadian Debtors shall retain and have all the rights, powers and duties necessary to carry out their responsibilities under this Plan, which shall be carried out by the Plan Administrator on behalf of the Canadian Debtors.

ARTICLE 7
PLAN COMMITTEE

7.1 Plan Committee

On the Plan Implementation Date, the Plan Committee shall be formed and constituted in accordance with this Plan and the Plan Administration Agreement. The Unsecured Creditors, in approving this Plan, are approving the constitution of the Plan Committee in this manner. At no time shall any member of the Plan Committee be employed by or otherwise related or affiliated

with any party that is adverse in interest to the Canadian Debtors. The powers, obligations, functions, rights, duration, compensation and all manner of acting of the Plan Committee shall be as set out in this Plan and the Plan Administration Agreement.

ARTICLE 8
SANCTION ORDER

8.1 Application for Sanction Order

The application for the Sanction Order shall be brought by the Interim Receiver, on behalf of the Canadian Debtors, forthwith following the approval of this Plan by the requisite majority of Creditors voting on such Plan at the Meeting. The Sanction Order shall not become effective until the Plan Implementation Date. On the Plan Implementation Date, subject to the satisfaction of the conditions contained in Section 9.1, this Plan will be binding upon all Creditors, including the Unsecured Creditors, and all other Persons in accordance with its terms.

8.2 Effect of Sanction Order

In addition to sanctioning this Plan, the Sanction Order shall, among other things:

(i) direct and authorize the Interim Receiver, the Plan Administrator and the Plan Committee, as the case may be, to complete all of the corporate, litigation and financial transactions contemplated under this Plan;

(ii) approve the appointment of the Plan Administrator and the constitution of the Plan Committee with those Persons named in Section 7.1 of this Plan;

(iii) declare that the compromises effected hereby are approved, binding and effective upon all Creditors, including the Unsecured Creditors, and all other Persons affected by this Plan;

(iv) subject to the performance by the Interim Receiver, the Plan Administrator and the Plan Committee of their respective obligations under this Plan, and except to the extent expressly provided otherwise by this Plan or the Sanction Order, provide that no Person who is a party to any such obligation or agreement shall, following the Plan Implementation Date, accelerate, terminate, rescind, refuse to perform or repudiate its obligations thereunder, 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 obligation or agreement, by reason:

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

(B) of the fact that the Canadian Debtors have sought or obtained relief under the CCAA and have commenced or completed the CCAA

Proceedings, or that the reorganization has been implemented by the Canadian Debtors;

(C) of the effect on the Canadian Debtors of the completion of any of the transactions contemplated by this Plan or the reorganization; or

(D) of any compromises or arrangements effected pursuant to this Plan;

(v) provide that the Monitor and the Interim Administrator shall be discharged on the Plan Implementation Date, except only with respect to any remaining duties or powers required to complete the terms of this Plan;

(vi) validate and enforce the essential agreements described in Article 4.8;

(vii) provide for the transmission of the administration of carriage of the litigation commenced on February 24, 2003 by the Interim Receiver;

(viii) provide that the Plan Administrator shall have the right, authority and power to be provided with and exercise all of the powers of the Interim Receiver set forth or provided for in this Plan, the Interim Receivership Order, including the powers set forth in paragraph 8 thereof;

(ix) provide that the appointment of the Claims Officer shall automatically cease when all Unresolved Claims are finally resolved, unless otherwise agreed with the Plan Administrator, except only with respect to matters to be completed pursuant to this Plan after the Plan Implementation Date, including the resolution of Unresolved Claims;

(x) subject to (xi), provide that the Charges on the assets of the Canadian Debtors provided for in the Initial Order, including the Directors' Charge, the Administrative Charge and the CCAA Lender's Charge (each as defined in the Initial Order) shall automatically be fully and finally discharged and released on the Plan Implementation Date;

(xi) provide that the Monitor shall continue to hold a charge, as provided in the Administrative Charge (as defined in the Initial Order), until the first date of distribution to Unsecured Creditors under this Plan or such further date as provided for pursuant to an Order of the Court; and

(xii) authorize and approve each of the Litigation Protocol, the Sale Proceeds Allocation Agreement and the Plan Administration Agreement, together with all of the terms, provisions and releases therein.

8.3 Further Stay

The Interim Receiver and/or the Interim Administrator, on behalf of the Canadian Debtors, may apply for an interim Order extending the Stay Period so that the application for the Sanction Order may be made before the Stay Period expires and the Stay Period shall not expire

until the earlier of the Plan Implementation Date and the date which is 60 Business Days after the date on which the Sanction Order is made, or such later date as may be fixed by the Court.

8.4 Monitor, Interim Administrator and Interim Receiver

On the Plan Implementation Date, the Monitor and the Interim Administrator shall be discharged and shall have no further obligations or responsibilities, except only with respect to any remaining duties or power required to complete the terms of this Plan. Any discharge of the Interim Receiver shall be effected in such a manner as will ensure that all of the rights, powers and authorities of the Interim Receiver are preserved and assumed by the Plan Administrator, and exercised in accordance with this Plan, the Plan Administration Agreement and the Litigation Protocol.

ARTICLE 9
CONDITIONS PRECEDENT

9.1 Conditions Precedent to Implementation of Plan

The implementation of this Plan shall be conditional upon the fulfillment of the following conditions on or before the Plan Implementation Date:

(a) ***Entry of Sanction Order***

The Sanction Order shall have been granted by the Court, in form and substance reasonably satisfactory to the Interim Receiver, including the granting by the Court of its approval of the Litigation Protocol, Sale Proceeds Allocation Agreement and Plan Administration Agreement;

(b) ***Approval of Plan Administrator***

The appointment of the Person selected to be the Plan Administrator pursuant to Section 6.1 of this Plan shall have been approved by the Court;

(c) ***Expiry of Appeal Periods***

The appeal period and any period for leave to appeal with respect to the Sanction Order shall have expired without an appeal of such Order having been commenced or, in the event of an appeal or application for leave to appeal, a final determination sanctioning this Plan shall have been made by the applicable appellate tribunal, with no further right of appeal;

(d) ***Governmental and Regulatory Approval***

The Canadian Debtors shall have received all applicable governmental, regulatory and judicial consents, orders (including the Sanction Order) and similar consents and approvals from, and the making of all filings with, all governmental, regulatory and judicial authorities having jurisdiction over any of the Canadian Debtors or all or any part of their respective assets or businesses, in each case to the effect deemed necessary or desirable by the Interim Receiver for the

completion of the transactions and compromises contemplated by this Plan or any aspect thereof;

(e) ***Completion of Necessary Documentation***

(i) The Interim Receiver shall have obtained the execution and delivery of all such agreements, resolutions, indentures, documents and other instruments which are necessary to be executed and delivered by the Canadian Debtors and the Interim Receiver, as the case may be, to implement this Plan and perform the obligations of the Canadian Debtors and the Interim Receiver hereunder; and

(ii) The Interim Receiver shall have obtained the execution and delivery by all relevant Persons other than the Canadian Debtors of all documentation necessary to give effect to all material terms and provisions of this Plan.

(f) ***Substance and Effectiveness of the U.S. Plan***

The U.S. Plan shall, among other things:

(i) with respect to the prosecution of the Debtors' Claims, reflect the provisions hereof, including the role of the Plan Committee and the Plan Administrator, as described herein;

(ii) incorporate by reference as a fundamental and inseparable part of the U.S. Plan each of the Sale Proceeds Allocation Agreement, the Litigation Protocol and the Plan Administration Agreement;

(iii) provide for the liquidation and distribution of all remaining assets of the U.S. Debtors; and

(iv) have been approved by the U.S. Bankruptcy Court.

The Interim Receiver reserves the right to waive, in its sole discretion, one or more of the foregoing conditions precedent, save and except for (a).

9.2 Monitor's Certificate

Upon the satisfaction of the conditions set out in Section 9.1, the Monitor shall file with the Court a certificate which states that all conditions precedent set out in Section 9.1 of this Plan have been satisfied or waived by the Interim Receiver, as the case may be, and that the Plan Implementation Date has occurred.

9.3 Termination of Plan for Failure to Become Effective

If the Plan Implementation Date shall not have occurred on or before one hundred eighty (180) Calendar Days of the date of the Sanction Order, then, subject to further Order of the Court, this Plan shall terminate and be or no further force or effect.

ARTICLE 10
EFFECT OF PLAN

10.1 Effect of Plan Generally

The Plan, if sanctioned and approved by the Court under the Sanction Order shall be binding on the Plan Implementation Date on the Canadian Debtors and all Creditors, including the Unsecured Creditors, and all other Persons affected by this Plan (and each of their respective heirs, executors, administrators, legal personal representatives, successors and assigns) irrespective of the jurisdiction in which such Unsecured Creditor resides or the Claims arise.

10.2 Consents, Waivers And Agreements

On the Plan Implementation Date, each Creditor shall be deemed to have consented and agreed to all of the provisions of this Plan in their entirety. In particular, each Creditor shall be deemed:

(i) to have executed and delivered to the Interim Receiver and to the Canadian Debtors all consents, or agreements, required to implement and carry out this Plan in its entirety; and

(ii) 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 Canadian Debtors at the Plan Implementation Date (other than those entered into by the Canadian Debtors on, or alter the Filing Date) and the provisions of this Plan, the provisions of this Plan take precedence and priority and the provisions of such agreement or other arrangement shall be deemed to be amended accordingly.

10.3 Discharge of Charges

Effective as of the Plan Implementation Date, no step or proceeding may be taken in respect of any Charge in connection with any Claim other than an Unaffected Claim and any Charge in connection with any Claim other than an Unaffected Claim will be deemed to have no further effect against the Canadian Debtors or any of their assets and will be released, discharged, dismissed and vacated without cost to the Canadian Debtors. The Interim Receiver may apply to the Court to obtain a discharge, if necessary, of any Charge in connection with a Claim other than an Unaffected Claim without notice to the affected Creditor.

10.4 Exculpation

None of the Canadian Debtors, the Plan Committee, the Plan Administrator, the Interim Receiver, the Interim Administrator, or the Monitor, nor any of their respective professional advisors, shall have incurred or shall incur any liability to any Person for any act or omission in connection with, or arising out of, the CCAA Proceedings, the Plan, the pursuit of sanctioning of the Plan, the consummation and implementation of the Plan, the Sale Proceeds Allocation Agreement, the Plan Administration Agreement, the Litigation Protocol or the administration of the Plan or the property to be distributed under the Plan, except for their own wilful misconduct

or gross negligence, and all such Persons, in all respects, shall be entitled to rely upon the advice of counsel with respect to their duties and responsibilities under the Plan and under the CCAA, and shall be fully protected from liability in acting or refraining from acting in accordance with such advice; provided, however, that this Section 10.4 shall not limit the obligations of any Person under the Plan.

10.5 Crown Claims

Any claims of the federal and provincial Crowns of a kind that could be subject to a demand under subsection 224(1.2) of the *Income Tax Act* (Canada) or any substantially similar provision of provincial legislation or in respect of which the federal or provincial Crown has a lien on or security interest in the property of the Canadian Debtors or recourse for non-payment against the directors or officers of the Canadian Debtors, outstanding under the provisions of said subsection 224(1.2) or substantially similar provincial legislation, or any other such claims of the federal or provincial Crown shall be paid on or before the Plan Implementation Date. Any other amounts owing to the federal and provincial Crowns shall be treated as Claims.

10.6 Cancellation of Securities, Instruments and Agreements Evidencing Claims.

Except as otherwise provided in this Plan, the U.S. Plan and in any contract, instrument or other agreement or document created in connection with this Plan, on the day after the Final Distribution Date, any promissory notes, share certificates (including treasury stock), other instruments evidencing any Claims, and all options, warrants, calls, rights, puts, awards, commitments or any other agreements of any character in respect of Claims shall be deemed canceled and of no further force and effect, without any further act or action under any applicable agreement, law, regulation, order or rule, and the obligations of the Canadian Debtors under the notes, share certificates and other agreements and instruments governing such Claims shall be discharged. Effective as of the Plan Implementation Date, the holders of or parties to such notes, share certificates and other agreements and instruments shall not exercise nor enforce their rights arising from or relating to such notes, share certificates and other agreements and instruments or the cancellation thereof, except the rights permitted or provided pursuant to this Plan; provided, however, that (i) the Credit Agreements shall continue in effect for the purpose of allowing a lender or an assignee to receive their distributions hereunder and for any party thereunder to make any distributions on account of the Credit Agreements; and (ii) the 1992 Indenture, the 1993 Indenture, the 1996 Indenture, the 1999 Indenture and the Debentures shall continue in effect for the purposes of allowing the Bondholders to receive their distributions hereunder and causing the Canadian Indenture Trustee and the U.S. Indenture Trustee, as the case may be, to make the distributions to be made on account of the Debentures and permitting the Canadian Indenture Trustee and the U.S. Indenture Trustee, as the case may be, to assert any Charge it may have under the respective indentures. Nothing in the Plan shall be deemed to impair, waive or discharge either of the Canadian Indenture Trustee or the U.S. Indenture Trustee's respective rights, liens, priorities or any other rights, if any, of the respective indenture trustee under its respective indentures against the distributions to the Bondholders. For greater certainty, this Section 10.6 shall not be deemed to cancel or otherwise affect any property, assets or undertaking of the Debtors, including, without limitation, the Canadian VarTec Note.

ARTICLE 11
GENERAL PROVISIONS

11.1 Plan Amendment

(a) The Interim Receiver, on behalf of the Canadian Debtors, reserves the right, at any time prior to the Plan Implementation Date to amend, modify and/or supplement this Plan, including without limitation the Sale Proceeds Allocation Agreement, the Litigation Protocol and the Plan Administration Agreement, provided that:

(i) any such amendment, modification or supplement must be contained in a written document which is filed with the Court and must be discussed in advance with, and not objected to by, each of counsel to the Teleglobe Lending Syndicate and the Bondholders, and, if made following the Meeting, communicated to such of the Creditors and in such manner, if any, as may ordered by the Court;

(ii) any amendment, modification or supplement may be made unilaterally by the Interim Receiver following the Sanction Order, provided that it concerns a matter which, in the opinion of the Interim Receiver, acting reasonably, is of an administrative nature required to better give effect to the implementation of this Plan and to the Sanction Order and is not adverse to the financial or economic interests of the Unsecured Creditors; and

(iii) any supplementary plan or plans of compromise or arrangement filed with the Court and, if required by this Section, approved by the Court, shall, for all purposes, be and be deemed to be a part of and incorporated in this Plan.

(b) Notwithstanding any term or provision contained in any of the Sale Proceeds Allocation Agreement, the Litigation Protocol or the Plan Administration Agreement and notwithstanding Article 11.5 of this Plan, the Sale Proceeds Allocation Agreement, the Litigation Protocol and the Plan Administration Agreement shall only be amended, modified or supplemented pursuant to the provisions of this Article.

11.2 No Objection

Notwithstanding any other term or provision of this Plan, the right of the Interim Receiver to amend, alter, modify or waive any term, provision, condition or time period under this Plan shall be conditional upon no objection being received from either of counsel to the Bondholders or the Teleglobe Lending Syndicate to such amendment, alteration, modification or waiver after receipt of adequate notice thereof from the Interim Receiver.

11.3 Severability

In the event that any provision in this Plan is held by the Court to be invalid, void or unenforceable, the Court shall have the power to alter and interpret such term or provision to make it valid and enforceable to the maximum extent practicable, consistent with the original purpose of the term or provision held to be invalid, void or unenforceable, and such term or provision shall then be applicable as altered and interpreted. Notwithstanding any such holding, alteration or interpretation, the remainder of the terms and provisions of this Plan shall remain in full force and effect and shall in no way be affected, impaired or invalidated by such holding, alteration or interpretation. The Sanction Order shall constitute a judicial determination and shall provide that each term and provision of this Plan, as it may have been altered or interpreted in accordance with the foregoing, is valid and enforceable pursuant to its terms.

11.4 Termination

At any time prior to the Plan Implementation Date, the Interim Receiver may, subject to further order of the Court, determine not to proceed with this Plan, or to delete one or more of the Canadian Debtors from this Plan, notwithstanding any prior approvals given at the Meeting or the obtaining of the Sanction Order. If the Interim Receiver determines not to proceed with this Plan and obtains an order of the Court to such effect, or if the Sanction Order is not issued by the Court: (A) this Plan shall be null and void in all respects; (B) any Claim, any settlement or compromise embodied in this Plan, and any document or agreement executed pursuant to this Plan shall be deemed null and void; and (C) nothing contained in this Plan, and no act taken in preparation of the consummation of this Plan, shall (i) constitute or be deemed to constitute a waiver or release of any Claims by or against any of the Canadian Debtors or any other Person; (ii) prejudice in any manner the rights of any of the Canadian Debtors or any Person in any further proceedings involving a Canadian Debtor; or (iii) constitute an admission of any sort by any of the Canadian Debtors or any other Person.

11.5 Paramountcy

From and after the Plan Implementation Date, any conflict between: (A) this Plan; and (B) any information summary in respect of this Plan, or the covenants, warranties, representations, terms, conditions, provisions or obligations, express or implied, of any contract, mortgage, security agreement, indenture, trust indenture, loan agreement, commitment letter, document or agreement, written or oral, and any and all amendments and supplements thereto existing between the Canadian Debtors and any Creditor as at the Plan Implementation Date, will be deemed to be governed by the terms, conditions and provisions of this Plan and the Sanction Order which shall take precedence and priority; provided that, for greater certainty, in the event of any conflict between either this Plan, the Litigation Protocol or the Plan Administration Agreement, the Plan Administration Agreement shall have paramountcy. In the event of any conflict between this Plan and the Litigation Protocol, the Litigation Protocol shall have paramountcy.

11.6 Responsibilities of the Monitor

The Monitor is acting in its capacity as Monitor in the CCAA Proceedings with respect to the Canadian Debtors and neither the Monitor nor the Interim Administrator will be responsible or liable for any obligations of the Canadian Debtors hereunder. The Monitor will have only

those powers granted to it by this Plan, by the CCAA and by any Order, including the Initial Order.

11.7 Unclaimed Cash or Distributions

If any Person entitled to a cash distribution pursuant to this Plan cannot be located on the Plan Implementation Date or at any time thereafter, then such cash or cash equivalent instruments shall be set aside and held in a segregated, interest-bearing account to be maintained by the Plan Administrator on behalf of such Person. Interest earned on any such money shall be the property of the Canadian Debtors and may be withdrawn from such account at any time and from time to time. If such Person is located within one (1) year of the Plan Implementation Date, such cash (less the allocable portion of taxes, if any, paid by the Canadian Debtors on account of such Person) and proceeds thereof, shall be paid or distributed to such Person. If such Person cannot be located within one (1) year of the Plan Implementation Date, any such cash, and interest and proceeds thereon, shall be deemed to be the property of those Unsecured Creditors that have been located at that time, to be redistributed forthwith thereafter and shared *pro rata* by such Unsecured Creditors free and clear of and from any claim to such property by or on behalf of such Person, who shall be deemed to have released such claim; provided, however, that nothing contained in this Plan shall require the Canadian Debtors, the Interim Receiver or the Monitor to attempt to locate such Person.

11.8 Deeming Provisions

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

11.9 Notices

Any notice or communication to be delivered hereunder shall be in writing and shall reference this Plan and may, subject as hereinafter provided, be made or given by personal delivery or by fax addressed to the respective parties as follows:

(i) if to the Interim Receiver or the Canadian Debtors:

Kroll Restructuring Ltd.
One Financial Place
One Adelaide Street East
30th Floor
Toronto, ON M5C 2V9

Attention: Mr. Paul Casey
Fax: (416) 777-2441

with a copy to:

Chaitons LLP
185 Sheppard Avenue West
Toronto, ON M2N 1M9

Attention: Mr. Harvey Chaiton
Fax: (416) 218-1849

(ii) if to a Creditor:

to the known address (including fax number or email address) for such Creditor or, if an Unsecured Creditor having filed a Proof of Claim, the address for such Unsecured Creditor specified in the Proof of Claim filed by such Unsecured Creditor in the CCAA Proceedings;

(iii) if to the Monitor:

Ernst & Young Inc.
222 Bay Street
Ernst & Young Tower
P.O. Box 251
Toronto-Dominion Centre
Toronto, ON M5K 1J7

Attention: Mr. Brian Denega
Fax: (416) 943-3300

with a copy to:

Lenczner Slaght Royce Smith Griffin
Suite 2600
130 Adelaide St. W.
Toronto, ON M5H 3P5

Attention: Mr. Peter Osborne
Fax: (416) 865-9010

(iv) with a copy to Counsel for the Bank Syndicate :

Goodmans LLP
250 Yonge Street, Suite 2400
Toronto, ON M5B 2M6

Attention: Mr. Geoffrey Morawetz / Mr. Robert J. Chadwick
Fax: (416) 979-1234

(v) with a copy to Counsel to the Bondholder Committee:

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

Attention: Mr. S. Richard Orzy / Mr. Kevin Zych
Fax: (416) 863-1716

(vi) with a copy to Counsel to the U.S. Debtors:

Richards, Layton & Finger
One Rodney Square
P.O. Box 551
Wilmington, Delaware 19899
U.S.A.

Attention: Mark D. Collins
Fax: (302) 651-7701

(vii) with a copy to Counsel to the U.S. Unsecured Creditors Committee:

Hahn & Hessen LLP
488 Madison Avenue
New York, NY 10022
U.S.A.

Attention: Mark S. Indelicato
Fax: (212) 478-7400

(viii) if to the Plan Administrator:

Kathy Morgan
Teleglobe USA Inc.
11495 Commerce Park Drive
Reston, Virginia 20191

Fax: (703) 775-2610

or to such other address as any party may from time to time notify the others in accordance with this Article. All such notices and communications which are delivered shall be deemed to have been received on the date of delivery. Any such notices and communications which are faxed shall be deemed to be received on the date faxed if sent before 5:00 p.m. Eastern Standard Time on a Business Day and otherwise shall be deemed to be received on the Business Day next following the day upon which such fax was sent. Any notice or other communication sent by mail shall be deemed to have been received on the fifth Business Day after the date of mailing. The unintentional failure by the Interim Receiver to give a notice contemplated hereunder shall not invalidate any action taken by any Person pursuant to this Plan.

11.10 Successors and Assigns

The rights, benefits and obligations of any Person named or referred to in this Plan shall be binding on, and shall inure to the benefit of, any heir, executor, trustee, administrator, successor or assign of such Person.

11.11 Further Assurances

Notwithstanding that the transactions and events set out in this Plan shall be deemed to occur without any additional act or formality other than as set out herein, each of the Persons affected hereby shall make, do and execute or cause to be made, done or executed all such further acts, deeds, agreements, transfers, assurances, instruments, documents or discharges as may be reasonably required by the Interim Receiver in order to better implement this Plan.

11.12 Governing Law

This Plan shall be governed by and construed in accordance with the laws of the Province of Ontario and the federal laws of Canada applicable therein without regard to conflict of laws. All questions as to the interpretation or application of this Plan and all proceedings taken in connection with this Plan and its provisions shall be subject to the exclusive jurisdiction of the Court.

Dated at Toronto, Ontario, as of this 26th day of November, 2004.

Court File No. 02-CL-4528

ONTARIO

SUPERIOR COURT OF JUSTICE

COMMERCIAL LIST

THE HONOURABLE MR. JUSTICE FARLEY

TUESDAY, THE 8TH DAY OF FEBRUARY, 2005

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

AND IN THE MATTER OF a Plan of Compromise or Arrangement of TELEGLOBE INC. and the other Applicants listed on Schedule "A"

Applicants

SANCTION ORDER

THIS MOTION, made by Kroll Restructuring Ltd. in its capacity as Interim Receiver as appointed pursuant to the Order of this Court made February 19, 2003 (the "Interim Receivership Order") in respect of the Canadian applicants listed on Schedule "A" hereto (collectively, the "Canadian Debtors") for an order approving the plan of compromise or arrangement of the Canadian Debtors dated January 26, 2005, as amended, and attached as Schedule "B" to this Order (the "Plan"), and certain other relief, was heard this day at 393 University Avenue, Toronto, Ontario.

ON READING the Notice of Motion and the Thirty-Third Report of the Monitor and upon hearing submissions of counsel to the Monitor and the Interim Administrator, the Interim Receiver, the Teleglobe Lending Syndicate, the Ad Hoc Bondholder Committee, BCE Inc. and others;

AND ON BEING ADVISED that those persons on the Service List were served with the notice of motion and motion record herein, and on being satisfied that circumstances exist that make this Order appropriate:

DEFINITIONS

1. **THIS COURT ORDERS** that any capitalized terms not otherwise defined in this Order shall have the meanings ascribed to them in the Plan.

SERVICE

2. **THIS COURT ORDERS AND DECLARES** that there has been good and sufficient service and notice of the Plan to all Creditors.

3. **THIS COURT ORDERS** that there has been good and sufficient service of the Meeting Materials, the Creditors Materials, the Bondholder Materials and the Bank Materials (all as defined in the Meeting Order) to all Creditors in connection with the Meeting, and that the Meeting was duly called, held and conducted in conformity with the CCAA and all other Orders of this Court.

4. **THIS COURT ORDERS AND DECLARES** that there has been good and sufficient service of notice of this Sanction Hearing, and this motion is properly returnable today and further service of the Notice of Motion and the Motion Record upon any interested party is unnecessary and is hereby dispensed with.

SANCTION OF PLAN

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

(a) The Plan has been approved by the requisite majorities of the Unsecured Creditors' Class created under the Plan in conformity with Section 6 of the CCAA and the terms of the Meeting Order and Claims Procedure Order;

(b) The Canadian Debtors have complied with all statutory requirements of the CCAA and have not done or purported to do anything which is not authorized by the CCAA;

(c) The Canadian Debtors have adhered to the Orders of this Court; and

(d) The Plan, including without limitation, the Plan Administration Agreement, the Sale Proceeds Allocation Agreement and the Litigation Protocol, is both substantively and procedurally fair, reasonable and in the best interests of the Creditors and the Canadian Debtors,

the Plan shall be and is hereby sanctioned and approved pursuant to Section 6 of the CCAA.

6. **THIS COURT ORDERS** that the Plan Administration Agreement (as amended), the Sale Proceeds Allocation Agreement and the Litigation Protocol, together with all of the terms, provisions and releases therein, are hereby authorized, approved, validated and enforced.

7. **THIS COURT DECLARES** that from and after the Plan Implementation Date, the compromises effected by the Plan are approved, binding and effective upon all Creditors, including the Unsecured Creditors, and all other Persons affected by the Plan.

PLAN IMPLEMENTATION

8. **THIS COURT ORDERS** that the Canadian Debtors, the Interim Receiver, the Plan Administrator and/or the Plan Committee, the Monitor and the Interim Administrator, as the case may be, are authorized and directed to take all actions 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, including without limitation, the completion of all corporate litigation and financial transactions and the execution and implementation of the Plan Administration Agreement, the Sale Proceeds Allocation Agreement and the Litigation Protocol.

9. **THIS COURT ORDERS** that, subject to the performance by the Interim Receiver, the Plan Administrator and the Plan Committee of their respective obligations under the Plan, and except to the extent expressly provided otherwise by the Plan or hereunder, no Person who is a party to any obligation or agreement 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 obligation or agreement, by reason of:

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

(b) the fact that the Canadian Debtors have sought or obtained relief under the CCAA and have commenced or completed the CCAA Proceedings or that the reorganization has been implemented by the Canadian Debtors;

(c) any compromises or arrangements effected pursuant to the Plan; or

(d) the effect on the Canadian Debtors of the completion of any of the transactions contemplated by the Plan or the reorganization.

10. **THIS COURT ORDERS** that the substantive consolidation of the Canadian Debtors in the Plan is only for the purposes of treating the Unsecured Creditors' Claims under the Plan and shall not affect the legal and corporate structures of the Canadian Debtors or cause any of the Canadian Debtors to be liable for any claim for which it otherwise is not liable.

11. **THIS COURT ORDERS AND DECLARES** that as of the Plan Implementation Date, the Plan shall enure to the benefit of and be binding upon the Creditors and all other Persons affected thereby and their respective heirs, administrators, executors, legal personal representatives, successors and assigns.

12. **THIS COURT ORDERS** that all notes, certificates, agreements and other instruments evidencing Claims shall be cancelled and shall be null and void in the manner and at the time provided for in Section 10.6 of the Plan and any holder thereof shall only be entitled to any compensation or participation as expressly provided for in the Plan, this Order, the Meeting Order and the Claims Procedure Order.

13. **THIS COURT ORDERS** that upon satisfaction of the conditions set out in Section 9.1 of the Plan, the Monitor shall file with the Court a certificate which states that all conditions precedent set out in Section 9.1 of the Plan have been satisfied or waived by the Interim Receiver, as the case may be, and that the Plan Implementation Date has occurred.

14. **THIS COURT ORDERS** that as soon as practicable after the Plan Implementation Date, the Monitor and/or Interim Administrator, as the case may be, shall disburse to the Plan Administrator on behalf of the U.S. Debtors, the funds allocated to the U.S. Debtors pursuant to the Sale Proceeds Allocation Agreement.

15. **THIS COURT ORDERS** that as soon as practicable after the Plan Implementation Date, the Monitor and/or Interim Administrator, as the case may be, shall, from the funds allocated to the Canadian Debtors pursuant to the Sale Proceeds Allocation Agreement, disburse to the Plan Administrator an amount for the Operating Reserve and Litigation Reserve and shall establish

the Post-Filing Claims Reserve and the Monitor shall continue to hold the remaining funds pending the first distribution under the Plan proposed and made by the Plan Administrator.

16. **THIS COURT ORDERS**, subject to paragraph 36 of this Order, that as of the Plan Implementation Date, all Creditors are forever stayed from exercising any rights or remedies against any of the Canadian Debtors in respect of any Claims, apart from the right to receive distributions in respect of the Claims in accordance with the Plan, the Meeting Order and the Claims Procedure Order.

17. **THIS COURT ORDERS**, subject to paragraph 36 of this Order, that without limiting the provisions of the Claims Procedure Order, a Creditor that did not receive notice of the claims process established by the Claims Procedure Order or file a Proof of Claim in accordance with the provisions of the Claims Procedure Order shall be and is hereby forever barred from making any Claim against the Canadian Debtors and shall not be entitled to any distribution under the Plan, and that such Claim is forever extinguished.

APPOINTMENT OF PLAN ADMINISTRATOR/PLAN COMMITTEE

18. **THIS COURT ORDERS** that, effective on the Plan Implementation Date, the appointment of Ms. Kathy Morgan as the Plan Administrator in accordance with Section 6.1 of the Plan and the Plan Administration Agreement and the constitution of the Plan Committee, comprising Provident Investment Management, LLC, Stonehill Capital Management LLC, JPMorgan Chase Bank, N.A. and DK Acquisition Partners L.P., in accordance with Section 7.1 of the Plan and the Plan Administration Agreement, are hereby approved.

19. **THIS COURT ORDERS** that, effective on the Plan Implementation Date, the Plan Administrator and the Plan Committee shall have all of the rights, authority, powers and duties

given to them pursuant to the Plan, the Plan Administration Agreement, the Sale Proceeds Allocation Agreement and the Litigation Protocol, as agents of the holders of Allowed Claims (within the meaning of the Plan Administration Agreement), and subject to the terms thereof.

DISCHARGE OF MONITOR/INTERIM ADMINISTRATOR

20. **THIS COURT ORDERS** that Ernst & Young Inc. shall be discharged from its duties as Monitor of the Applicants and as Interim Administrator of the Canadian Debtors effective as of the Plan Implementation Date; provided that the foregoing shall not apply in respect of matters to be completed pursuant to the Plan after the Plan Implementation Date or in respect of matters requested by the Plan Administrator and agreed by the Monitor or Interim Administrator.

21. **THIS COURT ORDERS** that no action or other proceeding shall be commenced against the Monitor and/or the Interim Administrator in any way arising from or related to its capacity or conduct as Monitor and/or Interim Administrator except with prior leave of this Court on prior notice to the Monitor and/or the Interim Administrator and upon further order securing, as security for costs, the solicitor and his own client costs of the Monitor and/or Interim Administrator in connection with any proposed action or proceeding.

22. **THIS COURT ORDERS AND DECLARES** that all actions and conduct of the Monitor and Interim Administrator are hereby approved and that the Monitor and the Interim Administrator have satisfied all of their obligations up to and including the date of this Order and that the Monitor and Interim Administrator shall not be liable for any act or omission on the part of the Monitor or Interim Administrator, including with respect to any reliance thereof, including without limitation, any act or omission pertaining to the discharge of duties under the Plan or as requested by the Plan Administrator 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 and/or Interim Administrator. Subject to foregoing, any claims against the Monitor and/or the Interim Administrator in connection with the performance of its duties, as Monitor and/or Interim Administrator are hereby stayed, extinguished and forever barred.

DISCHARGE OF INTERIM RECEIVER

23. **THIS COURT ORDERS** that Kroll Restructuring Ltd., shall be discharged from its duties as Interim Receiver of the Canadian Debtors effective as of the Plan Implementation Date; provided that the foregoing shall not apply in respect of matters to be completed pursuant to the Plan after the Plan Implementation Date.

24. **THIS COURT ORDERS** that no action or proceeding shall be commenced against the Interim Receiver in any way arising from or related to its capacity or conduct as Interim Receiver except with prior leave of this Court on notice to the Interim Receiver and upon further order securing, as security for costs, the solicitor and his own client costs of the Interim Receiver in connection with any proposed action or proceeding.

25. **THIS COURT ORDERS AND DECLARES** that all actions and conduct of the Interim Receiver are hereby approved and that the Interim Receiver has satisfied all of its obligations up to and including the date of this Order and that the Interim Receiver shall not be liable for any act or omission on the part of the Interim Receiver, including with respect to any reliance thereof, including without limitation, any act or omission pertaining to the discharge of duties under the Plan or as requested by the Plan Administrator 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 Interim Receiver. Subject to the foregoing, any claims against the Interim Receiver in connection with the performance of its duties as Interim Receiver are hereby stayed, extinguished and forever barred.

26. **THIS COURT ORDERS** that, as of the Plan Implementation Date, the Plan Administrator shall, as agent for the holders of the Allowed Claims (within the meaning of the Plan Administration Agreement), have all of the powers, rights and authorities of the Interim Receiver set forth or provided for in the Plan, the Plan Administration Agreement, the Sale Proceeds Allocation Agreement, the Litigation Protocol and the Interim Receivership Order, including without limitation, the powers set forth in paragraph 8 of the Interim Receivership Order.

27. **THIS COURT ORDERS AND APPROVES** the transfer by the Interim Receiver to the Plan Administrator of the actions commenced in respect of the Canadian Debtors' Claims, including without limitation, the redemption action commenced by the Interim Receiver on February 24, 2003 against certain former officers and directors of Teleglobe Inc. (Court File No. 03-CL-4884) or which may be commenced prior to the Plan Implementation Date, and upon any such transfer, the Plan Administrator shall replace the Interim Receiver as Plaintiff in such actions and any such transfer shall in no way directly or indirectly prejudice any rights or claims in respect of such actions.

CLAIMS OFFICER

28. **THIS COURT ORDERS** that the appointment of Mr. Gordon Marantz or any other Person appointed by the Monitor as Claims Officer shall automatically cease when all Unresolved Claims are finally resolved, unless otherwise agreed with the Plan Administrator,

except only with respect to matters to be completed pursuant to the Plan after the Plan Implementation Date, including the resolution of Unresolved Claims.

CHARGES

29. **THIS COURT ORDERS** that, subject to paragraph 30, the Charges on the assets of the Applicants provided for in the Initial Order and any subsequent Orders in these proceedings, including the Directors' Charge, the Administrative Charge and the CCAA Lender's Charge (each as defined in the Initial Order) shall be fully and finally terminated, discharged and released on the Plan Implementation Date.

30. **THIS COURT ORDERS** that the Monitor shall continue to hold a charge, as provided in the Administrative Charge (as defined in the Initial Order), until the first date of distribution to Creditors under the Plan or such further date as provided for pursuant to an Order of this Court.

31. **THIS COURT ORDERS AND DECLARES** that, notwithstanding any of the terms of the Plan or this Order, the Applicants or Plan Administrator shall not be released or discharged from their obligations to pay the fees and expenses of the Monitor, Interim Administrator or the Interim Receiver and its respective counsel.

PRESERVATION OF MATERIAL DOCUMENTS

32. **THIS COURT ORDERS** that from and after the Plan Implementation Date, the Plan Administrator shall be responsible for keeping and preserving the material books and records of the Canadian Debtors and any other material documentation relating to or in connection with the Canadian Debtors.

STAY OF PROCEEDINGS

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

RETENTION OF JURISDICTION

34. **THIS COURT ORDERS** that this Court retain jurisdiction in respect of any matter in dispute arising out of anything relating to the interpretation or implementation of the Plan, including without limitation, pursuant to Section 7.3 of the Plan Administration Agreement and Article VII of the Litigation Protocol.

GENERAL

35. **THIS COURT ORDERS** that, the terms of this Order are nonseverable and mutually dependent.

36. **THIS COURT ORDERS** that nothing in the releases or compromises effected in the Plan shall be construed as impairing any defence, including by way of set-off, that any party may have had based on any facts in existence as at the Filing Date, to any litigation brought or which may hereafter be brought by or on behalf of the Canadian Debtors or any Creditors of the Canadian Debtors (including, for greater certainty, litigation by the Plan Administrator or the Interim Receiver).

37. **THIS COURT ORDERS** that this Order shall have full force and effect in all provinces and territories in Canada and abroad and as against all Persons against whom it may otherwise be enforceable.

38. **THIS COURT ORDERS** that, notwithstanding (a) the pendency of the CCAA Proceedings and the declarations of insolvency made therein, (b) the pendency of any motions for bankruptcy orders hereafter issued pursuant to the *Bankruptcy and Insolvency Act* (Canada) in respect of the Canadian Debtors and any bankruptcy orders issued pursuant to any such motions, and (c) the provisions of any federal or provincial statute; any actions, steps or proceedings entered into or taken by the Canadian Debtors, or any agreements entered into, as part of the implementation of the Plan shall: (i) constitute legal, valid and binding obligations and shall be enforceable against the Canadian Debtors in accordance with the terms thereof; and (ii) do not constitute conduct meriting an oppression remedy, settlements, fraudulent preferences, fraudulent conveyances or other challengeable or reviewable transactions under any applicable law, federal, provincial or otherwise.

39. **THIS COURT ORDERS** the aid and recognition of any court and of any judicial, regulatory or administrative body in any province or territory of Canada (including the assistance of any court in Canada pursuant to Section 17 of the CCAA), and the Federal Court of Canada and any judicial, regulatory or administrative tribunal or other court constituted pursuant to the Parliament of Canada, the legislature of any province or otherwise and any court or any regulatory or administrative body of the United States of America and the states or other subdivisions of the United States of America or any other nation or state to act in aid of and to be complementary to this court in carrying out the terms of this order where required.

ENTERED AT / INSCRIT À TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO.:
FEB 09 2005
PER/PAR:

JOSEPH P. VAN TASSEL
REGISTRAR

SCHEDULE "A"

LIST OF CCAA APPLICANTS

Canadian Applicants

Teleglobe Financial Holdings Ltd.
Teleglobe Canada Limited Partnership
Teleglobe Management Services Inc.
Teleglobe Marine, Inc.
Teleglobe Marine, L.P.
Teleglobe Canada Management Services Inc.
3692795 Canada Inc.
Teleglobe Vision Call Center Services, General Partnership

U.S. Applicants

Teleglobe Holdings (U.S.) Corporation
Teleglobe Telecom Corporation
Teleglobe Luxembourg LLC
Teleglobe Holding Corp.
Teleglobe Investment Corp.
Teleglobe Communications Corporation
Teleglobe USA Inc.
Optel Telecommunications Inc.
Teleglobe Marine (U.S.) Inc.
Teleglobe Puerto Rico Inc.
Teleglobe Submarine Inc.

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

Court File No: _____

AND IN THE MATTER OF A PLAN OF COMPROMISE AND ARRANGEMENT OF CLINE MINING CORPORATION, NEW ELK COAL COMPANY LLC AND NORTH CENTRAL ENERGY COMPANY

Applicants

ONTARIO
SUPERIOR COURT OF JUSTICE-COMMERCIAL LIST

Proceeding commenced at Toronto

BOOK OF AUTHORITIES OF THE APPLICANTS
(Claims Procedure Order and Meetings Order)

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